

# **ECL PART - A NOTES [ CS -EXECUTIVE ]**

**RAJNISH PANDEY**



**THE INSTITUTE OF  
Company Secretaries of India**  
IN PURSUIT OF PROFESSIONAL EXCELLENCE  
Statutory body under an Act of Parliament

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## MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS

Properties are of two kind viz., tangible and intangible. Intellectual properties are those intangible properties which arise by virtue of creation of human mind and intellect. It includes rights relating to literary artistic work, invention, scientific discovery, industrial design, trademark etc.

**Industrial Property** includes invention of new solution to technological problems and designs i.e. aesthetic creation to present the appearance of industrial product. **Patent** grants monopoly status to its holder to regulate production, supply and price of patented product. **Trade Mark** consists of word, letter etc which distinguishes goods of one producer from similar goods of other manufacturer. **Copyright** gives the holder exclusive right to reproduce or distribute goods. Particularly it is related to print, sound, films etc. **Industrial Design** is some pattern for manufacture of product, like design of particular bike or bottle of beverage.

**THE PATENTS ACT, 1970**

PASSED IN PARLIAMENT ON 19 SEPTEMBER 1970 APPLIES TO WHOLE OF INDIA

CONTAINS 163 SECTIONS

**Some Special Word/ Terms used in this Chapter**

<b>PCT</b>	<b>Patent Cooperation Treaty, i.e. agreement between many Countries to make patent effective in all such agreeing countries</b>
<b>Anticipation</b>	If any person has described something in his specification which the applicant has also described, it is called that claim of applicant has been anticipated (hence the claim may not be new)
<b>Provisional Specification</b>	Details containing particulars of patent applied. But it is not finalized yet due to lack of some information
<b>Complete Specification</b>	It contains full description of patent i.e. its name, best method of performance, name of inventor etc
<b>Inventive Step</b>	Where invention involves some technological advancement as compared to existing knowledge, it is inventive step

**Invention** – As per Sec 2(j) invention means any new and useful product, substance or art, process, method of manufacture or any machine, apparatus etc and includes any improvement in any of them. Sec 3 provides that following, although they may come under above definition, are **not** inventions.

1. Invention which are frivolous or contrary to natural laws.
2. Invention, commercial exploitation of which may be against public order or morality.
3. Mere discovery of a scientific principle or discovery of living or non-living thing in nature.
4. Mere discovery of new form of known substance, not resulting in increasing its efficacy or mere discovery of new use of known process.
5. Discovery of new admixture by merely aggregating properties of other known substances.
6. Mere re-arrangement or duplication of known devices.
7. Method of agriculture or horticulture.
8. Medicinal or surgical process for treatment of human or animal so as to render them free of disease or increasing their economic value.
9. Literary, dramatic, musical or artistic work.
10. Method of performing mental act, method of playing game.

**Who Can Apply for Patent (Sec 6)**

Following person can apply for patent:-

- ❖ Any person claiming as true and first inventor
- ❖ Any person being the assignee of person claiming to be first inventor
- ❖ Legal representative of deceased person mentioned in 1 or 2 supra

**How To Apply****A. Following points must be taken in mind-**

1. Sec 7 requires every application for patent should be made for one invention only. Every international application under Patent Cooperation Treaty (PCT) filed designating India, shall be deemed to be application under this Act.
2. Along with application, specification regarding patent should be filed. Where provisional specification is filed, then a complete-specification shall be filed within twelve months.
3. Where two or more applications in the name of same applicant is filed with provisional specification, the Controller may allow filing of only one complete specification if all application relate to single invention.
4. Where application is accompanied by complete-specification, Controller may make a direction within 12 months to treat such specification as provisional.

**B. Contents of Specifications (Sec 10)**

All specifications whether provisional or complete, must describe the invention by stating its title and subject matter. Every complete specification must describe following:

1. Full description, operation and method of use.
2. Best method of performing the invention, which claimant wants to protect.
3. Claim of claimant
4. Abstract of technical information.

In case application relates to biological material, the applicant shall deposit the same to the Controller and the Controller may for providing better explanation of points a and b above, deposit the material to an International Depository Authority.

**C. Publication of Application**

Usually application are not open to public for inspection, however applicant may request the Controller to publish his application before expiry of prescribed period. Controller shall publish such application unless where secrecy is required. Publication shall include date of application, number of application, name and address of applicant etc.

From this date of publication, the applicant shall have same privilege and rights as he has been granted the patent. This right is available till date of actual grant, or rejection of application. However, applicant cannot institute any proceeding for infringement

**D. Request for Examination**

Application for patent cannot be examined unless applicant or any other interested person makes a request for examination. Where such request for examination has not been made within prescribed time period, application is treated to be withdrawn. Under Sec 12, when request for examination has been made, Controller shall make reference of specification and other documents to an examiner to make a report on following:

1. Whether application is in accordance with provisions of this Act
2. Whether objection can be made for the applied patent
3. Results of examination or investigation

**E. Search for Anticipation**

Sec 13 says that Examiner shall make investigation regarding:

1. Whether invention has been anticipated by publication before the date of filing of complete-specification by applicant.
2. Whether the invention is claimed in any other claim or complete-specification published on or after date of filing complete-specification by applicant.

**F. Report of Examiner and Consequences** - Where examiner gives adverse report which may require amendment, the Controller shall communicate the same to the applicant. Further, the Controller may either refuse the application or direct the applicant to amend the specification. Controller can also direct to “post-date” the application if applicant makes a request for a date which cannot be more than six months. Where Controller is of opinion that applied invention has been anticipated, he can refuse the application. However, he shall not refuse if applicant either shows his early priority date or amends his complete-specification. Where Controller is of opinion that applied invention is already claimed in any other complete specification, he can direct that a reference to that other complete specification shall be inserted.

**G . Potential Infringement (Sec 19)**

Where Controller is of opinion that applied invention cannot be performed without potential infringement or other patent, he can make direction that a reference to that other patent shall be inserted. However, where applicant shows grounds of his claim or amends his complete-specification, Controller shall not insert such reference.

Where reference to other patent as above has been inserted, Controller can delete the reference if:

1. That other patent is revoked
2. Complete-specification of that other patent is amended.

3. That other patent is invalid.

#### **H. Other Provisions**

Where a person, before grant of patent, claims and shows to the satisfaction of Controller that because of some agreement, claimant is also entitled to undivided share of that patent, the controller may direct that the patent shall be proceeded in the name of claimant or in joint name of applicant and claimant. Controller gives such direction only if following conditions are satisfied:

1. Copy of the said agreement is given to controller,
2. Invention is identified
3. Rights of claimant for that patent has been established.

Where an application is made by joint applicants and before grant of patent, one of the applicant dies, then controller may direct the application to proceed in the name of survivor, if consent is given by legal representative of deceased applicant,.

Where applicant does not complies with all requirements of this Act within prescribed time period, application for patent is deemed to have been abandoned. Where in the course of proceeding, any document has been returned by Controller, the applicant has to re-submit those document after due compliance.

#### **Powers of Controller**

1. Controller can refuse the application or require applicant to modify the application if:
  - Application or specification does not comply with requirement of Act or Rules
  - Invention is such which is not patentable
  - Application is made in violation of any other law
  - Invention has been anticipated
2. Controller can order for division of application if one application contains more than one claim for patent.
3. Controller has power to change the date of application
4. He has power to add reference of other patent in case of potential infringement etc.

#### **ANTICIPATION-**

Sec 29-34 deals with anticipation and says that existence of following situation only will not be called as anticipation:

1. Anything published before priority date of relevant specification published by applicant.
2. Communication of invention to Government for investigation of the same.
3. Public display of invention with permission of first and true inventor.
4. Working of invention within one year before priority date of relevant specification, etc.

**Opposition to Patent**

As per Sec 25, after publication but before grant of patent **any person** may apply in writing to Controller his opposition to the patent on following grounds:

- The applicant has wrongfully obtained invention from him.
- Claimed invention has been already published **before** priority date in any other specification or in any other document.
- Claimed invention is published in a claim of other complete specification on or **after** priority date of applicant's claim.
- Claimed invention is publicly known or publicly used in India before priority date.
- Claimed invention is obvious and does not involve any inventive step.
- Complete-specification does not sufficiently describe the invention, or it does not disclose the source of biological material.
- In case of convention application, the application was not made within twelve months from first application.
- Claimed invention is anticipated having regard to knowledge available in India or elsewhere.

Further any **interested person** can give notice of opposition to Controller after grant of patent and up to one year on same grounds as mentioned above. Sec 26 provides that if opponent makes request, the controller may make direction that patent shall be proceeded in the name of opponent.

Where any notice of opposition is given under Sec 25 to Controller, then he shall notify the patentee and shall constitute an Opposition Board. This board shall conduct the examination of opposition.

**Secrecy Direction**

Where Central Government has notified class of an invention as secret for defence purpose, the Controller shall give direction for prohibiting publication of any information regarding that class of patent. The Controller shall give notice of application of such patent to the Government and thereupon Government shall decide whether publication of information is prejudicial to defence of India or not. Any secrecy direction issued by Government can be reviewed periodically.

**Grant of Patent**

Application for patent, if it is in order and not refused and not found to be in contravention of any provision of the Act, it shall be granted under the seal of patent office with date. Where



patent is not opposed or where opposition has ended in favour of applicant, Controller will grant the patent. Controller shall publish the fact that patent has been granted. Sec 47 specifies some condition subject to which patent can be granted, viz

1. Any machine or article of which patent has been granted can be imported by Government.
2. Any process of which patent has been granted can be used by Government
3. Any machine or article of which patent has been granted can be used by any person for experiment or research purpose.
4. Sec 53 provides that term of patent shall be twenty years from the date of application, which can be renewed on payment of renewal fees

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#### MISCELLANEOUS PROVISIONS

##### **Patent of Addition (Sec 54)**

Where application is made for improvement or modification of the main invention, Controller may grant the patent for improvement. However, where the application for improvement is subject to an independent patent, the Controller may revoke the patent for improvement and grant a patent of addition. Patent of addition cannot be revoked simply because it does not involve any inventive step. The patent of addition is granted for equal term to that of unexpired period of original patent.

##### **Restoration of Lapsed Patent**

Where patent is expired because of non payment of renewal fees, it can be restored if application is made within 18 months from date of expiry. If Controller is satisfied that failure to pay renewal fees was unintentional, he shall publish the application of restoration and thereupon any person can oppose it on the ground that:

1. Failure to pay fees was intentional or
2. Application for restoration has been made after undue delay.

Where patent is restored, patentee will get same rights as earlier, subject to such conditions as may be specified by Controller.

##### **Surrender and Revocation**

Where the patentee wants to surrender the patent, the Controller shall publish his offer of surrender and any interested person, thereupon, can oppose it. Where Government is satisfied that patent relating to atomic energy has been granted, it may direct the Controller to revoke the patent.



**Register of Patent**

At patent office, a register of patent is kept wherein name and address of patentee is entered. Further any information regarding transmission, assignment or license of patent is also entered in the register. This register is open for inspection of public on payment of prescribed fee.

**Working of Patent**

Patent are granted to encourage invention and for commercial utilization in India, and not merely to enjoy monopoly. Hence it is necessary to ensure that patent granted do not impede protection of public health and are not abused by patentee. Otherwise Government can take any action in public interest.

**Compulsory License**

1. After three years from sealing of patent, any **interested** person can apply to Controller from grant of compulsory license on following grounds (Sec 84):

- Requirement of public has not been satisfied,
- Patented item is not available to public at reasonable price,
- Patented invention is not worked in India.

Person applying for compulsory license has to state the manner in which he is interested. Controller will grant license upon such terms as he thinks fit if he is satisfied about above grounds. Before granting license Controller will consider measures taken by patentee himself for production of goods, ability of applicant and efforts by applicant to take license directly from patentee.

As regards point (a) above, requirement of public is deemed as not to have been satisfied if existing trade in India is prejudiced or demand of public is not met or patented invention is not worked up to adequate extent.

2. Where manufacture or sale of a material which is not protected by patent is wrongfully affected due to conditions imposed by patentee, the Controller can grant compulsory license to person who is using unprotected material. (Suppose, mobile is not protected but mobile charger is patented, as mobile cannot be used without its charger, Controller can give compulsory license of charger to person who want to manufacture mobile).
3. Where two or more patents are held by same patentee and demand of public is not met as regards any one of the product and if such product cannot be worked without infringement of other, then, controller can grant compulsory license. (For Example, "A" is patentee of mobile and charger, and if requirement of public is not satisfied as

regards

charger, then any person having license to manufacture mobile can get compulsory license of charger)

4. Where, due to national emergency or extreme urgency, Central Government is satisfied that compulsory license should be granted, then upon declaration of Government, Controller shall grant license to the persons who are applying for the same.
5. Where a country is having insufficient supply of any pharmaceutical product, Government can grant compulsory license for any such products for export to such countries.

While granting compulsory license, Controller considers following points:

- Reasonable royalty or other remuneration payable to patentee
- Invention is used to fullest extent
- Patented item is available to public at reasonable price
- License granted is non-exclusive and non-assignable.

#### **Revocation of Patent for Non-working**

If within two years from grant of compulsory license, if patented invention is not worked then Government or any interested person can apply Controller to revoke the patent. Application should state nature of interest of person making application and reasons for making application. The Controller shall give copy of the application to the patentee and patentee may oppose the same.

#### **Controller**

The Controller shall have powers of Civil Court like, to summon and enforce attendance of a witness, discovery and production of documents, receiving evidence on affidavit, review of its decision, setting aside any order, passing interim order etc.

Controller has power to amend application of patent or complete specification to correct clerical mistake if such request made to him.

#### **International Arrangement**

Sec 133 to 139 provides for recognition of patent internationally. Accordingly, convention country is that country which is signatory of any bilateral/multilateral treaty or convention. Convention country gives same rights to patentee of other countries as are available to patentee of his country.

Where any country which is notified by India to be convention country does not give citizen of India same right which available to its own national, then citizen of such country shall also not be entitle to apply for patent/license or registered as assignee in India.

Where a person makes application for patent in convention country, he can make application under this Act within 12 months.

**Patent Agent**

Patent agent is a person who performs the work relating to drafting of specification, making application and other related work regarding patent. Sec 126 prescribes qualification of Patent Agent like, he should be citizen of India, having degree in science or other equivalent as prescribed by Government and has passed qualifying exam conducted for this purpose. Patent agent can practice before the Controller.

**Appeal & Penalties**

Appeal can be made to High Court within 3 months from specified orders of the Controller. Such appeal shall be disposed off the High Court within 12 months.

Any person who fails to comply with direction of Controller, or who makes any false entry in any register maintained under this Act shall be punishable with imprisonment of 2 years or fine. Similarly if any person false claims that he has patent of any product, he shall be punishable with fine of Rs 500/.

## THE TRADE MARKS ACT, 1999

<b>Published on 30-Dec-1999</b>	<b>Applies to Whole of India</b>
<b>Contains total 159 Sections</b>	<b>Latest amended in year 2010</b>

Trade mark is a mark affixed on any goods or service which distinguishes goods/service of one manufacturer from similar goods produced by other manufacturer. A trade mark affixed on any goods/service makes impression in mind of buyer that it contains a given quality.

### **Important Definitions**

<b>Certification Trade Mark Sec 2(1)(e)</b>	<b>Mark capable of distinguishing the goods/services which are certified by proprietor in respect of origin, material, quality etc from goods/services not so certified</b>
<b>Trade Mark Sec 2(1)(zb)</b>	Mark capable of represented graphically and capable of distinguishing goods/services of one person from those of others. It shows a connection between goods and person.
<b>Well-Known Trade Mark Sec 2(1)(zg)</b>	A mark, which is so well-known to public which regularly uses such kind of product, to indicate connection of mark and goods with its producer.
<b>Collective Mark Sec2(1)(g)</b>	Mark used by member of an association of person (but not partnership firm)

### **Procedure for Registration of Trade Mark**

Government has established Trade Marks Registry under Sec 3 known as “Controller General of Patent, Design and Trade Marks”, where application for trade marks can be made. Trademark is granted for several classes of goods or services. Registration of trade mark is prima facie evidence that all requirement of this law has been duly complied with. A register of trade mark is kept at Head Office of Trade Mark Registry.

An application for registration of any trade mark can be made under Sec 18 by the person claiming to be proprietor. Such application can be rejected for two reasons:

### **Absolute Grounds for Rejection**

Registrar can reject the trade mark application under Sec 9 on absolute ground on following basis:

- If mark is devoid of any distinctive character, e.g. where any character of any language or any shape has not been especially designed or visible.
- Any mark which shows just kind, quality, quantity or intended purpose of any goods, e.g. trademark of any goods can't be "500 gram"
- Mark consisting of marks or indications which are customary in current language, e.g. OMG (abbreviation of Oh My God) cannot be trade mark
- However where trademark which bears distinctive character because of its use, or is well-known to public is allowed, e.g. "Sugar-free" mark shows just quality but still allowed because this product is well-known to public
- If a mark is capable to deceive or cause confusion to public, or hurt religious susceptibility, or is obscene, it will not be registered
- Mark consisting of shape of natural goods (e.g. Neem leaf) or such shape which is necessary to obtain a given technical result shall not be registered.

### **Relative Grounds for Rejection**

Sec 11 (as amended by Trade Mark (Amendment) Act, 2010) provides that Registrar will reject the trademark application on relative grounds which are:

- Where mark is identical and affixed to similar goods or service, e.g. Lux washing powder
- Where mark is similar and affixed to identical or similar goods or service, e.g. Nirama washing powder (Original is Nirma)
- Where mark is identical or similar and affixed to goods which are not similar, if such mark is well-known to public e.g. Lux shoes
- Where mark's use is prevented by law of passing-off or copyright

However, Registrar shall not reject any application for trade mark on the grounds specified in point c and d supra, unless an objection is raised by proprietor of earlier trade mark.

Sec 14 provides that if any mark falsely suggests a connection with a living person or a person who died within 20 years prior to application of trade mark, then Registrar can demand consent of such person or his legal representative.

### **Registered Trade Mark**

Sec 20 says that whenever an application for trade mark is filed with Registrar, he shall publish the same in prescribed manner. Any person can oppose such application within 3 months from date of advertisement.

If application has not been opposed, or if opposition have been decided in favour of applicant, trade mark is granted. Tenure of trade mark is of 10 years with a provision for renewal from time to time for further period of 10 years

Where trade mark is not renewed after 10 years, it can be removed by the Registrar, which can be restored within 1 year from the date of removal

Where a proprietor of trade mark applies for another mark which is identical or similar to earlier **registered** trade mark, Registrar may allow such mark to be registered as associated trade mark.

Original registration is prima facie evidence of its validity; however where a person is using mark which is similar to registered mark from prior date, owner of registered mark cannot interfere. In case of unregistered mark, owner can sue only for passing-off but not for infringement. Generally, ownership of mark is governed by priority of use. Prior sale of goods is sufficient to establish priority.

### **Infringement of Registered Trade Mark**

Sec 29 provides that if a person who is not registered proprietor of mark uses a mark which is identical or deceptively similar to registered trade mark, it is called infringement. Further, registered trade mark is infringed if:

1. Mark is identical and is used in respect of similar goods/services, or
2. Mark is similar and is used in identical or similar goods/services, or
3. Mark is identical and is used in respect of identical goods, and

It is likely to cause confusion on the part of public. Further, following action is also called infringement;

1. Mark is identical or similar to registered trade mark and used in respect of goods which are not similar,
2. Using someone else's trade mark as his trade name as dealing with similar goods.
3. Affixing someone else's trade mark to goods or packing or using such mark in business papers or advertisements.

### **What is Not Infringement of Trade Mark:**

Where mark is used with honest business practice without taking unfair advantage, it is not deemed to be infringement. Following acts are not infringement:

1. If trade mark is used to indicate kind, quality or quantity etc of any goods/service.
2. If trade mark was registered subject to certain conditions.
3. Where mark is used in such types of goods/services for which owner of that mark had impliedly consented to its use.
4. Registered trade mark can be used in relation to parts and accessories to other goods/services.

The Supreme Court in *Mahindra & Mahindra Paper Mill V Mahindra & Mahindra Ltd* said that to determine similarity of two trade marks, nature of mark, nature of goods, extent of resemblance etc must be taken into account.

### **Assignment and Transmission**

Sec 37 says that registered proprietor of trade mark can, at any time, assign his trade mark. The Act also provide for assignment of unregistered trade mark. In case of assignment of registered trade mark without goodwill, assignor has to obtain permission of Registrar and has to publish advertisement.

## **OTHER PROVISIONS**

**Proposed Use by Company to be Formed:-** As a general rule, trade mark is granted only to person who is using that mark himself. However, if Registrar is satisfied that a company is being formed and applicant will assign the trade mark to the company, he can grant the mark.

**Removal of Trade Mark:** Where trade mark has not been put into use within five years of its registration, it can be removed. However, the Registrar shall not remove the trade mark where special circumstances or reason are shown for its non-use.

**Registered User:** Owner of mark can assign the mark to a person called registered user of the mark. Registered user is not entitled to assign the mark. Registrar can demand information from owner regarding agreement by which any person was made registered user. Where registered user uses that mark in violation of agreement, Registrar can cancel registration.

**Collective Mark:** Collective mark, which belongs to a group or association, can be registered by Registrar. This mark is owned by an association whose members can use this mark subject to compliance of specified standard.

**Certification Trade Mark:** This trade mark shows that goods on which this mark affixed are certified by some competent person in respect of quality, mode or manufacture etc. Proprietor of certification trade mark does not himself deal in the goods. For example if a particular “toothpaste” is certified by “IDA” (i.e. Indian Dental Association), then IDA is a certification trade mark which is affixed on the toothpaste.

**Well-Known Trade Mark:** Sec 11 provides following determining factors to decide whether a trade mark is well-known or not:

- Recognition of that mark in relevant section of public, e.g. number of actual or potential consumer of that goods
- Duration and geographical area of use of such mark



- Record of successful enforcement of rights under such trade mark

**Intellectual Property Appellate Board (IPAB):** Any person aggrieved by decision of Registrar can prefer appeal to IPAB. This Board has powers of Civil Court but not bound to follow the procedures of the Code of Civil Procedure.

**Offence and Penalties:** Following penalty provisions are prescribed under this Act:

1. Penalty of imprisonment of six months to three years and fine upto Rs two lakh for applying false trade mark or false trade description.
2. Any removal or sale of cotton yarn or cotton thread which are not marked in accordance with provisions of this Act is liable to forfeited.
3. Any person who falsely represents a trade mark to be registered trade mark is punished under this Act.
4. In case of offence is committed by Company, every person in charge of the Company, as well as the Company shall be deemed to be liable. Where such contravention is committed with consent or with negligence on the part or director, manager or secretary, they shall also be deemed to be guilty.

**Trade Mark Agent:** Trade mark agent is a person who performs the work relating to trade mark before the Registrar. Sec 145 prescribes that legal practitioner or Company Secretary can act as trade mark agent.

**List of Some Important Sections of the Trade Marks Act**

Section	Particulars	Section	Particulars
2(1)(e) & 67-78	Certification Trade Mark	2(1)(zb)	Trade mark
2(1)(zg)	Well-known trade mark	9	Absolute Grounds of rejection
11	Relative grounds of rejection	16	Registration of associated trade mark
18	Procedure of Registration of Trade mark	21	Opposition of Application
25	Tenure of Trade mark	29	Infringement of trade mark
37	Assignment of Trade mark	61-68	Collective Trade mark
69-78	Certification trade mark	83	Appellate Board
101-121	Penalties	145	Trade mark agent

**THE COPYRIGHT ACT, 1957**

<b>Contains total 79 Sections</b>	<b>Applies to Whole of India</b>
<b>Latest amended in year 2013</b>	

**IMPORTANT DEFINITIONS**

<b>Literary Work Sec 2(o)</b>	<b>Includes computer program, table, computer data base</b>
<b>Artistic Work Sec 2(c)</b>	<b>Means painting, sculpture, drawing, map or plan, engraving, photograph, architecture and others</b>
<b>Dramatic Work Sec 2(h)</b>	<b>Choreographic work, scenic arrangement or acting which is fixed</b>
<b>Musical Work Sec 2(p)</b>	<b>Work of music, graphical notation of such work</b>
<b>Cinematograph Film Sec 2(f)</b>	<b>Work of visual recording through a process of moving image including sound recording accompanying such visual recording</b>
<b>Sound Recording Sec 2(xx)</b>	<b>Recording of sound from which such sound may be produced.</b>

**Meaning of Copyright (Sec 14)**

Copyright means exclusive right to do or authorize doing of following work:

<b>In case of Literary, dramatic or musical work</b>	<ul style="list-style-type: none"> <li>-Reproduction of work</li> <li>-Issuing copies of work to public</li> <li>-Performing work in public</li> <li>-Making cinematograph film or sound recording</li> <li>- Making translation or adaptation of work</li> </ul>
<b>In case of Computer Program</b>	<ul style="list-style-type: none"> <li>- To do any of acts specified above</li> <li>- To sell or to give on rent</li> </ul>
<b>In case of Artistic work</b>	<ul style="list-style-type: none"> <li>- Reproduction of work</li> <li>- Issuing copies of work to public</li> <li>- Communication of work in public</li> <li>- Including work in cinematograph film</li> <li>- Making adaptation of work</li> </ul>

In case of Cinematograph film and sound recording

- Making copy of film or any image
- To sell or to give on rent
- Communicating the film or recording to public

### **Term of Copyright**

For literary, dramatic, musical or artistic work, copyright is granted for life time of author **plus** 60 years. In case of joint authors, it will be 60 years after death of survivor. For photographs, cinematograph films, sound recording etc, term of copyright is 60 years from beginning of next calendar year. In case of broadcast reproduction right, time period is 25 years from beginning of next calendar year.

### **Copyright Board**

Government has established a Copyright Board consisting of qualified person to perform following functions:

1. Settlement of dispute regarding term of copyright, assignment of copyright etc.
2. Granting of compulsory license in respect of Indian work, unpublished work or translation
3. Determination of royalty etc.

### **Assignment of Copyright**

Assignment is transfer of whole of legal rights from assignor to assignee. Copyright owner has right to use manuscript and has exclusive right similar to that of patentee. Mere transfer of manuscript does not mean assignment. Purchaser of a copy does not acquire right to reproduce.

Assignment of present as well as future work can be made either wholly or subject to limitations. However, assignment of future work comes into effect only when work comes into existence.

Assignment should be made by an agreement in writing signed by the owner. It should specify the work, and include duration, territorial extension of assignment and remuneration. In absence of above conditions, duration is deemed for five years and territory shall be India.

## **LICENSE OF COPYRIGHT**

<b><i>License by Owner:</i></b>	Owner of present or future work can grant license in writing to any person. In case of future work, where owner dies before the work comes into existence, his legal representative shall be entitled to benefit of license.
<b><i>Compulsory License for Work Withheld from Public:</i></b>	Where a complaint is made to Copyright Board that the owner of any work has refused to republish the work which has been earlier published or the work has been withheld from public, then the Copyright Board can after giving the owner opportunity of being heard, direct the Registrar of Copyright to grant license to the complainant to republish the work, subject to payment of royalty to owner.
<b><i>Compulsory License in case of Unpublished Work:</i></b>	Where the author of work at the time of making the work was citizen of India, it is called Indian work. In case of such Indian work, where author is dead or unknown or cannot be traced, any person may apply to Copyright Board for license to publish such work or its translation in any language.
<b><i>License to Publish Translation:</i></b>	Any person may apply to Copyright Board after seven years from its first publication for license to publish a translation of literary or dramatic work in any language. However, the Copyright Board can grant license of translation of work other than Indian work after three years for the purpose of teaching or research.
<b><i>Termination of License:</i></b>	Where, after grant of license, the owner of the copyright himself publishes such work at reasonable price, license granted shall stand terminated.

### **Copyright Society-**

As a general rule, the Copyright Act prohibits any person or association to carry on business of issuing license in respect of any protected work. However, Government can grant registration to copyright society after considering following factors:

- a. Protection of interest of authors,
- b. Interest and convenience of public, and
- c. Ability of person applying for license.

However, Government cannot register more than one society to do business of same class of work.

This Copyright Society can accept exclusive authorization from owner of copyright to exercise any right in relation to the work. It can enter into agreement with foreign copyright societies too. Following are functions or power of Copyright Society:

- a. Issuing license
- b. Collecting fees for license
- c. Distribution of fees among owners of right

### **Registration and Infringement**

Registration of copyright is not compulsory under this Act (*Asked in Jun 2011*). Claim of infringement of copyright can be made even if registration has not been done. Registrar maintains various register to register different types of copyrights. Whenever author, publisher or owner of work makes application in prescribed form along with fee, Registrar makes relevant entry in this register. Before registration, the Registrar can make appropriate inquiry. Every entry made in this register is published in official gazette.

### **Infringement of Copyright**

Copyright gives exclusive right to owner to reproduce the work. Any unauthorized copying of the protected work constitutes infringement. Following acts are deemed as infringement if done without license:

1. Doing anything which is exclusive right is of owner.
2. Permitting any place to be used for unauthorized communication of work to public for profit.
3. Sale, distribution, exhibition or import of infringed copies of the work.

However import of one copy is allowed.

### **Exception / What is not Infringement**

- a. Fair dealing of literary, dramatic, musical or artistic work for private use or research.
- b. Fair dealing of literary, dramatic, musical or artistic work for reporting current events in any news or newspaper.
- c. Making copy of computer program by lawful purchaser to utilize the program.
- d. Reproduction of literary, dramatic, musical or artistic work for judicial proceeding.
- e. Reading or recitation of reasonable extract of work in public.
- f. Publishing work in a collection consisting largely of non-copyrighted matters intended to be used in educational institutions.
- g. Reproduction of literary, dramatic, musical or artistic work by teacher.
- h. Performance of literary, dramatic, musical or artistic work in the activities of an educational institution.

- i. Performance of literary, dramatic, musical or artistic work by amateur club to non-paying audience.
- j. Making not more than three copies for public library.
- k. Hearing recording in public in enclosed room or hall (not being hotel or commercial place) meant for common use of residents in any residential premise.
- l. Reproduction of work for research or private study.
- m. Reproduction of work published in Official Gazette, or Act or Legislature with commentary.
- n. Production of translation of Act or Legislation in any Indian language if not published by Government.
- o. Publishing a photo or painting of a work of architecture.
- p. Inclusion of any artistic work situated at public place in cinematograph film.
- q. Performance of literary, dramatic or musical work in religious ceremony or Official ceremony of Government.

**Remedies for Infringement**

Owner of copyright has following remedies against the person who does infringement:

- a. Injunction, i.e. owner can restrain the person doing infringement to stop such infringement.
- b. He can claim for damage suffered.
- c. He can proceed to obtain possession of infringed copies.
- d. All plates or moulds used in production of infringed copies are deemed to be property of owner of copyright.

**OTHER PROVISIONS**

**Rights of Author:-** Author is a person who has created the work, i.e. in case of book, the writer, in case of musical work, the composer etc. Author has right to restrain a person who infringes copyright and also can claim damage. Author has such right even after he has assigned the work.

**Broadcasting Organization:-** Broadcasting organization has reproduction right for 25 years starting from next calendar year in which broadcasting is made. Following are not deemed to be infringement of broadcasting right:

- Making sound/video recording for private use or for teaching/research.
- Fairly using the work in reporting of current events.

**International Copyright:-**Central Government can extend benefits of copyright to work published first time in foreign country. These rights are equivalent to right available to work in home country and subject to condition that the foreign country should also extend same benefit to Indian work. These benefits are given upon following conditions:

- Work is first published by International Organization.
- There is no copyright of that work in India at that time.

Central Government can extend above benefits to broadcasting organization too.

**Offences and Penalties:-**Any person knowingly infringes any copyright is liable to imprisonment for 6 months to 3 years and fine of Rs 50,000/- to 2 lakh. Similarly any person who use infringed copy of computer program is liable to imprisonment for 7 days to 3 years and fine of Rs 50,000/- to 2 lakh

Police officer has power to seize without warrant all copies of the work and plates/mouldings used in making infringed copies..

**Appeal:-** Any person aggrieved by decision of Magistrate for seizure of infringed copy of the copyrighted material can prefer appeal to appellate court. Any person aggrieved by decision of Registrar of Copyright can prefer appeal to the Copyright Board within 3 months. From the order of Copyright Board, appeal lies to High Court within 3 months. Registrar of Copyright and Copyright Board shall have powers of civil court so as to issue summon, enforcing attendance of witness, receiving evidence on oath etc.



## THE DESIGNS ACT, 2000

<b>Enacted on 25-May-2000</b>	<b>Applies to Whole of India</b>
<b>Contains total 48 Sections</b>	<b>Controlling authority Controller General of Patent, Designs and Trade Marks</b>

This Act was enacted by repealing the earlier Act called The Designs Act, 1911 with a view to protect industrial designs.

### Important Definitions

<b>Design Sec 2(d)</b>	Means only the features of shape, pattern or composition of line or colour applied to any article in 2D or 3D format by any manual or mechanical process which can be judged by eyes. It does not include any Trade mark or artistic work (under copyright)
<b>Proprietor of a new or original design Sec 2(j)</b>	Includes (1) Author of design (2) Person who get the design executed through other person and (3) Person who acquires design right from author

### Some Special Word/ Terms used in this Chapter

<b>Scandalous</b>	Disgraceful, immoral
<b>Obscene</b>	Offensive to morality, corrupt
<b>Reciprocal</b>	Mutual, simultaneous

**Application-** Sec 5 provides that application for design can be made by any person who claims to be proprietor of new or original design can be made to the Controller. Application shall be made in prescribed format and shall be accompanied by four copies of representation of design and prescribed fee. This application can be sent by hand or by registered post. Application shall state the class to which such design is to be registered. The Designs Rules, 2001 prescribes classification under which application can be preferred.

On application, if any objection appears to Controller, which requires amendment in application, he may communicate list of such objections to the applicant. Applicant shall remove/solve the objections within 6 months.

Under Sec 6, Design is registered for all or any of the articles comprised in a particular class. Where design is registered for any one article coming under given a single classification, the application for same design but for any other article in same classification can be granted to the

same applicant. Say 'Bottle' and 'bag' comes under same classification and if any one has obtained design under 'bottle' he himself will not be refused from obtaining same design for 'bag'.

The Controller can either grant or refuse the application. On refusal, the person aggrieved can prefer appeal to High Court.

The Controller shall grant a certificate of registration to the applicant and publish the fact of registration of the design. A register of designs is kept at the Patent Office, in which all particulars of design shall be entered. Such register is prima facie evidence of any fact regarding design.

<b>Reciprocal Application:-</b>	Any person who has applied for any design in UK or any other convention country can claim the same design in India. However, such claim shall be made within 6 months from the date of application in UK or other convention country.
<b>Rejection:-</b>	The controller shall not register the design if: <ul style="list-style-type: none"> <li>➤ It is not new or original</li> <li>➤ It has been published in India or elsewhere in any format before priority date of application of applicant</li> <li>➤ It is not significantly different from known design or their combination</li> <li>➤ It contains scandalous or obscene matter.</li> </ul>
<b>Substitution:-</b>	Where before registration of design: <ul style="list-style-type: none"> <li>➤ A person has applied for registration of any design, and</li> <li>➤ Other person claims same design as his design due to any agreement or assignment</li> </ul> then the Controller can proceed to register such design in the name of claimant. However, the design should be identified to the satisfaction of the Controller and the agreement or assignment shall also be produced under which claim of the claimant has been made.
<b>Copyright Registration</b>	<b>on</b> Sec 11 provides that on registration, the registered proprietor shall have copyright in the design for 10 years. After expiry of such 10 years, the Controller can extend the period of copyright for 5 years on payment of renewal fee. During copyright, any person may inspect the design and obtain certified copy of the design on payment of fee to Controller.
<b>Restoration:-</b>	Where renewal fee is not paid, the right is lapsed which can be restored within 1 year, from the date of expiry of original period on payment of fee. Application for restoration, as applied by applicant, shall be published by Controller.
<b>Marking before Sale:-</b>	Where design of any article is registered, a mark with the word "Registered" or "Regd." shall be affixed along with registration

	number on such article before delivery for sale of such article.
<b>Cancellation of Registration</b>	<p>Any interested person can file a petition to Controller for cancellation of registration of design on following grounds:</p> <ul style="list-style-type: none"> <li>➤ The design is already registered in India by any other person</li> <li>➤ It has been published in India or elsewhere before its priority date</li> <li>➤ The design is not new or original</li> <li>➤ It does not come under definition of design</li> </ul> <p>Petition shall be in duplicate and one copy of it shall be sent to the registered proprietor. Registered proprietor can file his counter statement within prescribed time period. Controller shall fix a date for hearing on giving 10 days notice and shall decide the matter. Any person aggrieved by decision of Controller can prefer an appeal to High Court.</p>
<b>Piracy of Registered Design</b>	<p>Following acts are deemed to be infringement of design, if done without permission of registered proprietor:</p> <ul style="list-style-type: none"> <li>➤ Applying design or its imitation on any article in its sale</li> <li>➤ Import any article for the purpose of sale</li> <li>➤ Knowingly publishing any article for sale</li> </ul> <p>Any person doing above act in contravention of the Act, shall be liable to pay Rs 25,000 to proprietor. Further the proprietor also have right to sue for recovery of damage or injunction in District Court.</p>
<b>Power and Duties of Controller</b>	<ul style="list-style-type: none"> <li>➤ The Controller shall have powers of a civil court so as to call and receive evidence, taking oath, enforcing attendance of witness, discovery of documents etc.</li> <li>➤ Controller shall have power to get direction from Central Government in case of any doubt or difficulty in administration of this Act.</li> <li>➤ Controller has power to reject application on appropriate ground.</li> </ul>
<b>Design Agent</b>	<p>All applications and other communications to the Controller shall be signed by or through a legal practitioner or agent. The agent under this Act means the Patent Agent under the Patents Act.</p>

#### OTHER PROVISIONS

1. Every register kept under this Act at Patent Office is open for inspection and any person can take certified copies of any entry in such register upon payment of prescribed fee (Sec 26).
2. Where any application for a design has been refused, then any information, drawing, photo, representation relating to such application shall not be open for inspection.

3. Any person, who is entitle to any design due to any assignment or transmission, can apply to the Controller and the Controller, thereupon, shall register him as proprietor of such design.
4. The Controller shall not disclose any information of a design if it can be prejudicial to interest of security of India.

## **GEOGRAPHICAL INDICATION OF GOODS (REGISTRATION & PROTECTION) ACT, 1999**

Enacted on 30-Dec-1999 but came into force on 15-Sept-2003	Applies to Whole of India
Contains total 87 Sections	Controlling authority is Controller General of Patent, Design & Trade Mark

This Act was enacted by reason of TRIPS agreement under WTO regime to register and protect some geographical indication of goods which shows that goods relates to such geographical area.

### **Important Definitions**

<b>Geographical Indication Sec 2(e)</b>	Geographical indication in relation to goods, means indication which identifies goods as originated or manufactured in such territory, region or locality in India to assure a given quality, reputation or other characteristics of goods and that the manufacturing or any other similar processing takes place in such territory, region or locality. E.g. Kolhapuri Chappal, which is manufactured in Kolhapur and every manufacturer of such Chappal has to follow given quality.
<b>Deceptively Similar Sec 2(c)</b>	So resemble as to be likely to deceive or create confusion.
<b>Homonym</b>	A word which sounds or spells the same as another word but has different meaning, e.g. “ <b>two</b> boys wants <b>to</b> play <b>too</b> ”.

### **Registrar of Geographical Indications:-**

The Controller General of Patent, Designs and Trade Marks shall be registrar under this Act. Central Government shall establish a place of registry, to be known as Geographical Indications Registry. A register shall be maintained at Head Office of Geographical Indications Registry to enter particulars of all Geographical Indications.

### **Registration of Geographical Indications:-**

Geographical indications are registered u/s 8 for class of the goods as classified by the Registrar. Classifications are given in Fourth Schedule to the Geographical Indications Rules. For example pharmaceuticals, food for babies, dental wax etc comes under same classification (i.e. Class 5) and surgical, dental and medical instruments comes under same classification (i.e. class 10).

**Sec 9 provides that following geographical indications shall not be registered:**

#### **1. Use of which can create confusion**

2. Use of which can be unlawful
3. Which contains scandalous or obscene matter
4. Which falsely represent that goods belong to another territory

**Sec 10 provides that a homonymous geographical indication can be registered if registrar is satisfied it is different from other homonymous geographical indication and shall not misled the consumer.**

#### **Procedure for Registration-**

Any association of persons or producers or any authority representing interest of producers of the concerned goods shall apply to the Registrar in prescribed form. Sec 11 clearly stipulates that geographical indication is not granted to only one person, rather it is granted on behalf of all manufacturers of same territory.

#### **This application shall contain:**

- A statement as to how the geographical indication designates the goods as originating from particular territory or region. For example, if application relates to “Mysore Silk”, the statement shall show why this silk is different from silk produced at any other city and what is connection of silk with Mysore.
- Class of the goods
- Map of the territory etc

Application is examined by the Registrar who may refuse the application or accept it absolutely or subject to modification. Registrar may withdraw the accepted application before its registration, if there was any error in application.

On acceptance of application, it shall be advertised by the Registrar. Within 3 months from such advertisement, any person may oppose the application. Registrar shall send the particulars of opposition to the applicant, who shall submit his counter-statement within 2 months. Registrar can hear both the parties and can decide the matter.

Sec 15 provides for correction and amendment of the application by the applicant before or after acceptance of the application.

Sec 16 provides that where application has not been opposed, or the opposition has been decided in the favour of applicant, he shall register the geographical indication. If because of default by applicant, registration is not completed within 12 months from the date of application, Registrar can abandon the application.

Any person who claims as producer can apply to the Registrar for registration as “authorized user” of such geographical indication.

**Duration, Renewal, Removal, Restoration:-**

Sec 18 provides duration of the geographical indication to be 10 years which can be renewed for further 10 years from time to time.

Before the expiry of time period of registration, the Registrar shall give a notice to the proprietor or authorized user of the geographical indication requiring him to get the indication renewed. On failure to renew, the Registrar can remove the indication. However, Registrar shall not remove the indication within 6 months from expiry of registration.

After 6 months of expiry of registration but before 1 year, the Registrar can restore the removed indication, if application has been made in prescribed form.

**Effect of Registration:-**

Sec 20 provides that no one can sue for infringement of geographical indication which is not registered under this Act. Registered indication gives following rights:

- To get relief from infringement and
- To exclusively use the indication

**Infringement of Registered Indication:-**

Sec 22 prescribed following acts as infringement of registered indication:

- Use of geographical indication in design or presentation of goods in such a manner as to suggest that such goods have been originated from such area. For example, if any person selling “kesar” mango produced in Maharashtra but shows them to be “Gir Kesar Mango” (Gir kesar is registered indication).
- Use of geographical indication contrary to honest practice of competition which may create confusion or misleading impression on the public.
- Use another geographical indication to the goods which may be literally true but falsely represents its origin. For example, any person selling “Bikaneri Bhujia” made at Sholapur.

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**OTHER PROVISIONS**

- Sec 24 prohibits assignment or transfer of the geographical indication.
- Sec 25 prohibits registration of trade mark containing geographical indication. However, earlier registered trade mark shall not be affected by this provision.
- Registrar shall have power to correct or alter the Register of geographical indications maintained by him.



- Any kind of appeal against order of Registrar shall lie within 3 months to the Appellate Board
- Any person who falsifies or falsely applies geographical indication to the goods shall be punishable with imprisonment up to two years and fine up to Rs 2 lakh.
- All the acts to be done under this Act shall be done by legal practitioner or any other person registered as agent under this Act.
- Government shall have power to declare any country as convention country to which India can provide same privilege as it accords to Indian citizens.

## LAW RELATING TO TRANSFER OF PROPERTY

**Objective:** to amend the laws relating to the transfer of property by acts of parties.

**Not Applicable:** on transfer by operation of law i.e. sale in execution, forfeiture, insolvency etc and also excludes testamentary succession i.e. transfers by will (this is governed by the Indian Succession Act).

**Scope:** it is confined to transfer intervivos means (transfer takes effect between two living person).

<p><b>Instruments:</b> means a non testamentary instrument.</p>	<p><b>Attached to the earth : it means</b></p> <ul style="list-style-type: none"> <li>➤ Rooted in the earth (like tree and shrubs)</li> <li>➤ Imbedded in the earth (like walls etc)</li> <li>➤ Attached in such a way which gives permanent beneficial enjoyment.</li> </ul>
<p><b>Absolute interest:</b> Means ownership which consist of a bundle of rights ,rights to possessions ,right to enjoyment etc or any other way so that a owner can deal or dispose off.</p>	<p><b>Reversion:</b> The residue of an original interest which is left after the granter has granted the lessee a small estate. Ex- if a property has given on lease for 5 years ,after the period of 5 years ,the property which reverts back to him is called the reversion or reversionary interest.</p>
<p><b>Remainder:</b> In this case, limited interest in favour of a other person(1 mentioned person)by the owner of the property and gives remaining to other (2nd person) it is called a remainder.</p>	<p><b>Vested interest:</b> Vested interest should be without any condition.</p> <p>(i)Vested in possession- when it is a right to present possession for ex- our residential house.</p> <p>(ii) Vested in interest – when it is not a right to present possession but a right to future possession.</p> <p><b>Example-</b> a land &amp; building is given to Ramesh for his life with a remainder to B , in that case A's right in vested in possession ,B's right is vested in interest .i.e. after A's death property will come to B without any condition. A vested interest is transferrable and heritable</p>

**Rules relating to transfer of property (Section -5).**

- Transfer of property means an act by which a living person conveys (transfers) property in present or a in future to one or more living person.
- Living person means or includes a company or AOP/BOI whether incorporated or not.
- Property must be in existence for effecting transfer.
- Property may be movable or immovable.
- A transfer of property not in existence for effecting operates as a contract to be performed in future which may be specially enforced as soon as the property comes into existence.

**Section 6**

- No transfer can be made which may effect nature of the interest or for an unlawful object or to a person legally disqualified to be a transferee.
- EXCEPTIONS-Means the following properties cannot be transferred, namely:
  - The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.
  - A mere right of an re entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
  - An easement cannot be transferred apart from the dominant heritage, example – if A, The owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfers this right of way to C. But if he transfers the house itself to C, that easement is also transferred to C.
  - An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. Example-the office of a priest of a temple etc.
  - A mere right to sue cannot be transferred.
  - A public office cannot be transferred nor can the salary of a public officer whether before or after it has become payable.
  - Stipends allowed to military ,naval, air force and civil pensioners of the government and pensions cannot be transferred.
  - A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.

**Contingent interest:**

- Is an interest which takes effect after the condition is satisfied.
- Condition should be precedent.
- Example-(i) if Salman marries with Katrina, then only he will get the property.

**Who can transfer the property (Section 7):**

- “COMPETENT TO CONTRACT”- As per Indian Contract Act 1872, it means he is a major , sound mind and is not disqualified from contract.
- Minor can be transferee.
- A mortgage can be validly executed in favour of a minor to be a transferee ,who has paid a consideration(CASE LAW-HARI MOHAN V.MOHINI)

**Formalities of transfer-**

- Properties can be transfer either orally or by writing.

- Movable property can be transferred by delivery of possession or by registration.

**1. Attestation :**

- ❖ Attestation is an important formalities in connection with the execution of transfer
- ❖ Attest means to testify a factor to bear witness to a fact.
- ❖ Attestation is valid and complete when two witnesses sign the instrument. according to the definition given in TOP act (Section 3) .the following essentials are required for valid attestation.
  - There must be at least two or more witnesses
  - Each witnesses must see
    - The executants' sign or affix his mark to the instrument
    - Some other person sign the instrument in the presence of the executants.
    - receive from the executants a personal acknowledgement of his signature.
  - Each witness must sign the instrument in the presence of the executants .
- ❖ It is not necessary that both attesting witnesses should be present at the same time.
- ❖ Attestation cannot take place before the execution of the deed.
- ❖ No particular form is prescribed for attestation.
- ❖ Attestation witness may not be described as such on the face (case law – YAKUB V. Kalzurkan),only requirement of signature with Intention to Attest(Antmus attestandi).

**2. Registration :**

It is necessary for creating valid transfer in certain cases. Further discussed in Registration act,1908.

**3. Notice :**

- It may be actual or constructive.
- A person is deemed to have knowledge of notice when
  - ❖ He willfully absents from an enquiry or search which he ought reasonably to have made
  - ❖ Gross negligence on his part, he would have known it.
- Example – where a purchaser was informed that the title deeds were in the possession of a bank for safe custody and yet failed to make any enquiry in the bank. It was held gross negligence and deemed to have notice of the rights of the banks which has the custody of the title deeds.(Case Law -Imperial bank of India v. Rai Gyand)

**Restraint on transfers or rule against inalienability (section 10)**

- After transfer of property, transferee should not be restrained absolutely from alienating the property.
- Conditions can be imposed but should not prevent the transferee from alienating the property.
- Example- B gives property to A and his heirs adding a condition in case of transfer it should revert to B. (Such condition is not a valid condition).
- Exception of above –
  - In case of lease, the lessor imposes the condition that the lessee shall not sublet the property or sell his leasehold interest.
  - In respect of women who is not a Hindu, Buddhist or Muslim. In such case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.
- Partial restraint valid If there is a condition, not to transfer the property outside the family it has been held by the courts that they are partial restraints.

**Transfer for benefit of unborn person (section 13):**

- If a property is given to an unborn person, then two conditions should be satisfied:
- It should be preceded by a life estate in favour of a living person. And
- It should comprise the whole of the remaining interest of the transferor so that there can be no further interest in favour of others.

**Rule against Perpetuity (Section 14):** ➤ It says that no transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at the date of such transfers and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

➤ As per section 14 of the Act, the rule contains two propositions;

i. No transfer is valid after the life time of one or more persons living at the date of such transfer. Transfer can remain in effect only during the life time of an existing person.

ii. Transfer can be extended to a person who is not in existence but if he is in existence at the time of remuneration of the period of last transfer. The moment the person is born he shall have contingent interest and after minority i.e. after the age of 18 years, he shall have vested interest. Barring these two conditions, a restriction on alienation of a property is void

➤ Exception – the transfer of property is for the benefit of the public in the advancement of religion, knowledge, commerce etc.

**Restraint on enjoyment (section 11) :** The section says that where the land is transferred by one to another, the transferor should not impose conditions as to HOW and in WHAT manner the transferee should enjoy the property.

Ex-A sells his house to B and adds a condition that B only should reside in that house, such condition is invalid.

**Section 12** says that transfer is void if a property is transferred to any person adding a condition that if such person (buyer) becomes insolvent he ceases to hold that property. It is void condition but Exception in case of lease, he can impose a condition on the lessee that if the lessee becomes insolvent the lease should come to an end.

### **Accumulation of income (Section 17) :**

- The law allows accumulation of income for a certain period only. the period for which such accumulation is valid is :
  - The life of the transferor or
  - Eighteen years from the date of transfer.
- Any direction to accumulate the income beyond the period mentioned above is void except where it is for :
  - The payment of the debts of the transferor or any other persons taking any interest under the transferor,
  - Portions for children or any other person taking any interest in the property under the transfer and
  - For the preservation and maintenance of the property transferred .

### **Conditional transfer (Section 25) :**

- When an interest is created on the transfer of property but is made to depend on the fulfillment of a condition by the transferee, the transfer is known as a Conditional transfer.
- Condition can be precedent or subsequent.
- If the interest is made to accrue on the fulfillment of a condition, that condition is said to be condition precedent. ex- Salim agrees to sell his land to Salman if he marries with "Katrina.
- The condition precedent will be allowed to operate only if it is not hit by section 25 of the Act. Section 25 says that:
  - ☞ The condition must not be impossible to fulfill, (ex- Chand tare toodne wali)
  - ☞ The condition must not be forbidden by law.
  - ☞ It should not be of such a nature that if permitted it would defeat the provisions of any law. (Ex-supari business)
  - ☞ It should not be fraudulent, ex- X gives a false receipt to Y on behalf of principle in consideration of transfer of land.

- ☞ The condition should not be such as to cause injury to the person or property of another.
- ☞ The condition should not be immoral or opposed to public policy.
- If the condition is not hit by section 25 , then it is a valid condition.
- Subsequent conditions- is one which destroys or divests the rights upon the happening or non happening of an event.
- Difference between both of them – in condition precedent ,the condition comes before the interest, whereas in condition subsequent ,the interest is created before the condition.

**Doctrine of Election (Section – 35):**

- ☞ Election may be defined as “the choosing between two rights where there is a clear intention that both were not intended to be enjoyed.
- ☞ Election may be express or implied by conduct.
- ☞ The base of this doctrine is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument.(case law – Copper v. Copper)
- ☞ The question of election arises only when a transfer should be happens from the same instrument, if the transferor makes a gift of property by one deed and by another asks the donee to part with his own property then there is no question of election.

**Doctrine of Holding Out or Transfer by Ostensible (Section – 41):**

- ☞ Where with the consent of the person interested in immovable property ,a person is the ostensible owner of such property and transfers the same for consideration ,the transfer shall not be voidable on the ground that the transferor was not authorized to make it and transferee has obtained reasonable care that he has acted in a good faith.
- ☞ The following conditions are necessary for the application of above section –
  - The transferor is the Ostensible owner.
  - He is so by the consent , express or implied of the real owner.
  - The transfer is for consideration and
  - The transferee has acted in good faith taking reasonable care is not entitled to the transferor had power to transfer.
  - If any of the above conditions or element is absent ,the transferee is not entitled to the protection of this section.
- ☞ Ostensible owner is one who has all the indicia(means symbol, token or mark) of ownership without being the real owner.

**Doctrine of Feeding the Grant by Estoppel (Section -43) :**

- ☞ Where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, at the option of

transferee, operates as an when interest is acquired transferor provided contract is not rescinded by transferee.

- ☞ In order to invoke section 43, the transferee must prove that
  - There was a representation, fraudulent or erroneous
  - Transferor is entitled to transfer the immovable property
  - The transferor is found to have subsequently acquired the interest which he professed to transfers
  - The transfer of property was for consideration
  - The transferee has not rescinded the contract
  - The transferee acted in good faith for consideration and without notice of the rights under the prior transfers.
- ☞ Ex- A, a Hindu, who has separated from his father B, sells to C three fields X, Y and Z, representing that A is authorized to transfer the same. Of the fields Z doesn't belong to A, retained by B after his death this will go to A. C, not rescinded the contract of sale may acquire A to deliver Z to him.
- ☞ Thus under this doctrine a grantor has to grant an interest in land which he did not have at the time possess, but subsequently acquires the benefit of his subsequent acquisition goes automatically to the earlier grantee.

### **Doctrine of LIS PENDENS (Section 52) :**

- ☞ Lis pendens means pending suits, actions. Petition or the like.
- ☞ It states that during the pendency of a suit in a court of law, property which is subject to litigation cannot be transferred.
- ☞ Necessary conditions as laid down in section 52 are :
  - There must be a suit or proceeding in a court of competent jurisdiction.
  - The suit or proceedings must not be collusive
  - The litigation must be one in which right to immovable property is directly and specifically in question.
  - There must be transfer of or otherwise dealing with the property in dispute by any party to the litigation.
  - Such transfer must affect the right of the other party that may ultimately accrue under the terms of the decree or order.
- ☞ Exception –
  - i. A suit in foreign court cannot operate as lis pendens.
  - ii. It also does not apply to moveable's.

### **Doctrine of Fraudulent Transfer (Section – 53):**

Section 53 states that –“Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditors so defeated or delayed.

- Fraudulent transfers means when a person transfers his property so that his creditors shall not have anything out of the property.
- A debtor in order to defeat or delay the rights of a creditors, may transfer his property to some



- person, may be to his relatives or a friend. Such transfer is voidable at the option of the creditors.
- Above transfer is valid till creditors did not challenged same in the court and gets a declaration that the transfer is invalid.
  - The creditor has to satisfy the court that there was a intention to defeat his rights.
  - In case of many creditors, merely giving preference to some creditors can not be said to be fraudulent transfers
  - But other creditors can file a petition in the court within 3 months of the transfers praying that the debtor be declared insolvent, in such case their interest will be protected and transfer is declared to be a fraudulent preference and property will be distributed among all creditors.

**Doctrine of Part Performance (Section 53 A):**

- ☞ Main conditions for the operation of the doctrine of part performance as:
  - There must be a contract to transfer immovable property.
  - It must be for consideration
  - The contract should be in writing and signed by the transferor himself or on his behalf.
  - The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
  - The transferee should have taken the possession of the property in part performance of the contract
  - The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.
- ☞ If all the above conditions are fulfilled then the transferor and the other person has been debarred from exercising any rights in relation to the property except expressly provided in contract, notwithstanding that the instrument is not registered or completed.(case law – Delhi Motor Co. v. Basurkas)

**PROVISIONS RELATING WITH SPECIFIC TRANSFERS:****Sale (Section -54):**

- ☞ Sale has been defined as a transfer of ownership in exchange for a price paid or promised or part paid and part promised.
- ☞ Essentials conditions –
  - The seller must be a person competent to transfer.
  - The buyer must be any person who is not disqualified to be the transferee
  - The subject matter is transferable property.
  - There is a transfer of ownership
  - It must be an exchange for a price paid or promised to pay.
  - There must be a money consideration.
- ☞ Modes of transfers of sale –

- In case of transfer of immovable property, if the value exceeds 100 rs or more, it should be transfer only by registered document. Or by a registered instrument or by a delivery of property when its value is less than 100 rs.
- Where the property is tangible or a reversion, only by a registered instrument.

**Exchanges (Section 118 to 121):**

- ☞ When two persons mutually transfer the ownership of one thing for the ownership of another neither thing being money only, the transaction is called an exchange.
- ☞ Essentials conditions
  - The person making the exchange must be competent to contract
  - There must be mutual consent
  - There is a mutual transfer of ownership though things and interests may not be identical.
  - Neither party must have paid money only.
- ☞ This section applies over to both movable or immovable property.
- ☞ A transfer of property in completion of an exchange can be made only in the matter provided for the transfer of such property by sale.

**Gift Section (122 to 128):**

Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee.

**Essentials**

- ☞ here must be a transfer of ownership
- ☞ The subject matter of gift must be a certain existing movable or immovable property.
- ☞ The transfer must be made voluntarily
- ☞ It must be done without consideration
- ☞ There must be acceptance by donee or on his behalf.

**Formalities (section 123):**

It must be made by a registered document signed by the donor and attested by atleast two witnesses.

**Onerous gift:**

- It may be possible that several things are transferred as a gift by single transaction. Whereas some of them are really beneficial the others convey burdensome obligations.
- Example- A makes a gift of shares in the companies X and Y. X is prosperous but heavy calls are expected in respect of shares in Y Company. The gift is onerous.

**Mortgages (Section 54 to 104):**

A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

- ☞ The transferor is called mortgagor, the transferee a mortgagee,
- ☞ The principal money and interest the payment of which is secured for the time being are called the mortgage money
- ☞ The instrument by which the transfer is affected is called a mortgage deed.
- ☞ Essentials conditions of a mortgage
  - Transfer of interest.
  - Specific immovable property
  - To secure the payment of a loan.

#### Kinds of Mortgage:

##### 1. Simple Mortgage –

- ☞ No right of possession or foreclosure is available to the mortgagee.
- ☞ The mortgagor binds himself personally to pay debt and agrees in the event of his failure to pay the mortgage money.
- ☞ In case of failure the mortgagee can bring a personal action against the mortgagor and obtain a decree.

##### 2. Mortgage by Conditional Sale-

- The property is mortgaged with a condition super added that in the event of a failure by the debtor to repay the debt at the stipulated time, the transaction should be regarded a sale.
- If the loan is repaid, the sale becomes void.
- When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.
- Under this, mortgagor doesnot bind himself personally to repay the debt.
- The mortgagee is not given the possession of the property.

##### 3. Usufructuary mortgage Section 58(d)

A Usufructuary mortgage has the following features:

- Possession of the property must be delivered to the mortgagee.
- There is no personal liability on the part of the mortgagor to pay
- The mortgagee is entitled to rents and profits in lieu of interest or principal or both
- The mortgagee however is not entitled to foreclosure the mortgagee or to sue for sale.

##### 4. English mortgage Section -58(e)

- The mortgagor binds himself to repay the mortgage money on a certain day, in other words there should be a personal undertaking to pay.

- The mortgaged property is absolutely transferred to the mortgagee.
- Such absolute transfer is subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on a fixed day.

**5. Mortgage by deposits of the title deeds or equitable mortgage:**

- A person delivers to the creditors or his agent documents of title of his immovable property with an intention to create a security, and obtains loans
- The requisites of such a mortgage are debt, deposits of title deeds, an intention that deeds shall be security for the debt.
- In such case, an oral agreement between the person and the creditors followed by the delivery of the documents of title to the property is enough.
- It should be noted that this type of mortgage can be created in certain towns and not everywhere in India like Metro cities, Jaipur, Bangalore etc..

**6. Anomalous Mortgage Section 58(g):**

- A mortgage which does not fall in above category is called Anomalous mortgage.
- Basically it is combination of various other mortgages

**7. Sub-mortgage**

Where the mortgagee transfers by mortgage his interest in the mortgage property, or creates a mortgage of a mortgage the transaction is known as a sub mortgage, ex- A mortgages his house to B for Rs.10000 and B mortgages his mortgagee right to C for Rs 8000. B creates a sub mortgage.

**8. Puisne mortgage:**

Where a mortgagor mortgages his property to another person to secure another loan, the second mortgage is called a Puisne mortgage, ex- where A mortgages his house worth Rs . 1 Lakhs to B for Rs.40000 and mortgages the same house to C for a further sum of Rs.30000, the mortgage to B is first mortgage and that of C the second or Puisne mortgage.

**Rights of mortgagor:**

- Right of redemption:  
Means right of the mortgagor is the right to redeem i.e. take back the mortgaged property by paying the mortgage money at any time for repayment.
- Right against clog on equity of redemption:  
Means any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void.
- Right of partial redemption:  
Section 61, gives a right of partial redemption stating that “a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall. In the absence of the mortgages has become due, be entitled to redeem any one such mortgage separately or

any two or more of such mortgages together”. Ex-A mortgages property X to B and obtains a loan of Rs.2000. A again mortgages the same property to B and obtains a further loan of Rs.1000. A can redeem the first mortgage of Rs 2000 or he can redeem both together.

**Implied contract by mortgagor:**

In the absence of a contract to the contrary, the mortgagor shall be deemed to have contracted with the mortgagee that the:

- Mortgagor is entitled to transfer the interest.
- Mortgagor will assist the mortgagee to enjoy quiet possession.
- Mortgagor will pay public charges in respect of the mortgaged property
- Mortgagor covenants as to payment of the rent due on lease where, the mortgaged property is leased.
- Mortgagor covenants as to payments of interest and principal on prior encumbrances, where the mortgage is a second or subsequent encumbrance on the property.

**Rights of mortgagee and his remedies:**

- Remedies against the property are –
    - Right to bring property to sale
    - Right to foreclose
    - Right to the possession of the property
  - Right to sue for mortgage money
  - Right of private sale- a sale without the intervention of the court if ,the loan is not paid on a certain date in the following cases-
    - Where the mortgage is an English mortgage and neither the mortgagor or mortgagee is a Hindu, Mohammedan or Buddhist.
    - Where the mortgagee is the government and the mortgage deed confers an express power of sale.
    - Where the mortgage property was on the date of execution of the mortgage situated within the towns of Metros cities. And the mortgage deed confers express power of sale.
- This right is not exercise unless and until –
- Notice in writing requiring payment of the principal money has been served on the mortgagor and default has been made in payment of the principal money or part there of ,for three months after such service Some interest under the mortgage amounting at least to five hundred rupees in arrear and unpaid for three months after becoming due.

**Liabilities of the mortgagee in possession**

According to section 76,a mortgagee in possession is bound :

- To manage the property as a person of ordinary prudence would manage his own.
- To use his best endeavors to collect the rents and profits thereof

- To pay out of the income all government revenue or other charges of a public charges
- Not to commit any act which is destructive to the property
- To keep full and accurate accounts of all income and expenditure
- When the mortgagor tenders or deposits the mortgage money ,to account for his receipts from the property from the date of tender or deposited etc

**Marshalling Section 81:-**

If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgage is, in the absence of a contract to the contrary, entitled to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgage.

**Example –** Dharmendra mortgages properties X and Y to Sunny. Then he mortgages property Y to Bobby .Suppose Sunny obtains a decree on his mortgage for the sale of property X and Y which from security for his mortgage. Suppose Sunny applies to court for sale of property Y which is also mortgagee to Bobby, Bobby would be entitled to have the prior debt of B satisfied out of property X, if not satisfied then afterwards proceed towards property Y.

**Subrogation Section 91:**

The person who may sue for redemption the primary right to redemption is given to the mortgagor under Section 60, but in addition to the mortgagor certain other persons are also entitled to redeem or institute a suit for redemption of the mortgaged property, namely-

- Any person who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same.
- Any surety for the payment of the mortgage property.
- Any creditors of the mortgagor who has in a suit for the administration of his estate a decree for sale of the mortgaged property.

**Doctrine of Priority:**

- The general rule is that in case of different mortgages on the same property, successive mortgage is paid after the prior mortgage has been satisfied.
- In case of not satisfying both out of the mortgage property, then prior mortgage should be first satisfied.
- But where the prior mortgages suffers from fraud, misrepresentation or gross neglect, the subsequent mortgage shall have priority over prior mortgage, or of any other person who has for consideration acquired an interest in any of the properties.

**Charges (Section -100):**

As defined “where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.”

**Charge by acts of parties:**

When in a transaction of value, for both the parties (debtor or creditors) intend that the property existing or future shall be made available as security for the payment of a debt and that the creditors shall have a present right to have it made available, there is a charge.

Example- A inherited an estate from his grandfather and executed an agreement to pay his sister B a fixed amount sum out of the rents of estate .B has a charge on the estate.

**Charge by operation of Law:**

Are those which arise on account of some statutory provisions. They are not created by the voluntary

action of the parties but arise as a result of some legal obligation.

**Example-** W files a suit against her husband H for maintenance, the court grants a decree awarding the wife Rs.10000 per month, and in case of default by the husband makes his property liable for the month of maintenance, here a charge is created over the husband's property.

**Types of charges:**

- a) Fixed charge: is a charge on specific property.
- b) Floating charge: is an equitable charge on the assets for time being of a going concern.
  - It is a charge on class of assets both present and future.
  - The class of assets charged is one which in the ordinary course of business would be changing from time to time.

**Crystallization of charge:**

A floating charge becomes fixed in the following:

- When the money becomes payable under a condition in the debenture and the debenture holder (the creditors) takes some steps to enforce the security for their rights.
- The company ceases to carry on business.
- The company is being wound-up.

**Leases (Section 105):**

A “lease of immovable property is a transfer of a right to enjoy property.

The essentials of a lease are –

- It is a transfer of a right to enjoy immovable property.

- Such transfer is for a certain time or perpetuity
- It is made for consideration which is either premium or rent or both
- The transfer must be accepted by the transferee.

**Lease and licence:**

If the document creates an interest in the property, it is lease but if it only permits another person to make use of the property of which legal possession retains with the owner. It is called licence. (Case law Associated Hotel of India v. R.N.Kapoor)

- As per section 107, a lease from year to year or for any term exceeding 1 year can be made only by a registered document. it must be effected by a registered document.
- If a lease is for a term below one year, it can be made by a oral agreement but accompanied by delivery of possession

➤

**Types of tenancies:**

- Tenancy from year to year: may be made by a grant of land from year to year.
  - i. If the period of tenancy for a period more than a year, the landlord wants to terminate or ends the lease, he has to give a six month notice to the lessee to quit.
  - ii. In case of tenancy from month to month, a 15 days notice is required.
- Tenancy at will :
  - i. It is recognized in law.
  - ii. This comes into existence when a tenant holds over with the consent is let into occupation.
  - iii. If the tenant is in possession after the expiry of the period, if the tenant stays with the consent of the landlord till such time as further period is fixed or a fresh contract is made, the tenancy is called a tenant at will.
  - iv. The landlord will decide for what further period shall the tenancy be given
  - v. The tenancy at will does not mean that the landlord has to give a proper notice to quit.
  - vi. The tenant at will cannot sublet during that period because no valid contract for further extension in his favour has been made.
- A tenancy by sufferance:
  - i. This is a tenancy which is created by fiction of law.
  - ii. If a tenant continues to be possession after the determination of the period of the lease without the consent of the landlord, he becomes a tenant by sufferance.
  - iii. No notice is required to such a tenant.
  - iv. This tenant is not responsible for rent, he only pays compensation for use and occupation of the land.

**Requirement of valid notice:**



- In order that a notice to quit is valid it must be a proper notice.
- Intension to terminate the tenancy agreement and must specify the date in which the tenancy would expire.
- As above we have seen the requirement for 6 months and 15 days notice.
- The landlord cannot ask his tenant to quit at anytime before the expiry of a month or a year of the tenancy.

**Determination of leases:**

- By efflux of time or lapse of time:
- By the happening of a special event
- Merger
- By surrender
- By forfeiture

**Duties of the lessor :**

- The lessor is bound to disclose to the lessee any material defect in the property with reference to its intended use of which the lessor is and the lessee is not aware.
- The lessor is to put the lessee in possession of the property.
- The lessor is what is usually called covenant for quite enjoyment. Means right to undisturbed possession so long as lessee pays rent.
- The lessee is bound to disclose to the lessor any fact as to nature or extent of the interest that the lessee is about to takeoff which both are not aware.
- Bound to pay rent and other charges timely.
- He uses the property as a person of ordinary prudence would make use of
- He should not do any act which is destructive of or permanently injurious to the property.
- The lessee should handover the property at the end of the lessee.

**Rights of the lessee:**

- If during the continuance of the lease any accession is made to the property, such accession is deemed to be comprised in the lease, the lessee has a right to enjoy same.
- The landlord has agreed to repair the property, the lessee can carry out the repairs and deduct the expenses from the rent if the landlord fails to do so.
- The lessee has a right to remove the fixtures he has erected during the term of the lease.
- If any amount has been in the form of municipal taxes, by lessee to lessor, then he must paid same to government.

**Actionable claims:**

Definition – A Claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property ,or to any beneficial interest in movable property not in the possession ,either actual or constructive of the claimant which the civil courts recognize as affording grounds for relief, wheather such debt or beneficial interest be existent,accuring,conditional, or contingent.

- Actionable claims are claims ,to unsecured debts
- If a debt is secured by the mortgage of immovable property it is not an actionable claim because the section clearly excludes such a debt.
- Example- arrear of rent accrual constitute a 'debt' so it is actionable claim( Case law- Shenu Gobind Singh v. Gauri Prasad)
- Money due under the insurance policy
- Not A.C.-debentures are secured debts and therefore not regarded as actionable claim.
- Actionable claims are transferred by the execution of an instrument in writing signed by the transferor or his duly authorized agent.

## INDIAN CONTRACT ACT - 1872

1. Indian Contract Act, 1872 came into force on 1st September, 1872.
2. It applies to whole of India except the state of J & K.
3. The provisions related to contract are contained in Indian Contract Act, 1872.
4. The provisions related to sale of goods were originally contained in Indian Contract Act, 1872.
5. The provisions related to sale of goods are contained in the Sale of Goods Act, 1930.
6. The Sale of Goods Act came into force on 1st July, 1930.
7. Indian Partnership Act came into force on 1st oct, 1932.
8. The provisions related to partnership are contained in Indian partnership Act, 1932.
9. Contract [Sec. 2(h)] An agreement enforceable by law.
10. Agreement [sec 2(e)] Every promise & every set of promises forming consideration for each other.
11. Promise [sec 2 (b)] A proposal when accepted becomes a promise.
12. An agreement is an accepted proposal.
13. Consideration Quid pro quo i.e., something in return.
14. Enforceability by law Agreement which creates legal obligation on the part of parties. (Balfour Vs. Balfour)

### ESSENTIAL ELEMENTS OF A VALID CONTRACT [SECTION 10]

All agreements are contracts if they are made by the:-

- (i) Free consent of the parties
- (ii) Competent to the contract.
- (iii) For a lawful consideration &
- (iv) With a lawful object &
- (v) Are not hereby expressly declared to be void.
- (vi) Intention to create legal relationship
- (vii) Certainty of meaning
- (viii) Possibility of performance
- (ix) Legal formalities.

### TYPES OF CONTRACTS

- (i) **Valid Contract** – A contract which contains all essential elements.
- (ii) **Void Contract [sec 2 (j)]** – A contract which ceases to be enforceable by law becomes void when it ceases to be so enforceable. It is a contract which is valid in the beginning but later on due to some reasons it becomes void.

- (iii) **Void Agreement [Sec 2(g)]**- An agreement not enforceable by law. It is void from the very beginning when it is made. It is void ab initio.
- (iv) **Voidable Contract [Sec 2 (i)]** – A contract which is enforceable by law at the option of one party but not at the option of other(s). Here, only one party can go to the court of law, other party cannot go to the court of law.
- (v) **Illegal Agreement** – An agreement the consideration of object of which is unlawful [sec. 23].
- (vi) **Unenforceable contract** – It is one which is good in substance but due to some technical defect such as absence in writing, signing one or more parties cannot sue upon it.
- (vii) **Unilateral Contract** – Obligation is pending on the part of one of the parties to the contract.
- (viii) **Bilateral Contract** – Obligation is pending on the part of both of the parties to the contract.
- (ix) **Executed Contract** – A contract which is completed. Where parties to the contract have performed their respective obligations.
- (x) **Executory contract** – A contract which is to be performed in future.

#### TIME BARRED DEBT

1. Indian limitation Act, 1923 – A debt is said to be time barred on expiry of 3 years from the due date, if the amount has not been recovered and also no action has been taken for recovery of the amount.
2. A time barred debt is not recoverable.
3. A written promise to pay time barred debt & signed by the promisor or his duly authorized agent is valid.
4. A person who pay time barred debt, in ignorance of Indian Limitation Act, 1963 (Indian Law), cannot recover it back.
5. In case of appropriation of payment, here there is an appropriation by time, payment may appropriated to the debt first in time, whether time barred or not.
6. An agreement which is not legally enforceable but binding in honour only is invalid.
7. In commercial & Business Agreements, the intention of parties to create legal relationship is presumed to exist.

**Proposal [sec 2(a)]/Offer** – Where one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the consent of that either to such act or abstinence, he is said to make a proposal.

**Acceptance [sec 2 (b)]** – Where the person to whom proposal is made signifies his assent thereto, the proposal is said to be accepted.

**Legal rules regarding offer**

- (i) Offer must be capable of creating the legal relationship. (ii) Offer must be certain, definite and not vague.
- (iii) Offer may be express or implied. (iv) Offer must be distinguish from an invitation to offer.
- (v) Offer may be conditional.
- (vi) Offer may be specific or general.
- (vii) Offer must be made with a view to obtaining the assent of the offeree.
- (viii) An offer should not contain a term of non compliance which may amount to acceptance.
- (ix) Offer must be communicated to the person to whom it is made.
- (x) Special terms to an offer must be communicated.

**TYPES OF OFFER**

**(i) General Offer** – An offer made to the public at large. Anyone having knowledge of the offer can accept this offer by complying with the terms of offer.

**(ii) Specific Offer** – An offer made to a specified person. This offer can be accepted only by the person to whom it is made

**(iii) Cross Offers** – When two persons exchange identical offer in ignorance of each other's offer. Two cross offers cannot made a contract.

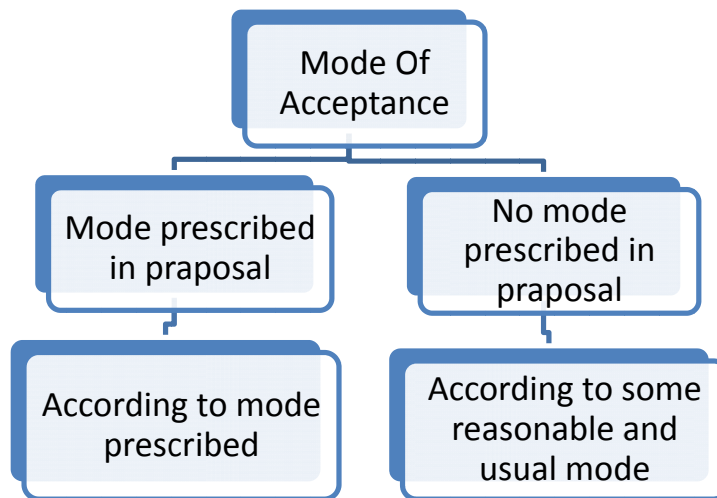
**(iv) Counter Offer** – Qualified acceptance to the offer & counter offer amounts to rejection of the original offer.

**(v) Standing /open/continuing offer** – An offer which is allowed to remain open over a period of time.

Tender for supply of goods is an example of General offer & standing offer.

**RULES REGARDING VALID ACCEPTANCE**

- (i) Acceptance must be absolute and unqualified.
- (ii) Mere silence is not an acceptance.
- (iii) Acceptance must be communicated.



**Consideration [Sec 2(d)]** – When at the desire of the promisor, the promisee or any other person has been done or abstained from doing or, does or abstains from doing or promise to do or to abstain from doing something. Such an act or abstinence or promise is called consideration for the promise. Technical word “Quid pro Quo” i.e., something in return.

**Legal rules regarding consideration**

1. Consideration must move at the desire of the promisor.
2. Consideration may move from the promisee or any other person.
3. Executed Consideration – Consideration which has been given.
4. Executory Consideration – Consideration which is to be moved in future.
5. Consideration may be past, present or future.
6. Consideration should be real & not illusory.
7. Consideration need not be adequate.
8. The performance of an act what one is legally bound to perform is not consideration for the contract.
9. Consideration must not be unlawful, immoral or opposed to the public policy. There can be a stranger to a consideration but there cannot be a stranger to a contract.

**A third party or stranger to a contract cannot sue.**

**Exceptions:**

1. Trust – Beneficiary can sue upon the contract.
2. Family Settlement – Other family members can sue.
3. Marriage contract – Female member for her marriage expenses on partition of HUF.
4. Acknowledgement of liability – when one admits his liability.
5. Assignment – Assignee can enforce upon the contract.
6. Covenant running with land.

**No Consideration, no contract (An agreement without consideration is void). [section 25].**

**Exceptions:**

1. Agreement on account of natural love and affection is valid if is-
  - (a) Written and registered agreement
  - (b) On account of natural love & affection.
  - (c) Between parties standing in near relation.
2. Compensation for past voluntary services
3. Promise to pay time barred debt:- 1. In writing 2. Signed
4. Agency
5. Completed gift
6. Charity
7. Bailment.

**An acceptance is to offer what is a lighted match is to a train of gunpowder. [Sir William Anson]**

### **COMMUNICATION OF OFFER AND ACCEPTANCE**

**Communication of offer is complete when**

1. it comes to the knowledge of the person to whom it is made (i.e., when the letter of offer reaches to offeree).
2. Communication of Acceptance is complete.
  - (A) As against the proposer – when it is put into the course of transmission to him so as to be out of power of the acceptor to withdraw the same (when letter of Acceptance posted).
  - (B) As against the acceptor – When it comes to the knowledge of the proposer. (i.e., when letter of Acceptance reaches to the proposer).

**Communication of Revocation is complete**

(A) AS against the person who made it, when it is put into the course of transmission to the another person so as to be out of power of the person making it.

(B) As against the person to whom it is made, when it reaches to him.

### **OTHER IMPORTANT POINTS**

1. A bid at an auction sale is an implied offer to buy.
2. A proposal is revoked by death or insanity of the proposer, if the fact of insanity or death comes to the knowledge of the acceptor before acceptance.
3. An agreement to agree in future is invalid.

### **MEANING OF TERMS**

1. **Offeror** – The person who made the offer.
2. **Offeree** – The person to whom offer is made.

**3. Promisor** – The person who makes the promise.

**4. Promisee** – The person to whom promise is made

### **PARTIES COMPETENT TO CONTRACT**

1. Major
2. Sound mind
3. Person not disqualified by law from contracting

### **PARTIES INCOMPETENT TO CONTRACT**

1. Major
2. Unsound mind person
3. Person disqualified by law from contracting

**NOTE** - Age of majority is defined u/s 3 of Indian Majority Act, 1875

**Major** – A person who has completed 18 years of age.

#### **Exceptions**

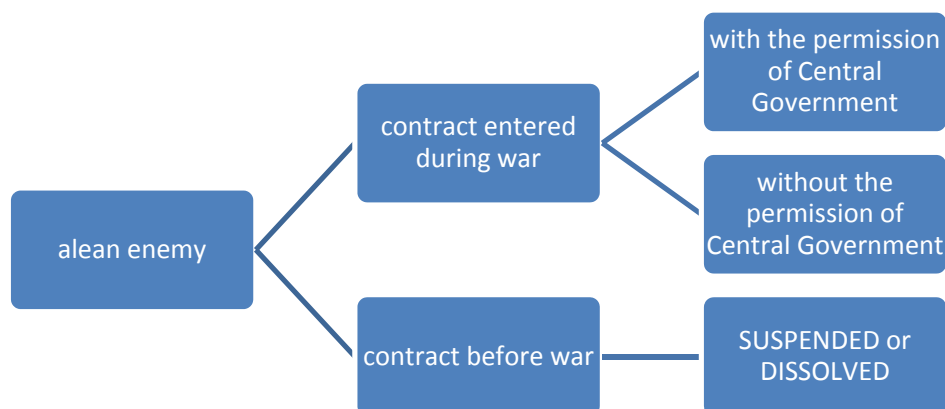
1. Guardian appointed by court
2. Superintendent appointed – 21 years.

### **NOTES**

1. A person who is usually of sound mind but occasionally of unsound mind cannot make a contract when he is of unsound mind.
2. A person who is usually of unsound mind but occasionally of sound mind may make a contract when he is of sound mind.
3. Unsound Mind Persons – Drunkard, Idiot, Lunatic.

### **4. Persons disqualified by Law**

1. Alien enemy
2. Statutory corporation
3. Municipal bodies
4. Sovereign states Ambassadors & Diplomatic couriers
5. Convict
6. Insolvent



**5** A contract with incompetent person is void-ab-initio.



**POSITION OF MINOR'S AGREEMENT**

1. An agreement entered into by or with a minor is void-ab-initio [ **Mohiri Bibi Vs. Dharmodas Ghose**]
2. Minor can be beneficiary.
3. Minor cannot become a partner but he can be admitted to the benefits of partnership with the consent of all partners.
4. Minor can always plead minority.
5. Ratification on attaining majority is not allowed.
6. Contract by minor's guardian is valid if it is within the scope of guardian's authority and it is for the benefit of minor.
7. Minor is not personally liable for necessities supply to him but minor's property is liable, not only for necessary goods, but also for necessary services. [Nash Vs. Inman]
8. Minor can be an agent but cannot be held personally liable for breach of duty or negligence.
9. A minor cannot be declared insolvent because he is incapable of contracting.

**CONSENT [SECTION 13]** – Agreed upon same thing in the same sense – consensus ad-idem – meeting/Identity of mind.

**FREE CONSENT [SECTION 14]** – A consent is said to be free if it is not caused by

- (a) Coercion or
- (b) Undue influence or
- (c) Fraud or
- (d) Misrepresentation or
- (e) Mistake.

**COERCION [SEC 15]** – Coercion is committing or threatening to commit an act forbidden by IPC or the unlawful detaining or threatening to detain any property to the prejudice of any person, whatever with intention of causing him to enter into an agreement.

1. A threat to commit suicide amounts to coercion.
2. A person to whom money has been paid or anything delivered must repay or return it.

**UNDUE INFLUENCE [SEC 16]** – A contract is said to be induced by undue influence where the relation subsisting between the parties are such that one of the parties is in a position to dominate the will of another and uses that position of obtain an unfair advantage over the other.

- A person is in a position to dominate the will of another where he holds real or apparent authority over the other or stands in fiduciary relation to the other.

**FRAUD [SEC 17] (Intention to Deceive)**

- (a) The suggestion as a fact which is not true by one who does not believes it to be true.
- (b) Active concealment of fact by one having knowledge or belief of the fact.

- (c) A promise made without any intention of performing it.  
 (d) Any other act fitted to deceive.  
 (e) Any such act or omission as to law specially declared to be fraudulent.

**MERE SILENCE IS NOT A FRAUD. Exception:**

- ❖ Where is the duty of person to speak.
- ❖ Where silence is equivalent to speech.

**MISREPRESENTATION** – Where a person asserts something which is not true though he believe it to be true.

\* A contract induced by Coercion, undue influence, fraud or misrepresentation is voidable.

**MISTAKE**

MISTAKE			
MISTAKE OF FACT		MISTAKE OF LAW	
UNILATERAL	BILATERAL	INDIAN LAW	FORIEGN LAW
One party under mistake - Valid	Both parties under mistake - void	VALID	VOID

**SOME OTHER IMPORTANT POINTS:-**

1. Moral pressure is involved in case of undue influence.
2. Ignorance of law is of no excuse.
3. A contract is not voidable if fraud or misrepresentation does not induce the other party to enter into contract.
4. A party cannot complain of fraudulent silence if he has the means of discovering the truth with ordinary means.
5. Coercion must be exercised against promisor or any other person.
6. An attempt to deceive is not fraud unless the other party is actually deceived.

**Section 23 – Consideration or object is unlawful if it is:-**

- (a) Forbidden by law or  
 (b) Of such nature that if permitted, defeat the provisions so any law or  
 (c) Fraudulent  
 (d) Involves injury to a person or property of another  
 (e) Immoral or opposed to the public policy.

**VOID AGREEMENTS**

- ❖ Agreement without consideration
- ❖ Agreement with incompetent parties
- ❖ Uncertain agreement

- ❖ Agreement made under mutual mistake of fact.
- ❖ Agreement with unlawful consideration or object.
- ❖ Illegal agreements
- ❖ Agreement to do an impossible act
- ❖ Wagering agreements
  - A. Collateral transactions to a wagering agreement are valid.
  - B. Speculative transactions are generally valid.

#### **AGREEMENTS OPPOSED TO THE PUBLIC POLICY**

- Trading with Alien enemy
- Champerty & maintenance
- Stifling prosecution
- Interference with the course of justice
- Marriage brokerage contracts
- Interest against obligation
- Sale of public office
- Agreement for creation of monopolies
- Agreement in restraint of trade
- Agreement in restraint of marriage
- Agreement in restraint of legal proceeding

CONSIDERATION UNLAWFUL IN PART		
CONTRACT IS INSEPARABLE	CONTRACT IS SEPARABLE	
CONTRACT IS ALTOGETHER VOID	LEGAL PART	ILLEGAL PART
	VALID	VOID

**WAGERING AGREEMENT** – It is an agreement involving payment of a sum of money upon the determination of uncertain event.

#### **OTHER IMPORTANCE POINTS**

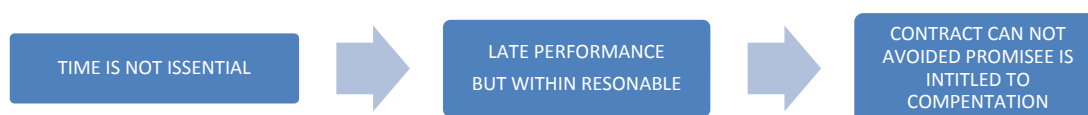
- Compromise of public offence is illegal.
- Maintenance – Promotion of litigation in which one has no interest.
- Champerty – It is a bargain whereby one party agrees to assist another in recovering property, with a view to sharing the profits of litigation.
- All agreements on account of champerty and maintenance are neither void nor valid. Some of them may be void, some of them are valid.

- An agreement which provides for a reference to arbitration instead of court of law is valid even if it is in restraint of legal proceeding.

1. Where a contract involves the exercise of personal skill and diligence, it must be performed by the promisor himself.
2. In case of death of promisor, the liability of legal representative is limited to the value of the property they inherited from the deceased.
3. If all of the joint promisers dies, their legal representatives are bound to perform the promise jointly.
4. Succession – Both burden & benefits are transferred.
5. Assignment – Only benefits are transferred, not the liability there upon.
6. Reciprocal Promises [Sec 2(f)] – When a contract consists a two promises, one being consideration for the other such promises are called reciprocal promises.



7.



8. If debt to be discharged is not indicated by the Debtor, then creditor may apply it, if creditor does not appropriate it, it will be applied in discharge of debt in order of time, whether time barred or not.
9. Novation – Old contract is cancelled & new contract is formed. Parties may or may not change.
10. Recession – Old contract is cancelled, no new contract is formed.
11. Alternation – Changing in the terms of original contract, parties must remain same
12. Remission – To remit or waive off the performance by promise.
13. In case of voidable contract, if aggrieved party rescinds the contact, it must return the benefit received there under.
14. Void Contract/Agreement – Either restore back the advantage received or pay compensation for it.
15. **Discharge of contract by**
  - ❖ Actual or attempted performance.
  - ❖ Mutual agreement – Novation, Alternation, Remission, Recession.
  - ❖ Impossibility of performance.
  - ❖ Lapse of time e.g. Time barred debt.
  - ❖ Operation of law such as death or insolvency.
  - ❖ Actual or anticipatory Breach.

16. Where the performance of promise by one party depends upon the prior performance of promise by the other party, such promises are mutual & dependent.

### **BREACH OF CONTRACT**

**Actual Breach** – Breach of contract on the due date of performance or during the performance.

**Anticipatory Breach** – Breach of contract before time of performance has arrived i.e., before due date of performance.

### **DAMAGES IN CASE OF BREACH**

1. **Ordinary damages** – Compensation for any loss or damage which arise naturally in the normal course of event of Breach.
2. **Special Damages** – It cannot be recovered as a matter of right. These can be recovered only if the notice of special circumstances is given.
3. **Vindictive damages/Exemplary Damages** – For Breach of promise to marry or for wrongful dishonor by banker of his customer cheque.
4. **Nominal Damages** – Where plaintiff proved that there is breach of contract but he has not suffered any real damage. These may be a single rupee or even 10 paise. These are awarded to maintain the right to decree in the court.
5. **Remote Damage** – Indirect loss from breach of contract. Remote Damages are not recoverable.
6. **Damages for deterioration caused due to delay Deterioration**  
Not only implies physical damages to goods but also loss of special opportunity for sale damages can be recovered from carrier even without notice.
7. **Calculation of Damage**  
**Breach by buyer** Damage = Contract Price – Market price on date of Breach.  
**Breach by seller** Damage = Market price on date of Breach – Contract price.
8. **Remedies for Breach of Contract**
  - ❖ Right to rescind the contract
  - ❖ Right to claim damages
  - ❖ Right to continue the contract
  - ❖ Suit upon Quantum Meruit (as much as is earned or according to the quality of work done)
  - ❖ Suit for specific performance
  - ❖ Suit for injunction
  - ❖ Injunction order is issued by the court when a party do what he promised not to do.

### **Other points:-**

- ❖ A contract is not frustrated by commercial impossibility
- ❖ In case of anticipatory breach, the aggrieved party may treat the contract
  - (a) As discharged and bring an immediate action for damages
  - (b) As operative and wait till the time of performance arrives.
- ❖ A party entitled to rescind the contract, loses the remedy where
  - (a) He has ratified the contract
  - (b) The third party acquired the right in good faith
  - (c) Contract is not separable and recession is sought of one part only.

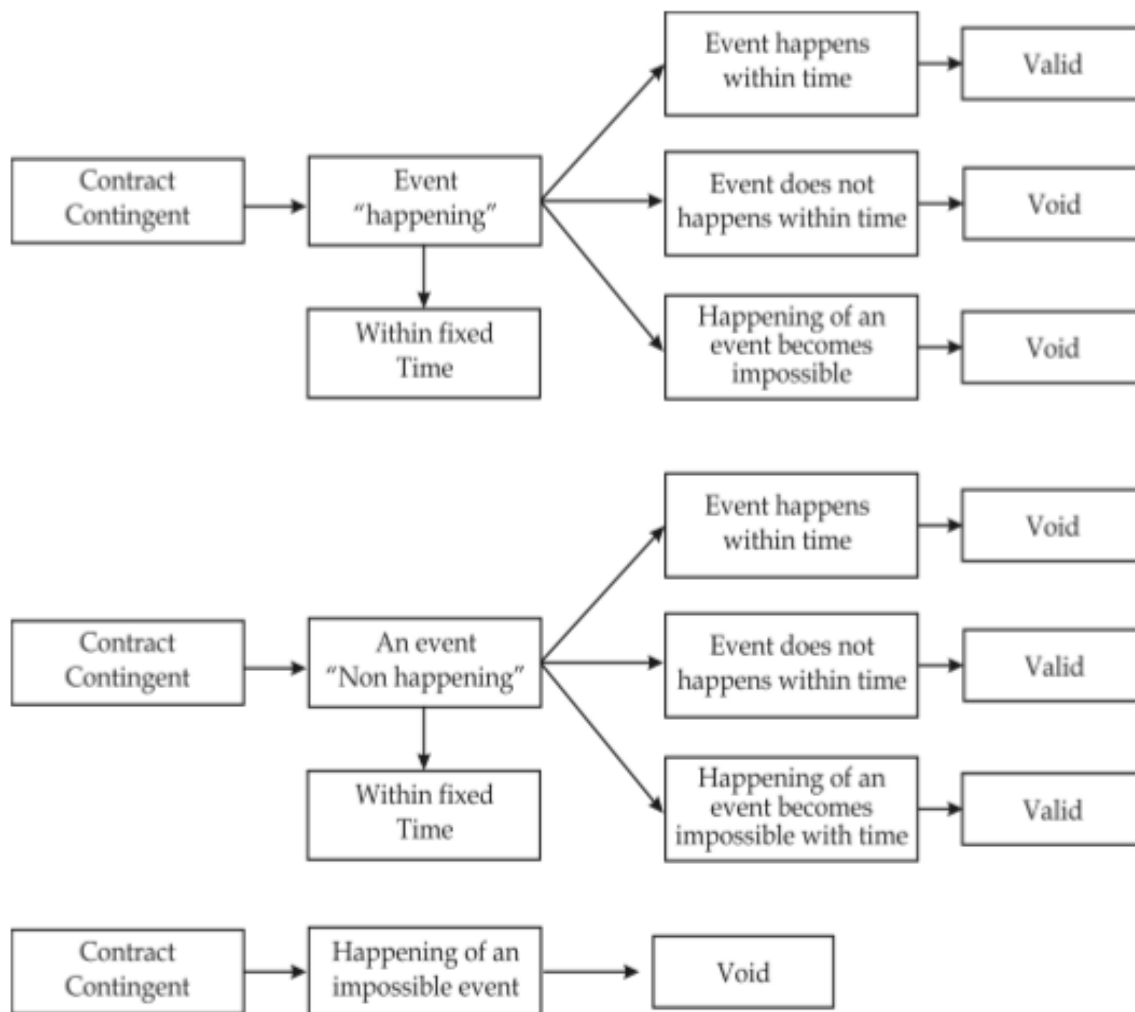
### CONTINGENT CONTRACT

- **Contingent Contract [Sec 31]** – It is a contract to do or not to do something, if some event collateral to such contract, does or does not happens.
- Contract of Insurance is a contingent contract.
- When the contingent event is the part of contract, the contract is conditional one, & where it is collateral to the contract, it is a contingent contract.

CONTINGENT CONTRACT			
EVENT HAPPENING		EVENT NOT HAPPENING	
EVENT HAPPENS	HAPPENING OF EVENT BECOMES IMPOSSIBLE	AN EVENT HAPPENS	HAPPENING OF EVENT BECOMES IMPOSSIBLE
<b>VALID</b>	<b>VOID</b>	<b>VOID</b>	<b>VALID</b>

The basis of “Quasi contractual relations” is the prevention of unjust enrichment at the expense of others.





### QUASI CONTRACT

- Right in rem – Right against the entire world.
- Right in personam – Right against a particular person.
  1. Quasi contractual right is a right in personam.
  2. Quasi contracts are implied by law.

### TYPES OF QUASI CONTRACTS

- ❖ Claim of necessities supplied to an incompetent person, supplier can recover the price from the property of such person.
- ❖ Right to recover money paid for another.
- ❖ Obligation of a person enjoying the benefit of non gratuitous act.
- ❖ Responsibility of finder of goods = same as bailee.
- ❖ A person to whom money has been paid or anything delivered under coercion or by mistake must repay or return it.

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**LAW RELATING TO STAMPS**

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**INTRODUCTION-**

*The basic purpose of Indian Stamp Act, 1899 is to raise revenue to Government. However, over a period of time, the stamped document has obtained so much value that a 'stamped document' is considered much more authentic and reliable than an un-stamped document.*

**POWER OF PARLIAMENT IN RESPECT OF STAMP DUTY –**

*Parliament can make law in respect of Stamp Duty. It can prescribe rates of stamp duty. The stamp duty rates prescribed by Parliament in respect of bill of exchange, cheques, transfer of shares etc. will prevail all over India. However, other stamp duty rates prescribed by Parliament in Indian Stamp Act, 1899 (e.g. stamp duty on agreements, affidavit, articles of association of a company, partnership deed, lease deed, mortgage, power of attorney, security bond etc.) are valid only for Union territories. In case of States, the rates prescribed by individual States will prevail in those States.*

**POWERS OF STATE GOVERNMENT OF STAMP DUTY –**

*State Government has powers to fix stamp duties on all documents except bill of exchange, cheques etc. Rates prescribed by State Government will prevail in that State. State Government can make law for other aspects of stamp duty also (i.e. matters other than quantum of duty). However, if there is conflict between State law and Union law, the Union law prevails [Article 254 of Constitution].*

**INSTRUMENTS CHARGEABLE TO STAMP DUTY –**

*Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded [section 2(17) of Indian Stamp Act]. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule [section 3]. The list includes all usual instruments like affidavit, lease, memorandum and articles of company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy, partnership deed, proxy, shares etc. Thus, if an instrument is not listed in the schedule, no stamp duty is payable. 'Instrument' does not include ordinary letters. Similarly, an unsigned draft of an agreement is not an 'instrument'.*

**DUTY PAYABLE WHEN SEVERAL INSTRUMENTS –**



*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 [section 4(1)]. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments [section 5]. However, it may happen that one instrument covering only one matter can come under more than one descriptions given in Schedule to Stamp Act. In such case, highest rate specified among the different heads will prevail [section 6].*

### **POWERS TO REDUCE STAMP DUTY –**

*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 [section 9(1)]. ‘Government’ means Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and ‘State Government’ in case of stamp duties on other documents [section 9(2)].*

### **MODE OF PAYMENT OF STAMP DUTY –**

*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 (section 17). Instrument executed out of India can be stamped within three months after it is first received in India [section 18(1)]. However, in case of bill of exchange or promissory note made out of India, it should be stamped by first holder in India before he presents for payment or endorses or negotiates in India [section 19].*

### **VALUATION FOR STAMP DUTY –**

*In some cases, stamp duty is payable on ad valorem basis i.e. on basis of value of property etc. In such cases, value is decided on prescribed basis.*

### **ADJUDICATION AS TO STAMP DUTY PAYABLE –**

*Adjudication means determining the duty payable. Normally, the person paying the duty himself may decide the stamp duty payable and pay accordingly. However, in cases of complex documents, the person paying the duty may not be sure of the stamp duty payable. In such case, he can apply for opinion of Collector. He has to apply with draft*

*document and prescribed fees. Collector will determine the stamp duty payable as per his judgment [section 31(1)].*

### **WHAT IS MEANT BY ‘DULY STAMPED’ –**

*‘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 [section 2(11)]. In case of adhesive stamps, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way that it cannot be used for other instrument and stamp appears on face of instrument. If stamp is not so used, the instrument is treated as ‘un-stamped’. Similarly, when stamp duty paid is not adequate, the document is treated as ‘not duly stamped’.*

### **INSTRUMENT CANNOT BE ACCEPTED AS EVIDENCE IF NOT DULY STAMPED –**

*An instrument not ‘duly stamped’ cannot be accepted as evidence by civil court, an arbitrator or any other authority authorised to receive evidence. However, the document can be accepted as evidence in criminal court.*

### **CASE WHEN SHORT PAYMENT IS BY MISTAKE –**

*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 [section 41].*

### **STAMP DUTY ON RECEIPT –**

*Stamp Duty on receipt is Re. 1 for receipt above Rs. 5,000. Receipt includes any note, memorandum or writing [whether signed by any person or not] (a) where any money, or any bill of exchange or promissory note is acknowledged to have been received or (b) where any other movable property is acknowledged to have been received in satisfaction of a debt or (c) whereby any debt or demand is acknowledged to have been satisfied or discharged or (d) which signifies or indicates any such acknowledgment [section 2(23)].*

### **STAMP DUTY ON TRANSFER OF SHARES IN A COMPANY OR BODY CORPORATE –**

*It is 50 Paise for every hundred rupees or part thereof of the value of share. [It is 75 Ps as*

*per Article 62 of Schedule I to Stamp Act, reduced to 50 Ps per Rs 100 vide notification No. SO 198(E) dated 16.3.1976]. As per section 21, the duty has to be calculated on the basis of market price prevalent on date of instrument and not on the face value of shares.*

### **STAMP DUTY ON TRANSFER IN DEPOSITORY SCHEME –**

*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. [section 8A(a) of Stamp Act]. 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. [section 8A(1)(b) of Indian Stamp Act]. If securities are purchased or sold under depository scheme, no stamp duty is payable.*

## LAW RELATING TO ARBITRATION AND CONCILIATION

### PURPOSE OF ARBITRATION ACT AND ALTERNATE DISPUTE RESOLUTION

*is to provide quick redressal to commercial dispute by private Arbitration. Quick decision of any commercial dispute is necessary for smooth functioning of business and industry. Internationally, it is accepted that normally commercial disputes should be solved through arbitration and not through normal judicial system. Hence, the need of ALTERNATE DISPUTE RESOLUTION. (ADR). There are four methods of ADR - negotiation, mediation, conciliation and arbitration. 'Negotiation' is cheapest and simplest method. If it does not work, mediation through a mediator can be tried. If it does not work, conciliation and arbitration will be useful. Arbitration Act makes provision for conciliation and arbitration as ADR mechanisms. An arbitrator is basically a private judge appointed with consent of both the parties. Object of arbitration is settlement of dispute in an expeditious, convenient, inexpensive and private manner so that they do not become the subject of future litigation between the parties.*

### ARBITRATION

*Arbitration is one of the methods of settling civil disputes between two or more persons by reference of the dispute to an independent and impartial third person, called ARBITRATOR, instead of litigating the matter in the usual way through courts. It saves time and expenses. It also avoids unnecessary technicalities and at the same time ensures “substantial justice within limits of the LAW”*

*As per section 2(a) of the Arbitration and Conciliation Act 1996, “Arbitration” means any arbitration, whether or not administered by an arbitrator appointed specially for the settlement of a particular dispute or by some permanent arbitral institution.*

**Law based on UNCITRAL model law** - *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.*

**Matters not referable to arbitration** - *Certain matters which are not arbitrable are –*

- ☞ *Suits for divorce or restitution of conjugal rights*
- ☞ *Taxation*

- ☞ *Non-payment of admitted liability*
- ☞ *Criminal matters.*
- ☞ *Insolvency matters*
- ☞ *Lunacy proceedings*
- ☞ *Testamentary matters*

## ARBITRATION AGREEMENT –

*The foundation of an arbitration is the arbitration agreement between the parties to submit to arbitration all are certain disputes which have arisen or which may arise between them. Thus, the provision of arbitration can be made at the time of entering the contract itself, so that if any dispute arises in future, the dispute can be referred to arbitrator as per the agreement. It is also possible to refer a dispute to arbitration after the dispute has arisen. Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement must be in writing and must be signed by both parties. The arbitration agreement can be by exchange of letters, document, telex, telegram etc. [section 7].*

## APPOINTMENT OF ARBITRATOR –

*The parties can agree on a procedure for appointing the arbitrator or arbitrators. If they are unable to agree, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator. [section 11(3)]. If one of the party does not appoint an arbitrator within 30 days, or if two appointed arbitrators do not appoint third arbitrator within 30 days, the party can request Chief Justice to appoint an arbitrator. [section 11(4)]. The Chief Justice can authorise any person or institution to appoint an arbitrator. [Some High Courts have authorised District Judge to appoint an arbitrator]. In case of international commercial dispute, the application for appointment of arbitrator has to be made to Chief Justice of India. In case of other domestic disputes, application has to be made to Chief Justice of High Court within whose jurisdiction the parties are situated. [section 11(12)]*

## CHALLENGE TO APPOINTMENT OF ARBITRATOR –

*An arbitrator is expected to be independent and impartial. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment. [section 12(1)].*

*Appointment of Arbitrator can be challenged only if*

- ☞ *Circumstances exist that give rise to justifiable doubts as to his independence or*

*impartiality*

☞ *He does not possess the qualifications agreed to by the parties. [section 12(3)].*

*Appointment of arbitrator cannot be challenged on any other ground.. The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award. However, in such case, application for setting aside arbitral award can be made to Court. If the court agrees to the challenge, the arbitral award can be set aside. [section 13(6)]. Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to court. The arbitration can continue and challenge can be made in Court only after arbitral award is made.*

### **CONDUCT OF ARBITRAL PROCEEDINGS –**

*The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present his case. [section 18]. The Arbitral Tribunal is not bound by Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. [section 19(1)]. The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the arbitral tribunal.*

### **LAW OF LIMITATION APPLICABLE –**

*Limitation Act, 1963 is applicable. For this purpose, date on which the aggrieved party requests other party to refer the matter to arbitration shall be considered. If on that date, the claim is barred under Limitation Act, the arbitration cannot continue. [section 43(2)]. If Arbitration award is set aside by Court, time spent in arbitration will be excluded for purpose of Limitation Act. [so that case in court or fresh arbitration can start].*

### **FLEXIBILITY IN RESPECT OF PROCEDURE, PLACE AND LANGUAGE –**

*Arbitral Tribunal has full powers to decide the procedure to be followed, unless parties agree on the procedure to be followed. [section 19(3)]. The Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence. [section 19(4)]. Place of arbitration will be decided by mutual agreement. However if the parties do not agree to the place, the same will be decided by tribunal. [section 20]. Similarly, language to be used in arbitral proceedings can be mutually agreed. Otherwise, Arbitral Tribunal can decide. [section 22].*

**Procedure for Arbitration****1. STATEMENT OF CLAIM AND DEFENSE –**

*The claimant should submit statement of claims, points of issue and relief or remedy sought. The respondent shall state his defence in respect of these particulars. All relevant documents must be submitted. Such claim or defence can be amended or supplemented any time [section 23].*

**2. HEARINGS AND WRITTEN PROCEEDINGS**

*After submission of documents and defence, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be oral hearing or proceedings can be conducted on the basis of documents and other materials. However, if one of the parties requests, the hearing shall be oral. Sufficient advance notice of hearing should be given to both the parties. [section 24]. [Thus, unless one party requests, oral hearing is not compulsory].*

**3. DEFAULT OF A PARTY**

*It is open to the parties to agree to what constitutes a default in the proceedings. In the absence of any such agreement, certain situations as stipulated under the Act are regarded as defaults, leading to certain consequences.*

**4. EXPERT APPOINTED BY ARBITRAL TRIBUNAL**

*The arbitral tribunal may appoint one or more experts to report to it, on specific issues to be determined by the arbitral tribunal*

**5. COURT ASSISTANCE IN TAKING EVIDENCE**

The arbitral tribunal as well as any party, with the approval of the arbitral tribunal, can apply to the court for assistance in taking evidence.

**6. DECISION –**

The decision of the tribunal is generally by a majority of all its members.

**SETTLEMENT****[SECTION 30].**

*It is permissible for parties to arrive at mutual settlement even when arbitration is proceeding. In fact, even the Tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms. Such Arbitral Award shall have the same force as any other Arbitral Award.*

**ARBITRAL AWARD –**

*Decision of Arbitral Tribunal is termed as 'Arbitral Award'. Arbitrator can decide the dispute ex aequo et bono (In justice and in good faith) if both the parties expressly authorize him to do so. [section 28(2)].*

*The decision of Arbitral Tribunal will be by majority.*

*The arbitral award shall be in writing and signed by the members of the tribunal. [section 29].*

*The award must be in writing and signed by the members of Arbitral Tribunal. [section 31(1)].*

*It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given. [section 31(3)].*

*The award should be dated and place where it is made should be mentioned.*

*Copy of award should be given to each party. Tribunal can make interim award also. [section 31(6)].*

**APPEALS [ SECTION 37 ]**

*An appeal against the order of arbitral tribunal granting or refusing to grant any interim measures shall lie to competent court. Further, appeal shall also lie to the competent courts only against the following orders of the court-*

- *Order granting or refusing to grant any interim measures,*



- *Order setting aside or refusing to set aside an arbitral award.*

*No second appeal shall lie from an order passed in appeal under this section. however, the right to appeal to supreme court is not affected.*

## **CORRECTION AND INTERPRETATION OF AWARD**

*Within 30 days from the receipt of arbitral award:*

- *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.*
- *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.*

*It may be noted that the arbitral tribunal may correct any errors of the type referred to above, on its own initiative, within 60 days from the date of the arbitral award.*

## **ADDITIONAL AWARD [SECTION 33(4)]**

*Unless otherwise agreed by the parties, a party with notice to the other party, may request, within 30 days from the receipt of arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request made to be justified, it shall make the additional arbitral award within 60 days from the receipt of such request.*

## **SETTING ASIDE OF AN ARBITRAL AWARD [SECTION 34]**

*Section 34 provides that an arbitral award may be challenged before the competent court and can be set aside on the following grounds:*

- *A party to arbitration suffered from want of competency.*
- *The arbitration agreement is illegal and void.*
- *The concerned part (i.e. party applying for setting aside the award) was not given proper notice of appointment of an arbitrator.*
- *The arbitral tribunal was not properly constituted or the procedure adopted not in accordance with the agreement.*
- *The arbitral tribunal acted without jurisdiction.*
- *Award is in conflict with the public policy.*

- *The subject matter of dispute is not capable of settlement by arbitration under law.*
- *Award dealing with a dispute not contemplated by or not falling within the terms of submission to arbitration.*

### **COST OF ARBITRATION –**

*Cost of arbitration means reasonable cost relating to fees and expenses of arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The tribunal can decide the cost and share of each party. [section 31(8)]. If the parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such case, any party can approach Court. The Court will ask for deposit from the parties and on such deposit, the award will be delivered by the Tribunal. Then Court will decide the costs of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party. [section 39].*

### **INTERVENTION BY COURT –**

*One of the major defects of earlier arbitration law was that the party could access court almost at every stage of arbitration - right from appointment of arbitrator to implementation of final award. Thus, the defending party could approach court at various stages and stall the proceedings. Now, approach to court has been drastically curtailed. In some cases, if an objection is raised by the party, the decision on that objection can be given by Arbitral Tribunal itself. After the decision, the arbitration proceedings are continued and the aggrieved party can approach Court only after Arbitral Award is made. Appeal to court is now only on restricted grounds. Of course, Tribunal cannot be given unlimited and uncontrolled powers and supervision of Courts cannot be totally eliminated.*

### **ARBITRATION ACT HAS OVER-RIDING EFFECT –**

*Section 5 of Act clarifies that notwithstanding anything contained in any other law for the time being in force, in matters governed by the Act, the judicial authority can intervene only as provided in this Act and not under any other Act..*

### **ENFORCEMENT OF FOREIGN AWARDS –**

*The foreign awards which can be enforced in India are as follows :-*

(a) *New York convention award (made after 11th October, 1960)*

(b) *Geneva convention award - made after 28th July, 1924,*

*but before the concerned Government signed the New York convention. Since most of the countries have signed New York convention, normally, New York convention awards are enforceable in India. New York convention was drafted and kept in United Nations for signature of member countries on 21st December, 1958. Each country became party to the convention on the date on which it signed the convention.*

*Party which intends to enforce a foreign award has to produce the arbitral award and agreement of arbitration [original or its certified copy] to the district court having jurisdiction over the subject matter of the award. [section 47]. The enforcement of award can be refused by court only in cases specified in section 48. Otherwise, the foreign award is enforceable through court as if it is a decree of the court. [section 49]. If the court declines to enforce the arbitral award, appeal can be made to the court where appeal normally lies from the district court. However, no further appeal can be made (except appeal to Supreme Court) - (section 50). [Probably, the aggrieved party may be able to approach International Court of Justice, as the convention is an international convention, signed by many of the member countries].*

*One advantage of foreign award, according to foreign parties, is that Indian courts come into picture only at the time of implementation of award. The courts can refuse to implement the award only on limited grounds.*

## **CONCILIATION –**

*Part III of the Act makes provision for conciliation proceedings. In conciliation proceedings, there is no agreement for arbitration. In fact, conciliation can be done even if there is arbitration agreement.*

*The conciliator only brings parties together and tries to solve the dispute using his good offices. The conciliator has no authority to give any award. He only helps parties in arriving at a mutually accepted settlement. After such agreement they may draw and sign a written settlement agreement. It will be signed by the conciliator. However after the settlement agreement is signed by both the parties and the conciliator, it has the same status and effect as if it is an arbitral award.*

*Conciliation is the amicable settlement of disputes between the parties, with the help of a conciliator.*

### **APPOINTMENT OF CONCILIATOR**

Section 64 of the act provides that the conciliator is appointed in following manner:

- ☞ If there is one conciliator in a conciliation proceedings, there should be an agreement on his name.
- ☞ If there are two conciliator, each party should appoint one conciliator each.
- ☞ If there are three conciliators in a conciliation proceedings, each party should appoint one conciliator each and the third conciliator will be agreed person, who will act as presiding conciliator.

### **ROLE OF CONCILIATOR**

The conciliator's role is to provide assistance in an independent and impartial manner to the parties to reach an amicable settlement of their dispute and to conduct the conciliation proceedings in such a manner as he considers appropriate. He is guided by principles of objectivity, fairness and justice. The conciliator may conduct the conciliation proceedings in an appropriate manner taking into consideration all circumstances and wishes of the parties.

The conciliators role is not confined merely in providing assistance, but also extends to making proposals for settlement of disputes. The conciliator may make proposals for a settlement of disputes at any stage of the proceedings.