

ECONOMIC & COMMERCIAL LAWS



(STRICTLY AS PER NEW SYLLABUS FOR CS STUDENTS)

FOR CS EXECUTIVE STUDENTS (MODULE -1)



With Foreign
Trade Policy
2015-2020

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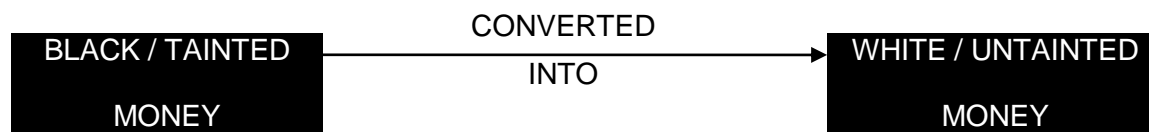
ECONOMIC & COMMERCIAL LAW

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CHAPTER 1 PREVENTION OF MONEY LAUNDERING ACT, 2002



Money laundering is the process of conversion of black (tainted) money into white (untainted) money. Money laundering is the processing of criminal proceeds to disguise its illegal origin.



Most fundamentally, money laundering is linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.

Since money laundering is an international phenomenon, a number of initiatives have been taken to deal with the problem at international level. In this context, the **United Nations took some initiatives which includes a political declaration of 1998**. Declaration asked United Nations members to enact specific legislation for the prevention of money laundering. In India, the prevention of money laundering act, 2002 was passed to implement the UN resolution.

MONEY LAUNDERING-MEANING

SECTION 3

Whoever,

- (a) Acquires, owns, possesses, or transfers any **proceeds of crime** or
- (b) Knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or
- (c) Conceals or aids in the concealment of the proceeds of crime, ***shall be guilty of offence of money laundering.***

PROCEEDS OF CRIME

Proceeds of Crime means any property derived or obtained, directly or indirectly by any person as a result of criminal activity relating to a **scheduled offence** or the value of any such property.

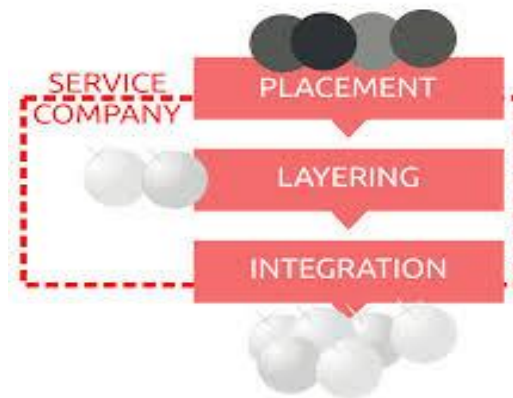
SCHEDULED OFFENCE

“scheduled offence” means—

- (i) The offences specified under **Part A** of the Schedule,(offences relating to narcotics etc.)
- (ii) The offences specified under **Part B** of the Schedule if the total value involved in such **offences is thirty lakh rupees or more.** (offences relating to murder, kidnapping, Arms)

MONEY LAUNDERING- PROCESS

The process of money laundering can be classified into **three stages**, namely, **placement**, **layering** and **integration**.



1. PLACEMENT

At this stage ,the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into l smaller sums.

2. LAYERING

In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source.

3. INTEGRATION

At this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.



The gaps in a national anti-money laundering system are exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.

The funds owned by criminals escape the **government's ability to control and regulate the economy**.

Through the process of money laundering, organised crime can infiltrate financial institutions, **acquire control of large sectors** of the economy through investment, or **offer bribes to public officials and indeed governments**. Thus, the economic and political influence of criminal organisations **can weaken the social fabric, ethical standards** and ultimately the democratic institutions of society.

OBLIGATION OF BANKING COMPANIES, FINANCIAL INSTITUTIONS AND INTERMEDIARIES

Section 12 requires every banking company, financial institution and intermediary to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month. Any doubtful transaction is required to be intimated to **authority (director)** under the Act.

Banks and financial institutions are required to verify and maintain the records of the identity of all its clients, for a period of ten years from the date of cessation of the transactions between the clients and the banking company, financial institution or intermediary.

If **Banks and financial institutions** provides the aforesaid information to the **prescribed Authority** in time, then no civil proceedings can be taken against them.

'know your customer' (KYC) guidelines

The objective of KYC guidelines is to **prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering activities**. KYC procedures enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently. RBI introduced kyc guidelines for all banks.

All banks are required to put in place a comprehensive policy framework covering KYC standards .KYC enables banks to know/ understand their customers and their financial dealings to be able to serve them better and manage its risks prudently.



PUNISHMENT

Section 4 provides that any person who commits the offence of money laundering shall be punishable with **rigorous imprisonment** for a term which shall not be less than **three years but which may extend to seven years** and also liable to fine which may extend to **five lakh rupees**.

However, where the proceeds of crime involved in money laundering relates to any offence specified under the narcotic drugs and psychotropic substances act, the punishment may extend to rigorous imprisonment for **ten years**. Property involved in money laundering will also be **confiscated** by the Central Government.

Offences to be cognizable and non-bailable

Section 45 declares every offence punishable under the act to be cognizable and non-bailable.

However the special court shall not take cognizance of any offence punishable under section 4, except upon a complaint in writing made by (i) the director or (ii) any officer of the central government or state government authorised in writing in this behalf by the central government by a general or special order made by that government.

No police officer shall investigate into an offence under this act, unless specifically authorized, by the central government by a general or special order, and subject to such conditions as may be prescribed.

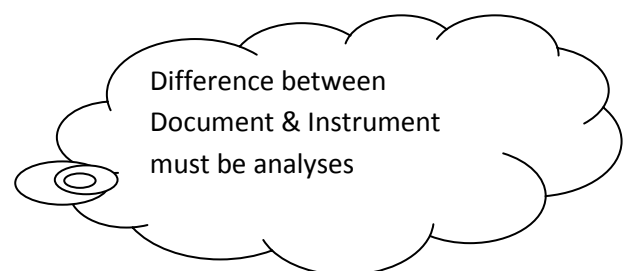
The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments.



INSTRUMENT

‘Instrument’ includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

The definition is an inclusive definition, and is not necessarily restricted to those documents which are specifically mentioned in the definition. Briefly stated, an instrument includes conveyances, leases, mortgages, promissory notes and wills, but not ordinary letters or accounts.



INSTRUMENTS CHARGEABLE WITH DUTY

The following instruments shall be chargeable with a duty of the amount indicated in that **Schedule I** as the proper duty thereof, namely:-

- (a) every instrument mentioned in Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;

- (b) every bill of exchange payable ***otherwise than on demand*** or promissory note drawn or made out of India on or after the date and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in India; and,
- (c) every instrument **(other than a bill of exchange or promissory note)** mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day and relates to any property situate, or to any matter or thing done or to be done in India and is received in India.

However, no duty shall be chargeable in respect of:-

- (a) any instrument executed by or on behalf of or in favour of the Government, in cases where, but for this the Government would be liable to pay the duty chargeable in respect of such instrument.
- (b) any instrument for the sale, transfer or disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel or any part, interest, share of property of or in any ship or vessel.
- (c) Any instrument executed by, or, on behalf of, or in favour of, the Developer or Unit or in connection with the carrying out of purposes of the special Economic Zone.

SEVERAL INSTRUMENTS IN SINGLE TRANSACTION

SECTION 4

Section 4 provides that, where in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction: –

- (a) only the **principal instrument** shall be chargeable with the **duty prescribed** for the conveyance, mortgage or settlement; and
- (b) each of the **other instruments** shall be chargeable with a duty of **one rupee**.

Illustrations

1. A executed a conveyance of immovable property. On the same deed his **nephew** (undivided in status) endorsed his **consent** to the sale, as such consent was

considered to be necessary. It was held that the conveyance was the principal instrument. The consent was chargeable with only one rupee.

2. Brother A executed in favour of brother B a **gift** of all his property. By another deed, brother B made provision for the **living expenses of brother A and hypothecating in favour of brother A a part of the property** included in the above mentioned gift deed, in order to secure the payment of the living expenses. It was held that the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied (*In Re. Maharaj Someshar Dutt,*)

SECTION 4 NOT APPLICABLE

1. A lease is executed and got registered. A second document is executed altering the terms of the first document. The second document has to be stamped as a lease. Section 4 does not apply.
2. A purchaser of land executes a **mortgage of the land in favour of the vendor for a portion of the purchase money**. The mortgage is liable to full duty as a separate instrument. Section 4 does not apply.

INSTRUMENTS RELATING TO SEVERAL DISTINCT MATTERS

SECTION 5

This is the reverse of the situation governed by Section 4. Under Section 5, an instrument comprising or relating to several distinct matters is chargeable with the **aggregate amount** of the duties with which each separate instrument, relating to one of such matters, would be chargeable under the Act.

“Distinct matters”

The expression “distinct matter” means **distinct transactions**.

A document containing both an agreement for the dissolution of a partnership and a bond, is chargeable with the aggregate of the duties with which two such separate instruments would be chargeable. The two are “distinct matters” (*Chinmoyee Basu v. Sankare Prasad Singh*)

INSTRUMENTS COMING WITHIN SEVERAL DESCRIPTIONS IN SCHEDULE-I

SECTION 6

There may be cases where an instrument may come under several descriptions in Schedule-I to the Act. In such a circumstance, Section 6 of the Act provides that the instrument shall, where the duties chargeable thereunder are different, be chargeable only with the **highest of such duties**.

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

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

SECURITIES DEALT IN DEPOSITORY NOT LIABLE TO STAMP DUTY

SECTION 8A

As per Section 8A of the Act:—

(a) an issuer, by the issue of securities to one or more depositories shall, in respect of such issue, be chargeable with duty on the total amount of security issued by it and such securities need not be stamped;

(b) the transfer of—

(i) registered ownership of securities from a person to a depository or from a depository to a beneficial owner;

(ii) beneficial ownership of securities, dealt with by a depository;

(iii) beneficial ownership of units, such units being units of a Mutual Fund including units of the Unit Trust of India established under sub-section (1) of Section 3 of the Unit Trust of India Act, 1963, dealt with by a depository,

shall not be liable to duty under this Act or any other law for the time being in force.

VALUATION FOR DUTY UNDER THE ACT

(a) According to Section 20, where an instrument is chargeable with ad valorem duty in respect of any money expressed in **foreign currency** such duty shall be calculated according to the **current rate of exchange notified by Central Government** on the date of the instrument. The Central Government notifies from time to time, in the Official Gazette the rate of exchange for conversion of certain foreign currencies into Indian currency for this purpose and such rate shall be deemed to be the current rate.

(b) Section 21 provides that in the case of an instrument chargeable with ad valorem duty in respect of **any stock or any marketable or other security**, such duty

shall be calculated on the value of such stock or security according to the **average price or the value thereof** on the date of the instrument.

(c) Section 25 deals with the manner of computation of duty in the case of **annuities** (periodic payments). It provides that:-

- (i) where the sum payable is for a **definite period** so that the total amount to be paid can be previously ascertained such total amount;
- (ii) where the sum is payable in **perpetuity or for an indefinite time** not terminable with any life in being at the date of such instrument or conveyance – the total amount which, according to the terms of such instrument or conveyance will or may be payable during the period of **twenty years** calculated from the date on which the first payment becomes due, and
- (iii) where the sum is payable for an indefinite **time terminable with any life** in being at the date of such instrument or conveyance – the maximum amount which will be or which may be payable as aforesaid during the period of **12 years** calculated from the date on which the first payment becomes due.

PERSONS LIABLE TO PAY DUTY

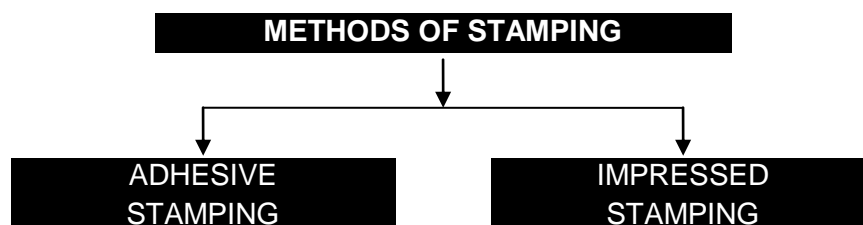
In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

- (a) in the case of any BOE, P-notes, mortgage by the person drawing, making or executing such instrument;
- (b) in the case of a insurance insurer.
- (c) in the case of a lease by the lessee
- (d) in the case of sale – by the purchaser
- (e) in the case of an instrument of partition – by the parties thereto in proportion to their respective shares in the whole property partitioned.

METHODS OF STAMPING

There are two types of stamping, namely:-

- (a) **Adhesive stamping,**
- (b) **Impressed stamping.**





1. ADHESIVE STAMPS

SECTION 11

Section 11 provides that the following instruments may be stamped with adhesive stamps, namely :-

- (a) instruments chargeable with a duty not exceeding 10 paise, bills of exchange payable otherwise than on demand.
- (b) bills of exchange and promissory notes drawn or made out of India;
- (c) entry as an advocate, vakil or attorney on the roll of a High Court;
- (d) notarial acts; and
- (e) transfers of shares in any incorporated company or other body corporate.

The use of the words 'may be stamped' really connotes '**shall be stamped**'.

CANCELLATION OF ADHESIVE STAMPS

Section 12(1)(a) provides that any person affixing any adhesive stamp to any instrument chargeable with duty which has been executed by another person shall, when affixing such stamp cancel the same so that it cannot be used again.

Any instrument bearing an adhesive **stamp** which has **not** been **cancelled** is **deemed to be unstamped**.

MODE OF CANCELLATION OF ADHESIVE STAMPS

The cancellation of an adhesive stamp may be done by the person concerned:-

- (a) *by writing on or across the stamp his name or initials, or the name or initials of his firm with the true date of his so writing, or*

(b) *in any other effectual manner.*

1. In **Mahadeo Koeri v. Sheoraj Ram Teli**, it was held that a stamp may be treated as having been effectively cancelled by merely **drawing a line** across it.
2. In **Hafiz Allah Baksh v. Dost Mohammed**, it was held that if it is **possible to use** a stamp a **second time**, inspite of a line being drawn across it, there is **no** effectual cancellation.
3. In **Melaram v. Brij Lal**, it was held that a very effective method of cancellation is the drawing of **diagonal lines** right across the stamps with ends **extending** on to the **paper** of the document.
4. A **cross** marked by an illiterate person indicating his acknowledgement, was held to be an effective cancellation of the stamp in **Kolai Sai v. Balai Hajam**.

2. IMPRESSED STAMPS

SECTION 13

Section 13 provides that every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument.

Under Section 14, no second instrument chargeable with duty shall be written upon piece of stamp paper upon which an instrument chargeable with duty has already been written.

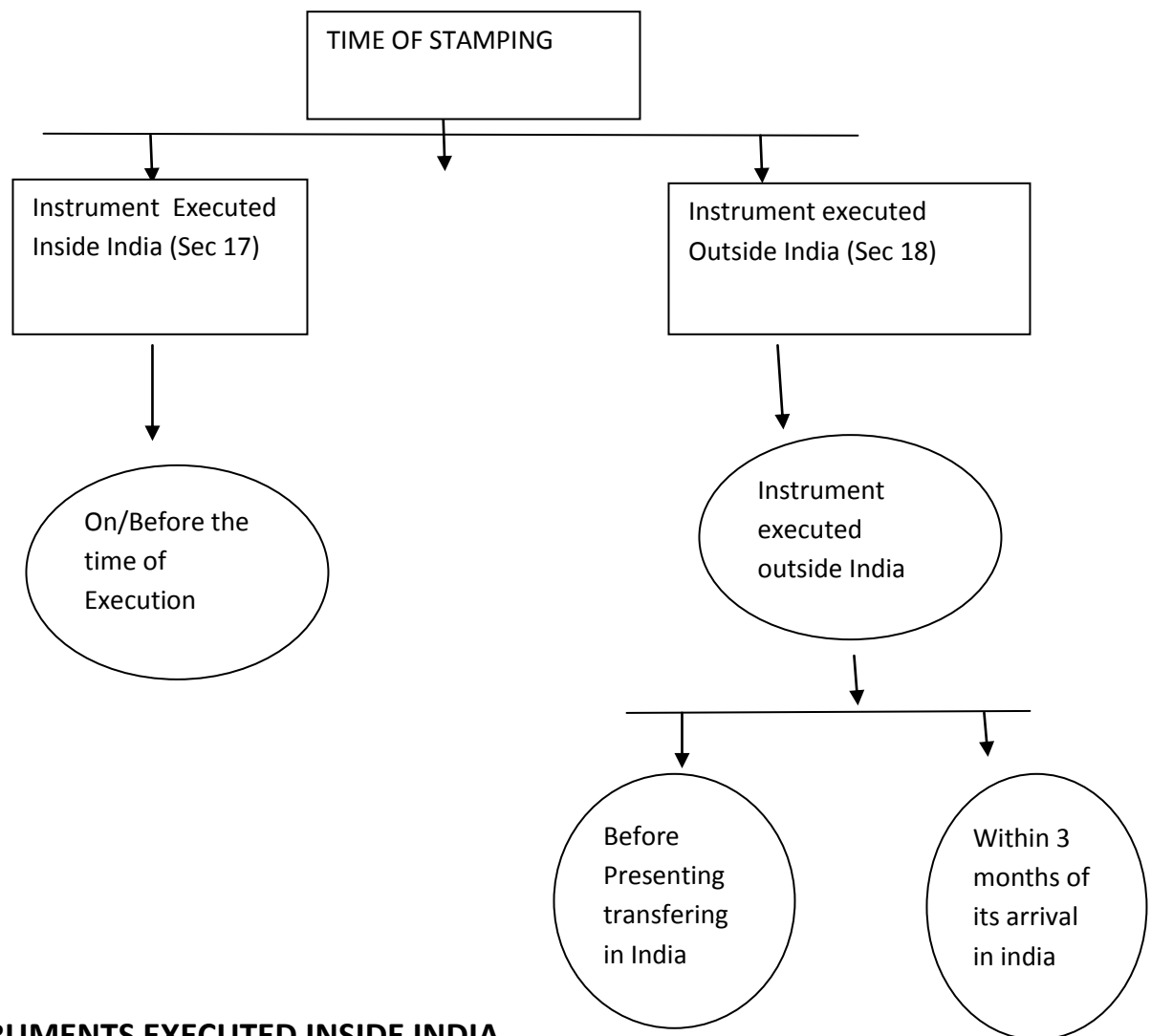
DENOTING DUTY

Where the duty with which an instrument is chargeable, or its exemption from duty, **depends** in any manner upon the duty actually paid in respect of **another instrument**, the payment of such last mentioned duty, shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, be **denoted upon such first mentioned instrument**, by endorsement under the hand of the Collector of Stamps or in such other

manner as the rules of the State Government may provide. This is called denoting of instruments.

The objective of Denoting duty is to **spare parties of an instrument from the inconvenience of having to produce the original or principle document** in order to prove that the instrument is duly stamped.

TIMING OF STAMPING OF INSTRUMENTS



➤ INSTRUMENTS EXECUTED INSIDE INDIA

Section 17 provides that all instruments chargeable with duty and executed by any person in India shall be stamped **before or at the time of execution**.

➤ INSTRUMENTS EXECUTED OUTSIDE INDIA

According to Section 18, every instrument chargeable with duty executed only out of India and (not being a bill of exchange or promissory note) may be stamped within **three months** after it has been first received in India.

Any bill of exchange payable otherwise than on demand or promissory note drawn or made out of India must be stamped and the stamp cancelled, before the first holder in India deals with the instrument, i.e., **presents the same for acceptance or payment, or endorses**, transfers or otherwise negotiates the same in India.

INSTRUMENTS NOT DULY STAMPED – TREATMENT AND CONSEQUENCES

Duly stamped means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India.

➤ **INSTRUMENTS NOT DULY STAMPED INADMISSIBLE IN EVIDENCE**

Section 35 stipulates that no instrument chargeable with duty shall be–

- (a) admitted in evidence for any purpose whatsoever by any person authorised by law (such as judges or commissioners) or by the consent of the parties (such as arbitrators) to record evidence; or
- (b) shall be acted upon; or
- (c) registered; or
- (d) authenticated by any such person as aforesaid or by any public officer

unless such instrument is duly stamped.

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

CASES WHERE UNSTAMPED INSTRUMENT CAN BE ADMITTED IN EVIDENCE

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

[

- (a) any instrument be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of Rs. 5/- or ten times the amount of the proper duty or deficient portion, whichever is higher.
- (b) unstamped receipt would be admissible in evidence on payment of a penalty of Re. 1/-.
- (c) where a contract or agreement of any kind is affected by the correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;
- (d) any instrument can be admitted in evidence in any proceeding in a criminal Court.
- (e) when such instrument has been executed by or on behalf of the Government, it is admissible.

ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED)

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not be questioned at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. (*Guni Ram v. Kodar*).

COLLECTOR'S POWER TO STAMP

The Collector when impounding any instrument not being an instrument chargeable with duty not exceeding 10 paise only or a bill of exchange or promissory note, shall adopt the following procedure:-

- (a) if he is of the opinion that such instrument, is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together **with a penalty of Rs. 5/-**, if he thinks fit and amount not exceeding **ten times** the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of Rs. 5/-.

INSTRUMENTS UNDULY STAMPED BY ACCIDENT

If the Collector is satisfied, that the omission to pay the proper duty was due to accident, mistake or urgent necessity, he may receive the deficit amount and certify by endorsement on the instrument that the proper duty has been levied.

In order to avail of the benefit of this section, the instrument must be produced before the Collector within **one year** of the date of its execution.

REFUND OF STAMP DUTY OR PENALTY BY REVENUE AUTHORITIES

According to section 39 of the Indian Stamp Act, 1899, when a copy of an instrument is sent to the Collector, he may refund any portion of the penalty in excess Rs.5, which has been paid in respect of such instrument.

When the Collector is of opinion that any instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable.

CHAPTER 3 ARBITRATION AND CONCILIATION

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

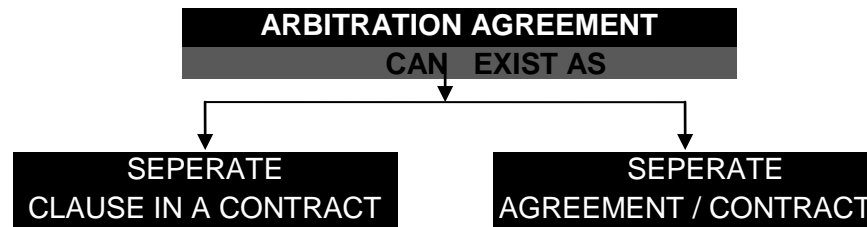


ARBITRATION AGREEMENT

The “Arbitration agreement” has been defined to mean ***an agreement by which parties may submit to the arbitration, certain disputes which have arisen or which may arise between them in respect of a defined legal relationship.***

ESSENTIALS/FEATURES OF ARBITRATION AGREEMENT

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



ARBITRATOR

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

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

APPOINTMENT OF ARBITRATORS

SECTION 11

The **parties** may **agree** to a procedure of appointment of arbitrators. Otherwise the following procedure shall apply :-

- (a) Arbitrator could be of any nationality.
- (b) In case of an arbitration with **three arbitrators**, each party shall appoint its own arbitrator, and the two appointed arbitrators shall appoint a third arbitrator, who shall be the presiding arbitrator.
- (c) If, **within 30 days**, the **parties fail** to appoint their arbitrators, or the **arbitrators fail to appoint the third arbitrator**, the arbitrator shall be appointed by the **Chief Justice of High court** or a person institution designated by him at the request of a party.
- (d) Similar procedure is also applicable for appointment of a sole arbitrator. If parties fail to agree on the appointment of a sole arbitrator within 30 days, the appointment shall be done by the Chief Justice or a person/institution designated by him.
- (e) In case of appointment of a sole or third arbitrator in an **international commercial arbitration**, the **Chief Justice of India** or a person/Institution designed by him, may appoint a person of a nationality, other than that of the parties, where the parties are of different nationalities.

NUMBER OF ARBITRATORS

SECTION 10

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

GROUND FOR CHALLENGE

SECTION 12

An arbitrator may be challenged by a party only if:-

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

A challenge is **also permitted**, if a party becomes **aware** of these grounds **after** an **appointment** is made.

CHALLENGE PROCEDURE

SECTION 13

- (a) The **parties are free** to agree on a procedure for challenging an arbitrator.
- (b) If the **parties doesn't agree** on any procedure, then a party who intends to challenge an arbitrator shall, **within 15 days** after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Section 12, send a **written statement** of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge **unless** the arbitrator challenged withdraws from his office **or** the other party agrees to the challenge.
- (c) if a **challenge** under any **procedure** is **not successful**, the arbitral tribunal **shall continue** the arbitral proceedings and make an arbitral award.

But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

FAILURE OR IMPOSSIBILITY TO ACT AS AN ARBITRATOR**SECTION 14**

As per Section 14, the mandate of an arbitrator shall terminate, if:-

- (a) He becomes de jure or de facto unable to perform his functions, or
- (b) He fails to act without undue delay due to some other reasons.

Mandate is **also terminated**, if he withdraws from his office, or the parties agree to the termination of his mandate.

SUBSTITUTION OF ARBITRATOR

Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to such appointment being replaced.

Unless otherwise agreed by the parties, where an arbitrator is replaced, any **hearings** previously held may be **repeated** at the discretion of the arbitral tribunal.

Unless otherwise agreed by the parties, an **order or ruling** of the arbitral tribunal made prior to the replacement of an arbitrator shall **not be invalid** solely because there has been a change in the composition of the arbitral tribunal.

ARBITRAL PROCEEDINGS/ARBITRATION PROCEDURE**SECTION 23-27**

Sections 23 to 27 stipulate the procedure to be followed in arbitration proceedings.

(1) STATEMENTS OF CLAIMS AND DEFENCE

Within the period of time agreed upon by the parties or determined by the tribunal, the claimant has to state the facts in supporting his claim, the points at issue and the relief or remedy sought.

Similarly, the respondent shall also state his defence in respect of these particulars. There is no restriction upon the parties to agree for holding oral hearings for presentation of evidence and for oral arguments or, alternatively, for conducting the proceedings on the basis of document.

(2) SUBMISSION OF DOCUMENTS

The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence which they will submit later on.

(3) AMENDMENTS

Parties may amend or supplement these statements during the proceedings, unless:-

- (i) Parties have agreed otherwise, or
- (ii) Arbitral tribunal considers it inappropriate to allow the amendment or supplement, due to delay in making it.

(4) DETERMINATION OF RULES OF ARBITRAL PROCEDURE

According to **Section 19 the arbitral tribunal is neither bound by the Code of Civil Procedure 1908, nor by the Indian Evidence Act, 1872.**

The parties are free to agree on a procedure to be followed by the arbitral tribunal in conducting its proceedings.

(5) APPOINTMENT OF EXPERTS BY ARBITRAL TRIBUNAL

Section 26 of the Act, provides for appointment of experts **subject to agreement between the parties**. Section 26 obligates the parties to provide the expert access to necessary information and documents.

(6) DECISION BY MAJORITY

Section 29 of the Act provides for decision by majority where there is more than one arbitrator.

(7) COURT ASSISTANCE

Provisions are also made under the Act relating to Court assistance in taking evidence. Section 27 of the Act provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence.

JURISDICTION OF ARBITRAL TRIBUNALS

The arbitral tribunal is empowered to **rule its own jurisdiction** including any objections in relation to existence and validity of the arbitration agreement.

Section 16 of the Act relates to competence of arbitral tribunal to rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. For this purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract; and

A **plea can be raised** before the **submission of the statement of defence** where the arbitral tribunal does not have jurisdiction. It is further provided that a **party shall not be precluded** from raising such a plea merely **because he** has appointment or **participated** in the **appointment** of an arbitrator.

ARBITRAL AWARD

Arbitral award is the decision of arbitrator/Arbitral Tribunal

INTERIM AWARD

The arbitral tribunal can make an interim award on any matter with respect to which it may make a final award . **"Arbitral award" includes an interim award.**

ESSENTIALS /REQUISITE/CONTENTS OF A VALID AWARD

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

FINALITY OF ARBITRAL AWARDS

Section 35 of the Act provides that the **award shall be final and binding on the parties and persons claiming under it.**

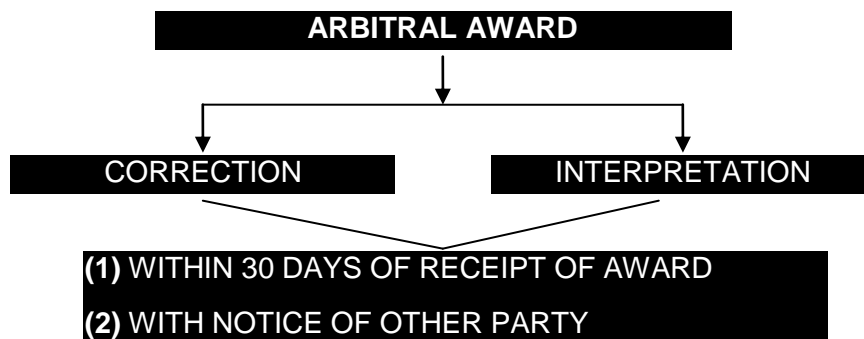
Section 36 provides that where **time for making application for setting aside award has expired or such application has been refused**, the award shall be enforced as a decree under CPC, 1908 in the same manner as if it were a decree of the court.

CORRECTION AND INTERPRETATION OF AN AWARD

Section 33 of the Act deals with correction and interpretation of an award, or additional award.

- ❖ The award may be **corrected** by the arbitral tribunal within **30 days** of the receipt of the award. For that purpose, a party, **with notice to the other party**, may request the 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. The parties may agree upon a period of time other than 30 days for the request.

If the tribunal finds that the request is reasonable, it shall make a correction or give an interpretation, within **30 days** of the receipt of the request.



ADDITIONAL AWARD

Unless otherwise agreed by the parties, a party with notice to the other party, may request the tribunal to make an additional award as to claims presented in the arbitral

proceedings but omitted from the arbitral award. Such request may be made within **30 days** from the receipt of the arbitral award. If the arbitral tribunal considers the above request reasonable, the tribunal shall make the additional arbitral award within **60 days** of the request.

The time period of 60 days may be extended by the tribunal if necessary.

PROVISIONS REGARDING SETTING ASIDE AN AWARD

The parties can approach the **Court** for setting aside the Award. An application may be made for setting aside an arbitral award.

➤ GROUND ON WHICH THE AWARD MAY BE CHALLENGED BEFORE THE COURT

Section 34, stipulates the following grounds on which the award may be challenged before the Court:-

- (a) incapacity of a party;
- (b) invalidity of the arbitration agreement;
- (c) party applying was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings
- (d) or was otherwise unable to present his case;
- (e) award not in accordance with the terms of submission to arbitration in regard to the dispute;
- (f) arbitral tribunal not properly constituted or the arbitral procedure was not in accordance with the agreement of the parties;
- (g) subject matter of the dispute not capable of settlement by arbitration under the law for the time being in force;
- (h) Award being in conflict with 'the public policy of India'.

TIME PERIOD FOR MAKING APPLICATION

Application for setting aside an arbitral award can be made before **three months** from the date on which the party making that application had received the arbitral award or if a request had been made under Section 33 (*for correction & interpretation*), from the date on which that request had been disposed of by the arbitral tribunal.

It is further provided that the period of three months could be **extended** to a maximum of **30 days** by the Court but not thereafter if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period.

APPEALS

Section 37 of the Act provides that an appeal shall lie from the following orders to the court authorised by law to hear appeals from original decrees of the court passing the order, namely:-

- (i) granting or refusing to grant any measures;
- (j) setting aside or refusing to set aside an arbitral award.

Section 37(3) prohibits making of **second appeal** from an order passed in appeal. but the right to appeal to the **Supreme Court** is always open to a party aggrieved.

INTERNATIONAL COMMERCIAL ARBITRATION

“International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under law in force in India and where at least one of the parties is:-

- (a) an **individual** who is a national of, or habitual resident in, any country other than India; or
- (b) a **body corporate** which is incorporated in any country other than India; or
- (c) a company or an association or a body of individuals whose **central management and control** is exercised in any country other than India; or
- (d) the **Government** of a foreign country.

CONCILIATION

Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement.

He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement.

The Act gives a formal recognition to conciliation in India.

➤ NUMBER OF CONCILIATORS

There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

Where there is more than one conciliator, they ought, as a general rule, to act jointly.

➤ **APPOINTMENT OF CONCILIATORS**

- (a) In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;
- (b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;
- (c) in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

➤ **ROLE OF CONCILIATOR**

The **conciliator shall assist the parties in an independent and impartial manner** in their attempt to **reach an amicable settlement of their dispute**.

The conciliator **shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things**, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

The **conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate**, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

The conciliator may, **at any stage of the conciliation proceedings, make proposals for a settlement of the dispute**. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

➤ **TERMINATION OF CONCILIATION PROCEEDINGS**

The conciliation proceedings shall be terminated:-

- (a) by the **signing of the settlement agreement by the parties** on the date of the agreement; or
- (b) by a **written declaration of the conciliator**, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- (c) by a **written declaration of the parties** addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

➤ **RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS**

The parties shall not initiate, during the conciliation proceedings, **any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings** except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

ALTERNATIVE DISPUTE RESOLUTION SYSTEM (ADRS)



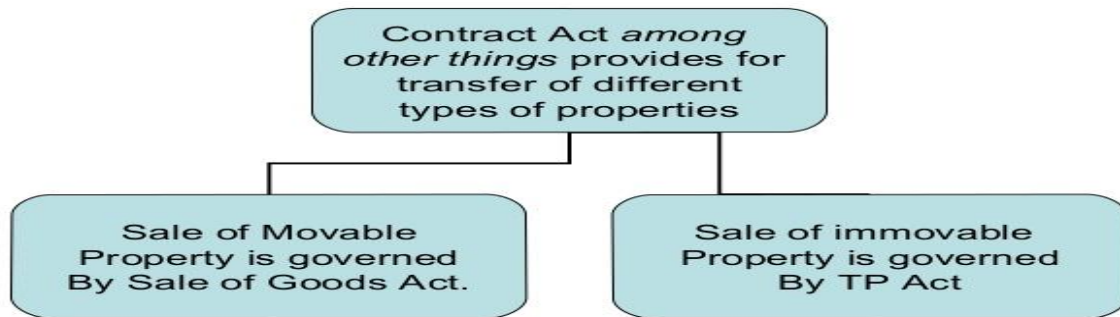
Alternate dispute resolution would include within it any method of dispute resolution other than court litigation. It would include **arbitration, mediation and conciliation** in main.

There is a growing awareness that courts will not be in a position to bear the entire burden of justice system. A very large number of disputes lend themselves to resolution by alternative modes such as arbitration, mediation, conciliation, negotiation, etc. The ADR processes provide procedural flexibility save valuable time and money and avoid the stress of a conventional trial.

CHAPTER 4 TRANSFER OF PROPERTY ACT, 1882

The law relating to transfer of **immovable property** is governed by the Transfer of Property Act, 1882.

Position of TP Act



IMMOVABLE PROPERTY-MEANING

The term “immoveable property” is not exhaustively defined under Transfer of Property Act, 1882. However, it is negatively defined in section 3 of the Act as *“the immoveable property does not include standing timber, growing crops, or grass”*

The General Clauses Act defines the term “immoveable property” as *“immoveable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to any thing attached to the earth”*

If the definitions of “immoveable property” as given in the Transfer of Property Act, and The General Clauses Act are viewed together, we can say that:-

“Immovable property” includes land, benefits arising out of land, and things attached to the earth, but doesnot includes standing timber, growing crops, or grass”

TRANSFER OF PROPERTY

According to Section 5 of the Transfer of Property Act, the term “transfer of property” *means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself, and one or more other living persons .*

In this section, “living person” includes a company or association or body of individuals whether incorporated or not.



WHO CAN TRANSFER THE PROPERTY

According to Section 7 of the Transfer of Property Act, every person who is competent to contract and entitled to transferable property, or authorised to dispose of property is competent to transfer such property. Hence, every person **competent to contract and having ownership** can transfer property.

Exception

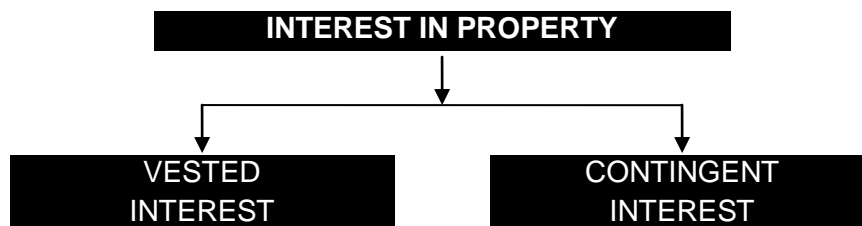
If a person holds himself out as the owner with the consent of the owner i.e. doctrine of holding out or if a person represents to be the owner i.e. doctrine of feeding the grant by estoppel.

ABSOLUTE INTEREST

When a person **owns property**, he has an "absolute interest" in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property.

For eg:- If A is the owner of a land, he has an absolute interest in the land.

VESTED AND CONTINGENT INTERESTS



➤ VESTED INTEREST

An interest is said to be vested when it is not subject to any condition/event **or** when it is subject to any condition/event, such event is bound to be satisfied / happen.

For eg:- if a land is given to A for life with a remainder to B, A's right is vested in possession, B's right is vested in interest.

A vested interest is transferable and heritable. If property is given to A for life and afterwards to B, B gets a vested interest and if B transfers this interest to C, C will take when the life estate of A comes to an end. B's interest, since it is vested, is also heritable. Therefore, if B dies during the lifetime of A, C will get the property after the death of A.

➤ CONTINGENT INTERESTS

A contingent interest, is an interest which takes effect after the condition is satisfied. It is subject to a condition precedent, i.e., unless A marries B's daughter, he will not get the property.

For example- Property is given to A for life and then to B if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent.

DISTINCTION BETWEEN A VESTED AND A CONTINGENT INTEREST

The following are the principal points of distinction between a vested and a contingent interest:-

- (a) When an interest is vested the transfer is complete. It creates an **immediate** proprietary interest in the property though the enjoyment may be postponed to a future date. A contingent interest on the other hand is dependant upon the fulfilment of some conditions which may or may not happen.
- (b) A vested interest **takes effect** from the **date of transfer**. A contingent interest in order to become vested is conditioned by a contingency which may not occur.
- (c) A vested interest **cannot be defeated by the death of the transferee** before he obtains possession. A contingent interest may fail in case of the death of transferee before the fulfilment of condition.
- (d) Since vested interest is not circumscribed by any limitation which derogates from the completeness of the grant, it logically follows that a **vested interest is transferable as well as heritable**. If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs. A contingent interest, on the other hand, cannot be inherited though

it may be transferred coupled with limitation regarding fulfilment of a condition

PROPERTIES WHICH CAN BE TRANSFERRED

Section 6 of provides that property of any kind may be transferred.

PROPERTIES WHICH CANNOT BE TRANSFERRED

Section 6 of this Act contains some exceptions to the general rule that property of any kind may be transferred. Consequently, the following properties cannot be transferred, namely:-

1. CHANCE OF AN HEIR APPARENT OR 'SPES SUCCESSIONIS'

'Spes Successionis' is a latin phrase which means the **expectancy of succession**. In other words, it is the possibilities of future interest in a property. The chance of a heir apparent succeeding to the estate of a deceased person cannot be transferred.

For eg"- A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has **only a hope expectancy** that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

2. RIGHT OF RE-ENTRY

The right which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may re-enter is called the right of re-entry.

For eg-, if A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person.

Thus, right of re-entry being a right for the personal benefit of any party cannot not be transferred.

3. TRANSFER OF EASEMENT

An easement is a right enjoyed by the owner of land over the land of another. Such as, right of way, right of light, right of support, right to a flow of air or water.

For eg;- if A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

4. RESTRICTED INTEREST OR PERSONAL INTEREST

An interest restricted in enjoyment to the owner personally is by its very nature and are not transferable.

Example of such restricted interest or property is--The office of a Shebait of a Temple or mohunt of a mutt or mutuwalli of a wakf.

5. RIGHT TO FUTURE MAINTENANCE

This again is a personal right in the property which the law says that it cannot be transferred. The right of a Hindu widow to maintenance is a personal right which cannot be transferred.

However the arrears of past maintenance can be transferred.

6. MERE RIGHT TO SUE AND ACTIONABLE CLAIM

A 'mere right to sue' apart from the interest from which such right accrues cannot be assigned. The 'right to sue' is a personal right annexed to the ownership of property and cannot be served, from it.

7. TRANSFER OF PUBLIC OFFICE AND SALARIES, STIPENDS, ETC.

It is against public policy to transfer the public office, salary etc.

CONDITIONAL TRANSFER

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. Such a transfer may be subject to a condition precedent or a condition subsequent.

If the interest is made to accrue on the fulfilment of a condition, the condition is said to be condition precedent. For instance, A agrees to sell his land to B if B marries C. This is a **condition precedent**.

Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event.

For example, A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

RESTRAINT ON TRANSFERS / RULE AGAINST INALIENABILITY

Section 10 of the Act says that when property is transferred, the transferee should not be restrained **absolutely** from alienating the property. Any condition restraining alienations of the property is **void**.

PARTIAL RESTRAINT VALID

Though absolute restraints are bad in law, partial restraints are valid. For eg- If there are conditions which restrain the transferee not to alienate the property outside the family, it has been held by the Courts that they are partial restraints.

RESTRAINT ON ENJOYMENT

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property. **for eg-** A sells his house to B and adds a condition that B only should reside in that house, the condition is invalid.

Rule under Section 11 is subject to the **exception** that, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

For eg- A has properties X and Y. He sells property Y to B and puts a condition that B should not construct on property Y more than one storey so that A's property X which he retains should have good light and free air.

TRANSFER FOR BENEFIT OF UNBORN PERSON

Section 13 of the Transfer of Property Act lays down that where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the

date of transfer, **subject to a prior interest created** by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the **whole of the remaining interest** of the transferor in the property.

Thus if a property is given to an unborn person, two **conditions** should be satisfied:-

- (a) it should be preceded by a life estate in favour of a **living person**, and
- (b) it should comprise the whole of the remaining interest of the transferor so that there can be no further interest in favour of others.

For eg:- A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

IMPORTANT DOCTRINES

➤ **DOCTRINE OF ELECTION**

Section 35 of the Transfer of Property Act deals with what is called doctrine of election.

'Election' may be defined as ***"the choosing between two rights where there is a clear intention that both were not intended to be enjoyed"***.

The foundation of doctrine of election is that a **person taking the benefit of an instrument must also bear the burden**, and he must not take under and against the same instrument. It is, a general rule that **no one may approbate and reprobate**.

For eg:- A transfers to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your

house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election.

The question of Election arises only when a transfer is made by the **same document**. If the transferor makes a gift of property by one deed and by another asks the donee to part with his own property then there is no question of election.

For eg- A transfers his land to B by a document. A by another document transfers B's property to C. In this case B can retain the property given to him and refuse to transfer his property to C as the two transfers do not form part of the same document.

➤ **TRANSFER BY OSTENSIBLE OWNER OR DOCTRINE OF HOLDING OUT**

The Doctrine makes an exception to the rule that a person cannot confer a better title than he has. An ostensible owner is one who has all the indicia of ownership without being the real owner.

Where, with the consent, express or implied, of the real owners of immoveable 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 authorised to make it**, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in **good faith**.

The following conditions are necessary for the application of the transferor is the ostensible owner:-

- (a) he is ostensible owner by the consent, express or implied, of the real owner;
- (b) the transfer is for consideration, and
- (c) the transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer.

If any one of these elements is absent, the transferee is not entitled to the protection of this section.

➤ **DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL**

Where, a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

In order to invoke this section, the transferee must prove that:-

- (a) there was a representation, fraudulent or erroneous;
- (b) it was to the effect that the transferor is entitled to transfer the immoveable property;
- (c) the transferor is found to have subsequently acquired the interest which he professed to transfer;
- (d) the transfer of property was for consideration;
- (e) the transferee has not rescinded the contract;
- (f) the transferee acted in good-faith for consideration and without notice of the rights under the prior transfer.

➤ **DOCTRINE OF FRAUDULENT TRANSFER**

Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer.

“Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor **shall be voidable** at the option of any creditor so defeated or delayed.”

➤ **DOCTRINE OF PART-PERFORMANCE**
SECTION 53A

A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected A, the transferor, seeks to evict B from the land. B will not be allowed to suffer simply because the formality of registration has not been through. The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.

Followings are the **essential conditions** for the operation of the doctrine of part-performance according to Section 53A:-

- (a) There must be a contract to transfer immoveable property.
- (b) It must be for consideration.
- (c) The contract should be in writing and signed by the transferor himself or on his behalf.
- (d) The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.

- (e) The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
- (f) The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

However, the doctrine of part-performance **will not affect the right of a subsequent transferee for consideration** without notice of the earlier contract and of its being partly performed.

➤ DOCTRINE OF LIS PENDENS

Lis means dispute, Lis pendens means a *pending suit, action, petition or the like*.

Doctrine of Lis pendens states that during the pendency of a suit in a Court of Law, property which is subject to a litigation cannot be transferred and if transferred, the transferee will be bound by the result of the suit/proceedings.

For example, A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

MODES OF TRANSFER

1. SALE

Under Section 54 of the T.P. Act, "sale" has been defined as a *transfer of ownership in exchange for a price paid or promised or part paid and part-promised*.

Essentials for sale

- (a) The seller & buyer must be a person competent to transfer.
- (b) The subject matter is transferable property.
- (c) There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.

- (d) It must be an exchange for a price paid or promised or part paid and part promised.
- (e) There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

2. EXCHANGE

Sections 118 to 121 of the Transfer of Property Act, 1882 deal with "Exchanges".

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

Essentials for exchange

- (a) The person making the exchange must be competent to contract.
- (b) There must be mutual consent.
- (c) There is a mutual transfer of ownership though things and interests may not be identical.
- (d) Neither party must have paid money only.
- (e) This Section applies to both moveable and immoveable property.

3. GIFT

Section 122 of the Transfer of Property Act defines "gift" as follows:-

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

Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Essentials for gift

- (a) There must be a transfer of ownership.
- (b) The subject matter of gift must be a certain existing moveable or immoveable property.
- (c) The transfer must be made voluntarily.
- (d) It must be done without consideration.

LEASES

According to Section 105, a "lease" of immovable property is a **transfer of a right to enjoy** property.

Since it is a transfer to enjoy and use the property, possession is always given to the transferee.

The lease of immoveable property must be made for a certain or in perpetuity period. For example, one may give a lease of property for a definite number of years, or for life, or even permanently.



The **essentials** of a lease are:-

- (a) It is a transfer of a right to enjoy immoveable property;
- (b) Such transfer is for a certain time or perpetuity;
- (c) It is made for consideration
- (d) The transfer must be accepted by the transferee.
- (e) The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively.

LICENCE

A licence is a right to do or continue to do in or upon the immoveable property of the grantor, something which would, in the absence of such a right, be unlawful.

DIFFERENCE BETWEEN LEASE AND LICENCE

- (a) lease is a transfer of a right to enjoy immoveable property, but licence does not transfer any interest in the property.
- (b) In case of lease possession is always given to the transferee but the licensee has no right to possession.
- (c) a lease cannot be revoked any time at the will of lessor but a licence can be revoked by the grantor at any time.

- (d) the transferee of the lessor is bound by the lease but the transferee of the licensor is not bound by the licence.
- (e) in case of death of licencer, licence terminates.but in case of lease ,it is not so.

ACTIONABLE CLAIMS

Actionable claims are claims, to unsecured debts. A debt is a liquidated money obligation which is usually recoverable by a suit. An essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.

The Section also says that it must be a claim to any debt which the Civil Courts recognise as affording grounds for relief to the person who claims it.

Illustrations of actionable claims:-

- (a) Arrears of rent accrual constitute a 'debt' so it is an actionable claim (**Sheu Gobind Singh v. Gauri Prasad,**).
- (b) Provident Fund that is standing to the credit of a member of the Provident Fund.
- (c) Money due under the Insurance Policy.
- (d) A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (**Thakardas v. Vishindas**).

MORTGAGES

According to Section 58 of the Transfer of Property Act, a "mortgage" is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee.

Essentials of a mortgage:-



- (a) Transfer of interest
- (b) Specific immoveable property
- (c) To secure the payment of a loan

KINDS OF MORTGAGES

There are in all **six kinds** of mortgages in immoveable property.

1. SIMPLE MORTGAGE

In a simple mortgage, the ***mortgagor binds himself personally to pay the debt*** and agrees in the event of his failure to pay the mortgage money, the mortgagee shall have the right to cause the property to be applied so far as may be necessary by means of a decree for the ***sale of property***. In simple mortgage, *no right of possession or foreclosure is available to the mortgagee*.

2. MORTGAGE BY CONDITIONAL SALE

In this type of mortgage, the mortgagor ostensibly sells the property with the following three conditions:-

- (a) If the loan is repaid, the sale becomes void.
- (b) If the loan is not repaid at the stipulated time, the sale will become absolute and binding.
- (c) When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.

Unlike in the case of a simple mortgage, *the mortgagor in this case does not bind himself personally to repay the debt*.

The mortgagee is *not given the possession of the property* in this type of mortgage.

In a mortgage by conditional sale, *the mortgagee's remedy is 'foreclosure'*, that is he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage.

3. ENGLISH MORTGAGE

This type of mortgages have features of both, (i) simple mortgage and (ii) mortgage by conditional sale. It is a **combination** of both.

Here the mortgagor *transfers the ownership of the property* as security and the mortgagee promises to re-transfer the ownership, if the money is paid within a definite time.

There is also a personal covenant as the mortgagor promises to repay within a certain date. The remedy of the mortgagee is *sale of the property* to recover the debt.

4. USUFRUCTUARY MORTGAGE

“Where the mortgagor *delivers possession of property* to mortgagee and authorises him to retain such possession until payment of the mortgage money, and to receive profits accruing from the property and to appropriate the same in lieu of interest, or in payment of the mortgage money, the transaction is called an usufructuary mortgage. It is also called a mortgage with possession.”

The mortgagee in this case has *no remedy* either by forecloser or by sale.

5. MORTGAGE BY DEPOSIT OF TITLE DEEDS/ EQUITABLE MORTGAGE

In this transaction, a person delivers to mortgagee ,documents of title of his immoveable property . all the featuers of simple mortgage applies here.

6. ANOMALOUS MORTGAGE

Transfer of Property Act provides that “a mortgage which is not a simple mortgage, a mortgage by conditional sale, usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage”.

Thus, an anomalous mortgage is a combination of various other mortgages,

RIGHTS OF MORTGAGOR

By mortgaging the property the mortgagor does not cease to be its owner, he only transfers an interest in it. The law, therefore, grants him the following rights:

1. Right of redemption

Right to redeem means the right to take back the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment.

2. Right against clog on redemption

Any condition which prevents the mortgagor from redeeming the property is called a “clog” on the right of redemption and is void. Right of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void.

A mortgage deed provided that if the mortgage money was not paid at a certain time, the mortgagee might enter into possession for a period of twelve years and that mortgagors right to redeem would remain suspended for that period. It was held the condition was a clog and therefore unenforceable (**Mohd. Sher Khan v. Seth Swami Dayal**)

A mortgage deed provided that in case the payment was not made by the mortgagor within the stipulated period, the mortgagee would become the absolute owner of the property. It was held to be a clog on the equity of redemption.

SUB-MORTGAGE

Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage.

For example, where A mortgages his house to B for Rs. 10,000 and B mortgage his mortgagee right to C for Rs. 8,000. B creates a sub-mortgage.

PUISNE MORTGAGE

Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a puisne mortgage.

For example, where A mortgages his house worth Rs. one lakh to B for Rs. 40,000 and mortgages the same house to C for a further sum of Rs. 30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of Rs. 40,000 plus interest.

MARSHALLING

According to Section 81, if the owner of two or more properties mortgages them to one person and then sells one of the properties to another person, the purchaser is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee.

SUBROGATION

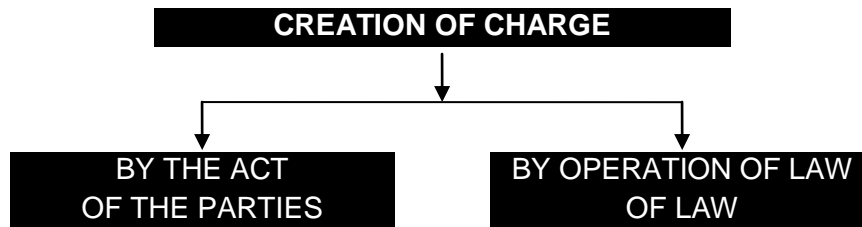
Section 92 incorporates the principle of "subrogation". It provides that any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this Section is called the "right of subrogation", and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

Nothing in this Section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

CHARGES

"Charge" has been defined under Section 100 as follows: *"Where immoveable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property".*¹



Illustrations

Charge by the act of parties

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

Charge by operation of law

W files a suit against her husband H for maintenance. The Court grants a decree awarding the wife Rs. 100 per month, and in case of default by the husband makes his property liable for the amount of maintenance. Here a charge is created over the husband's property.

KINDS OF CHARGES

A charge on the property of the company as security for debentures may be of the following kinds, namely :

- (1) Fixed or specific charge;
- (2) Floating charge.

➤ FIXED OR SPECIFIC CHARGE

A charge is fixed or specific when it is made specifically to cover assets which are **ascertained** and **definite** or are capable of being ascertained and defined, at the time of creating charge e.g., land, building, or heavy machinery.

A fixed charge, therefore, is against security of certain specific property, and the company loses its right to dispose of that property as unencumbered.

➤ FLOATING CHARGE

A floating charge is a charge on a class of assets present and future which in the ordinary course of business is **changing from time** to time and leaves the company free to deal with the property as it sees fit until the holders of charge take steps to enforce their security.

A floating charge is not attached to any definite property but covers property of a fluctuating type e.g., **stock-in-trade** and is thus necessarily equitable.

CRYSTALLISATION OF FLOATING CHARGE

A floating charge attaches to the company's property generally and remains dormant till it crystallises or becomes fixed. The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event which determines this right.

A floating charge crystallises and the security becomes fixed in the following cases:-

- (a) when the company goes into liquidation;
- (b) when the company ceases to carry on the business;
- (c) when the creditors or the debenture holders take steps to enforce their security.
- (d) on the happening of the event specified in the deed.

EFFECT OF CRYSTALLISATION OF A FLOATING CHARGE

On crystallisation, the floating charge converts itself into a fixed charge on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors.

DISTINCTION BETWEEN MORTGAGE AND CHARGE

- (a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.
- (b) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties
- (c) A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
- (d) In certain types of mortgage, the mortgagor can foreclose the mortgaged property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.

CHAPTER 5 CONSUMER PROTECTION ACT, 1986

The need to ensure the basic rights to health, safety, etc. of consumers has long been recognised the world over and various legislations were enacted abroad in this

direction. In India, **Consumer Protection Act, 1986** provides for **simple, quick and easy remedy to consumers** under a **three-tier quasi-judicial redressed agency** at the District, State and National levels.

Object of the Act is to provide for **better protection of the interests of consumers** and for that purpose to make provision for the **establishment of consumer councils and other authorities** for the settlement of consumers disputes and for matters connected therewith.

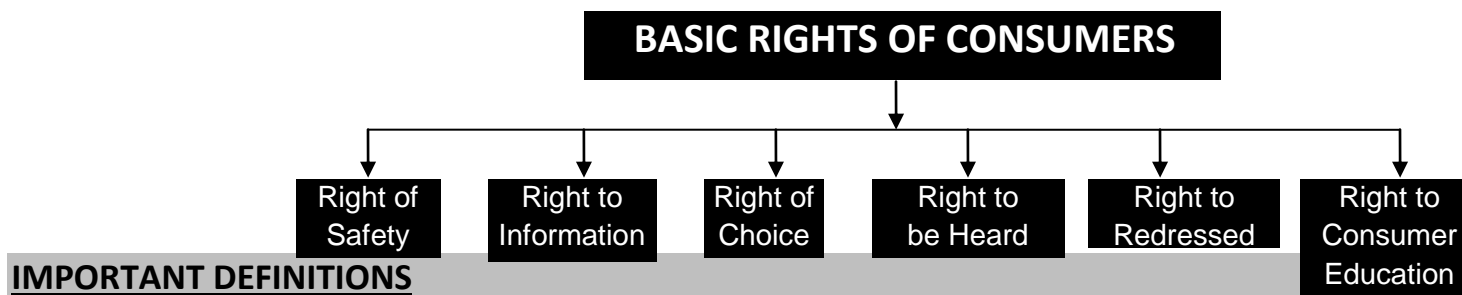


The Act extends to the whole of India except the State of Jammu and Kashmir and applies to all goods and services unless otherwise notified by the Central Government.

BASIC RIGHTS OF CONSUMERS

The basic rights of consumers that are sought to be promoted and protected are:-

- (a) the **right to be protected** against marketing of goods and services which are hazardous to life and property;
- (b) the **right to be informed** about the quality, quantity, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;
- (c) the **right to be assured**, wherever possible, access to variety of goods and services at competitive prices;
- (d) the **right to be heard** and to be assured that consumers interests will receive due consideration at appropriate forums;
- (e) the **right to seek redressal** against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
- (f) the **right to consumer education**.



IMPORTANT DEFINITIONS

- **COMPLAINANT**
SECTION 2(1)(b)

Complainant means

- (a) a consumer, or
- (b) any voluntary consumer association registered under the Companies Act, 1956, or under any other law for the time being in force; or
- (c) the Central Government or any State Government, who or which makes a complaint; or
- (d) one or more consumers where there are numerous consumers having the same interest;
- (e) in case of death of a consumer, his legal heir or representative;
who or which makes a complaint

An association of persons, to have locus standi as consumer, it is necessary that all the individual persons forming the association must be consumers having **purchased the same goods/hired** the same **service** from the **same party** i.e. they should have a common cause of action.

In case the affected consumer is unable to file the complaint due to **ignorance, illiteracy or poverty**, any **recognised consumer association** may file the complaint. The rule of '**privity of contract**' or locus standi which permits only the aggrieved party to take action has very rightly been **set aside** in the spirit of public interest litigation.

- **COMPLAINT**
SECTION 2(1)(c)

Complaint means any allegation in writing made, **with a view to obtaining any relief**, by a complainant that:-

- (a) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

- (b) the goods bought by him or agreed to be bought by him suffer from one or more defects;
- (c) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;
- (d) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, **a price in excess of the price—**
 - (i) fixed by or under any law for the time being in force;
 - (ii) displayed on the goods or any package containing such goods;
 - (iii) displayed on the price list exhibited by him by or under any law for the time being force
 - (iv) agreed between the parties.
- (e) Goods which will be hazardous to life and safety when used are being offered For sale to the public,
- (f) Services which are hazardous or likely to be hazardous to life and safety of the Public when used, are being offered by the service provider

Time limit for filing the complaint

A complaint has to be made within **2 years** from the date on which **cause of action** has arose. However, the concerned authority may entertain complaint after the said period of 2 years, if it is satisfied that there was sufficient cause for not filling it within the prescribed period.

- **CONSUMER**
SECTION 2(1)(d)

Consumer means any person who

- (a) **buys any goods** for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and **includes any user of such goods** with the permission of the buyer, **but does not include** a person who obtains such goods for resale or for any **commercial purpose**; or
- (b) **hires or avails of any services** for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and **includes any beneficiary of such services** with the permission of hirer, **but does not include** a person who avails of such services for any **commercial purpose**.

Commercial purpose

A purchase of goods can be said to be for a ‘commercial purpose’ only if

- (a) the goods have been purchased for being used in *some profit making activity on a large-scale, and;*
- (b) there is **close and direct nexus** between the purchase of goods and the **profit-making activity**.

It has been clarified that the term commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of **earning his livelihood** by means of self-employment.

Decided Cases

1. In **Laxmi Engineering Works v. P.S.G. Industrial Institute**, Supreme Court held that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.
2. In **Bhupendra Jang Bahadur Guna v. Regional Manager and Others**, the National Commission held that a tractor purchased primarily to till the land of the purchaser and let out on hire during the idle time to till the lands of others would not amount to commercial use.
3. In **A Narasamma v. LIC of India** It was held that the widow being the beneficiary of services is a ‘consumer’ under the Act and is entitled to be compensated for the loss suffered by her due to negligence of the LIC.
4. In **Spring Meadows Hospital v. Harjot Ahluwalia** the Supreme Court held that parents who bring the child to hospital and the child, both are consumers.
5. In **Laxmiben Laxmichand Shah v. Sakerben Kanji Chandan** the Supreme Court held that the tenant entering into lease agreement with the landlord cannot be considered as consumer under Section 2(1)(d) of the Act. Where there was no provision in the lease agreement in respect of cleaning, repairing and maintaining the building, the rent paid by tenant is not the consideration for availing these services and therefore, no question of deficiency in service.

- **GOODS**
SECTION 2(1)(i)

Goods means goods as defined in the Sale of Goods Act, 1930.

As per **Sale of Goods Act, 1930**, goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

In ***Morgan Stanley Mutual Fund v. Kartik Das***, the Supreme Court held that **shares before allotment cannot** constitute **goods** because at the stage of application there is no purchase of goods for consideration.

- **DEFECT**
SECTION 2(1)(f)

Defect means any fault, imperfection or shortcoming in the quality, quantity, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.

Decided cases

1. ***Dayanand a avasare v. BPCL***. (Gas cylinder with excessive gas)
2. ***Narayan vyankatkrishnan v. shakti foods***. (soft drink not fit for consumption)
3. ***Abhaya kr. Pandya v. Bajaj Auto Ltd.*** (vehicles having major manufacturing defects which could not be removed despite several repairs)
4. ***Chitranjan Sahu v. N.C. Jain*** (change in color of white marble supplied)

- **SERVICE**
SECTION 2(1)(o)

Service means service of any description which is made available to potential users and includes, but not limited to the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, **but does not include** the rendering of any service **free of charge** or under a **contract of personal service**.

Contract of Personal Service and Contract for Personal Service

A contract **FOR** Personal service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion.

A contract **OF** Personal service on the other hand implies relationship of master and servant (employee- employer relationship) and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

Decided cases

1. Passengers travelling by trains on payment of the stipulated fare charged for the ticket are 'consumers' and the facility of transportation by rail provided by the railway administration is a 'service' rendered for consideration as defined in the Act **(General Manager v. Anand Prasad Sinha)**
2. Subscribers of telephones would also be 'consumer' under the Act **(Dist. Manager, Telephones Patna v. Lalit Kumar Bajla)**
3. it was held that complaints against government hospitals cannot be entertained under the Act on the ground that a person receiving treatment in such hospital is not a 'consumer as the patient does not 'hire the services of the hospital'. Moreover, the treatment provided is free of charge, and therefore, it does **not** amount to service. **Consumer Unity and Trust Society v. State of Rajasthan)**
4. it was held that Services of Professional like CS, CA, Doctors, Advocates, Engineers are covered under Consumer protection Act. **(Ram Ralsh Pal v. Smt. Ranjana)**
5. it was held that Professors of Universities or Civil Servants are not covered under Act as they are appointed under Contract of Personal Service. **(Centre for Research & Industrial Development v. Madan Lal Sahni)**
6. it was held that the University in conducting examination, evaluating answer sheets and publishing the result was not performing any service for consideration and a candidate who appeared for the examination cannot be regared as a consumer. **(J. Rebello v. Vice Chancellor, Bangalore University)**

- **DEFICIENCY**

SECTION 2(1)(g)

Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service .

Decided cases

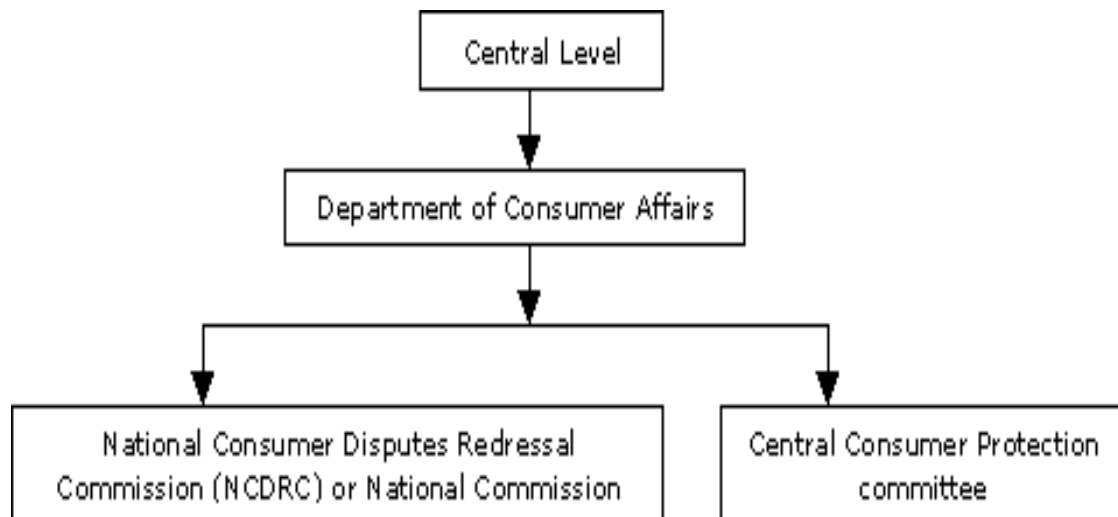
1. It was held that in order to be 'deficiency in service' loss or injury must be coupled with **negligence.****(Consumer Unity and Trust Society)**
2. In ornaments kept in the banks locker were found lost though the certificate recorded by the custodian of the bank on the day the customer operated the locker stated that all lockers operated during the day have been checked and found properly locked. Bank was held guilty of negligence **(Punjab National Bank v. K.B. Shetty)**
3. Failure of a Housing Board to give possession of the flat after receiving the price and after registering it in favour of the allottee was held to be 'deficiency in service'**(Lucknow Development Authority v. Roop Kishore Tandon)**
4. Non-delivery of a video cassette by a courier service company resulting in the complainant losing admission to the desired college was held to be 'deficiency in service' **(Skypack Couriers Pvt. Ltd. & Another v. Ms. Anupama Bagla)**
5. failure to provide nursing and financing facilities to a small scale industry which consequently became sick cannot be said to constitute 'deficiency in service' **(Special Machines v. Punjab National Bank,)**
6. In the appellant purchased a car by taking a loan from the respondent bank, and gave post dated cheques to the bank not only in respect of repayment of loan instalments but also of premium of insurance policy for succeeding years. On the expiry of the policy the bank failed to get the policy renewed. In the meantime the car met with an accident. The Supreme Court held that there is no deficiency in service because the obligation to renew the policy was on the appellant alone. **(Pradeep Kumar Jain v. Citi Bank)**

- **CONSUMER DISPUTE**
SECTION 2(1)(e)

Consumer Dispute means a dispute where the **person** against whom a complaint has been made, denies or **disputes the allegation** contained in the complaint.

CONSUMER PROTECTION COUNCILS

The interests of consumers are sought to be promoted and protected under the Act inter-alia by establishment of Consumer Protection Councils at the Central, State and District Levels.



1. CENTRAL CONSUMER PROTECTION COUNCIL

Section 4 empowers the Central Government to establish a Council to be known as the Central Consumer Protection Council consisting of:-

- (a) the Minister in charge of Consumer Affairs in the Central Government, as its Chairman,
- (b) such number of other official or non-official members representing such interests as may be prescribed.

However, the Consumer Protection Rules, 1987 restrict the number of members of the Central Council to **150 members**.

Section 5 of the Act requires the Central Council to **meet** as and when necessary, but **atleast once** in every year. The term of the council shall be three years.

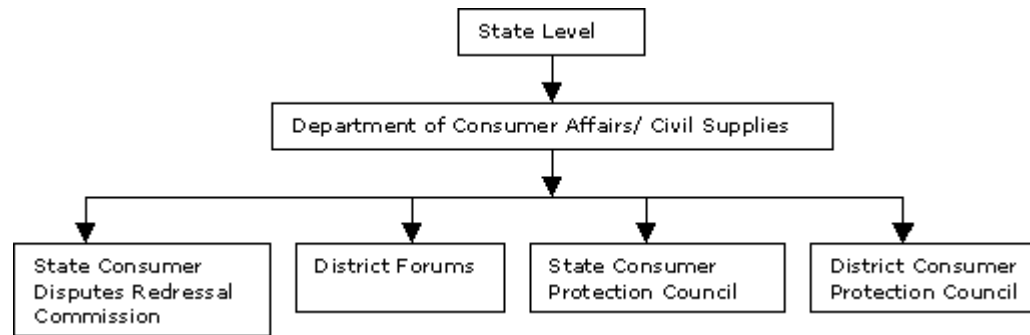
2. STATE CONSUMER PROTECTION COUNCIL

Section 7 provides for the establishment of State Consumer Protection Councils by State Governments. The State Council shall consist of:-

- (a) the Minister incharge of Consumer Affairs in the State Government as its Chairman

- (b) and such number of other official or non-official members representing such interests as may be prescribed by the State Government
- (c) and such number of other official or non official members, not exceeding **ten**, as may be nominated by the Central Government.

The State Council shall meet as and when necessary but not less than **two meetings** shall be held every year.



3. DISTRICT CONSUMER PROTECTION COUNCIL

Section 8A provides for establishment in every district of a council to be known as the District Consumer Protection Council which shall consist of:-

- (a) the Collector of the district (by whatever name called), who shall be its Chairman
- (b) and such number of other official and non-official members representing such interests as may be prescribed by the State Government.

The District Council shall meet as and when necessary but not less than two meetings shall be held every year.



केन्द्रीय उपभोक्ता कार्य, खाद्य और सार्वजनिक वितरण मंत्री श्री शरद यादव, सोमवार, 24 मार्च, 2003 को नई दिल्ली में केन्द्रीय उपभोक्ता संरक्षण परिषद की 22वीं बैठक को संबोधित करते हुए।

REDRESSAL MACHINERY UNDER THE ACT

The Act provides for a **three-tier quasi-judicial redressal machinery** at the District, State and National level for redressal of consumer disputes and grievances.

1. DISTRICT CONSUMER DISPUTES REDRESSAL FORUM

Section 9 of the Act provides for the establishment of a District Forum by the State Government in each district of the State. However, the State Government may establish more than one District Forum in a district if it deems fit to do so. Section 10 provides that each District Forum shall consist of:-

- (a) a person who is, or who has been, or is qualified to be, a District Judge, who shall be its President;
- (b) two other members one of whom shall be a woman.

The members of District Forum should be a graduate and not be of less than **35 years** of age.

They should be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Every member of the District Forum shall hold office for a term of **5 years** or upto the age of **65** years, whichever is earlier, and shall be eligible for reappointment .

Jurisdiction of District Forum

Section 11 provides for the jurisdiction of the District Forum under two criteria pecuniary and territorial.

Pecuniary limits

Section 11(1) empowers the District Forum to entertain complaints where the value of goods or services and the compensation, if any, claimed is **less** than rupees **20 lakhs**.

Territorial limits

Section 11(2) empowers the District Forum to entertain complaints if within the local limits of its jurisdiction the any of the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or the cause of action arises, wholly or in part.

2. STATE CONSUMER DISPUTES REDRESSAL COMMISSION

Section 16 of the Act empowers the State Government to establish the State Consumer Disputes Redressal Commission consisting of:-

- (a) a person who is or has been a judge of a High Court appointed by the State Government (in consultation with the Chief Justice of the High Court) who shall be its President.
- (b) not less than two and not more than such number of members, as may be prescribed, one of whom shall be a woman.

The members of state commission should be a graduate and not be of less than thirty-five years of age. They should be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Every member of the State Commission shall hold office for a term of **five years** or upto the age of **67** years, whichever is earlier and shall be eligible for reappointment

Jurisdiction of State Commission

Pecuniary limits

Act empowers the State Commission to entertain complaints where the value of goods or services and the compensation, if any, claimed exceed rupees **20** lakhs but does not exceed rupees **1 crore**;

Territorial limits

Act empowers the State Commission to entertain complaints if within the local limits of its jurisdiction the any of the opposite party or the defendant actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or the cause of action arises, wholly or in part.

Appellate jurisdiction

The State Commission has the jurisdiction to entertain appeals against the orders of any District Forum within the State.

Reversionary jurisdiction

The State Commission has the power to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum if it appears to it that such District Forum has exercised any power not vested in it by law or has failed to exercise a power rightfully vested in it by law or has acted illegally or with material irregularity. The State Commission may reverse the orders passed by the District Forum on any question of fact or law or correct any error of fact or of law made by the Forum.

3. NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Section 9 empowers the Central Government to establish the National Consumer Disputes Redressal Commission which shall consist of:-

- (a) a person who is or has been a judge of the Supreme Court, to be appointed by the Central Government (in consultation with the Chief Justice of India), who shall be its President;
- (b) not less than four and not more than such number of members as may be prescribed one of whom shall be a woman.

The members of state commission should be a graduate and not be of less than thirty-five years of age. They should be persons of ability, integrity and standing, and have adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration:

Jurisdiction of National Commission**Pecuniary limits**

Act empowers the National commission to entertain complaints where the value of goods or services and the compensation, if any, claimed exceed **exceeds** rupees **1** crore;

Appellate jurisdiction

The National Commission has the jurisdiction to entertain appeals against the original orders of any state commissions. the appellant has to deposit fifty percent of the amount or Rs. thirty-five thousand, whichever is less;

Reversionary jurisdiction

The National commission has power to call for the records and pass appropriate orders in any consumer dispute which is pending before, or has been decided by any State Commission.

APPEALS UNDER THE ACT

Act entitles a person aggrieved by an order of the District Forum to prefer an appeal to the State Commission. Similarly any person aggrieved by any **original order** of the State Commission may prefer an appeal to the National Commission under Section 19.

Likewise, any person aggrieved by any **original** order of the National Commission may prefer an appeal to the Supreme Court.

TIME LIMIT FOR FILING APPEAL

All such appeals are to be made within **thirty days** from the date of the order. However, the concerned Appellate authority may entertain an appeal after the said period of thirty days if it is satisfied that there was sufficient cause for not filling it within the prescribed period.

Further appellant has to deposited in the prescribed manner **50%** of amount required to be paid as per orders of District Forum, State commission, National commission **or** Rs. **25,000/ 35,000/ 50,000** respectively, whichever is less.

NATURE AND SCOPE OF REMEDIES UNDER THE ACT

SECTION 14

Where the allegations contained in the complaint are proved, the District Forum/State Commission/National Commission may pass one or more of the following orders:-

- (a) to remove the defects pointed out by the appropriate laboratory from the goods in question;
- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
- (e) to remove the defects in goods or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;
- (i) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

PROCEEDINGS BEFORE CONSUMER FORUMS AND APPLICABILITY OF SECTION 34 OF THE ARBITRATION ACT

According to Section 34 of the Arbitration Act if a contract contains an arbitration clause, the legal proceedings before a judicial authority are liable to be stayed.

The National Commission in **N.K. Modi v. Fair Air Engineers Pvt. Ltd** held that the forums under the Consumer Protection Act are not to be construed as judicial authorities and the proceedings before them cannot be taken to be legal proceedings. Though, the consumer forums have powers to adjudicate dispute, they do not have any trappings of a Court, they are **quasi-judicial bodies**. So consumer forums **can entertain** a complaint arising out of the contract which provides for arbitration of disputes, and Section 34 of the Arbitration Act shall not be a bar on the jurisdiction of the forums.

SOME IMPORTANT CASES

1. In **J.K. Puri Engineers v. Mohan Breweries & Distilleries Ltd** the company maintained a guest house for use of its managing director, and other executives. It entered into a contract with the appellants for the installation of central air-conditioning system. The allegation was that the system installed did not function, developed snags, and that there was leakage of water from dusting system.

Supreme court held that guest house was intended only for the residence of the directors, including the Managing Director and other executives of the company during their visits to the city. The system was installed only to provide comfort of these persons and therefore it was not used for a commercial purpose as it had no close or direct nexus with the commercial activity carried on by the company.

*Even where the goods are purchased for **commercial purpose**, if there is a **warranty**, for its maintenance, the purchaser becomes a **consumer** in respect of the services rendered or to be rendered by the manufacturer or supplier during the warranty period.*

2. In **Kerela State Electricity Board v. Raveendran** it was held that fall in electricity voltage damaging the machine in a plastic factory and affecting production would amount to deficiency in service.

3. In **Zenith Computers v. Venus Compugraphics**, it was held that if goods are purchased from an independent dealer, complaint has to be lodged against the dealer only.

4. In **S.P. Goel v. Collector of Stamps** the National Commission held the view that Salaries paid to the government officials in discharge of governmental functions could in law never be said to be consideration paid by a member of the public for availing the service of the Government.

➤ **MEDICAL CASES**

1. In **Indian Medical Association v. V.P. Shanta & others** it was held that Government/Private hospitals where no fee is charged for consultation and treatment, but only a token registration fee is charged will not be liable under the Act.

2. In **Poonam Verma v. Ashwin Patel** a person had died because of the negligence of the Doctor in administering allopathic medicines in which he was not qualified to practise. Supreme Court held that the respondent who had practised in allopathy without being qualified in that system was guilty of negligence and so there was deficiency in service.

3. In **Kalpavriksha Charitable Trust v. Toshnival Brothers (Bombay) Pvt. Ltd** the Supreme Court held that in a diagnostic Centre where 90% of the patients are required to pay for the services availed and only 10% of the patients were given free services, the CT scan machine was used for **commercial purpose**.

➤ **INSURANCE CASES**

1. In **L.I.C. v. Mumtaji Begam** it was held that where the date of birth of the insured was in dispute and not accepted by the insurance company, the forums under the Act had no jurisdiction to entertain any complaint against the insurance company.

2. In **Regional Provident Fund Commissioner, Faridabad v. Shiv Kumar Joshi** the complainant had alleged that the appellant had not settled his provident fund dues within the period. The Commissioner in reply contended that there was no hiring of service for consideration in this case since he was performing a statutory function.

The National Commission observed that the Administration charges were levied and recovered by the Commissioner for payment of services rendered by him and his staff. Accordingly National Commission held complainant as a consumer under Act and deficiency in service on part of the Commissioner.

3. In **Jyoti Kumar Jain and another v. United India Insurance Co. Ltd** it was held that repudiation of claim on the ground that complainant was suffering from chronic disease even before the issuance of policy, amounts to suppression of material facts, cannot be sustained unless Insurance Company proves suppression of facts amounted to fraud.

4. In **Jitendra Kumar v. Oriental Insurance Company Ltd** the Supreme Court has held that where the fire has occurred due to mechanical failure and not due to any act or omission of the driver, the insurance company cannot repudiate the claim because of lack of valid driving license.

5. In **Harshad J. Shah v. Life Insurance Corporation of India** it was held that if Premium is paid to the agent of the LIC, but the agent did not deposit the premium and during that period if the death of the insured takes place, the complainant cannot claim compensation as there is no deficiency of service on the part of the LIC. Supreme Court held that the agent had no express authority to receive the premium on behalf of the Corporation.

6. In **National Insurance Co. Ltd. v. Seema Malhotra** a cheque was issued under a contract of insurance of motor car by the insured for payment of premium to the policy. However, cheque was dishonoured for want of funds in the account. Meanwhile, the car met an accident and badly damaged, killing the insured owner. The claim for insured amount was repudiated by the company.

The Supreme Court held insurer need not to perform his part of promise when the other party fails to perform his part and thus not liable to pay the insured amount.

7. In **Delhi Electric Supply Undertaking v. Basanti Devi** Premium due on each policy was collected by the employer from the salary of the employee and sent to LIC under a

salary saving scheme. Employees were kept ignorant of what happens between the employer and LIC. After a few month employer started not depositing the money to LIC but continued the salary deduction. In the meantime an employee died and payment from LIC was sought. LIC repudiated the claim on the ground of non-remittance of the premium.

The Supreme Court held that since the burden of collecting the premium and remitting it to the corporation was on the employer it was not for the employee to intimate the corporation about non-remittance of the premium, the LIC is liable to pay the claim.

8. In **National Insurance Co. Ltd. v Sky Gems** Supreme court held that that Insurance Company was right in denying its liability to pay the amount in US Dollar on the ground that the title in goods had not passed to the consignee and that consignee continued to be the owner of the goods at the time of loss of goods, and therefore the payment of claim can be made only in Indian rupees.

9. In **Abhilash Jewellery v. New India Assurance Co. Ltd** the complainant took a Jeweller's Block Policy. During the currency of the policy the complainant lodged a claim for loss of gold ornament which was being carried by one of its employees. The claim was repudiated by the respondent holding that loss of gold occasioned as it was in the custody of an apprentice and he being not an employee it was not covered under the policy and as such the claim was repudiated.

National Commission held that apprentice should be regarded covered under the policy and the denial of a valid claim itself is a deficiency in service.

➤ **TRANSPORTATION CASES**

1. In **Indian Airlines v. Dr. Jiteswar Ahir**, when the complainant-passenger occupied his seat in the aircraft, an announcement was made that his luggage was lying on the ground unidentified and that he should disembark to identify his luggage. Accordingly the complainant moved towards the rear door, and finding that the step ladder was attached to the aircraft door, he stepped out on to the staircase but before he could actually put his entire body weight on the staircase the ladder was suddenly removed as a result of which he fell down on the ground and sustained bodily injuries.

It was held that there was dangerous deficiency in service.

2. In **Ravneet Singh Bagga v. KLM Royal Dutch Fintimes** the complainant booked a ticket from Delhi to New York by a KLM plane. The airport authorities in New Delhi did not find any fault in his visa and other documents. However at Amsterdam, the airport authorities instituted proceedings of verification because of which the appellant missed his flight to New York. After reaching New York, the airlines tendered apology to the

appellant for the inconvenience and paid as a goodwill gesture a sum of Rs. 2,500. The appellant made a complaint to the National Commission under the Consumer Protection Act which was rejected.

The Supreme Court held that the respondent could not be held to be guilty of deficiency in service as staff of the airline acted fairly and in a bona fide manner, keeping in mind security and safety of passengers and the Aircraft.

3. In Union of India v. Nathmal Hansaria the daughter of the complainant, travelling by a train, fell down from the running train while she was passing through the inter-connecting passage between two compartments and died as a result of crush injuries on her head. The Railways contended that the Consumer Redressal agencies had no jurisdiction to consider a complaint of this nature in view of Railway Claims Tribunal Act.

The State Commission held that a railway passenger travelling in a train on payment of consideration was a consumer and as the death didn't occur because of railway accident, but due to absence of safety device in the vestibule passage way, there was deficiency in service.

4. In General Manager, Southern Railway v. Mrs. A Shamin, Railway was held liable for deficiency in service when some unauthorized passengers who boarded reserved compartments was not removed by T.T.E despite several complaint of passengers and later passengers were robbed during the night.

➤ POST OFFICE CASES

1. In Devi Engineering Co. v. Union of India the complainant had alleged that demand drafts sent by him by registered post to an addressee were misdelivered to someone else. The State Commission, invoking the provisions of Section 6 of the Post Office Act held that the post office could not be made liable to pay compensation ordered by the District forum.

2. Absolute immunity to Post Offices under Section 6 of Post Office Act

It was settled by the National Commission in **Presidency Post Master v. Dr. U. Shankar Rao** that in view of the clear mandate of Section 6 of the Indian Post Office Act, the Government shall not incur any liability by reason of the loss, misdelivery or delay or damage to any postal article in course of transmission by post.

3. Postal Department cannot take shield of Indian Post Offices Act always

In **Superintendent of Post Offices v. Upbhokta Suraksha Parishad** the respondent in its complaint alleged that as a result of delayed delivery of a postal article the consumer could not get admission to an educational institution resulting in loss of one year in the educational career.

The National Commission held post office liable because delay caused by post office was willful.

4. In **Airpack Couriers (India) Pvt. Ltd. v. S. Suresh** where a package of important documents entrusted to the courier had not been delivered causing loss to the complainant, the National Commission, on appeal against the State Commissions order awarding compensation of Rs. 1 lakh, reduced it to Rs. 100 holding that the terms incorporated in the consignment note specifically limited the couriers liability to a maximum of Rs. 100 per consignment for loss in transit.

Moreover, as per **IATA regulations**, no important documents may be sent through courier service and the consignee is bound to declare the nature of contents before sending the consignment. Further, if the documents to be consigned were of great value, the consignee ought to have insured them or declared their value in the consignment note.

➤ **EDUCATIONAL CASES**

1. In **Sreedharan Nair N. v. Registrar, University of Kerala** the University refused to provide LL.B. degree certificate on completion of course on the ground that the qualifying examination on the basis of which student was admitted in LL.B. course in Kerala law college has not been recognised by it.

The National Commission held that this is a clear case of deficiency on part of University.

2. In **Isabella Thoburn College v. Ms. Fatima Effendi** the State Commission held that non-refund of admission fee is not a deficiency of service on the part of the university because admission fee is consideration for admission and respondent herself voluntarily withdrawing admission from one university to join another institute cannot claim refund of admission fee.

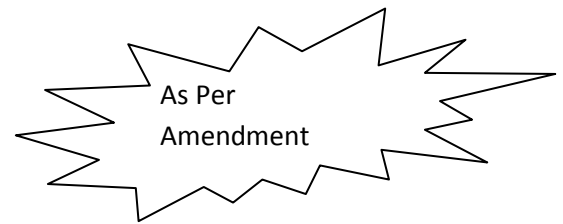
3. In **IGNOU v. Surender Pal Ahir**, it was held that delay in supplying the study material to the students resulting in the loss of one semester is deficiency in service as imparting education is regarded as service.

4. In **Sashikant Krishnaji Dole v. Shitshan Prasarak Mandali** the school owned a swimming pool and offered swimming facilities to the public on payment of a fee. The complainants had enrolled their son for learning swimming under the guidance of the coach. It was alleged that due to the negligence of the coach the boy was drowned and met with his death. The school denied that it had engaged the services of a coach and also denied any responsibility on its part.

The State Commission held the school and the coach deficient in rendering service to the deceased, that the coach was not fully trained, did not exercise even the basic commonsense needed to counter an accident in swimming and as far as the school was concerned it did not even provide basic facilities nor did it provide any safeguards to prevent accidents. Accordingly it was considered as deficiency in service.

5. In **Chairman, Board of examination v. Mohd. Abdul Kader**, it was held that conduction of examinations by the Boards is a sovereign function and any candidate appearing for exams cannot be regarded as consumers under the Act.

CHAPTER 6 COMPETITION ACT, 2002



COMPETITION (AMENDMENT) ACT 2007
AND
COMPETITION (AMENDMENT) ACT 2009

Competition can be defined as a process of economic rivalry between market players to attract customers. These market players can be multinational or domestic companies, wholesalers, retailers, or even the neighborhood shopkeeper.



In their pursuit to outdo rival enterprises, market players either adopt **fair means** (producing quality goods, being cost efficient, adopting appropriate technologies, etc.) Or indulge in **unfair measures** (carrying out restrictive business practices – such as predatory pricing, exclusive dealing, tied selling, collusion, cartelisation, abuse of dominant position, etc.).

Therefore, in the interest of consumers, and the economy as a whole, Competition Act, 2002 was passed to promote an environment that facilitates fair competitive outcomes in the market, curb anti-competitive behaviour and discourage market players from adopting unfair measures.

SALIENT FEATURES OF THE COMPETITION ACT, 2002

- With the enforcement of the Competition Act, 2002 the MRTP Act, 1969 shall stand repealed and the MRTP Commission shall be dissolved.
- The main purpose of the Act is to ensure free and fair competition in the market.
- The Competition Act, 2002 has been enacted to :-
 - (i) prevent practices having an appreciable adverse effect on competition,
 - (ii) to promote and sustain competition in the market and
 - (iii) to protect the interests of consumers and to ensure freedom of trade.
- The competition Act, 2002 seeks to achieve its objectives by:-
 - (i) prohibiting anti-competitive policy on competition,
 - (ii) creating awareness by imparting training on competition issues.
- The Competition Act, 2002 provides for the establishment of Competition Commission of India.

IMPORTANT DEFINITIONS

- **AGREEMENT**

Agreement includes any arrangement or understanding or action in concert –:-

- a) Whether or not, such agreement, understanding or action is formal or in writing;
- b) Whether or not, such agreement, understanding or action is intended to be enforceable by legal proceedings.

- **GOODS**

Goods mean goods as defined in the Sale of Goods Act, 1930 and include the following:-

- (a) Products manufactured, processed or mined;
- (b) Debentures, shares and stocks after allotment;
- (c) In relation to “goods supplied”, goods imported in India

- **SERVICE**

Service means service of any description which is made available to potential users and includes the provision of services in connection with business of any **industrial or commercial matters** such as banking, communication, education, financing, insurance,

chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, constructions, repair, conveying of news or information and advertisements.

- **CONSUMER**

Consumer means any person who:-

- (a) Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any person who uses those goods with the approval of the person buying those goods, whether such purchase of goods is for **resale or for any commercial purpose** or for personal use,
- (b) Hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any person who is the beneficiary of those services with the approval of hirer or avail or of those services, whether such hiring or availing of services **is for any commercial purpose** or for personal use.

- **CARTEL**

Cartel includes an association of producers, sellers or distributors, traders or service providers who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of goods or services or, trade in goods or provision of services.

- **ENTERPRISE**

Enterprise means a person or department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services of any kind.

- **RELEVANT MARKET**

Relevant market means the market, which may be determined by the Commission with reference to 'relevant product market' or 'relevant geographic market' or with reference to both the markets.

- **RELEVANT GEOGRAPHIC MARKET**

Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas.

- **RELEVANT PRODUCT MARKET**

Relevant Product Market means a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use.

COMPETITION COMMISSION OF INDIA

Act empowers the Central Government to establish a Commission to be known as “Competition Commission of India.” The Commission is a body corporate having perpetual succession and common seal. The Competition Commission has its head office at New Delhi.

COMPOSITION OF CCI

The Commission shall consist of a Chairman and other members, which shall not be less than **2** and more than **10**. The Chairman and all the members shall be appointed by the Central Government.

QUALIFICATIONS

Following are the qualifications of Chairman and the members:-

- 1) They shall be a person of ability, integrity and standing; and
- 2) They has been or is qualified to be a Judge of a High Court or he has special knowledge and professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, etc.

The term of office of **Chairman** shall be **5 years** or up to the age of **67** years, whichever is earlier and that of other **members** shall be **5** years or up to the of **65** years, whichever is earlier. However, they shall be eligible for reappointment.

REMOVAL

The Chairperson or a Member of CCI may be removed from the office by the Central Government in the following cases:-

- (a) Where he is adjudged as an insolvent;
- (b) Where he has been engaged in any paid employment;
- (c) Where he has been convicted of an offence which involved moral turpitude;
- (d) Where he has acquired such financial or other interest as is likely to affect prejudicially his functions;
- (e) Where he has abused his position; and
- (f) Where he has become physically or mentally incapable.

DUTIES, POWERS AND FUNCTIONS OF CCI

Duties of the CCI are:—

- (a) to eliminate practices having adverse effect on competition;
- (b) to promote and sustain competition;
- (c) to protect interests of consumers and
- (d) to ensure freedom of trade carried on by other participants, in markets in India.

Following are the powers/ functions of CCI:-

- 1) To determine whether an agreement has an appreciable adverse effect on competition;
- 2) To inquire into anti-competitive agreements and abuse of dominant position;
- 3) Enquire whether a combination has cause or likely to cause an appreciable adverse effect on competition;
- 4) To award compensation;
- 5) To grant such interim relief as would be necessary in a particular case;
- 6) To impose fines;
- 7) To order demerger;
- 8) To order cost for frivolous complaints.

Power of Commission to regulate its own procedure



The Competition Commission of India has been empowered to lay down its own procedure and regulations. It is not bound by the procedure laid down by the Code of

Civil Procedure, 1908 but shall have to observe the principles of natural justice and subject to the provisions of the Act.

The Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying the suit, in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning any public record or document or copy of such record or document from any office;

The Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any discipline as it deems necessary to assist the Commission in the conduct of any enquiry by it.

DIRECTOR GENERAL

Act empowers the Central Government to appoint a Director General and such number of additional, joint, deputy or assistant Director Generals or other advisers, consultants or offices.

DG shall be appointed from amongst the persons of integrity and outstanding ability and who have experience in investigation and knowledge of accountancy, management, business, public administration, international trade, economics, law etc.

Director General assists the Commission by furnishing Investigation Report in respect of such matters as are referred to him by the CCI. He also assists the Commission in conducting proceedings of enquiries, which are initiated by the CCI suo moto.

IMPORTANT PROVISIONS

➤ ANTI COMPETITIVE AGREEMENTS

Section 3 of the Competition Act provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or

provision of services, which causes or is likely to cause an appreciable adverse effect on competition.

It further declares that any anti competitive agreement shall be void.

Section 3(3) provides that **following kinds of agreements** entered shall be **presumed** to have an appreciable **adverse effect** on the competition:-

- (a) **Tie- in arrangement**, - an agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.
- (b) **Exclusive supply agreement**, - an agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
- (c) **Refusal to deal**, - an agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.
- (d) **Resale price maintenance** - an agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

PREDATORY PRICING

The term “predatory price” has been defined as *the sale of goods or provision of services, at a price which is below the cost of production of goods or provision of services*, with a view to reduce competition or eliminate the competitors.

Thus, the two conditions precedent to bring a case with the ambit of predatory pricing are:-

- (a) selling goods or provision of service at a price which is below its cost of production and
- (b) that practice is resorted to eliminate the competitors or to reduce competition.

BID RIGGING

According to section 3 of the Competition Act, 2002, '**bid rigging**' means any agreement, between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on by any association including cartels, engaged in identical or similar production or trading of goods or

provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

➤ PROHIBITION OF ABUSE OF DOMINANT POSITION

Section 4 of the Competition Act, 2002 expressly prohibits any enterprise or group from abusing its dominant position, meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to:-

- (a) operate independently of competitive forces prevailing in the relevant market; or
- (b) affect its competitors or consumers or the relevant market in its favour”.

➤ REGULATION OF COMBINATIONS

COMBINATIONS- MEANING

Section 5 of the Competition Act, 2002 provides that *acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination* of such enterprises and persons or enterprises which are above the certain prescribed size in terms of assets or turnover as provided under section 5.

The term Group has been explained in the Act. Two enterprises belong to a “**Group**” if one is in position to exercise **at least 26 per cent voting rights** or **appoint at least 50 per cent of the directors** or **controls the management or affairs in the other**.

Notification S.O. 481 (E) dated 4th March, 2011

Vide notification S.O. 481 (E) dated 4th March, 2011, the government has exempted “Group” exercising less than fifty per cent of voting rights in other enterprise from the provisions of section 5 of the Act for a period of five years.

REGULATION OF COMBINATIONS

Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void.

Section 6 provides that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form, prescribed and submit the form together with the fee prescribed by regulations.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

	APPLICABLE TO	ASSETS		TURNOVER	
In India	Individual	₹1,500 cr.		₹ 4,500 cr.	
	Group	₹ 6,000 cr.		₹ 18,000 cr.	
In India and outside		ASSETS		TURNOVER	
		Total	Minimum Indian Component	Total	Minimum Indian Component
	Individual parties	\$ 750 m	₹ 750 cr	\$ 2,250 m	₹ 2,250 cr
	Group	\$ 3 bn.	₹ 750 cr.	\$ 9 bn.	₹ 2,250 cr.

➤ COMPETITION ADVOCACY

Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter.

Section 49 provides that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within sixty days of making such a reference and the latter may formulate the policy as it deems fit.

The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central Government/State Government in formulating such a policy.

The Commission is also empowered to take suitable measures for the:-

- (a) promotion of competition advocacy;

- (b) creating awareness about the competition; and
- (c) imparting training about competition issues.

APPEALS

Under the relevant provisions of the Act, an appeal to Competition Appellate Tribunal (COMPAT) may be filed within 60 days of receipt of the order /direction/decision of the Commission.

The Commission also has the power to impose a fine which may extend to one per cent of the total turnover or the assets of the combination, whichever is higher, for failure to give notice to the Commission of the combination.

CHAPTER 7 INTELLECTUAL PROPERTY LAW**INTELLECTUAL PROPERTY-MEANING**

The term *intellectual property relates to the creations of human mind and human intellect*, this property is called Intellectual property.

In other words, intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property right does not vest in those copies but in the information reflected in those copies. Similar to property rights in movable and immovable property, intellectual property is also characterised by certain rights as well as limitations such as right to use and licence and also limited duration in the case of copy right and patents.

KINDS OF INTELLECTUAL PROPERTY

1. PATENT
2. TRADEMARK
3. COPYRIGHT
4. DESIGN.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION IN INDIA – REGULATORY FRAMEWORK

Following Acts constitute the regulatory framework for IPR protection in india:-

1. COPYRIGHT ACT, 1956
2. PATENTS ACT, 1970
3. TRADE MARKS ACT, 1999
4. DESIGNS ACT, 2000

PATENTS ACT, 1970

Generally speaking, Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale.

Protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare.

The law relating to patents is contained in the Patents Act, 1970.

Patents Act, 1970 provides that any 'inventions' may be patented.

PATENT- DEFINITION

Patent is an **exclusive licence from the government which confers on the licensee, or on persons authorised by licensee, to the exclusion of all other persons**, any right in respect of the patented invention.

ESSENTIAL INGREDIENTS OF A PATENT

Following are the essential ingredients of a patent:-

1. Novelty
2. Lack of obviousness
3. Inventive step
4. No prior knowledge / use
5. Utility
6. Industrial application and marketability
7. Sufficiency of description.

➤ **INVENTION**

Invention means a new product or process involving an ***inventive step*** and capable of Industrial application.

➤ **INVENTIVE STEP**

‘inventive step’ means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both that makes the invention not obvious to a person skilled in the art.

➤ NEW INVENTION

Section 2(l) defines the term new invention as to mean any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification.

INVENTIONS WHICH CAN NOT BE PATENTED

The following are not inventions within the meaning of Section 3 of the Act:-

- (a) an invention which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment.
- (b) the mere discovery.
- (c) a substance obtained by a mere mixture or aggregation of the properties of the components.
- (d) a method of agriculture or horticulture;
- (e) any process for the medicinal, surgical, curative, diagnostic, or other treatment of human beings or of animals
- (f) plants and animals other than micro-organisms but including seeds, varieties and species and essentially biological processes
- (g) a computer programme
- (h) a literary, dramatic, musical or artistic work or cinematographic works and television productions;
- (i) a mere scheme or rule or method of performing mental act or method of playing game;
- (j) a presentation of information;
- (k) an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.
- (l) an invention relating to atomic energy

PERSONS ENTITLED TO MAKE APPLICATION FOR PATENT

Section 6 of the Act provides that an application for a patent for an invention may be made by any of the following persons, that is to say:-

- (a) by any person claiming to be the true and first inventor of the invention;

- (b) by any person being the assignee of the person claiming to be the true and first inventor in respect of the right to make such an application;
- (c) by the legal representative of any deceased person who immediately before his death was entitled to make such an application.

The application may be made by one of the persons either alone or jointly with any other person.

PATENT PROCEDURE

➤ **FORM OF APPLICATION AND COMPLETE SPECIFICATION**

Section 7 dealing with form of application requires every application for a patent to be made for one invention only. Where the application is made by virtue of an assignment of the right to apply for a patent for the invention, there shall be furnished with the application proof of the right to make the application.

➤ **CONTENTS OF SPECIFICATIONS**

Section 10 dealing with contents of Specifications provides that every specification, shall describe the invention and begin with a title sufficiently indicating the subject matter to which the invention relates. Every complete specification is required to -

- (a) fully and particularly describe the invention and its operation or use and the method by which it is to be performed;
- (b) disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection; \
- (c) end with a claim or claims defining the scope of the invention for which protection is claimed; and
- (d) be accompanied by an abstract to provide technical information on the invention.

➤ **PUBLICATION OF APPLICATIONS**

The Controller on receipt of such request shall publish such application as soon as possible.

The publication of every application shall include the particulars of the date of application, number of application, name and address of the applicant identifying the application and an abstract.

➤ **OPPOSITION TO THE PATENT**

Where an application for a patent has been published, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the following grounds:-

- (a) that the applicant for the patent wrongfully obtained the invention
- (b) that the invention so far as claimed was publicly known or publicly used
- (c) that the invention is not patentable under this Act;
- (d) that the complete specification does not sufficiently and clearly describe the invention.

The Controller on request of such person shall hear him and dispose of the representation in the prescribed manner and specified time.

➤ GRANT OF PATENTS

where an application for a patent has been found to be in order for grant of the patent the patent shall be granted as expeditiously as possible to the applicant with the seal of the patent office and the date on which the patent is granted shall be entered in the register.

The Controller has been put under obligation to publish the fact that the patent has been granted and thereupon the application, specification and other documents related thereto shall be open for public inspection.

➤ GRANT OF PATENTS SUBJECT TO CONDITIONS

The grant of a patent shall be subject to the following conditions that:-

- (a) any machine, apparatus or other article in respect of which the patent is granted may be imported or made by or on behalf of the Government for the purpose merely of its own use;
- (b) any machine, apparatus or other article in respect of which the patent is granted may be made or used, by any person, for the purpose merely of experiment or research
- (c) in the case of a patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or notified by Central Government.

PATENTS OF ADDITION

where an application is made for a patent in respect of any improvement in or modification of an invention, namely the main invention and the applicant also has applied for a patent for that invention or is the patentee in respect thereof, the Controller may, if the applicant so requests, grant the patent for the improvement or modification as a patent of addition.

A patent of addition is granted for a term equal to that of the patent for the main invention or so much thereof as has not expired and remains in force during that term. No renewal fees is payable in respect of a patent of addition.

TERM OF PATENT

The term of every patent shall be **20 years from the date of filing of application** for the



patent.

It may be noted that a patent shall cease to have effect if the renewal fee is not paid within the prescribed period or within such extended period as may be prescribed.

RESTORATION OF LAPSED PATENTS

Where a patent has ceased to have effect by reason of failure to pay any renewal fee within the period prescribed, the patentee or his legal representative may **within 18 months** from the date on which the patent ceased to have effect, make an application for the restoration of the patent.

if, after hearing the applicant the Controller is prima facie satisfied that the failure to pay the renewal fee was unintentional and that there has been no undue delay in the making of the application, he shall publish the application in the prescribed manner; and within 2 months, any person interested may give notice to the Controller of opposition thereto.

The Controller of Patents will hear both the parties and will allow the restoration or refuse the restoration, as the case may be.

SURRENDER OF PATENTS

The patentee may offer to surrender his patent, at any time by giving notice to the Controller. Where such an offer is made, the Controller shall publish the offer in the prescribed manner. Any person interested may, within the prescribed period after such publication, give notice of opposition to the Controller. If the Controller is satisfied after hearing the patentee and any opponent, if any that the patent may properly be surrendered, he may accept the offer and by order revoke the patent.

REVOCATION OF PATENTS

A patent can be revoked by **High Court** on any of the grounds specified under Sec. 64 of the Patents Act, 1970. Section 65 provides that where at any time after grant of a patent, the **Central Government** is satisfied that a patent is for an invention relating to atomic energy for which no patent can be granted, it may direct the Controller to revoke the patent, and thereupon the Controller, after giving notice, to the patentee, and after giving them an opportunity of being heard, may revoke the patent.

Patent can also be revoked in the following cases:

- (a) If patent is not reasonably worked within 2 years after compulsory licensing;
- (b) If patentee fails to comply with the request of Central Government to make, use or exercise patented invention for the purposes of the Government;
- (c) Central Government can revoke a patent if it is exercised against security of India or public interest.

REMEDIES AGAINST INFRINGEMENT OF PATENT

Infringement is the violation of monopoly rights given to patentee by patent. The patentee, his agents and his licensee may file a suit for infringement in the District Court.

Remedies for infringement of copyright and entitles the owner of the copyright to all such remedies by way of injunction, damages, and otherwise as may be conferred by law for the infringement patent.

The Court can also order that infringing goods shall be seized, forfeited, or destroyed as the Court deems fit.

ACTS WHICH ARE NOT INFRINGEMENT

Following are the Acts which are not considered to be amounting to infringement under Act:-

- (a) Making, constructing, testing, selling, using or importing of patented invention solely for uses reasonably related to development and submission of information required under any law.
- (b) Importation of patented products by any person, who is authorized under the law to produce, sell, distribute the products in india.

PATENT AGENT

The work relating to drafting of specifications, making of application for a patent, subsequent correspondence with the Patent office, representing the applicant's case at the hearings, etc is entrusted to a qualified Patent Agent.

Qualifications for Registration as Patent Agent

A person shall be qualified to have his name entered in the register of patent agent, if he:-

- (a) is a citizen of India,
- (b) Has completed the age of 21 years,
- (c) has obtained a degree in science, engineering or technology from any university established under law or
- (d) possesses such other equivalent qualifications as the Central Government may specify in this behalf

and in addition has passed the qualifying examination prescribed for the purpose **or** has, for a total period of not less than ten years, functioned either as an examiner or discharged the functions of the Controller but cease to hold any such capacity at the time of making the application for registration.

COPYRIGHT ACT, 1957

The copyright deals with the rights of intellectual creators in their creation. The copyright law deals with the particular forms of creativity, concerned primarily with **mass communication**. It is also concerned with virtually all forms and methods of public communication, not only printed publications but also with such matters as sound, and television broadcasting, films for public exhibition etc. and even computerised systems for the storage and retrieval of information.

COPYRIGHT - MEANING

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematographic films and sound recordings. Copyright includes right of reproduction, communication to the public, adaption and translation of the work.

In order to be copyrighted A work must show certain minimum levels of creativity and originality. Copyright protection is **not granted for an abstract idea nor can facts be copyrighted**. The copyright law, protects only the form of expression of ideas, So only author's manner of expressing or compiling the facts can be copyrighted .

**COPYRIGHT - DEFINITION**

Section 14 of the Act defines the term “Copyright” as an exclusive right to do or authorize the doing of the following acts in respect of a work or any substantial part thereof namely –

- **In the case of literary, dramatic or musical work:-**

- a. Reproducing the work in any material from which includes storing of it in any medium
by electronic means
- b. Issuing copies of the work to the public which are not already in circulation
- c. Performing the work in public or communicating it to the public;
- d. Making any cinematographic film or sound recording in respect of the work;
- e. Making any translation or adaptation of the work. Further, any of the above-mentioned
acts in relation to work can be done in the case translation or adaptation of the work.

➤ **In the case of a computer programme:-**

- a. To do any of the acts specified in respect of a literary , dramatic or musical work;
and
- b. To sell or give on commercial rental or offer for sale of for commercial rental any
copy of the computer programme.

However, such commercial rental does not apply not in respect of computer programmes where the programme itself is not the essential object of the rental.

➤ **In the case of an artistic work:-**

- a. Reproducing the work in any material including depiction in three dimensions of a
two dimensional work or in two dimensions of a three dimensional work;
- b. Communicating the work to the public.
- c. Issuing the copies of work to the public. Which are not already in existence.
- d. Including work in any cinematographic film.
- e. Making adaptation of the work. And to do any of the above acts in relation to an
adaptation of the work.

➤ **In the case of cinematographic film and sound recording:-**

- a. Making a copy of the film including a photograph of any image or making any other sound recording embodying it;
- b. Selling or giving on hire or offer for sale or hire any copy of the film/sound recording even if such copy has been sold or given on hire on earlier occasions ; and
- c. Communicating the film/sound recording to the public.

TERM OF COPYRIGHT

The term of copyright is throughout the **lifetime of the author plus next 60 calendar years** from the the year in which the author dies. In case of joint authorship, author who dies last will be considered.

In case of anonymous, pseudonyms and posthumous work, the term of copyright is 60 years from the beginning of calendar year next to the year in which the work is published.

REGISTRATION OF COPYRIGHT

Registration of copyright is **optional and not mandatory**. Non-registration does not deprive the owner of his right to bring both civil as well as criminal action against an offence of infringement. However, if registered, Certificate of registration serve as prima- facie evidence in court of law with refrence to dispute relating to ownership of copyright.

PROCEDURE OF REGISTRATION

Any person interested in the copyright in any work may make an application in the prescribed form in triplicate along with prescribed fees to the Registrar of Copyrights. Separate application should be made in respect of each work.

Registrar of Copyrights after 30 days of date of receipt of application, after being satisfied and if there is any objection, after holding such enquiry as he deems fit, enter such particulars of work in the Register of Copyrights. A copy of the entry made in the Register of Copyrights shall be sent to the parties concerned.

ASSIGNMENT OF COPYRIGHT

The owner of the copyright in an existing work or the prospective owner of copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to conditions and either for whole term of the copyright or any part thereof.

However, in case of assignment of copyright in any future work, the assignment has the real effect only when the work comes into existence.

MODE OF ASSIGNMENT

An assignment of copyright should be in writing signed by the owner of the copyright. The assignment of copyright should specify the assigned work, rights including duration, territorial extent of assignment and the amount of royalty.

However, in the absence of duration and territorial extent, the assignment shall be valid for a period of **five years and within the territory of India**.

In case assignee does not exercise his rights within a period of one year from the date of assignment, the assignment in respect of such rights lapsed after the expiry of said period, unless otherwise specified in the assignment.

Any dispute arising with respect to assignment of rights shall be decided by Copyright Board.

LICENSING OF COPYRIGHT

➤ **VOLUNTARY LICENSING**

Owner of copyright can grant interest in his right by license in writing to another person. Such license is normally for republication, performance in public or communication to public or translation thereof.

A licence of copyright should be in writing signed by the owner of the copyright. The licence should specify the rights including duration, territorial extent of assignment and the amount of royalty.

However, in the absence of duration and territorial extent, the licence shall be valid for a period of five years and within the territory of India.

➤ **COMPULSORY LICENSE**

During term of copyright, if the owner of copyright has refused to re-publish/ allow performance in public or to permit republication, a complaint can be made to copyright board. Then copyright board after conducting inquiry and giving opportunity of being heard to the owner finds that ground of refusal are not reasonable, may direct the registrar of copyright to grant compulsory licence to the complainant on payment of compensation to owner.

Any person can apply to Copyright Board for a license to produce and publish a translation of a literary or dramatic work **after a period of 7 years from the date of publication.**

TERMINATION OF LICENCE

If at any time after the granting of a licence, the owner of the copyright in the work publishes a translation of such work in the same language and which is substantially the same in content at a reasonable price, Copyright Board, **after giving 3 months notice** can terminate the licence.

INFRINGEMENT OF COPYRIGHT

Copyright protection gives exclusive rights to the owners of the work to reproduce the work enabling them to derive financial benefits by exercising such rights. If any person without authorization from the owner exercises these rights in respect of the work, which has copyright protection, it constitutes an infringement of the copyright.

However, if the reproduction of the work is carried out after the expiry of the copyright term it will not amount to an infringement.

CIRCUMSTANCES/ SITUATION OF INFRINGEMENT OF COPYRIGHT

Section 51 of the Act contemplates situation in which a copyright shall be deemed to be infringed. This section provides that a copyright is infringed when any person without a license granted by the owner of the copyright or the Registrar of Copyright or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority-

- (a) Does anything for which the exclusive right is conferred upon the owner of the copyright; or
- (b) Permits for profit any place to be used for the communication of the work to public where such a communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable

ground for believing that such communication would be infringement of copyright; or

(c) Makes for sale or hire or lets for hire or by way of trade display or offers for sale or hire; or

(d) Distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(e) By way of trade, exhibits in public; or

(f) Imports into India any infringing copies of the work.

However, import of one copy of any work is allowed for private and domestic use of the importer. Explanation to section 51 clarifies that the reproduction of literary, dramatic, musical, or artistic work in the form of cinematograph film shall be deemed to be an infringing copy.

REMEDIES AGAINST INFRINGEMENT OF COPYRIGHT

Section 55 entitles owner of the copyright to sue the person who has infringed the copyright in District Court. The owner shall be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are conferred by law for the infringement of the right.

Section 58 entitles owner of the copyright to initiate proceedings for the possession of infringed copies and other materials related thereto.

COPYRIGHT SOCIETIES

A Copyright Society can be registered under the Copyright Act, 1957 after getting the Certificate of Registration from Central Government.

Section 34 of the Act empowers a Copyright Society to accept exclusive authorisation from an owner of Copyright to administer any right in any work by issuing licences or collection of licence fee or both. Society will forward the fee collected to the owner of the copyright after deducting its expenses.

However, an owner of copyright in his individual capacity continues to have the right to grant licences in respect of his own works

INTERNATIONAL COPYRIGHT

The Copyright Act applies only to works first published in India, irrespective of the nationality of the author.

However Section 40 of the Act empowers the Government of India to extend the benefits of all or any of the provisions of the Act to works first published in any foreign country. The benefits granted to foreign works will not extend beyond what is available to the works in the home country and that too on a reciprocal basis i.e. the foreign country must grant similar protection to works entitled to copyright under the Act. The term of Copyright in India to the foreign work, will not exceed that conferred by the foreign country.

Government of India has passed the International Copyright Order, 1958. According to this order any work first published in any country which is a member of the Berne Convention or the Universal Copyright Convention will be accorded the same treatment as if it was first published in India.

CONDITIONS OF COPYRIGHT PROTECTION TO WORKS OF INTERNATIONAL ORGANISATIONS

The following are the requisites for conferring copyright protection to works of international organisations:

- (a)** The work must be made or first published by or under the direction or control of the International Organisation.
- (b)** There should be no copyright in the work in India at the time of making or on the first publication of the work.
- (c)** If the work is published in pursuance of an agreement with the author, such agreement should not reserve the author any copyright in the work or any copyright in the work should belong to the organisation.

TRADE MARK ACT, 1999

The object of trademark law is to permit an enterprise by registering its trademark to obtain an exclusive right to use, share, or assign a mark.



A trademark is any **word, symbol, phrase, or logo design** adopted and placed on a product offered for sale or on a container to identify its source. A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. Since a trade mark indicates relationship in the course of trade, between trader and goods, it serves as a useful medium of advertisement for the goods and their quality.

TRADEMARK- DEFINITION

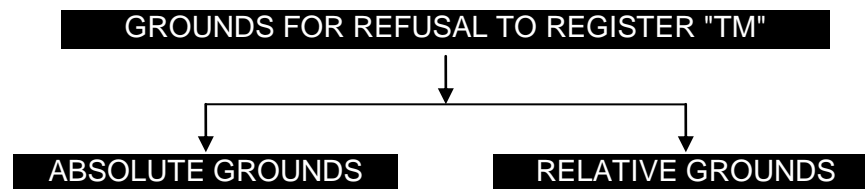
Trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging, and combination of colours.

TRADEMARK- REGISTRATION

A trademark belongs to the firm that first adopts and uses it.

Any person claiming to be the proprietor of trademark used or proposed to be use can apply for registration of his trademark by filing application for registration of trademark with the Office of Registry of Trademark under whose territorial jurisdiction the principal place of business of proprietor is situated.

It may be noted that a single application may be made for different classes of goods and services, but separate fees is payable for each class.

GROUND FOR REFUSAL TO REGISTER TRADEMARK**➤ ABSOLUTE GROUND**

Following types of trademarks cannot be registered:-

1. Common or non-distinctive

- (a) Any Trademark which are not capable of distinguishing goods and services of one person from those of another person.
- (b) Any Trademark which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, value, geographical origins, or the time of production of goods or rendering the service or other characteristics of goods or services;
- (c) Any Trademark which consists exclusively of marks which have become customary in the current language or in the bona fide and established practices of the trade.

However, a trademark shall not be refused registration, if the mark has in fact acquired a distinctive character as a result of use or is a well known trade mark before the date of application.

2. Confusing, obscene or prohibited trademark

- (a) Any Trademark which is likely to deceive or cause confusion;
- (b) Any Trademark which comprises of scandalous or obscene matters;
- (c) Any Trademark which contains any matter likely to hurt religious sentiments;
- (d) Any Trademarks use of which is prohibited under the Emblems and names (Prevention of improper Use) Act, 1950.

3. Trademarks regarding certain shapes

- (a) Any Shape of goods which result from nature of goods themselves;
- (b) Any Shapes of goods which is necessary to obtain a technical result;

(c) Any Shapes which give substantial value to the goods.

➤ **RELATIVE GROUNDS**

1. A trademark shall not be registered if there exists likelihood of confusion on the part of the public because of the following factors:-
 - a. It's identity with the earlier trademark and similarity of goods or services covered by trademark;
 - b. It's similarity to an earlier trademark and the identity of goods or services covered by trademark.
2. In case of dissimilar goods with identical or similar trademark will not be registered if earlier trademark is well known trademark in India and use of mark proposed to be registered could be unfair or detrimental to the proprietors of well known trademark.

DURATION AND RENEWAL OF TRADEMARK

Registration of trademark is valid for **10 years**. Act also allows renewal of registration for successive period of 10 years from the date of expiry of original registration period or the last renewal.

REMOVAL OF A TRADEMARK FOR NON-USE

Trademark not used for more than 5 years of registration shall be removed unless it is shown that non-use is due to some special circumstances

INFRINGEMENT OF TRADEMARK

When a registered trade mark is used by a person who is not entitled to use such a trade mark under the law, it constitutes infringement.

INSTANCES OF INFRINGEMENT OF TREADEMARK

- (a) Use of deceptively similar mark;
- (b) Use of mark likely to cause confusion because of identity/similarity;
- (c) Unauthorized use of trademark on material intended to be used for labeling or packing of goods;

- (d) Use of identical or similar registered trademark even on dissimilar goods, if the registered trademark has a reputation in India;

WHAT IS NOT INFRINGEMENT OF TRADEMARK

- (a) where the use is in relation to goods or services to indicate the kind, quality, quantity, etc. of the goods or of rendering of services, or other characteristics of goods or services.
- (b) where a person uses the mark in relation to goods or services for which the registered owner had impliedly consented to its use.
- (c) Where a trade mark registered for any goods may be used in relation to parts and accessories to other goods or services and such use is reasonably necessary and its effect is not likely to deceive as to the origin.
- (d) Where the use is as per limitations and conditions in registered trademark.
- (e) Purchase of goods bearing the registered trademark and then displayed for sale.

RELIEF IN SUITS FOR INFRINGEMENT/PASSING OFF

Section 135 deals with reliefs which may be granted by courts in suits for infringement or passing off.

It is expressly provided that the court may grant:-

- (a) an injunction
- (b) either damages or an account of profit,
- (c) order for delivery of infringing labels and marks for destruction.

Damages can also be claimed, even if the trademark is not registered. This is called **passing-off action**.

ASSIGNMENT AND TRANSMISSION OF TRADEMARK

A proprietor of trademark can assign his registered trade mark with or without goodwill of the business either in respect of all goods or services or part thereof to any person in return of consideration. An unregistered trade mark may also be assigned/ transmitted with or without the goodwill of the business concerned.

However, assignments or transmissions of trade mark is restricted where multiple exclusive rights are created in more than one person in relation to same goods or services which would be likely to deceive or cause confusion.

REGISTERED USER

The registered proprietor of a trademark can grant permission to a person to use the mark as a registered user. Any use of registered trademark by registered user will be deemed to be as used by the proprietor himself for the purposes of the Act. Registered user shall have right to take proceedings against infringement. However, registered user will not have a right of assignment or transmission.

COLLECTIVE MARKS

A collective mark means a trademark which belongs to a group or association of persons and the use thereof is reserved for members of the group or association of persons. Collective marks serve to distinguish characteristic features of the products or services offered by those enterprises. It may be owned by an association which may not use the collective mark but whose members may use the same.

The association ensures compliance of certain quality standards by its members, who may use the collective mark if they comply with the prescribed requirements concerning its use. The primary function of a collective mark is to indicate a trade connection with the Association or Organisation.

CERTIFICATION TRADEMARK

Certification trade mark means a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registerable as such in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person.

The proprietor of a certification trade mark does not himself deal in the goods. A certification trade mark may be used in addition to the user's own trade mark on his goods.

WELL-KNOWN TRADE MARK

A well known trade mark in relation to any goods or services means a mark which has become so to the substantial segment of the public which uses such goods or services such that the

use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

DESIGNS ACT, 2000

An industrial design is the ornamental or aesthetic aspect of a useful article, which must appeal to the sense of sight and may consist of the shape and/or pattern and/or colour of article. An industrial design to be protectable, must be new and origin.

Designs Act, 2000 has been passed by the parliament to protect industrial designs are protected against unauthorised copying or limitation, for a period which usually lasts for five, ten or 15 years.

CHAPTER 8 FOREIGN TRADE POLICY 2015-2020**OBJECTIVES OF FTP 2015- 2020**

India's Foreign Trade Policy (FTP) has, conventionally, been formulated for five years at a time and reviewed annually. The focus of the FTP has been to provide a framework of rules and procedures for exports and imports and a set of incentives for promoting exports.

The FTP for 2015-2020 seeks to achieve the following objectives:

- (i) To provide a stable and sustainable policy environment for foreign trade in merchandise and services;
- (ii) To link rules, procedures and incentives for exports and imports with other initiatives such as **“Make in India”, “Digital India” and “Skills India” to create an “Export Promotion Mission”** for India;
- (iii) To promote the **diversification of India's export basket by helping various sectors** of the Indian economy to gain global competitiveness with a view to promoting exports;
- (iv) To create an **architecture for India's global trade engagement** with a view to expanding its markets and better integrating with major regions, thereby increasing the demand for India's products and contributing to the government's flagship “Make in India” initiative;
- (v) To provide a mechanism for regular appraisal in order to rationalise imports and reduce the trade imbalance.

Exports should not merely be a function of marketable surplus but should also reflect an enhancement of economic capacity and development.

Foreign Trade Policy envisages:

- Employment creation in both manufacturing and services through the generation of
- foreign trade opportunities
- Zero defect products with a focus on quality and standards;
- A stable agricultural trade policy encouraging the import of raw material where required and export of processed products;

- A focus on higher value addition and technology infusion;
- Investment in agriculture overseas to produce raw material for the Indian industry;
- Lower tariffs on inputs and raw materials; and
- Development of trade infrastructure and provision of production and export incentives.

FOCUS ON FOREIGN TRADE POLICY

The Foreign Trade Policy is primarily focused on accelerating exports. This is sought to be implemented through various schemes intended to exempt and remit indirect taxes on inputs physically incorporated in the export product, import capital goods at concessional duty, stimulate services exports and focus on specific markets and products. The Policy attempts to dovetail these schemes with the specific market access openings that India has achieved through negotiations with its trading partners for various bilateral and regional trading arrangements.

LEGAL BASIS OF FTP

The Foreign Trade Policy 2015-20, is **notified by Central Government**, in exercise of powers conferred under **Section 5 of the Foreign Trade (Development & Regulation) Act, 1992, as amended**. The Foreign Trade Policy, 2015-20 came into force with effect from 01.04.2015

AMENDMENT TO FTP

Central Government, in exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, as amended from time to time, reserves the right to make any amendment to the FTP, by means of notification, in public interest.

DURATION OF FTP

The **Foreign Trade Policy (FTP), 2015-2020**, incorporating provisions relating to export and import of goods and services, shall come into force with effect from the date of notification and shall remain in force up to 31st March, 2020, unless otherwise specified.

All exports and imports made upto the date of notification shall, accordingly, be governed by the relevant FTP, unless otherwise specified.

TRANSNATIONAL ARRANGEMENTS

- a) Any License / Authorisation / Certificate / Scrip / any instrument bestowing financial or fiscal benefit issued before commencement of FTP 2015-20 shall continue to be valid for the purpose and duration for which such License/Authorisation/ Certificate / Scrip / any instrument bestowing financial or fiscal benefit Authorisation was issued, unless otherwise stipulated.
- b) In case an export or import that is permitted freely under FTP is subsequently subjected to any restriction or regulation, such export or import will ordinarily be permitted, notwithstanding such restriction or regulation, unless otherwise stipulated.

GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS**Exports and Imports – ‘Free’, unless regulated**

(a) **Exports and Imports shall be ‘Free’ except** when regulated by way of ‘prohibition’, ‘restriction’ or ‘exclusive trading through State Trading Enterprises (STEs)’ as laid down in **Indian Trade Classification (Harmonised System) [ITC (HS)] of Exports and Imports**.

(b) Further, there are some items which are ‘free’ for import/export, but subject to conditions stipulated in other Acts or in law for the time being in force.

INDIAN TRADE CLASSIFICATION (HARMONISED SYSTEM) [ITC (HS)] OF EXPORTS AND IMPORTS

(a) ITC (HS) is a compilation of codes for all merchandise / goods for export/ import. Goods are classified based on their group or sub-group at 2/4/6/8 digits.

(b) ITC (HS) is aligned at 6 digit level with international Harmonized System goods nomenclature maintained by World Customs Organization (<http://www.wcoomd.org>). However, India maintains national Harmonized System of goods at 8 digit level which may be viewed by clicking on ‘Downloads’ at <http://dgft.gov.in>.

(c) The import/export policies for all goods are indicated against each item in ITC (HS).

Schedule 1 of ITC (HS) lays down the Import Policy regime while Schedule 2 of ITC (HS) details the Export Policy regime.

(d) Except where it is clearly specified, Schedule 1 of ITC (HS), Import Policy is for new goods and not for the Second Hand goods. For Second Hand goods, the Import Policy regime is given in Para 2.31 in this FTP.

COMPLIANCE OF IMPORTS WITH DOMESTIC LAWS

(a) Domestic Laws/ Rules/ Orders/ Regulations / Technical specifications/ environmental/ safety and health norms applicable to domestically produced goods shall apply, mutatis mutandis, to imports, unless specifically exempted.

(b) However, goods to be utilized/ consumed in manufacture of export products, as notified by DGFT, may be exempted from domestic standards/quality specifications.

AUTHORITY TO SPECIFY PROCEDURES

Director General of Foreign Trade (DGFT) may specify procedure to be followed by an exporter or importer or by any licensing/Regional Authority (RA) or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP.

Such procedure, or amendments, if any, shall be published by means of a Public Notice.

FTP & ITS INTERLINKAGE WITH EXCISE AND CUSTOMS

5. What is the general import/ export policy?

General Policy provisions governing import and export of goods and services are dealt under Chapter 2 of FTP and procedural aspects governing import and export are under Chapter 2 of Handbook of procedure (HBP) Import/ export policies for all goods are indicated against EACH ITEM in Indian Trade Classification (Harmonized System) [ITC(HS)] of Exports and Imports Schedules. ITC (HS) is compilation of codes for all goods for import / export.

- Schedule 1 lays down the Import Policy regime while Schedule 2 lays down Export Policy Regime.

6. Under present regime, whether import of goods in general is restricted?

No

- Exports and imports shall be 'FREE' except when regulated by way of 'prohibition', 'restriction' or 'exclusive trading through State Trading Enterprises (STE)', as laid down in Indian Trade Classification (Harmonized System) [ITC(HS)] of Exports and Imports.

NOTE:

Category	Importability/ Exportability	example
PROHIBITED GOODS	Not permitted for import / export	Bone Meal of Wild Animals
RESTRICTED GOODS	Import / Export of an item is permitted under license . authorization / permission issued by DGFT	Cows
EXCLUSIVE TRADING THROUGH STE (Canalized Goods)	Permitted to import / export through STE, subject to fulfillment of other conditions provided under STP	Basmati Rice – import allowed through Food Corporation of India (FCI)
FREE Goods	Import/ export is freely allowed.	Printed Books

IMPORT POLICY FOR SECOND HAND GOODS

• IMPORT of FOLLOWING second hand goods is restricted and hence, import of such items require an authorization from Regional Authority of DGFT.

- a) Personal Computers, Laptops
- b) Photocopy machine
- c) Air Conditioners
- d) Diesel Generating Set;
- e) All second goods *other than capital goods*;

***Note:** Import of second hand capital goods is not restricted (unless it falls under point (a) to (d))

PRACTICE:

1. Is it correct to say that all imports are free unless restricted or prohibited under the Foreign Trade Policy (FTP)?

FTP states that **exports shall be free, except in cases where these are regulated by provisions of FTP or any law** for the time being in force. The item wise export and import policy shall be specified in import Trade classification published and notified by DGFT.

BOARD OF TRADE (BOT)

8. State the functions of the 'Board of Trade' with reference to the FTP 2015-20. 'Board of Trade' has been constituted to give advice to CG on matters relating to foreign trade. It consists of chairman and 25 nominated members as well as chairman of recognized export promotion councils.

The functions of the Board of Trade include :

- a) To advise the Government on Policy measures for preparation and implementation of both short & long term plans for increasing exports in the light of emerging national and international economic scenario;
- b) To review export performance of various sectors, identify constraints and suggest industry specific measures to optimize export earnings;
- c) To examine the existing institutional framework for imports and exports and suggest practical measures for further streamlining to achieve the desired objectives;
- d) to review the policy instruments and procedures for imports and exports and suggest steps to rationalize and channelize such schemes for optimum use;
- e) To examine issues which are considered relevant for promotion of India's foreign trade, and to strengthen the international competitiveness of Indian goods and services; and
- f) To commission studies for furtherance of the above objectives.

EXPORT PROMOTION COUNCILS (EPC)

9. What do you mean by EPC? What are the reasons for setting up of Export Promotion Councils? Write a brief note on their responsibilities and types of

Councils in India in the context of foreign trade policy. Should an exporter compulsorily register himself as a member of such Export Promotion Council?

EPC are the organization of exporters, set up with the objective to promote and develop Indian exports. Export promotion councils have been set up to promote and develop export of the country. These EPCs are expected to monitor and encourage exports and to assist and guide the exporter. **Their main aim is to project India's image**

abroad as reliable supplier of high quality goods and services. EPC are non-profit autonomous organizations (registered as companies or registered society)

Each council is responsible for promotion of a particular group of products.

Registration of exporter with EPC:

If exporter intends to obtain export incentives, then it has to mandatory register itself with EPC.

- ✓ **Exporter** shall make **application** for membership in specified form (ANF-2C). [*in case an exporter desires to get registration as ‘manufacturer exporter’, an exporter has to furnish evidence to that effect*]
- ✓ EPC issues a certificate registering him – which is known as **RCMC Registration cum membership certificate**.
- ✓ RCMC is valid from 1st of April of Year in which it is issued and remains valid for a period of **5 years**.
- ✓ *If he does not intend to claim any export incentive*, then registration is optional.

Remember:

1. Exporter is required to obtain RCMC from the Council which is concerned with the product of his main line of business.
2. In case an export product is not covered by any EPC / Commodity Board etc., EPC shall be obtained from **FIEO (Federation of Indian Export Organization)**.

DEDICATED EXPORTERS (EOU & SEZ)

Export promotion councils for EOU and SEZ units has also been constituted.

10. What is meant by RCMC (Registration-cum-Membership Certificate)

RCMC is a certificate evidencing registration of an exporter as a member of any Export Promotion Councils (e.g., Apparel Export Promotion Council, Engineering Export Promotion Council, etc)

IMPORTER-EXPORTER CODE (IEC) NUMBER / E-IEC

An IEC is a 10-digit number allotted to a person that is mandatory for undertaking any export/import activities. Now the facility for IEC in electronic form or e-IEC has also been operationalised.

(a) Application for obtaining IEC can be filed manually and submitting the form in the office of Regional Authority (RA) of DGFT. Alternatively, Exporters/Importers shall file an application in ANF 2A format for grant of e-IEC. Those who have digital signatures can sign and submit the application online along with the requisite documents. Others may take a printout of the application, sign the undertaking/declaration, upload the same with other requisite documents and thereafter submit the signed copy of the online application form to concerned jurisdictional Regional Authorities (RA) either through post or by hand.

(b) Deficiency in the application form has to be removed by re-logging onto “Online IEC application” on DGFT website and filling the form again by paying the requisite application processing charges.

(c) When an e-IEC is approved by the competent authority, applicant is informed through e-mail that a computer generated e-IEC is available on the DGFT website. By clicking on “Application Status” after having filled and submitted the requisite details in “Online IEC Application” webpage, applicant can view and print his e-IEC.

Briefly, following are the requisite details/documents (scanned copies) to be submitted/uploaded along with the application for IEC:

Details of the entity seeking the IEC:

- (1) PAN of the business entity in whose name Import/Export would be done (Applicant individual in case of Proprietorship firms).
 - (2) Address Proof of the applicant entity.
 - (3) LLPIN /CIN/ Registration Certification Number (whichever is applicable).
 - (4) Bank account details of the entity. Cancelled Cheque bearing entity’s pre-printed name or Bank certificate in prescribed format ANF2A(I).
- (ii) Details of the Proprietor/ Partners/ Directors/ Secretary or Chief Executive of the Society/ Managing Trustee of the entity:

- (1) PAN (for all categories)
- (2) DIN/DPIN (in case of Company /LLP firm)

(iii) Details of the signatory applicant:

- (1) Identity proof
- (2) PAN
- (3) Digital photograph

(d) In case the applicant has digital signature, the application can also be submitted online and no physical application or document is required. In case the applicant does not possess digital signature, a print out of the application filed online duly signed by the applicant has to be submitted to the concerned jurisdictional RA, in person or by post.

NO EXPORT/IMPORT WITHOUT IEC:

No export or import shall be made by any person without obtaining an IEC number **unless specifically exempted.**

The following categories of importers or exporters are exempted from obtaining IEC.

- ✓ Ministries /Departments of Central or State Government
- ✓ Persons importing or exporting goods for personal use not connected with trade or manufacture or agriculture.

Only one IEC against one
Permanent Account Number
(PAN)

FTP 2015-20

- If any PAN Card Holder is already having more than one IEC, then the extra IEC shall be surrendered by him.
- If not so surrendered, then the same shall be de-activated suo-moto.

Briefly, following are the requisite details /documents (scanned copies) to be submitted/ uploaded along with the application for IEC:

<u>(i) Details of the entity seeking the IEC:</u>	<u>(ii) Details of the Proprietor/ Partners/ Directors/ Secretary or Chief Executive of the Society/ Managing Trustee of the entity:</u>
(1) PAN of the business entity in whose name Import/Export would be done (Applicant individual in case of Proprietorship firms).	(1) PAN (for all categories)
(2) Address Proof of the applicant entity.	(2) DIN/DPIN (in case of Company /LLP firm)
(3) LLPIN /CIN/ Registration	(iii) Details of the signatory applicant:

Certification Number (whichever is applicable).

(4) Bank account details of the entity. Cancelled Cheque bearing entity's pre-printed name or Bank certificate in prescribed format ANF2A(I).

(1) Identity proof

(2) PAN

(3) Digital photograph

(d) In case the applicant has digital signature, the application can also be submitted online and no physical application or document is required. In case the applicant does not possess digital signature, a print out of the application filed online duly signed by the applicant has to be submitted to the concerned jurisdictional RA, in person or by post.

MENDATORY DOCUMENTS FOR EXPORT /IMPORTS OF GOODS FROM/INTO INDIA

(a) Mandatory documents required for export of goods from India:

1. Bill of Lading/Airway Bill
2. Commercial Invoice cum Packing List*
3. Shipping Bill/Bill of Export

(b) Mandatory documents required for import of goods into India

1. Bill of Lading/Airway Bill
2. Commercial Invoice cum Packing List*
3. Bill of Entry

[Note: *(i) As per **CBEC Circular No. 01/15**-Customs **dated 12/01/2015**. (ii) Separate Commercial Invoice and Packing List would also be accepted.]

(c) For export or import of specific goods or category of goods, which are subject to any restrictions/policy conditions or require NOC or product specific compliances under any statute, the **regulatory authority concerned may notify additional documents** for purposes of export or import.

(d) In specific cases of export or import, the regulatory authority concerned **may electronically or in writing seek additional documents or information**, as deemed necessary to ensure legal compliance.

PRINCIPLES OF RESTRICTIONS

DGFT may, **through a Notification, impose restrictions on export and import**, necessary for: -

- (a) Protection of public morals;
- (b) Protection of human, animal or plant life or health;
- (c) Protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- (d) Prevention of use of prison labour;
- (e) Protection of national treasures of artistic, historic or archaeological value;
- (f) Conservation of exhaustible natural resources;
- (g) Protection of trade of fissionable material or material from which they are derived;
- (h) Prevention of traffic in arms, ammunition and implements of war.

Export/Import of Restricted Goods/Services

Any goods /service, the export or import of which is 'Restricted' may be exported or imported **only in accordance with an Authorisation / Permission** or in accordance with the procedure prescribed in a Notification / Public Notice issued in this regard.

AUTHORIZATION

□

15. Write a brief note on Import/Export Authorization.

AUTHORIZATION means permission to import or export as per provisions of FTP.

Need of Authorization:

At present, most of imports/ exports are free, but are still regulated/ restricted. Import or export of such regulated /restricted items needs 'authorization from DGFA...

- ✓ Authorization can be based on value, quantity, actual user condition, export obligation, value addition to be achieved, minimum export price and other conditions.
- ✓ In general, import authorization is given subject to 'actual user condition'.
- ✓ Procedure for obtaining authorization:
- ✓ For obtaining authorization, an application shall be made to DGFA / RA (Regional Authority).
- ✓ Authorization not a right:
 - No person may claim and Authorization as a right.
 - DGFT / RA shall have power to refuse to grant or renew the same in accordance with provisions of FT (D&R) Act, rules made thereunder and FTP.

EXPORT FROM INDIA SCHEME

The objective of the Export from India Schemes is to provide rewards to exporters to offset infrastructural inefficiencies and associated costs involved and to provide exporters a level playing field.

There shall be following two schemes for exports of Merchandise and Services respectively:

- (i) Merchandise Exports from India Scheme (MEIS).
- (ii) Service Exports from India Scheme (SEIS)

NATURE OF REWARDS

Duty Credit Scrips shall be granted as rewards under MEIS and SEIS. The Duty Credit Scrips and goods imported/domestically procured against them shall be freely transferable.

The Duty Credit Scrips can be used for:

- (i) Payment of Customs Duties for import of inputs or goods, except items listed in Appendix 3A of Appendices and Aayat Niryat Forms of FTP 2015-2020.

- (ii) Payment of excise duties on domestic procurement of inputs or goods, including capital goods as per Department of Revenue (DoR) notification.
- (iii) Payment of service tax on procurement of services as per DoR notification.
- (iv) Payment of Customs Duty and fee as per Foreign Trade Policy.

Merchandise Exports from India Scheme (MEIS)

The objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

Entitlement under MEIS:

Exports of notified goods/products with ITC[HS] code, to notified markets as listed in Appendix 3B of Appendices and Aayat Niryat Forms of FTP 2015-2020, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise].

The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified.

Export of goods through courier or foreign post offices using e-Commerce:

(i) Exports of goods through courier or foreign post office using e-commerce, as notified in Appendix 3C of Appendices and Aayat Niryat Forms) of FTP 2015-2020, of FOB value upto Rs. 25000 per consignment shall be entitled for rewards under MEIS.

(ii) If the value of exports using e-commerce platform is more than Rs 25000 per consignment then MEIS reward would be limited to FOB value of Rs.25000 only.

(iii) Such goods can be exported in manual mode through Foreign Post Offices at New Delhi, Mumbai and Chennai.

(iv) Export of such goods under Courier Regulations shall be allowed manually on pilot basis through Airports at Delhi, Mumbai and Chennai as per appropriate amendments in regulations to be made **by Department of Revenue**. Department of Revenue shall fast track the implementation of Electronic Data Interchange (EDI) mode at courier terminals.

Ineligible categories under MEIS:

The following exports categories /sectors shall be **ineligible for Duty Credit Scrip entitlement under MEIS:**

- (i) EOUs/EHTPs/BTPs/ STPs who are availing direct tax benefits/exemption.
- (ii) Supplies made from DTA units to SEZ units
- (iii) Export of imported goods covered;
- (iv) Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India;
- (v) Deemed Exports;
- (vi) SEZ/EOU/EHTP/BPT/FTWZ products exported through DTA units;
- (vii) Service Export ETC.

SERVICE EXPORTS FROM INDIA SCHEME (MEIS)

The objective of Service Exports from India Scheme (SEIS) is to encourage export of notified Services from India.

Eligibility:

- (a) Service Providers of notified services, located in India, shall be rewarded under SEIS, subject to conditions as may be notified.
- (b) The notified services and rates of rewards are listed in Appendix 3D of Appendices and Aayat Niryat Forms of FTP 2015-2020. Following Services shall be eligible:
 - (i) Supply of a 'service' from India to any other country; (Mode1- Cross border trade)
 - (ii) Supply of a 'service' from India to service consumer(s) of any other country; (Mode 2- Consumption abroad).
- (b) Such service provider should have minimum net free foreign exchange earnings of US\$15,000 in preceding financial year to be eligible for Duty Credit Scrip. For Individual

Service Providers and sole proprietorship, such minimum net free foreign exchange earnings criteria would be US\$10,000 in preceding financial year.

(c) Payment in Indian Rupees for service charges earned on specified services, shall be treated as receipt in deemed foreign exchange as per guidelines of Reserve Bank of India. The list of such services is indicated in Appendix 3E of Appendices and Aayat Niryat Forms of FTP 2015-2020.

(d) Net Foreign exchange earnings for the scheme are defined as under:

Net Foreign Exchange = Gross Earnings of Foreign Exchange minus Total expenses/payment/ remittances of Foreign Exchange by the IEC holder, relating to service sector in the Financial year.

(e) If the IEC holder is a manufacturer of goods as well as service provider, then the foreign exchange earnings and Total expenses/payment/remittances shall be taken into account for service sector only.

(f) In order to claim reward under the scheme, Service provider shall have to have an active IEC at the time of rendering such services for which rewards are claimed.

INELIGIBLE CATEGORIES UNDER SEIS:

- (1) Foreign exchange remittances other than those earned for rendering of notified services would not be counted for entitlement.
- (2) Following shall not be taken into account for calculation of entitlement under the scheme

(a) Foreign Exchange remittances:

I. Related to Financial Services Sector

- (i) Raising of all types of foreign currency Loans;
- (ii) Export proceeds realization of clients;
- (iii) Issuance of Foreign Equity through ADRs/GDRs or other similar instruments;
- (iv) Issuance of foreign currency Bonds;
- (v) Sale of securities and other financial instruments;
- (vi) Other receivables not connected with services rendered by financial institutions; and

II. Earned through contract/regular employment abroad (e.g. labour remittances);

- (b) Payments for services received from EEFC Account;

- (c) Foreign exchange turnover by Healthcare Institutions like equity participation, donations etc.
- (d) Foreign exchange turnover by Educational Institutions like equity participation, donations etc.
- (e) Export turnover relating to services of units operating under SEZ/EOU/EHTP/STPI/BTP Schemes or supplies of services made to such units;
- (f) Clubbing of turnover of services rendered by SEZ/EOU /EHTP/STPI/BTP units with turnover of DTA Service Providers;
- (g) Exports of Goods.
- (h) Foreign Exchange earnings for services provided by Airlines, Shipping lines service providers plying from any foreign country X to any foreign country Y routes not touching India at all.
- (I) Service providers in Telecom Sector.

STATUS HOLDER

- (a) Status Holders are business leaders who have excelled in international trade and have successfully contributed to country's foreign trade. Status Holders are expected to not only contribute towards India's exports but also provide guidance and handholding to new entrepreneurs.
- (c) All exporters of goods, services and technology having an import-export code (IEC) number shall be eligible for recognition as a status holder. Status recognition depends upon export performance. An applicant shall be categorized as status holder upon achieving export performance during current and previous two financial years, as indicated in Foreign Trade Policy.
- (d) The export performance will be counted on the basis of FOB value of export earnings in free foreign exchange.
- (e) For deemed export, FOR value of exports in Indian Rupees shall be converted in US\$ at the exchange rate notified by CBEC, as applicable on 1st April of each Financial Year.
- (d) For granting status, export performance is necessary in at least two out of three years.

STATUS CATEGORY

<u>Status Category</u>	<u>Export Performance FOB/FOR (as converted) Value (in US \$ million)</u>
One Star Export House	3
Two Star Export House	25
Three Star Export House	100
Four Star Export House	500
Five Star Export House	2000

GRANT OF DOUBLE WEIGHTAGE

(a) The exports by IEC holders under the following categories shall be granted double weightage for calculation of export performance for grant of status.

(i) Micro, Small & Medium Enterprises (MSME) as defined in Micro, Small & Medium Enterprises Development (MSMED) Act 2006.

(ii) Manufacturing units having International Organisation for Standardisation (ISO)/Bureau of Indian Standards (BIS).

(iii) Units located in North Eastern States including Sikkim and Jammu & Kashmir.

(iv) Units located in Agri Export Zones.

(b) Double Weightage shall be available for grant of One Star Export House Status category only. Such benefit of double weightage shall not be admissible for grant of status recognition of other categories namely Two Star Export House, Three Star Export House, Four Star export House and Five Star Export House.


c) A shipment can get double weightage only once in any one of above categories.

OTHER CONDITIONS FOR GRANT OF STATUS

(a) Export performance of one IEC holder shall not be permitted to be transferred to another IEC holder. Hence, calculation of exports performance based on disclaimer shall not be allowed.

(b) Exports made on re-export basis shall not be counted for recognition.

(c) Export of items under authorization, including SCOMET items, would be included for calculation of export performance.



Privileges for status holder

A Status Holder shall be eligible for privileges as under:

- (a) Authorisation and Customs Clearances for both imports and exports may be granted on self-declaration basis;
- (b) Input-Output norms may be fixed on priority within 60 days by the Norms Committee;
- (c) Exemption from furnishing of Bank Guarantee for Schemes under FTP, unless specified otherwise anywhere in FTP or Hand Book of Procedure (HBP);
- (d) Exemption from compulsory negotiation of documents through banks. Remittance/receipts, however, would be received through banking channels;
- (e) Two star and above Export houses shall be permitted to establish Export Warehouses as per Department of Revenue guidelines.
- (f) Three Star and above Export House shall be entitled to get benefit of Accredited Clients Programme (ACP) as per the guidelines of CBEC (website: <http://cbec.gov.in>).
- (g) The status holders would be entitled to preferential treatment and priority in handling of their consignments by the concerned agencies. ETC.

DUTY FREE EXEMPTION /REMISSION SCHEME

Duty Exemption/Remission Schemes enable duty free import of inputs for export production, including replenishment of input or duty remission.

Schemes:

- (a) Duty Exemption Schemes.

The Duty Exemption schemes consist of the following:

- (i) Advance Authorisation (AA) (which will include Advance Authorisation for Annual Requirement).
- (ii) Duty Free Import Authorisation (DFIA).

- (b) Duty Remission Scheme.

Duty Drawback (DBK) Scheme, administered by Department of Revenue.**ADVANCE AUTHORISATION**

a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed/utilised in the process of production of export product, may also be allowed.

(b) Advance Authorisation is issued for inputs in relation to resultant product, on the following basis:

(i) As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures);

OR

(ii) On the basis of self declaration as per of Handbook of Procedures.

APPLICANT/EXPORT/SUPPLY –ELIGIBILITY

(a) Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.

(b) Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in Handbook of Procedures) shall be issued to manufacturer exporter only.

(c) Advance Authorisation shall be issued for:

(i) Physical export (including export to SEZ);

(ii) Intermediate supply; and/or

(iii) Supply of 'stores' on board of foreign going vessel/aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

Eligibility Condition to obtain Advance Authorisation for Annual Requirement

(i) Exporters having past export performance (in at least preceding two financial years) shall be entitled for Advance Authorisation for Annual requirement.

(ii) Entitlement in terms of CIF value of imports shall be upto 300% of the FOB value of physical export and/or FOR value of deemed export in preceding financial year or Rs 1 crore, whichever is higher

VALUE ADDITION

Value Addition for the Duty Exemption/Remission Schemes (except for Gems and Jewellery sector for which value addition is prescribed in of FTP) shall be:-

$$VA = \frac{A - B}{B} \times 100, \text{ where}$$

A = FOB value of export realized/FOR value of supply received.

B = CIF value of inputs covered by Authorisation, plus value of any other input used on which benefit of DBK is claimed or intended to be claimed.

DETAILS OF DUTIES EXEMPTED

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, wherever applicable. However, Import against supplies covered under certain category of supply under Deemed Exports of FTP will not be exempted from payment of applicable Anti-dumping Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any.

ADMISSIBILITY OF DRAWBACK

Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid imported or indigenous inputs (not specified in the norms) used in the export product. For this purpose, applicant shall indicate clearly details of duty paid input in the application for Advance Authorisation. As per details mentioned in the application, Regional Authority shall also clearly endorse details of such duty paid inputs in the condition sheet of the Advance Authorisation.

VALIDITY PERIOD FOR IMPORT

- (i) Validity period for import of Advance Authorisation shall be 12 months from the date of issue of Authorisation.
- (ii) Advance Authorisation for Deemed Export shall be co-terminus with contracted duration of project execution or 12 months from the date of issue of Authorisation, whichever is more.

EXPORT OBLIGATION

- a) Period for fulfilment of export obligation under Advance Authorisation shall be 18 months from the date of issue of Authorisation or as notified by DGFT.
- b) In cases of supplies to turnkey projects in India under deemed export category or turnkey projects abroad, the Export Obligation period shall be co-terminus with contracted duration of the project execution or 18 months whichever is more.
- c) Export Obligation for items falling in categories of defence, military store, aerospace and nuclear energy shall be 24 months from the date of issue of authorization or co-terminus with contracted duration of the export order whichever is more.
- d) Export Obligation Period for specified inputs, from the date of clearance of each consignment, is given in Appendix 4-J of Appendices and Aayat Niryat Forms of FTP 2015.

DUTY FREE IMPORT AUTHORISATION SCHEME (DFIA)

- (a) Duty Free Import Authorisation is issued to allow duty free import of inputs. In addition, import of oil and catalyst which is consumed/utilised in the process of production of export product, may also be allowed.
- (b) Provisions of Accounting Imputes, Importability/Exportability of items that are Prohibited/Restricted/ STE, Domestic Sourcing of Inputs, Currency for Realisation of Export Proceeds and Re-import of exported goods under Duty Exemption/Remission Scheme of FTP shall be applicable to DFIA also.

Duties Exempted and Admissibility of CENVAT and Drawback

- (i) Duty Free Import Authorisation shall be exempted only from payment of Basic Customs Duty.
- (ii) Additional customs duty/excise duty, being not exempt, shall be adjusted as CENVAT credit as per DoR rules.

(iii) Drawback as per rate determined and fixed by Central Excise authority shall be available for duty paid inputs, whether imported or indigenous, used in the export product. However, in case such drawback is claimed for inputs not specified in SION, the applicant should have indicated clearly details of such duty paid inputs also in the application for Duty Free Import Authorization, and as per the details mentioned in the application, the Regional Authority should also have clearly endorsed details of such duty paid inputs in the condition sheet of the Duty Free Import Authorization.

Eligibility

(i) Duty Free Import Authorisation shall be issued on post export basis for products for which Standard Input Output Norms have been notified.

(ii) Merchant Exporter shall be required to mention name and address of supporting manufacturer of the export product on the export document viz. Shipping Bill/Airway Bill/Bill of Export/ARE-1/ARE-3.

(iii) Application is to be filed with concerned Regional Authority before effecting export under Duty Free Import Authorisation.

Minimum Value Addition

Minimum value addition of 20% shall be required to be achieved. For items where higher value addition has been prescribed under Advance Authorisation in Appendix 4C of Appendices and Aayat Niryat Forms of FTP 2015, the same value addition shall be applicable for Duty Free Import Authorisation also.

EXEMPTION SCHEMES- REMISSION SCHEMES

	AA SCHEME	DFIA SCHEME
Coverage of material	<p><i>Inputs which gets physically incorporated under the export product</i></p> <ul style="list-style-type: none"> • Fuel • Oil • Catalyst 	<p><i>Inputs required for production of export goods</i></p> <ul style="list-style-type: none"> • Oil • Catalyst <p>(FTP 2015-20)</p> <p><i>Fuel cannot be imported under the new DFIA.</i></p>

CS EXECUTIVE –I		121	ECONOMIC & COMMERCIAL LAW
Actual User	Not Compulsory	Compulsory	
Condition			
Type	Pre-export	[Pre-Export] as well [Post Export]	
Value Addition	> = 15% (in general)	> = 20% (in general)	
Norms			
SION Norms Fixed	Scheme is applicable	Scheme is applicable	

TRADE FACILITATION MEASURES & EASE OF DOING BUSINESS: RECENT FTP PROVISIONS

TRADE FACILITATION MEASURES

<u>1) NIRYAAT BANDHU SCHEME:</u> <u>[Niryat Bandhu = Export Facilitator]</u>	<ul style="list-style-type: none"> Under this, DGFT mentors new and potential exporter on the provisions and details of foreign trade through counselling, training and outreach programmes. Outreach training activities will be organized in a structured way with the help of Export Promotion Councils as 'industry partners' and other willing 'knowledge partners' in academia and research community to achieve the objective of Niryat Bandhu Scheme.
<u>2) ON-LINE ASSISTANCE & COMPLAINT REGISTRATION</u>	An EDI Help Desk is made available to assist the exporters in filing online applications in the DGFT portal and resolving other EDI related issues. For assistance an e-mail may be sent to dgftedi@nic.in .

3) TOWNS OF EXPORT EXCELLENCE (TEE)	Selected towns/cities producing goods of Rs. 750 Crore or more may be notified under Appendix 1B as Towns of Export Excellence. For TEE in Handloom, Handicraft, Agriculture and Fisheries sector, threshold limit would be Rs. 150 crore.

For example: Madurai situated in Tamil Nadu is notified as Towns of Export Excellence for Handlooms and Surat in Gujarat is notified as TEE for Gems and Jewellery.

The following facilities are provided to such TEE's:

- i. Recognized associations of units will be provided **financial assistance** under Market Access Initiative Scheme, on priority basis, for export promotion projects for marketing, capacity building and technological services.
- ii. Common Service Providers in these areas shall be entitled for **duty free import of capital goods under EPCG scheme.**

DIGITIZATION OF SYSTEMS & PROCEDURS

1) MOBILE APPLICATION (FOR FTP & DGFT RELATED SERVICES)

As part of trade facilitation measure, DGFT has now developed a mobile application which has been released for the Android platform.

2) DIGITIZATION

The DGFT has introduced many on-line initiatives viz., **EDI platform, Online filing of Applications, Message Exchange with Community Partners, Digital Signatures** and **e-payment of application fee**, etc.

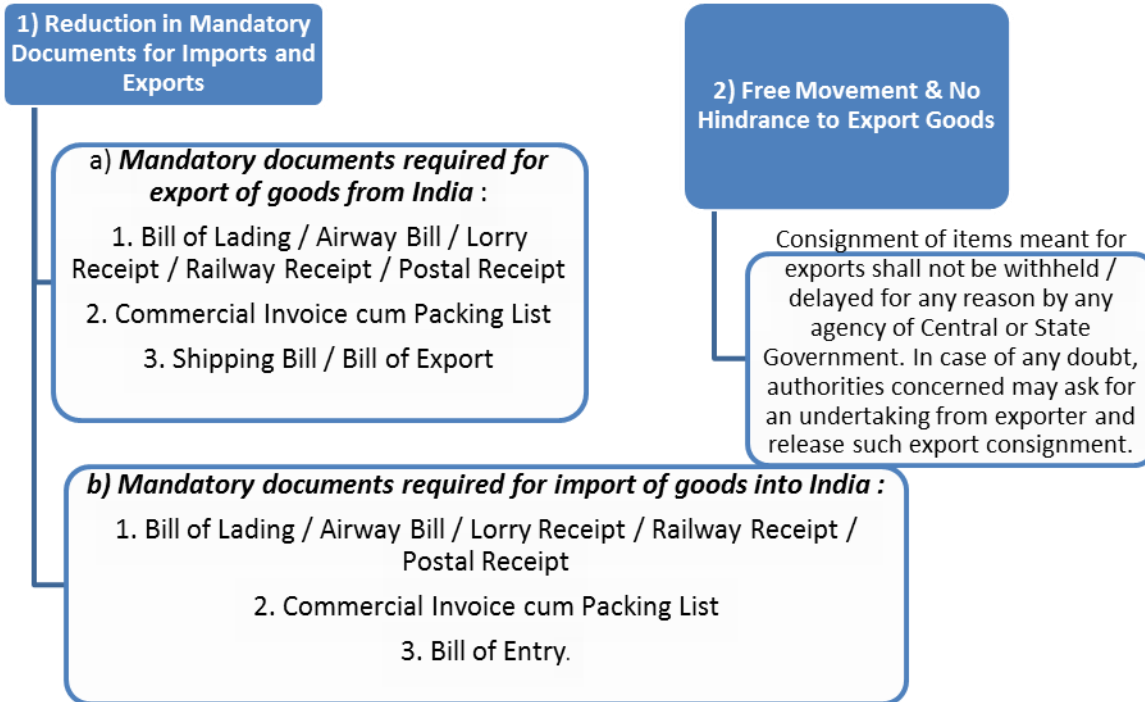
3) e-IEC

- Recently introduced the facility of issuing Importer Exporter Code in electronic form (e-IEC).

	<ul style="list-style-type: none"> • Application can be made online. • Applicants can Upload the documents and pay the required fee through Net banking
<u>4) e-BRC</u>	One prominent initiative of DGFT in recent times is e-BRC (Electronic Bank Realization Certificate) project and its successful implementation. It has enabled DGFT to capture details of realization of export proceeds directly from the Banks online network through secured electronic mode.
<u>5)EXPORTER IMPORTER PROFILE.</u>	<i>Once the documents are uploaded, there will be no need to submit these documents / copies of these documents to Regional Authority</i> repeatedly with each application viz., Application for MEIS Scrip, EPCG Authorization etc. It intends to reduce the transaction cost and time and is a step towards paperless processing of different applications in DGFT.
6) Digitally signed CA/CS/CMA certificate	In order to move towards paperless processing, an electronic procedure is being developed to upload digitally signed documents by Chartered Accountant / Company Secretary / Cost Accountant.
7) Use of digital signature	DGFT allows online filing of applications with Class-II digital signature with IEC number embedded in it.

EASE OF DOING BUSINESS MEASURES

FTP that the number of mandatory documents required for exports and imports of goods from / into India have been **reduced to three** each which are as follows :



EPCG SCHEME

The objective of the Export Promotion Capital Goods (EPCG) Scheme is to facilitate import of capital goods for producing quality goods and services to enhance India's export competitiveness

SCHEME

(a) EPCG Scheme allows import of capital goods for pre-production, production and post-production at Zero customs duty. Alternatively, the Authorisation holder may also procure Capital Goods from indigenous sources. Capital goods for the purpose of the EPCG scheme shall include:

- (i) Capital Goods including in Completely Knocked down (CKD)/ Semi- Knocked Down (SKD) condition thereof;
- (ii) Computer software systems;
- (iii) Spares, moulds, dies, jigs, fixtures, tools & refractories for initial lining and spare refractories; and
- (iv) Catalysts for initial charge plus one subsequent charge.

- (b) Import of capital goods for Project Imports notified by Central Board of Excise and Customs is also permitted under EPCG Scheme.
- (c) Import under EPCG Scheme shall be subject to an export obligation equivalent to 6 times of duty saved on capital goods, to be fulfilled in 6 years reckoned from date of issue of Authorisation.
- (d) Authorisation shall be valid for import for 18 months from the date of issue of Authorisation. Revalidation of EPCG Authorisation shall not be permitted.
- (e) In case countervailing duty (CVD) is paid in cash on imports under EPCG, incidence of CVD would not be taken for computation of net duty saved, provided CENVAT is not availed.
- f) Second hand capital goods shall not be permitted to be imported under EPCG Scheme.

COVERAGE OF THE SCHEME

EPCG scheme covers manufacturer exporters with or without supporting manufacturer(s), merchant exporters tied to supporting manufacturer(s) and service providers. Name of supporting manufacturer(s) shall be endorsed on the EPCG authorisation before installation of the capital goods in the factory/premises of the supporting manufacturer (s).

In case of any change in supporting manufacturer (s) the RA shall intimate such change to jurisdictional Central Excise Authority of existing as well as changed supporting manufacturer (s) and the Customs at port of registration of Authorisation.

(b) Export Promotion Capital Goods (EPCG) Scheme also covers a service provider who is designated/certified as a Common Service Provider (CSP) by the DGFT, Department of Commerce or State Industrial Infrastructural Corporation in a Town of Export Excellence subject to provisions of Foreign Trade Policy/Handbook of Procedures

DEEMED EXPORTS

‘Deemed Export’ refers to those transactions in which **goods supplied don't leave the country and payment for such supplies is received either in Indian Rupees or in free foreign exchange**, but these transactions are deemed as exports. *Supply of goods shall be regarded as ‘deemed export’ provided goods are manufactured in India.*

NOTE:

Deemed Export = Supplies of 2 kinds:

SUPPLY BY THE MANUFACTURER

- (i) Supply of **goods** against Advance Authorization (AA) / Advance Authorization for Annual Requirement / DFIA;
- (ii) Supply of **capital goods** against EPG Authorization;
- (iii) Supply of **goods** to EOU / EHTP / STP / BTP
- (iv) Supply of **marine freight containers by 100% EOU** (i.e., domestic freight containers manufacturers) provided said containers are exported out of India within 6 months or such further period as permitted by customs;

SUPPLY BY MAIN/ SUB CONTRACTOR

- (i) Supplies to **project financed by multilateral or bilateral agencies/ fund**;
- (ii) Supply of **goods exempted under E/N 12/2012- Cus** (permitting import at 0 customs duty, where supply is made under procedure of ICB);
- (iii) Supply of **goods to United Nation or International Organizations**;
- (iii) Supply of **goods to Nuclear Power Projects**;

SEZ SCHEME

Special Economic Zone (SEZ) is **specially demarcated area where units operate under a set of rules and regulations different from those applicable to other units in the country.**

The emphasis is on enhancing exports.

1. SEZ are like a separate island within the territory of India.
2. SEZs are projected as duty free area for the purpose of trade, operations, duty, and tariffs.
- 3.

The main motivating force for setting up SEZ is to boost exports by attracting both Indian and Foreign corporates to undertake investment in these areas.

- 1) Promotion of exports of goods and services;
- 2) Export of goods and services without taxes
- 3) Providing exemption from duties and taxes on procurement;
- 4) Development of infrastructure facilities;
- 5) Promotion of investment from domestic and foreign sources;
- 6) Generation of additional economic activity

- 7) Creation of employment opportunities;

Note

All the import/export operations of the SEZ units is on self-certification basis.

The units in the Zone are required to be a net foreign exchange earner but they would not be subjected to any pre-determined value addition or minimum export performance requirements.

Sales in the Domestic Tariff Area by SEZ units are subject to payment of full Custom Duty and as per import policy in force.

COMMITTEE ON QUALITY COMPLAINTS AND TRADE DISPUTES (CQCTD).

Exporters need to project a good image of the country abroad to promote exports. Maintaining an enduring relationship with foreign buyers is of utmost importance, and complaints or trade disputes, whenever they arise, need to be settled amicably as soon as possible. Importers too may have grievances as well. In an endeavour to resolve such complaints or trade disputes and to create confidence in the business environment of the country, a mechanism is being laid down to address such complaints and disputes in an amicable way.

Complaints of the following nature will be considered:

- Complaints received from foreign buyers in respect of poor quality of the products supplied by exporters from India;
- Complaints of importers against foreign suppliers in respect of quality of the products supplied; and
- Complaints of unethical commercial dealings categorized mainly as non-supply / partial supply of goods after confirmation of order; supplying goods other than the ones as agreed upon; non-payment; non adherence to delivery schedules etc.
- For resolving such disputes at a faster pace, a Committee on Quality Complaints and Trade Disputes ('CQCTD') has been constituted (in all regional offices of DGFT).
- The CQCTD will be responsible for enquiring and investigating into all quality related complaints and other trade related complaints falling under the jurisdiction of the respective RAs. It will take prompt and effective steps to redress and resolve the grievances of the importers / exporters / overseas buyers, preferably within three months of receipt of the complaint. Wherever required, the Committee (CQCTD) may take the assistance of the Export Promotion Councils/FIEO/Commodity Boards or any other agency as considered appropriate for settlement of these disputes.

CQCTD proceedings are only reconciliatory in nature and the aggrieved party, whether the foreign buyer or the Indian importer, is free to pursue any legal recourse against the other erring party.

MECHANISM FOR HANDLING TRADE DISPUTE

(a) Committee on Quality complaints and Trade Disputes (CQCTD)

To deal effectively with the increasing number of complaints and disputes, a 'Committee on Quality Complaints and Trade Disputes' (CQCTD) will be constituted in the 22 offices of the Regional Authority(RA's) of DGFT.

(b) Composition of the CQCTD

The CQCTD would be constituted under the Chairpersonship of the Head of Office. The CQCTD may comprise of the following members:

1. Additional DGFT/Joint DGFT/ (H.O.O): Chairperson
2. Representative of Bureau of India Standard (BIS): Member
3. Representative of Agricultural and Processed Food Products Export Development Authority: Member
4. Representative of the Branch Manager of the concerned Bank: Member
5. Representative of Federation of Indian Exporter Organisation/and OR Export Promotion Council: Member
6. Representative of Export Inspection Agency: Member
7. Nominee of Director of Industries of State Government: Member
8. Nominee of Development Commissioner of MSME: Member
9. Officer as nominated by Chairperson: Member Secretary
10. Any other agency, as co-opted by Chairperson: Member.

(c) Functions of CQCTD

The Committee (CQCTD) will be responsible for enquiring and investigating into all Quality related complaints and other trade related complaints falling under the jurisdiction of the respective RAs. It will take prompt and effective steps to redress and resolve the grievances of the importers, exporters and overseas buyers, preferably within three months of receipt of the complaint. Wherever required, the Committee (CQCTD) may take the assistance of the Export Promotion Councils/FIEO/Commodity Boards or any other agency as considered appropriate for settlement of these disputes.

Proceedings under CQCTD

CQCTD proceedings are only reconciliatory in nature and the aggrieved party, whether the foreign buyer or the Indian importer, is free to pursue any legal recourse against the other erring party.

Procedures to deal with complaints and trade disputes

The procedure for making an application for such complaints or trade disputes and the procedure to deal with such quality complaints and disputes is given in the Handbook of Procedures.

CORRECTIVE MEASURES

The Committee at RA level can authorize the Export Inspection Agency or any technical authority to assess whether there has been any technical failure of not meeting the standards, manufacturing/ design defects, etc. for which complaints have been received.

NODAL OFFICER

Director General of Foreign Trade would appoint an officer, not below the rank of Joint Director General, in the Headquarters, to function as the 'Nodal Officer' for coordinating with various Regional Authorities of DGFT.

FOREIGN CONTRIBUTION (REGULATION) ACT, 2010

The Foreign Contribution (Regulation) Act, 1976 was enacted to regulate the acceptance and utilization of foreign contribution or hospitality with a view to ensuring that the Parliamentary institutions, political associations, academic and other voluntary organizations as well as individuals working in important areas of national life may function in a manner consistent with the values of sovereign democratic republic

The Foreign Contribution (Regulation) Act, 2010 has come into effect from May 1, 2011. The Ministry of Home Affairs has issued the necessary Gazette Notification vide S.O. 999 (E) dated the 29th April, 2011 in this regard. The Ministry of Home Affairs has also issued a Gazette Notification vide G.S.R. 349 (E) dated the 29th April, 2011 notifying the Foreign Contribution (Regulation) Rules, 2011 made under section 48 of FCRA, 2010. The FCR Rules, 2011 have come into force simultaneously with FCRA, 2010.

DEFINITIONS

FOREIGN CONTRIBUTION	<p>“Foreign contribution” means the donation, delivery or transfer made by any foreign source,—</p> <p>(i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;</p> <p>(ii) of any currency, whether Indian or foreign;</p> <p>(iii) of any security as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 and includes any foreign security as defined in clause (o) of section 2 of the Foreign Exchange Management Act, 1999.</p>
FOREIGN HOSPITALITY	<p>“Foreign hospitality” means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country or territory or with free boarding, lodging, transport or medical treatment [Section 2(1)(i)].</p>
FOREIGN SOURCE”	<p>Foreign source” includes, —</p> <p>(i) the Government of any foreign country or territory and any agency of such Government;</p> <p>(ii) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by</p>

notification, specify in this behalf;

- a foreign company;
- a corporation, not being a foreign company, incorporated in a foreign country or territory;
- a multi-national corporation referred to in sub-clause (iv) of clause
- a company within the meaning of the Companies Act, 1956 and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following,

namely:—

(A) the Government of a foreign country or territory;

(B) the citizens of a foreign country or territory;

(C) corporations incorporated in a foreign country or territory;

(D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;

(E) foreign company;

- a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;
- a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;
- a society, club or other association of individuals formed or registered outside India;
- a citizen of a foreign country[Section 2(1)(j)]

PROHIBITION TO ACCEPT FOREIGN CONTRIBUTION

- Section 3(1) of the Act, imposes restriction on acceptance of foreign contribution by candidate for election; correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- Judge,
- Government servant or employee of any corporation or any other body controlled or owned by the Government;
- member of any Legislature;
- political party or office-bearer thereof; organisation of a political nature as may be specified by the Central Government;
- association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode,
- or any other electronic form as defined in clause (r) of sub-section (1) of section 2

of the Information Technology Act, 2000 or any other mode of mass communication; correspondent or columnist, cartoonist, editor, owner of the association or company. A “corporation” for the above purpose means a corporation owned or controlled by the Government and includes a Government company as defined in section 617 of the Companies Act, 1956.

PROHIBITION ON ACCEPTANCE OF FOREIGN CONTRIBUTION ON BEHALF OF POLITICAL PARTY OR ANY PERSON REFERRED TO IN SUB-SEC (1) OR BOTH

Sub-section (2)(a) of Section 3 provides that no person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person, prohibited from accepting any foreign contribution.

Sub-section (2) (b) mandates that no person, resident in India, shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person, prohibited from accepting any foreign contribution.

Section 3(2)(c) provides that no citizen of India resident outside India shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any political party or any person specified in sub-section (1) of section 3, or both or any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person specified in sub-section (1) of section 3, or both.

PERSON TO WHOM SECTION 3 DOES NOT APPLY

Section 4 provides that nothing contained in section 3 shall apply to the acceptance, by any person specified in that section, of any foreign contribution where such contribution is accepted by him, subject to the provisions of section 10,—

(a) By way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or

(b) By way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or

(c) As an agent of a foreign source in relation to any transaction made by such foreign source with the Central Government or State Government; or

(d) By way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the rules made by the Central Government with regard to the acceptance or retention of such gift or presentation; or

(e) From his relative; or

(f) By way of remittance received, in the ordinary course of business through any official channel, post office, or any authorised person in foreign exchange under the Foreign Exchange Management Act, 1999; or

(g) By way of any scholarship, stipend or any payment of like nature:

<p>PROCEDURE TO NOTIFY AN ORGANIZATION OF A POLITICAL NATURE</p>	<p>Section 5(1) provides that the Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3.</p> <p>Further, the Central Government may, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature</p>
<p>RESTRICTION ON ACCEPTANCE OF FOREIGN HOSPITALITY (SEC 6)</p>	<p>Section 6 prohibits acceptance of foreign hospitality by certain persons except with the prior permission of Central Government. Accordingly no member of a Legislature or office-bearer of a political party or Judge or Government servant or employee of any corporation or any other body owned or controlled by the Government shall, while visiting any country or territory outside India, accept, except with the prior permission of the Central Government, any foreign hospitality.</p>

CS EXECUTIVE –I	134	ECONOMIC & COMMERCIAL LAW
		<p>However, it shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India, but, where such foreign hospitality has been received, the person receiving such hospitality shall give, within one month from the date of receipt of such hospitality an intimation to the Central Government as to the receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received by him.</p>
<p>(Prohibition to transfer foreign contribution to other person SCE 7)</p>		<p>Section 7 prohibits the transfer of foreign contribution to other person. Accordingly, no person who is registered and granted a certificate or has obtained prior permission under the Act; and receives any foreign contribution, shall transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under the Act.</p> <p>However, such person may transfer, with the prior approval of the Central Government, a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission under the Act in accordance with the rules made by the Central Government</p>

UTILIZATION OF FOREIGN CONTRIBUTION

Section 8 (1)(a) provides that every person, who is registered and granted a certificate or given prior permission under the Act and receives any foreign contribution, shall utilise such contribution for the purposes for which the contribution has been received. Further any foreign contribution or any income arising out of it shall not be used for speculative business and that the Central Government shall, by rules, specify the activities or business which shall be construed as speculative business for the purpose of this section.

Section 8 (1) (b) provides that every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall not

defray as far as possible such sum, not exceeding fifty per cent of such contribution, received in a financial year, to meet administrative expenses. Further administrative expenses exceeding fifty per cent of such contribution may be defrayed with prior approval of the Central Government.

The Central Government prescribes the elements which shall be included in the administrative expenses and the manner in which the administrative expenses shall be calculated.

Power of Central Government to prohibit receipt of foreign contribution (SCE 9)

Section 9 deals with power of Central Government to prohibit receipt of foreign contribution, etc., in certain cases. Accordingly, the Central Government has been empowered to -

- (a) prohibit any person or organisation not specified in section 3, from accepting any foreign contribution;
- (b) require any person or class of persons, not specified in section 6, to obtain prior permission of the Central Government before accepting any foreign hospitality;
- (c) require any person or class of persons not specified in section 11, to furnish intimation within such time and in such manner as may be prescribed as to the amount of any foreign contribution received by such person or class of persons as the case may be, and the source from which and the manner in which such contribution was received and the purpose for which and the manner in which such foreign contribution was utilised;

CONDITIONS ON WHICH CG MAY IMPOSE SUCH RESTRICTIONS

no such prohibition or requirement shall be made unless the Central Government is satisfied that the acceptance of foreign contribution by such person or class of persons, as the case may be, or the acceptance of foreign hospitality by such person, is likely to affect prejudicially

- The sovereignty and integrity of India; or
- Public interest; or
- Freedom or fairness of election to any Legislature; or
- Friendly relations with any foreign State; or
- Harmony between religious,
- Racial, social, linguistic or regional groups, castes or communities.

POWER TO PROHIBIT PAYMENT OF CURRENCY RECEIVED IN CONTRAVENTION OF THE ACT

Section 10 provides that where the Central Government is satisfied, after making such inquiry as it may deem fit, that any person has in his custody or control any article or currency or security, whether Indian or foreign, which has been accepted by such person in contravention of any of the provisions of this Act, it may, by order in writing, prohibit such person from paying, delivering, transferring or otherwise dealing with, in any manner whatsoever, such article or currency or security save in accordance with the written orders of the Central Government and a copy of such order shall be served upon the person so prohibited in the prescribed manner

CHAPTER 9 FOREIGN EXCHANGE MANAGEMENT ACT, 1999

The Foreign Exchange Management Act, 1999 (**FEMA**) has been introduced as a replacement for earlier Foreign Exchange Regulation Act (FERA). FEMA became an act on the 1st day of June, 2000.

FEMA is applicable to all parts of India. The act is also applicable to all **branches, offices and agencies** outside India owned or controlled by a **person who is a resident of India** and all **branches, offices and agencies** inside India owned or controlled by a **person resident outside India**.

OBJECT OF THE ACT

The main objective behind the Foreign Exchange Management Act (1999) is:-

- (a) To consolidate and amend the law relating to foreign exchange.
- (b) To facilitate external trade and payments.
- (c) To promote the orderly development and maintenance of foreign exchange market in India.

REASON FOR REPLACEMENT OF FERA

FEMA was introduced because the FERA didn't fit in with post-liberalisation policies. A significant change that the FEMA brought with it, was that it made all offenses regarding foreign exchange civil offenses, as opposed to criminal offenses as dictated by FERA.

Unlike other laws where everything is permitted unless specifically prohibited, **under FERA nothing was permitted unless specifically permitted**. Hence the tenor and tone of the Act was very drastic.

It provided for imprisonment of even a very minor offence. **Under FERA, a person was presumed guilty unless he proved himself innocent** whereas under other laws, a person is presumed innocent unless he is proven guilty.

FEMA has brought a new management regime of Foreign Exchange consistent with the emerging frame work of the World Trade Organisation (WTO).

STRUCTURE OF FEMA

FEMA, 1999 contains only basic legal framework. **Sec. 46 of FEMA authorizes Central Govt. to make Rules** and **Sec. 47 authorizes RBI to make Regulations** to carry out the provisions of the Act.

Accordingly, the Central Govt. has issued number of Rules and RBI has issued number of Regulations for various purposes. The practical aspects of FEMA are covered by these Rules and Regulations.

AUTHORITIES UNDER FEMA

Reserve Bank of India is the overall controlling authority in respect of FEMA. In addition to **RBI, Directorate of Enforcement** has also been formed for the implementation of FEMA.

The FEMA head-office, also known as **Enforcement Directorate** is situated in New Delhi and is headed by a Director. The Directorate is further divided into 5 zonal offices in Delhi, Mumbai, Kolkata, Chennai and Jalandhar and each office is headed by a **Deputy Director**. Each zone is further divided into **7 sub-zonal offices** headed by the **Assistant Directors** and 5 field units headed by **Chief Enforcement Officers**.

DEFINITIONS

SECTION 2

1. FOREIGN EXCHANGE Sec2(n)

Foreign exchange means foreign currency and includes the following :-

- (a)** Deposits, credits and balance payable in any foreign currency
- (b)** Drafts, travelers' cheques, letters of credit or bill of exchanges expressed or drawn in Indian currency but payable in foreign currency

(c) Drafts, travelers' cheques, letters of credit or bill of exchange drawn by banks, institutions or person outside India payable in Indian currency.

2. FOREIGN SECURITY Sec 2(o)

Foreign security means any security in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency. Further, the term foreign security also includes security expressed in foreign currency but where redemption or any form of return such as interest or dividend is payable in Indian currency.

3. PERSON Sec 2(u)

Person includes an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals, whether incorporated or not; any agency, office or branch owned or controlled by such persons. Further, it includes any other artificial person.

4. PERSON RESIDENT IN INDIA Sec 2(v)

Person resident in India means the following:-

1) A person residing in India for **more** than **182 days** during the course of preceding financial year but **does not include the following:-**

(A) Person who has gone out of India or who stays outside India for any of the following purposes:-

- (a) For taking up employment outside India;
- (b) For carrying on a business or vocation outside India;
- (c) For any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) Person who has come to India or who stays in India for any purpose other than the following purposes:

- (a) For taking up employment in India;

- (b) For carrying on a business or vocation in India;
- (c) For any purpose in such circumstances as would indicate his intention to stay in India for an uncertain period;

- 2) Any person or body corporate registered or incorporated in India;
- 3) An office, branch or agency established in India which is owned or controlled by a person resident outside India;
- 4) An office, branch, or agency established outside India, which is owned or controlled by a person resident in India.

5. PERSON RESIDENT OUTSIDE INDIA Sec 2(w)

It means a person who is not resident in India

6. REPATRIATE TO INDIA Sec 2(Y)

Repatriate to India means the realized foreign exchange should be sold to an authorized person in India in exchange for rupees. It also includes the holding of realized amount in an account with an authorized person in India to the extent notified by the Reserve Bank and includes use of the realized amount for the discharge of a debt or liability denominated in foreign exchange.

EXPLANATION

7. NON-RESIDENT INDIAN

Non-resident India means a person resident outside India who is a citizen of India or a person of Indian origin.

8. PERSON OF INDIAN ORIGIN

It means a citizen of any country **other than** Pakistan or Bangladesh if:-

- 1) He/she at any time held an Indian passport; or
- 2) He/she or either of his/her parents or grandparents were the citizen of India; or
- 3) He/she is a spouse of an Indian citizen or a spouse of a person referred to in the above clauses.

9. AUTHORIZED PERSON Sec 2(C)

Authorized person means an **authorized dealer, moneychanger, off shore banking unit** or **any other person for the time being authorized by RBI** for the following purposes:-

- (a) To deal in or transfer any foreign exchange of foreign security to any person;
- (b) To receive any payment by order or on behalf of any person resident outside India in any name;
- (c) To open the various accounts like Non-Resident (Ordinary) Rupee A/c, Non-Resident(External) Rupee A/c, Foreign Currency (Non-resident) A/c, Resident Foreign Currency A/c, Exchange Earners Foreign Currency A/c.
- (d) To sale or purchase foreign exchange for current account transactions;
- (e) To sale or purchase foreign exchange for permissible capital account transactions.

10. CAPITAL ACCOUNT TRANSACTIONS (Sec 2(e))

Capital account transaction **means a transaction**, which alters the assets and liabilities, **including contingent liabilities outside India of person resident in India (PRI)** or assets and liabilities in India of a person resident outside India (PROI).

Capital account transaction relate to movement of capital. These include transactions in property and investments and lending and borrowing money. **(i.e transaction referred to in Section 6(3)= 10 Transactions.**

11. CURRENT ACCOUNT TRANSACTIONS SEC 2(J)

Current account transaction means a transaction **other than** a capital account transaction.

Without prejudice to the generality of the foregoing provisions include the following:-

- (a) Payments due in connection with foreign trade, other current business, services and short-term banking and credit facilities in the **ordinary course of business(OCB)**;
- (b) Payments due as **interest on loans and as net income from investments**;
- (c) Remittances for **living expenses** of parents, spouse and children residing abroad;
- (d) **Expenses in connection with foreign travel, education and medical care** of parents, spouse and children.

REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE

Chapter II of the Act containing Sections 3-9 deals with Regulation and Management of Foreign Exchange.

DEALINGS AND HOLDINGS IN FOREIGN EXCHANGE, FOREIGN SECURITY, ETC. DEALING IN FOREIGN EXCHANGE, ETC**SECTION-3**

Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall:—

- (a) Deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
- (b) Make any payment to or for the credit of any person resident outside India in any manner;
- (c) Receive otherwise than through an authorised person, any payment by order or on behalf of any person resident outside India in any manner;

Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

- (d) Enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.



Explanation.—For the purpose of this clause, “**financial transaction**” **means** making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

HOLDING OF FOREIGN EXCHANGE, FOREIGN SECURITY & IMMOVABLE PROPERTY
SECTION-4

Save as otherwise provided in the Act, rules or regulations, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

FOREIGN EXCHANGE MANAGEMENT (POSSESSION AND RETENTION OF FOREIGN CURRENCY) REGULATIONS, 2000

Foreign exchange can be possessed and retained subject to the following conditions:-

(a) A person resident in India can retain foreign exchange up to US \$ 2000 or its equivalent in aggregate **provided:-**

(1) Such foreign exchange have been acquired by him while on a visit to any place out of India by way of payment for services or by way of honorarium or gift. or,

(2) Such foreign exchange have been acquired by him from any person resident outside India and who is on a visit to India for services rendered or by way of honorarium or gift or in settlement of any lawful obligation. or,

(3) Such foreign exchange represents unspent amount of foreign exchange acquired by him from an authorized person for travel abroad;

(b) Any person can possess foreign coins without limit;

(c) Authorized person can retain or possess foreign currency and coins within the scope of his authority without any limit

(d) A person resident in India **but not permanently resident in India** may possess foreign exchange **without any limit if such foreign exchange** was acquired, held or owned by him when he was resident outside India and has been brought into India in accordance with the prescribed regulations.

The expression '**not permanently resident**' means a person resident in India for employment of a specified duration or for a specific job or assignment, the duration of which does not exceed 3 years.

REALISATION, REPATRIATION AND HOLDING OF FOREIGN CURRENCY

FOREIGN EXCHANGE MANAGEMENT (REALISATION, REPATRIATION AND SURRENDER OF FOREIGN EXCHANGE) REGULATIONS, 2000

A person resident in India to whom any **foreign exchange is due or has accrued**, should take all reasonable steps to realise and repatriate to India such foreign exchange.

A person resident in India, to refrain from doing anything/taking any action, resulting in delay in receipt of foreign exchange in whole or part, or ceasing in whole or part the foreign exchange receivable by him.

MANNER OF REPATRIATION

After realisation of foreign exchange due, the person concerned **shall repatriate the same to India and sell it to an authorised person** or retain it to the specified extent in an account with an authorised dealer or use it for discharging a foreign exchange debt or liability to the specified extent.

TIME LIMIT FOR SURRENDER OF REALISED FOREIGN EXCHANGE

Any foreign exchange should be sold by the person concerned to an authorised person within a period of seven days of its receipt, and in all other cases within 90 days from the date of its receipt.

any person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person and **does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible**, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of **sixty days** from the date of its acquisition or purchase by him.

However, in case the foreign exchange acquired or purchased by any person from an authorised person is for the purpose of **foreign travel**, then, the unspent balance of such foreign exchange shall be surrendered to an authorised person:-

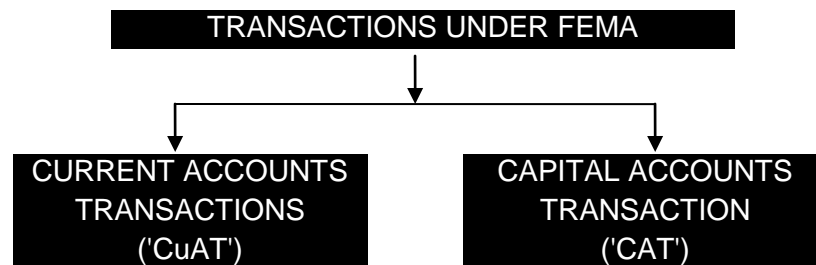
- (a) within **ninety days** from the date of return of the traveller to India, when the unspent foreign exchange is in the form of **currency notes and coins**; and
- (b) within **one hundred eighty days** from the date of return of the traveller to India, when the unspent foreign exchange is in the form of **travellers cheques**.

The provisions of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) **Regulation** are **not applicable** to foreign exchange in the form of currency of **Nepal or Bhutan**.

EXEMPTION FROM REALISATION OR REPATRIATION

Possession of foreign currency or coins by any person or class of persons, as the Reserve Bank may specify is not prohibited. A person or class of persons may hold and operate foreign currency account within the prescribed limits as may be specified by the Reserve Bank.

TRANSACTIONS UNDER FEMA



PROVISIONS RELATING TO CURRENT ACCOUNT TRANSACTIONS

DEALINGS IN CURRENT ACCOUNT TRANSACTIONS

SECTION 5

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed

Thus, *generally all current account transactions are free subject to reasonable restrictions*, which may be imposed by Central govt. in consultation with RBI.

FOREIGN EXCHANGE MANAGEMENT (CURRENT ACCOUNT TRANSACTIONS) RULES, 2000

➤ **PROHIBITION ON DRAWAL OF FOREIGN EXCHANGE FOR CERTAIN TRANSACTIONS**

Rule 3 prohibits the drawal of foreign exchange for the purposes of transactions;-

- (a) Specified in the **Schedule I** or
- (b) A travel to **Nepal and/or Bhutan** or
- (c) A transaction with a person resident in Nepal or Bhutan.

However, in the case of transaction with a person resident in Nepal and Bhutan, the prohibition may be exempted by RBI subject to such terms and conditions as it may consider necessary.

Schedule I enumerate the following situations in which the drawal of foreign exchange is prohibited:-

- (a) Remittance out of lottery winnings;
- (b) Remittance of income from racing/riding etc. or any other hobby;
- (c) Remittance for purchase of lottery tickets, banned/prescribed magazine, football pools, etc.
- (d) Payment of commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries abroad of Indian Companies.
- (e) Payment related to 'call back service' of telephone.
- (f) Remittance of interest income on funds held in Non-resident Special Rupee Scheme Account.

➤ **PRIOR APPROVAL OF GOVERNMENT OF INDIA FOR CERTAIN TRANSACTIONS**

Rule 4 requires prior approval of the Government of India for the transactions as specified in Schedule II. However, this does not apply to the cases where the payment is made out of funds held in **Resident Foreign Currency Account (RFC)** of the remitter.

In the following situations **prior Central Government approval** will be **necessary**:-

- (a) For cultural tours, permission of minister of HRD (department of education and cultural) is required.
- (b) Advertisements abroad by any public sector undertaking, State Government and central Government department for any purpose other than for promotion of tourism, foreign investment and for international bidding (exceeding US \$10000) will require approval from ministry of Finance (Department of Economic Affairs).
- (c) Payment for freight of vessels chartered by public sector undertakings or import by a government department or a public sector undertaking on CIF basis can be made with the approval of Ministry of Shipping.
- (d) Payment of import through ocean transport by government or a public sector undertaking on CIF basis requires approval of ministry of transport.
- (e) Multi-modal transport operators making payments to their agents abroad have to obtain registration certificate from Ministry of Transport.
- (f) Remittance of hiring charges of transponders by TV channels should be approved by Ministry of Information and Broadcasting and remittance of hiring of transponders by Internet Service providers is required to be approved by Ministry of Communication and Information Technology.
- (g) Remittance of container detention charges exceeding rates prescribed by Director General of Shipping requires approval from Ministry of Shipping.
- (h) Under foreign technology agreement, remittance of royalty exceeding 5% on local sales and exceeding 8% on exports and remittance of lump sum payment exceeding US \$2 million requires approval from Ministry of Industry and Commerce.
- (i) Remittance of prize money/sponsorship of sports activity abroad will require approval from Ministry of HRD (Department of Youth Affairs and Sports), if the remittance amount exceeds US \$1lakh. It may be noted that aforesaid permission is not required irrespective of amount, if remittance is made by International /National/ State level Sports Bodies.

**FOREIGN EXCHANGE MANAGEMENT (CURRENT ACCOUNT TRANSACTIONS)
AMENDMENT RULES. 2015**

PRIOR APPROVAL OF RBI FOR CERTAIN TRANSACTIONS

- **As per Rule 5** of the Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015, every drawal of foreign exchange for transactions included in **Schedule III** shall be governed as provided therein:
- Provided that this rule shall not apply where the payment is made out of funds held in **Resident Foreign Currency (RFC) Account** of the remitter.

Facilities for individuals:

1. Individuals can avail of foreign exchange facility for the following purposes within the limit of **USD 2,50,000 only**. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

- (i) Private visits to any country (except Nepal and Bhutan)
- (ii) Gift or donation.
- (iii) Going abroad for employment
- (iv) Emigration
- (v) Maintenance of close relatives abroad
- (vi) Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction

Provided that for the purposes mentioned at item numbers **(iv), (vii) and (viii)**, the individual **may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme** as provided in regulation 4 to FEMA Notification 1/2000-RB, dated the 3rd May, 2000 (here in after referred to as the said Liberalised Remittance Scheme) if it is so required by a country of emigration, medical institute offering treatment or the university, respectively:

Provided further that if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Provided also that for a person who is resident but not permanently resident in India and

(a) Is a citizen of a foreign State other than Pakistan; or

(b) Is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident:

Provided also that a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above.

However, this Rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

FACILITIES FOR PERSONS OTHER THAN INDIVIDUAL -

2. The following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India.

(i) Donations **exceeding (1%) one per cent. of their foreign exchange earnings** during the **previous three financial years** or **USD 5,000,000, whichever is less, for-**

(a) Creation of Chairs in reputed educational institutes,

(b) Contribution to funds (not being an investment fund) promoted by educational institutes; and

(c) Contribution to a technical institution or body or association in the field of activity of the donor Company.

(ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

(iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

(iv) Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.”

3. PROCEDURE

The procedure for drawal or remit of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance Scheme.

LIBERALISED REMITTANCE SCHEME (LRS)

Under Liberalised Remittance Scheme **allow remittances by a resident individual** up to **USD 250,000 per financial year** for any permitted current or capital account transaction or a combination of both.

If an individual has already remitted any amount under the LRS, then the **applicable limit for such an individual would be reduced from the present limit of USD 250,000** for the financial year by the amount already remitted. The permissible capital account transactions by an individual under LRS are:

- i) Opening of foreign currency account abroad with a bank;
- ii) Purchase of property abroad;
- iii) Making investments abroad;
- iv) Setting up Wholly owned subsidiaries and Joint Ventures abroad;
- v) Extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

The Scheme cannot be made use for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

REQUIREMENTS TO BE COMPLIED WITH BY THE REMITTER UNDER LRS

The resident individual seeking to make the remittances should furnish an application cum declaration in the prescribed format to the Authorised Dealer / full-fledged money changer (FFMC) concerned regarding the purpose of the remittances and declaration to the effect that the funds belong to the remitter and will not be used for the prohibited purposes referred to in Para 4 above.

Resident individuals can also purchase foreign exchange from a full-fledged money changer (FFMC) for private/business visits. Foreign exchange thus purchased from an FFMC should also be reckoned with in the overall LRS limit USD 250,000 and declared accordingly in the application-cum-declaration form submitted to the Authorise Dealer bank.

RULE 7 IN CASE OF INTERNATIONAL CREDIT CARD

Rule 7 provides that in case of use of International Credit Card for making payment by a person towards meeting expenses while such person is on visit outside India the prior approval of Reserve Bank shall not be required for transactions included in Schedule III.

It has been clarified that International Debit Cards can also be used by a resident for drawing cash or making payment to a merchant establishment overseas during his visit abroad for permissible current account transactions and itemwise limits as mentioned in the schedules.

FOREING EXCHANGE MANAGEMENT PROVISIONS RELATING TO CAPITAL ACCOUNT TRANSACTIONS

PROVISIONS RELATING TO CAPITAL ACCOUNT TRANSACTIONS

REGULATION OF CAPITAL ACCOUNT TRANSACTION

SECTION 6

Section 6 empowers RBI to specify, in consultation with the Central Government, the permissible capital account transactions and the limits up to which foreign exchange will be allowed for such transactions by making the appropriate regulations.

Thus, capital account transactions are permitted to the extent specifically permitted by RBI.

FOREIGN	EXCHANGE	MANAGEMENT	(PERMISSIBLE	CAPITAL	ACCOUNT
TRANSACTIONS) REGULATIONS, 2000					

➤ **PERMISSIBLE CAPITAL ACCOUNT TRANSACTIONS**

- (a) of a person resident in India(PRI)- SCH-I
- (b) of a person resident outside India(PROI)- SCH-II

A. Following are Permissible Capital Account Transactions of persons resident in India(PRI):-

- (a) investment in foreign securities.
- (b) foreign currency loans raised in India and abroad;
- (c) transfer of immovable property outside India
- (d) guarantees issued in favour of a person resident outside India;
- (e) export, import and holding of currency/currency notes;
- (f) loans and overdrafts from a person resident outside India;
- (g) maintenance of foreign currency accounts in India and outside India
- (h) taking out of insurance policy from an insurance company outside India;
- (i) loans and overdrafts to a person resident outside India;
- (j) remittance outside India of capital assets;
- (k) sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad.

B. following are Permissible Capital Account Transactions of persons resident outside in India(PROI):-

- (a) Investment in security of body corporate India
- (b) investment by way of contribution to the capital of a firm or a proprietorship concern or an association of persons in India.
- (c) Acquisition and transfer of immovable property in India.
- (d) Guarantee favour of, or on behalf of a person resident in India.
- (e) Import and export of currency/currency notes into/from India
- (f) Maintenance Foreign Currency accounts in India
- (g) Remittance outside India of capital assets in India.

➤ **PROHIBITED CAPITAL ACCOUNT TRANSACTIONS**

Except as otherwise provided in the Act, no person resident outside India is entitled to make investment in India, in any form, in any entity which is engaged or proposed to engage in the business of-

- (a) chit funds, or
- (b) Nidhi company, or
- (c) in agricultural or plantation activities,
- (d) or real estate business, or
- (e) construction of farm houses, or
- (f) Trading in **Transferable Development Rights (TDRs)**.

For this purpose real estate business includes development of townships, construction of residential/commercial premises, roads or bridges.

‘Trading in Transferable Development Rights (TDRs)’ means a certificate issued by the government to any person whose land is compulsorily acquired by the government without paying any monetary compensation.

MANNER FOR PAYMENT FOR INVESTMENT

The payment for investment are required to be made by remittance from abroad through normal banking channels or by debit to an account of the investor maintained with an authorised person in India in accordance with the regulation made by the Reserve Bank of India.

DECLARATION TO BE FURNISHED

Every person selling or drawing foreign exchange to or from an authorised person for a capital account transaction is required to furnish to Reserve Bank a declaration within the time specified in the regulations relevant to the transactions.

FOREIGN EXCHANGE MANAGEMENT (ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA) REGULATIONS, 2000

➤ ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY OUTSIDE INDIA

A person resident in India requires RBI permission for acquiring or transferring any immovable property situated outside India.

However, the approval of RBI is not required in the following cases:-

- (a) property held by a person resident in India who is a national of a foreign state;

- (b) property acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of the Reserve Bank.
- (c) Property acquired by way of gift or inheritance from a person (a) who was resident outside India, (b) acquired by a person resident in India on or before July 8, 1947 and continued to be held by him with the permission of RBI.

A person resident in India who has acquired immovable property outside India as above may transfer it by way of gift to his relative who is a person resident in India.

➤ **ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA**

ACQUISITION AND TRANSFER OF PROPERTY IN INDIA BY AN INDIAN CITIZEN RESIDENT OUTSIDE INDIA

An Indian citizen resident outside India may—

- (a) acquire any immovable property in India **other than** agricultural/plantation/ farm house,
- (b) transfer any property in India to a person resident in India, and
- (c) transfer any property **other than** agricultural or plantation property or farm house to an Indian citizen or to a person of Indian origin, resident outside India.

ACQUISITION AND TRANSFER OF PROPERTY IN INDIA BY A PERSON OF INDIAN ORIGIN

A person of Indian origin resident outside India may acquire any immovable property **other than** agricultural land/farm house/ plantation property in India. He may also acquire any immovable property in India **other than** agricultural land/farm house/plantation property by way of gift or Inheritance.

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China are debarred, without prior permission of the Reserve Bank, from acquiring any immovable property in India.

RESTRICTION ON ESTABLISHMENT OF BRANCH OR OFFICE IN INDIA

No person resident outside India shall, without the prior approval of the RBI, establish in India a branch office or liaison office or a project office or any other place of business by whatever name called. However, no approval is necessary for banking if such company has obtained necessary approval under the provisions of the Banking Regulations Act, 1944.

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China are debarred, without prior permission of the Reserve Bank, from establishing in India, a branch or liaison office or a project office or any other place of business by whatever name called.

ACQUISITION OF IMMOVABLE PROPERTY FOR CARRYING ON BUSINESS BY PROI

A person resident outside India who has established in India, a branch, office or other place of business for carrying on in India any activity, except a liaison office, may acquire any immovable property in India, which is necessary for or incidental to carrying on such activity, provided that all applicable laws, rules, regulations or directions for the time being in force are duly complied with; and the person files with the Reserve Bank a declaration in the **Form IPI** not later than **ninety days** from the date of such acquisition.

REPATRIATION OF SALE PROCEEDS

A person resident outside India, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property.

In the event of sale of immovable property **other than agricultural land/farm house/plantation property** in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied—

- (a) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force
- (b) the amount to be repatriated does not exceed the amount paid for acquisition of the immovable property
- (c) In the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

FOREIGN EXCHANGE MANAGEMENT ACT 1999 PART II

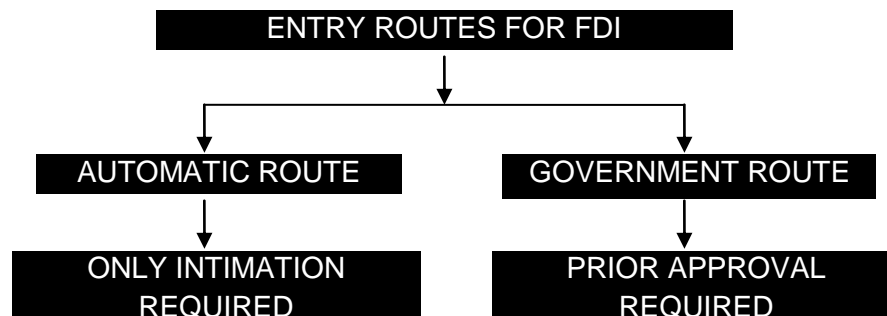
FOREIGN DIRECT INVESTMENTS IN INDIA

Foreign Investment in India is governed by the FDI policy announced by the Government of India and the provisions of the Foreign Exchange Management Act (FEMA) 1999. Reserve Bank has issued Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 in this regard which has been amended from time to time.

ENTRY ROUTES FOR INVESTMENTS IN INDIA

Foreign Direct Investments (FDI) can be made under two routes:—

- (a) Automatic Route and
- (b) Government Route.



Under the Automatic Route, the foreign investor or the Indian company does not require any approval from the Reserve Bank or Government of India for the investment. Only an intimation is required to be given to RBI.

If the proposed foreign investment is beyond the sectoral limits stipulated and beyond which approval route is permitted or where automatic route is not permitted, prior approval of the Government of India, Ministry of Finance, Foreign Investment Promotion Board (FIPB) is required Under the Government Route.

TYPE OF INSTRUMENTS OF INVESTMENT

Foreign direct investment may be by way of investment in equity shares, fully compulsorily convertible preferences shares, fully compulsorily convertible debentures ADR/GDR and FCCB.

Foreign investment in shares in any industry up to 100% is permitted except the following:-

1. proposals falling under compulsory industrial licensing

2. Investment in defence sector

License for manufacture of arms and ammunition can be granted with foreign direct investment up to 26%. The management of the company as well as the CEO should be in the hands of resident Indians.

3. Proposals relating to acquisition of shares in favour of a foreigner, non-resident Indians

4. Investments in Small Scale Industrial units

A foreign investor can invest in an Indian company which is a small scale industrial unit provided it is not engaged in any activity which is prohibited under the FDI policy. Such investments are subject to a limit of 24% of paid-up capital of the Indian company/SSI Unit.

An India company may issue shares or convertible debentures to a person resident outside India subject to the following conditions:-

1. The activity of the issuer company should not require an Industrial License in terms of the provisions of IDRA,1956 or in terms of the locational policy of new industrial policy, 1991;
2. The share or convertible debentures are not being issued by the India Company with a view to acquire the existing shares of an Indian company.

ISSUE OF RIGHTS/BONUS SHARES

FEMA provisions allow Indian companies to freely issue Right / Bonus shares to existing non-resident share-holders, subject to adherence to sectoral cap, if any.

The price of shares offered on rights basis by the Indian company to non-resident shareholders shall not be lower than the price at which such shares are offered to resident shareholders.

ACQUISITION OF SHARES UNDER SCHEME OF AMALGAMATION/MERGER

Mergers and amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/amalgamation.

Once the scheme of merger or amalgamation of two or more Indian companies has been approved by a Court the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India subject to the condition that:-

- (a) The percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap.
- (b) The transferor company or the transferee or the new company is not engaged in activities which are prohibited in terms of FDI policy.

ISSUE OF SHARES UNDER EMPLOYEES STOCK OPTION SCHEME

Indian companies are allowed to issue shares under the Employees Stock Option Scheme (ESOPs), to its employees or employees of its joint venture or wholly owned subsidiary abroad, other than citizens of Pakistan.

Shares under ESOPs can be issued subject to the condition that:-

- (a) The scheme has been drawn in terms of relevant regulations issued by the Securities and Exchange Board of India; and
- (b) The face value of the shares to be allotted under the scheme to the non-resident employees does not exceed 5 per cent of the paid-up capital of the issuing company.
- (c) The issuing company is required to report the details of such issues to the concerned Regional Office of the Reserve Bank, within 30 days from the date of issue of shares under ESOPs.

REPORTING OF FDI

An Indian company receiving investment from outside India for issuing shares/convertible debentures/preference shares under the FDI Scheme is required to report

the details of the inflow to the Reserve Bank not later than **30 days from the date of receipt**.

Details to be reported are:-

- (a) Name and address of the foreign investor/s,
- (b) Date of receipt of funds in foreign currency and its rupee equivalent,
- (c) Name and address of the Authorised Dealer through whom the funds have been received, and
- (d) Details of Government approval for the investment, if any.

REPORTING OF ISSUE OF SHARES

After issue of shares/convertible debentures/preference shares, the Indian company is required to file **Form FC-GPR** not later than **30 days** from the date of issue. **Part A** of **Form FC-GPR** has to be duly filled up and signed by the Authorised Signatory and submitted to the Authorised Dealer of the company, who is required to forward it to the Reserve Bank. While forwarding the Form, the Authorised Dealer is required to enclose a KYC Report on the foreign investor.

Along with Part A of FC-GPR, the following documents are required to be attached by the company:-

- (a) A **certificate from the Company Secretary** of the company certifying that:-
 - (i) all the requirements of the Companies Act, 1956 have been complied with;
 - (ii) terms and conditions of the Government approval, if any, have been complied with;
 - (iii) the company is eligible to issue shares under these Regulations; and
 - (i) the company has all original certificates issued by authorised dealers in India evidencing receipt of amount of consideration.

- (b) A **certificate from Statutory Auditors or Chartered Accountant** indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

Both the above reports have to be submitted to the concerned Regional Office of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

Part-B of **FC-GPR** is required to be filed on an **annual basis** with the Reserve Bank. This filing has to be done in the month of **June** every year, for all outstanding investment by

way of FDI as well as Portfolio/other investments and by way of re-invested earnings for the previous April to March period.

TRANSFER OF SHARES AND CONVERTIBLE DEBENTURES

Foreign investors can also invest in Indian companies by purchasing/ acquiring existing shares from Indian shareholders or from other non-resident shareholders.

General permission has been granted to non-residents / NRIs for acquisition of shares by way of transfer subject to the following:-

- (a) A person resident outside India (Other than NRI and OCB) may transfer by way of sale or gift the shares or convertible debentures to any person resident outside India (including NRIs).
- (b) NRIs and erstwhile OCBs may transfer by way of sale or gift the shares or convertible debentures held by him or it to another NRI.

ISSUE OF SHARES BY INDIAN COMPANIES UNDER ADR /GDR

Indian companies are permitted to raise foreign currency resources abroad through the issue of ADRs/GDRs, in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and guidelines issued by the Central Government thereunder from time to time.

The company can issue ADRs/GDRs if it is eligible to issue shares to persons resident outside India under the FDI Scheme.

There are no end-use restrictions except for a ban on deployment / investment of such funds in Real Estate or the Stock Market. There is no monetary limit upto which an Indian company can raise ADRs/GDRs.

The **pricing** of ADR/GDR issues should be made at a price **not less** than the **higher** of the following two averages:

- (a) The average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date;
- (b) The average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the relevant date.

The “relevant date” means the date thirty days prior to the date on which the meeting of the general body of shareholders is held, in terms of section 81 (IA) of the Companies Act, 1956, to consider the proposed issue.

The ADR/GDR proceeds can be utilised for first stage acquisition of shares in the disinvestment process of Public Sector Undertakings / Enterprises and also in the mandatory second stage offer to the public in view of their strategic importance.

REPORTING OF ADR/GDR ISSUES

The Indian company issuing ADRs / GDRs has to furnish to the Reserve Bank, full details of such issue in the form prescribed, within 30 days from the date of closing of the issue. The company should also furnish a quarterly return to Reserve Bank within 15 days of the close of the calendar quarter.

DIRECT INVESTMENT OUTSIDE INDIA

In terms of section 6(3) of FEMA, the Direct investments by residents in Joint Venture (JV) and Wholly Owned Subsidiary (WOS) has been allowed. the Reserve Bank has , issued Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004

PROHIBITIONS

Indian parties are prohibited from making investment in a foreign entity engaged in real estate or banking business.

AUTOMATIC ROUTE

An Indian party has been permitted to make investment in overseas Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS)subject to following conditions:-

- (a) the total financial commitment of the Indian party should not exceed 400 per cent of the net worth of the Indian party (corporates) as on the date of the last audited balance sheet.

This ceiling will not be applicable where the investment is made out of balances held in Exchange Earners' Foreign Currency account (EEFC A/C)of the Indian party or out of funds raised through ADRs/GDRs.

- (b) The Indian Party is required to report such acquisition in form ODI to the AD Bank for report to the Reserve Bank within a period of 30 days from the date of the transaction
- (c) The direct investment is made in overseas JV/WOS engaged in bonafide business activity.
- (d) The Indian party is not on RBI's caution list or under investigation of enforcement directorate.
- (e) The automatic route facility is not available for investment in Pakistan.

GENERAL PERMISSION IN CERTAIN CASES

Residents are permitted to acquire a foreign security, if it represents: –

- (a) **Qualification shares** for becoming a director of a company outside India provided it does not exceed 1 per cent of the paid up capital of the overseas company.
- (b) **Rights shares** provided that the rights shares are being issued by virtue of holding shares in accordance with the provisions of law for the time being in force;

EXPORT OF GOODS AND SERVICES

Export of goods and services is regulated by the provisions of Sections 7 and 8 of FEMA, 1999 and Foreign Exchange Management (Export of Goods and Services) Regulations, 2000.

Export includes the taking or sending out of India goods by land, sea or air, on consignment or by way of sale, lease, hire purchase or under any other arrangement by whatever name called. In the case of software, export also includes transmission of any data through any electronic medium.

In general, all exports are free.

CERTAIN EXPORTS REQUIRING PRIOR APPROVAL

Generally, exports are free but in the case of following exports, prior approval of RBI is required:

(a) Export of goods on lease, hire, etc.

No person is allowed, except with the prior permission of the reserve bank, to take or send out by land, sea or air any goods from india to any place outside india on lease or hire or under any arrangement or in any other manner other than sale or disposal of such goods.

(b) Exports under trade agreement/rupee credit etc.

Export of goods under special arrangement between the central government and government of a foreign state, are governed by the terms and conditions set out in the relative public notices issued by the trade control authority in india and the instructions issued from time to time by the reserve bank.

The export under the line of credit extended to a bank or a financial institution operating in a foreign state by the exim bank for financing exports from india, are governed by the terms and conditions advised by the reserve bank to the authorised dealers from time to time.

(c) Counter trade

Any arrangement involving adjustment of value of goods imported into india against value of goods exported from india, requires prior approval of the Reserve Bank.

DECLARATION AS REGARDS EXPORT OF GOODS AND SERVICES

Every exporter of goods or software, in physical form or through any other form either directly or indirectly to any place outside India, other than Nepal and Bhutan, is required to furnish to the specified authority a declaration in the prescribed form within **21 days** of export.

In respect of export of services to which none of the forms specified apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise

the amount of foreign exchange which becomes due or accrues on account of such export and to repatriate the same to India.

EXPORT OF GOODS OR SERVICES WITHOUT DECLARATION

Export of goods or services may be made without furnishing the declaration in the following cases, namely:-

- (a) trade samples of goods and publicity material supplied free of cost;
- (b) personal effects of travellers, whether accompanied or unaccompanied;
- (c) goods or software accompanied by a declaration by the exporter that they are not more than twenty five thousand rupees in value;
- (d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than one lakh rupees in value;

MANNER OF PAYMENT OF EXPORT VALUE OF GOODS

Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000.

TIME LIMIT FOR REALISATION OF EXPORT VALUE OF GOODS/SOFTWARE

The amount representing the full export value of goods or software exported is required to be realised and repatriated to India within six months from the date of export.

However in the following case the stipulation of period of realization and repatriation to India shall not apply:-

- 1) In case of star export houses, export value can be realized within 12 months.
- 2) Export oriented units and units in FHTP/STP/BTP can realize and repatriate full value of exports proceeds within 12 months from the date of export.
- 3) In the case of units in SEZ, there is no time limit for realization of export proceeds.

PAYMENT FOR THE EXPORT

In respect of export of any goods or software for which a declaration is required to be furnished no person shall, except with the permission of the Reserve Bank or authorized dealer, of or refrain from doing anything or take or refrain from taking any action which has the effect of securing:-

- (a) That the payment for the goods or software is made otherwise than in the specified manner; or
- (b) That the payment is delayed beyond the period specified under these Regulations; or
- (c) That the proceeds of sale of the good or software do not represent the full export value of the goods or software.

PROJECT EXPORTS

Regulation 18 deals with project exports and provides that where the export of goods or services is proposed to be made:-

- In Export of engineering goods on deferred payment terms;
- in execution of a turnkey project or,
- a civil construction contract,

the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval to the authority which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank from time to time.

FOREIGN EXCHANGE MANAGEMENT ACT 1999 PART III

ADJUDICATION AND APPEAL

➤ DIRECTORATE OF ENFORCEMENT

Section 36 of the act empowers the central government to establish a directorate of enforcement with a director and other officers or class of officers, for the purposes of the enforcement of the act.

➤ APPOINTMENT OF ADJUDICATING AUTHORITY

Section 16 empowers the central government to appoint by notification in the official gazette as many adjudicating authorities as it may think fit for holding enquiries under section 13. The central government is, however under obligation to specify the jurisdiction of the adjudicating authority.

There are 3 levels of Adjudicating Authorities i.e. Deputy Director, Additional Director and Director of Directorate of Enforcement in the ascending order of hierarchy. The assistant Director of Directorate of Enforcement normally makes a complaint before the Adjudicating Authorities but sometimes he can also act as Adjudicating Authority.

The jurisdiction of various Adjudicating Authorities is as follows:-

<u>Authority</u>	<u>Jurisdiction</u>
Deputy Director	Cases involving amount up to Rs. 75 lakhs
Additional Director	Cases involving amount more than Rs. 75 lakhs and up to Rs.1 crore
Director	Cases involving amount more than Rs. 1 core

The adjudicating authority has been empowered to hold any enquiry on a complaint made in writing by an officer authorised by a general or special order by the central

government. The officers so appointed shall exercise the like powers which are conferred on income tax authorities under the income tax act, 1961, subject to such conditions and limitations as laid down under that act.

In case, a complaint has been made in respect of a person alleged to have committed the contravention, such person shall be given a reasonable opportunity of being heard before imposing any penalty under section 13.

➤ APPEAL TO SPECIAL DIRECTOR (APPEALS)

Section 17 of the act provides for appointment of one or more special directors (appeals) to hear appeals against the orders of the adjudicating authorities.

The appeal shall be filed in **Form No. 1** (in triplicate) of Foreign Exchange Management Rules, 2000 along with a **fee of Rs. 5000** within **45 days** from the date of the receipt of the order by aggrieved person.

The special director (appeals) has however, been empowered to entertain appeal after the expiry of the said period of forty five days.

➤ ESTABLISHMENT OF APPELLATE TRIBUNAL

Under section 18, the central government is empowered to establish an appellate tribunal, by a notification in the official gazette, to hear appeals against the orders of adjudication authorities and special director (appeals).

The central government or any person aggrieved by the orders of adjudicating authority or special director (appeals) may prefer an appeal to the appellate tribunal.

➤ APPEAL TO HIGH COURT

A right to appeal to high court lies with the appellant who is aggrieved by the decision of the tribunal. Such appeal must be filed within **60 days** from the date of communication of the decision or order of the tribunal.

The appeal to the high court can be made on any **question of law** arising out of such order. A relaxation for a maximum period of sixty days for making an appeal may be granted by the high court, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the specified period.

CONTRAVENTION AND PENALTIES

Section 13 provides that any person contravening any provision of the act, shall be liable for penalty upon adjudication, which may extend upto thrice the sum involved in such contravention where such amount is quantifiable or upto two lakh rupees where the amount is not quantifiable. If the contravention continues, the penalty of rs. 5,000 per day during the period in which the contravention continues, shall be imposed.

➤ CONTRAVENTION BY COMPANIES

where the person committing the contravention of the act or rules happened to be a company, every person who at the time the contravention was committed, was **in charge** of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly.

However, no such persons shall be deemed to be guilty of committing any offence if he proves that such contravention took place without his knowledge or that he exercised adequate steps to prevent such contravention.

In case the contravention is committed by a company and it is proved that such contravention is committed with the knowledge, consent and connivance or is attributed to the neglect on the part of any **director, manager or secretary or other officer** of the company, they will also be deemed to be guilty of contravention and liable to be proceeded against and punished accordingly.

➤ ENFORCEMENT OF THE ORDERS OF ADJUDICATING AUTHORITY

In terms of section 14 of the act, if any person fails to make full payment of the penalty imposed within a period of ninety days from the date on which the notice of payment of such penalty is served on him, he shall be liable for **civil imprisonment**.

COMPOUNDING OF CONTRAVENTIONS

Section 15 empowers the directorate of enforcement or officers of the directorate of enforcement and of the reserve bank to compound the offences. This section provides that contravention under section 13 may be compounded **within 180 days** from the date of receipt of application. Sub-section (2) provides that where the contravention has been compounded, the accused person is relieved from further proceedings for the contravention.

Foreign exchange (compounding proceedings) rules, 2000 deals with procedure for compounding of contravention of the provisions of the act.

Rule 3 defines the **compounding authority** as to mean the persons authorised by the central government namely:-

- (a) An officer of the **enforcement directorate** not below the rank of deputy director or deputy legal advisor (dla).
- (b) An officer of the **RBI** not below the rank of the assistant general manager.

➤ **POWERS OF RESERVE BANK TO COMPOUND CONTRAVENTION**

Rule 4 empowers the RBI (*an officer of the RBI not below the rank of the **assistant general manager***) to compound only quantifiable contravention committed by any person of the provisions of section 7 or section 8 or section 9, or third schedule to the foreign exchange management (current account transactions) rules, 2000 in the following manner:-

<u>Sum involved in contravention</u>	<u>Adjudicating authority</u>
5 lakhs rupees or below	assistant general manager of the RBI
more than rupees 5 lakhs but less than rupees 20 lakhs	deputy general manager of RBI
20 lakhs or more but less than rupees 50 lakhs	general manager of RBI
rupees 50 lakhs or more	chief general manager of the RBI

The benefit of above provisions shall not be available in case a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules.

➤ **POWERS OF ENFORCEMENT DIRECTORATE TO COMPOUND CONTRAVENTION**

Rule 5 specifies the cases in which only quantifiable contraventions of the provisions of the act [**other than** section 7 or section 8 or section 9 or third schedule to the foreign exchange (current account transactions) rules, 2000] can be compounded by the enforcement directorate(*An officer of the **enforcement directorate** not below the rank of deputy director or deputy legal advisor*) in the following manner:-.

<u>Sum involved in contravention</u>	<u>Adjudicating authority</u>
5 lakhs rupees or below	deputy director of the directorate of enforcement

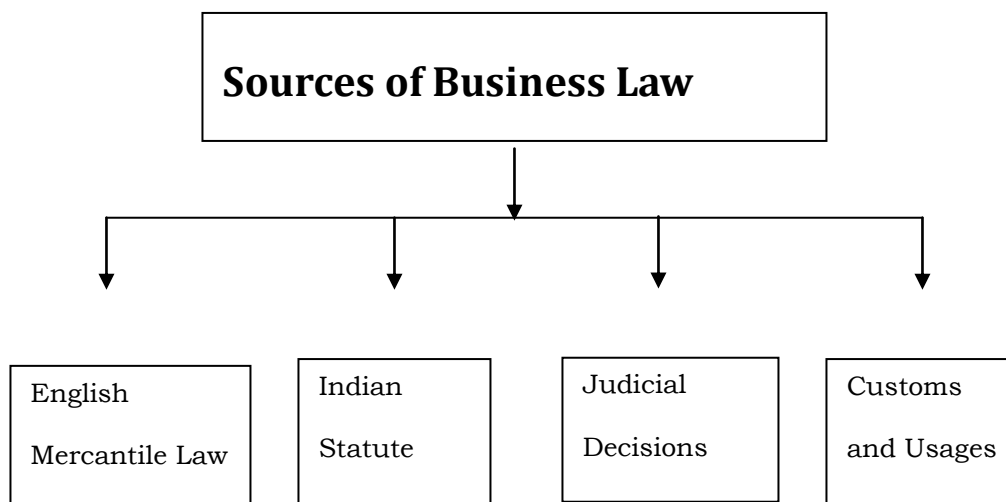
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more than rupees 5 lakhs but less than rupees 10 lakhs		additional director of the directorate of enforcement
10 lakhs or more but less than rupees 50 lakhs		special director of the directorate of enforcement
rupees 50 lakhs or more, but less than rupees 1 crore		special director with deputy legal advisor of the directorate of enforcement
1 crore rupees or more		director of enforcement with special director of the enforcement directorate

The benefit of above provisions shall not be available in case a contravention committed by any person within a period of **three years** from the date on which a similar contravention committed by him was compounded under these rules.

CHAPTER 10 – INDIAN CONTRACT ACT, 1872**Meaning of Law**

Law means set of **rules** and principles either enforced by an **authority** or self-imposed by the member of the society to control and regulate people's behaviour with a view to secure justice, peaceful and social security. There are different **branches** of law : International law, constitutional law, criminal law, company law, business law etc.

Business law is a branch of law, which comprises law **concerning** trade, industry and commerce. The scope of Business Law has enormously widened. It includes laws relating to contracts, Sale Of Goods, Partnership, Companies, Negotiable Instruments, etc. One should know the law to which he is or she is concerned with because, “**Ignorance of law is no excuse**”.

**Let us discuss them one by one.**

(a) English Mercantile Law: English laws are the **primary** sources of Indian Mercantile Law. English laws are **based** on customs and usages of merchants in England.

(b) Indian Statute Law: The various Acts **passed** by the Indian Legislature are in the **main** sources of mercantile law in India, e.g. Indian Contract Act, 1872, The Sale Of Goods Act, 1930, The Indian Partnership Act, 1932, The Negotiable Instruments Act 1881, The Companies Act, 1956.

(c) **Judicial Decisions:** The **past** judicial **decision** of English courts and Indian courts are also **one** of the sources of law. **Wherever** the law is **silent** on a point, the judge has to **decide** the case according to the **principle** of equity, justice and good conscience. The courts while deciding similar cases before them follow the past judicial decisions.

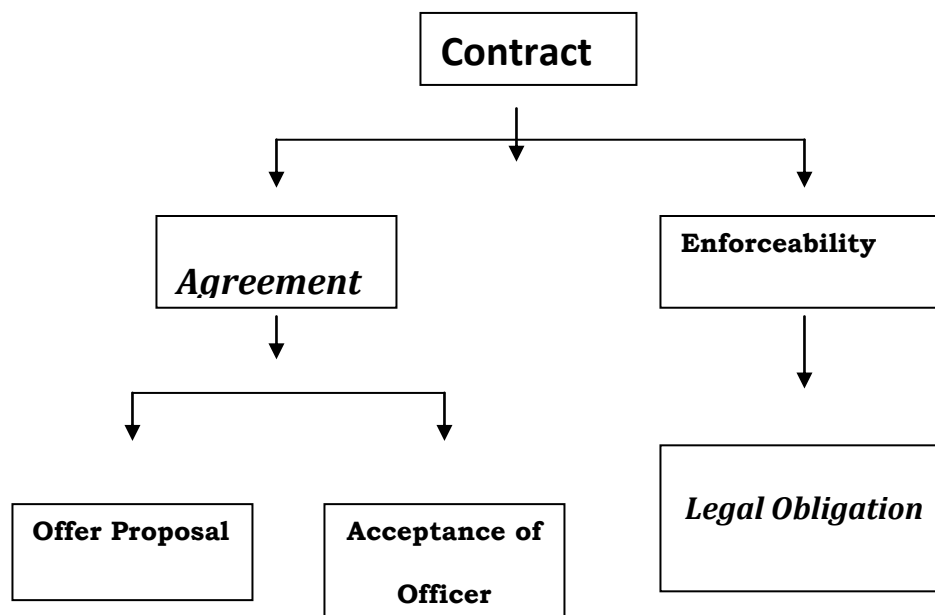
(d) **Customs and Usages** The customs and usages of a trade are **also** one of the sources of mercantile law in India. These **customs and usages** govern the merchants of a trade in their dealing with **each** other., Some **Acts** passed by the Indian Legislature recognizes the importance of such customs and usages.

INDIAN CONTRACT ACT, 1872

Meaning And Nature Of Contract

- **The law of contract** is contained in Indian Contract Act, 1872.
- It extends to throughout India except the State of **Jammu and Kashmir**.
- It came into force on **1st September 1872**.
- **There** are separate **Acts** related to **Negotiable Instruments, Transfer of Property, Sale of Goods, Partnership, Insurance etc.**

► Scheme of the Act



ESSENTIALS OF A VALID CONTRACT**1. Offer and Acceptance**

There must be **lawful** offer and lawful **acceptance**.

Lawful **implies** that both must satisfy the **requirements** of Contract Act.

- **Intention to Create Legal Relations:**

Agreement should **be** attached by **legal** consequences & create legal obligation.

Duties and **rights** should be legal and not merely moral.

- **Lawful Consideration:** **Price** paid by one party **for the promise** of the other is known as consideration.

It is referred to as “**quid pro quo**” means something in **return**.

4. Free Consent: There must be **free consent** of the **parties** to the contract. According to **Section 14.**, consent is said to be **free** when it is **not** caused by (i) **coercion**, (ii) **undue influence**, (iii) **fraud**, (iv) **misrepresentation**, or (v) **mistake**.

Example: X threatens to kill Y if he does not sell his house to X. Y agrees to sell his house to X, In this case, Y’s consent has been obtained by coercion and therefore, it cannot be regarded as free.

5. Capacity of Parties: The **parties** to an agreement **must** be competent to contract. According to **Section 11 of Indian Contract Act, 1872**, “every **person** is competent to contract who is of the age of **majority** according to the law to which he is subject and who is of **sound mind** and is **not disqualified** from contracting by any law to which is subject.”

Example: X, a minor borrowed Rs.8000/- from Y and executed mortgage of his property in favour of the lender. This was not a valid contract because X is not competent to contract. Therefore, the mortgage was not valid and the money advanced to minor could not be recovered.

6. **Lawful Object:** The **object** of an agreement must be **lawful**. According to **Section 23** “the object is considered lawful unless it is **forbidden** by law or is **fraudulent or involves or implies injury** to the person or property of person or is **immoral** or is opposed to public policy.”

Example I: X, Y and Z enter into an agreement for the division among them y fraud. The agreement is void because its object is unlawful

7. **Agreement not Expressly Declared Void:** The agreement must not have been expressly declared void under the provision of **Sec 24 to 30** of Indian Contract Act, 1872. Under these provisions, **agreement** in restraint of marriage, agreement is **restraint** of legal proceedings, and agreement in restraint **of trade** and agreement **by way of wager** have been expressly **declared void**.

Example I: X and Y carried on business in Chandni Chowk area of Delhi. X promised to sop business in that locality if Y paid Rs.1,00,000/-. X stopped his business but Y did not pay hi the promised money. It was held that X was not entitled to recover anything because the agreement was in restraint of trade and as such void.

8. **Certainty of Meaning:** The terms of the agreement must be certain and unambiguous. **According to Section 29 of the Indian Contract Act, 1872** agreements the meaning of which is not certain or capable of being made certain are void.

Example I: X a dealer in different types of oils agreed to sell 100 tones of oil to Y. This agreement is void on the ground of uncertainty because it is not clear what kind of oil is intended to be sold.

9. **Possibility of Performance:** The terms of the agreement must be such as are capable of performance. According to **Section 56**, “an agreement to do an impossible act is void.”

Example I: X agrees with Y to discover treasure by magic and Y agrees to pay Rs,1000/- D X. This agreement is void because it is an agreement to do an impossible act.

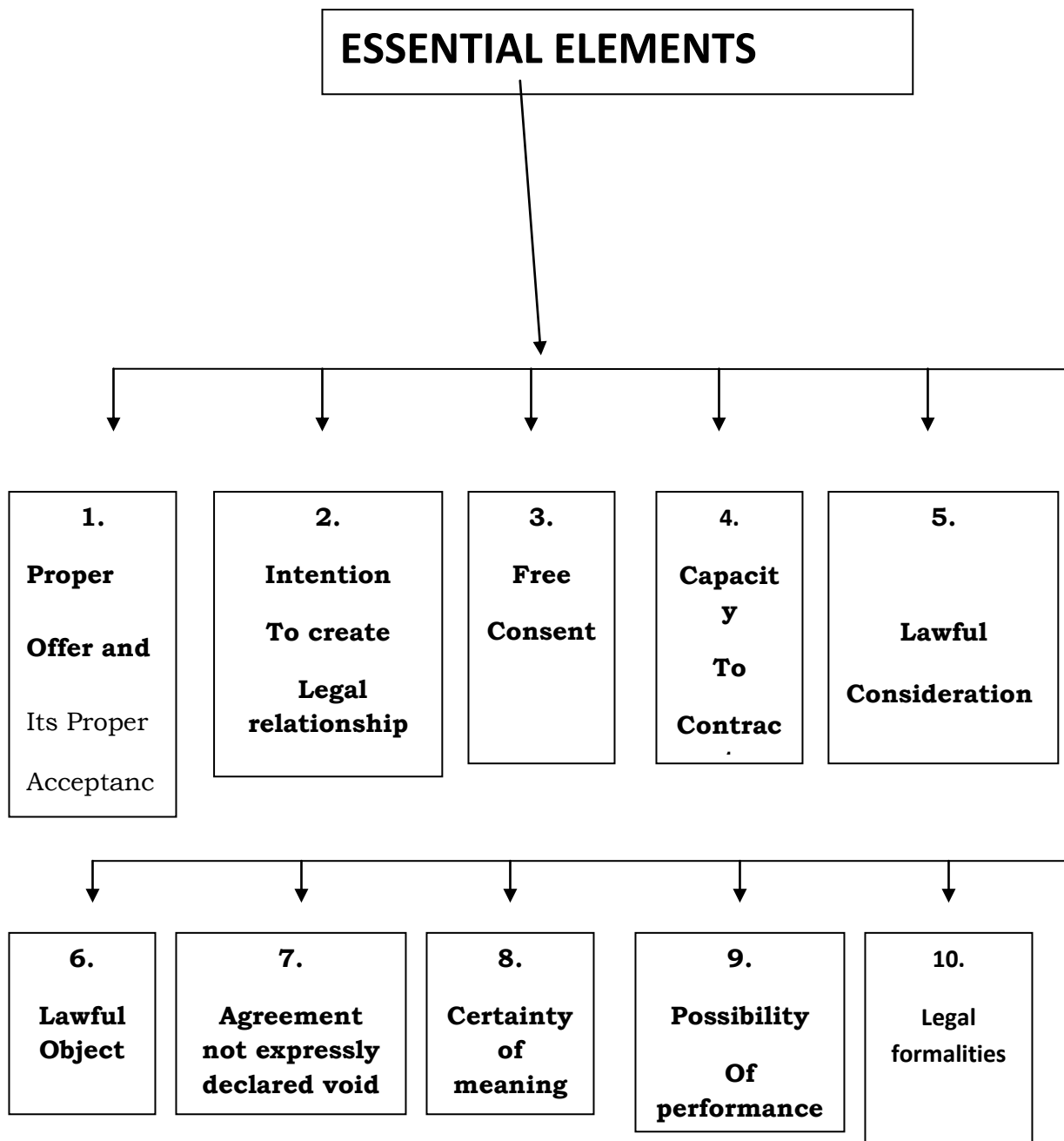
Example II: X agrees with Y to enclose some area between two parallel lines and Y agrees to pay Rs.1000/- to X. This agreement is void because it is an agreement to do an impossible act.

10. Legal Formalities: The agreement must **comply** with necessary formalities as to **writing, registration, stamping etc.** If any required in order to make it enforceable by law.

Example I: An oral agreement for arbitration is unenforceable because the law requires that arbitration agreement must be in writing.

Example II: An oral agreement for sale of immovable property is unenforceable because the law requires that such agreement must be in writing and registered.

Conclusion:- All the aforesaid elements must be present in an agreement in order to create a valid contract. If anyone of them is missing or absent, the agreement will not be enforceable by law.



OFFER AND ACCEPTANCE

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

Essential Elements: An offer involves the following essential elements:

(a) It must be made by one person to another person. In other words, there can be no proposal by a person to himself.

Example: X says to Y that he wants to sell his car to himself for Rs.1 lakh. There is no proposal because there can be no proposal by a person to himself.

(b) It must be an expression of or willingness to do (**i.e. positive act**) or to abstain from doing something (**i.e. negative act**).

Example I: X offers to sell his car to Y for Rs, 1 lakh. It is a positive act on the part of X.

Example II: X offers not to file a suit against Y if Y pays X the outstanding amount of Rs,1 lakh. It is a negative act on the part of X.

(c) It must be made with a view to obtain the consent of that other person to proposed act or abstinence.

Example: X jokingly says to Y “I am ready to sell my car for Rs.1,000.” Y, knowingly that X is not serious in asking the offer, says “I accept your offer.” In this case, X’s offer was not the real offer, as he did not make it with a view to obtain the consent of Y,

OFFERER (or ‘PROMISOR’) AND OFFEREE (or PROMISEE)

Meaning of Offer: The person making the proposal is called the ‘offeror’ or ‘proposer’.

Meaning of Offeree: The person to whom the proposal is made is called the ‘offeree’ or ‘proposee’.

Example: X says to Y, “I want to sell my car to you for Rs.1 lakh.” Here, ‘to sell car’ is an offer or proposal. X who has made the offer is called offeror or promisor; Y to whom the offer has been made is called the offeree or proposee.

On the basis of HOW TO MAKE AN OFFER

An offer can be made by any act, which has the effect of communicating it to another person. An offer may, either be an '**express offer**' or '**implied offer**'.

Express Offer: An express offer is one, which is made by words spoken or written.

Example I: X says to Y, "Will you purchase my car for Rs.1 lakh?"

Example II: X writes to Y in a letter, "I want to sell my house for Rs.1 lakh".

Example III: X advertises in a newspaper, "I will pay Rs.1,000/- to anyone who traces my missing nephew".

Implied Offer: An implied offer is one which is made otherwise than in words. In other words, it is inferred from the conduct of the person or the circumstances of the particular case.

Example I: A transport company runs buses on different routes to carry passengers. This is an implied offer by the transport company to carry passengers for a certain fare.

Example II: A bid at an auction is an implied offer to buy.

On the basis of TO WHOM AN OFFER IS MADE

An offer may be 'specified' or 'general'.

Specific Offer: A specific offer is one, which is made to a definite person or particular group of persons. A specific offer can be accepted only by that definite person or that particular group of persons to whom it has been made.

Example: X offers to buy car from Y for Rs.1 lakh. This offer is a specific offer, which has been made to a definite person Y. No person other than Y can accept this offer.
{**Boulton v. Jones**}

Similarly, an offer made to a company is an offer to a group of persons and hence a specific offer.

General Offer: A general offer is one, which is not made to a definite person, but to the world at large or public in genera. A general offer can be accepted by a person by fulfilling the terms of the offer. In case of general offer, the contract is made with person who having the knowledge of the offer comes forward and acts according to the conditions of the offer.

Example : Carbolic Smoke Ball Co. advertised in the newspaper that it would pay Rs.1000/- to anyone who contracts influenza after using the smoke ball of the company according to the printed instructions. Mrs. Carlil uses the smoke ball according to the printed directions but subsequently contracted influenza. On a suit for the reward she was held entitled to recover the same because she had accepted the offer by fulfilling the terms of the offer. **{Carlil v. Carbolic Smoke Ball Co.}**.

LEGAL RULES FOR A VALID OFFER

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

- 1. Intention to Create Legal Relationship:** An offer must intend create legal relations. An offer must be such that when accepted, it will create legal relationship among the parties.
- 2. Certain and Unambiguous Terms:** The terms of the offer must be certain and unambiguous and not vague. If the terms of the offer are vague, no contract can be entered into because it is not clear as to what exactly the parties intended to do.
- 3. Different from a Mere Declaration of Intention:** The offer must be distinguished from a mere declaration of intention. Such statement or declaration merely indicates that an offer will be made or invited in future.
- 4. Different from an Invitation to an Offer:** An offer must be distinguished from an invitation to offer. In case of an invitation to offer, the person making an invitation invites others to make an offer to him. It is prelude to an offer inviting negotiations or preliminary discussions.
- 5. Communication:** An offer must be communicated to the person to whom it is made. An offer is complete only when it is communicated to the offeree. One can

accept the offer only when he knows about it. Thus, an offer accepted without its knowledge does not confer any legal rights on the acceptor.

Example I: G sent his servant L to trace his lost nephew. When the servant had left. G announced a reward of Rs.500 to anyone who traces the missing boy. L found the boy and brought him home. When L came to know about reward, he filed a suit against G to recover the reward. It was held that L was not entitled the reward because he did not know about the reward when he found the missing boy. {**Lalman Shukla v. Gauri Dutt**}.

Example II: S offered a reward to anyone who traces his lost dog. F brought the dog without any knowledge of the offer of reward. It was held that F was not entitled to the reward because F cannot be said to have accepted the offer, which he did not know. {**Fitch v. Snedakar**}.

6. No Term the Non-compliance of which Amounts to Acceptance: The offer must not contain a terms the non-compliance of which would amount to accept an. It means that while making the offer, the offeror cannot say that if offer is not accepted before a certain date, it will be presumed to have been accepted.

Example: X writes a letter to Y. If offer to sell my car for Rs. 1 lakh. If I do not receive your reply by Friday next, I shall assume that your have accepted the offer. Here if Y does not reply, it does not mean that he has accepted the offer.

7. Communication of Special terms or Standard Form Contracts: The special terms of the offer must also be communicated along with the offer. If the special terms of the offer are not communicated, the offeree will not be bound by those terms. The question of special terms arises generally in case of standard form of contracts. Standard contracts are made with big companies such as insurance companies, railways, shipping companies, banking companies, hotel companies, and dry cleaning companies. Since such companies, are in position to exploit the weakness of general public by including certain terms in the contract which may limit their liabilities, it is provided that the special terms of the offer must be brought to the notice of general public.

CROSS OFFERS

Meaning: Two offers, which are similar in all respects made by two parties to each other, in ignorance of each other's offer are known as '**cross offers**'.

Effect: Cross offers do not amount to acceptance of one's offer by the other. Hence, no contract is entered into on cross offer.

STANDING OFFER/OPEN OFFER/CONTINUING OFFER:

Meaning: An offer of a continuous nature is known as '**standing offer**'.

A standing offer is in the nature of a tender. It is the same thing as an invitation to an offer.

A contract is said to have been entered into only when an order is placed on the basis of the tender.

Example: Z Ltd. requires a large quantity of certain goods during the 12 months period and gives an advertisement inviting tender in the leading newspaper. Z submitted the tender to supply those goods at a specific rate. Z's tender is accepted or approved. Now, Z's tender becomes a standing offer. Each order given by X Ltd., will be an acceptance of the offer.

MEANING OF ACCEPTANCE

Acceptance means giving consent to the offer. It is an expression by the offeree of his willingness to be bound by terms of the offer. According to **Section 2(b)** of the Indian Contract Act, 1872, "**A proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise**".

Example: X offers to sell his car to Y for Rs.1 lakh. Y agrees to buy the car for Rs. 1 lakh. Y's act is an acceptance of X's offer.

WHO CAN ACCEPT AN OFFER

In General, an offer can be accepted only by the person or persons to whom it is made. The Specific Answer To This question can be given with reference to type of offer as under:

1. **In case of Specific Offer:** An offer made to a definite person or particular group of persons (called specific offer) can be accepted only by that definite person or that particular group of persons to whom it has been made and none else.

3. **In case of General Offer:** General offer) can be accepted by any person having knowledge of the offer by fulfilling the terms of the offer.

HOW TO MAKE AN ACCEPTANCE

1. **Express Acceptance:** An express acceptance is one, which is made by words spoken or written.

2. **Implied Acceptance:** An implied acceptance is one which is made otherwise than in words. In other words, it is inferred from the conduct of the person or the circumstances of the particular case.

LEGAL RULES FOR A VALID ACCEPTANCE

An acceptance to be valid must fulfill certain conditions, which are discussed below:

1. **Absolute and Unqualified:** According to Section 7(1) of the Indian Contract Act, 1872, **“In order to convert a proposal into a promise, the acceptance must be absolute and unqualified.”** It means, that an offer must be accepted as it is without any reservation, variation or conditions. A qualified and conditional acceptance amounts to making of a counter offer which puts an end to the original offer and it cannot be revived by acceptance.

Example I: X offered to sell his car for Rs.1 lakh to Y. B agreed to buy it for Rs.90,000/- Y's act is a counter offer and not an acceptance of X's offer. Now if Y accepts the original offer to buy the car for Rs.1 lakh X will not be bound to sell the car because Y's counter offer has put an end to the original offer. **{Nihal Chand v. Amar Nath}**

2. Manner of Acceptance: According to Section 7(2) of the Indian Contract Act, 1872, the acceptance of an offer must be given in the following manner.

(a) If the proposal does not prescribe the manner in which it is to be accepted.	The offer must be accepted in some usual and reasonable manner.
(b) If the proposal prescribes the manner in which it is to be accepted.	The offer must be accepted in the prescribed manner.

Consequences of not accepting the offer in the prescribed manner: If the offer is not accepted in the prescribed manner, the offeror may approve or reject such acceptance. If the offeror wants to reject it, he must inform the acceptor within a reasonable time that he is not bound by acceptance because it is not in the prescribed manner. If he does not do so within a reasonable time the presumption will be that he doesn't mind the offer being accepted in a different mode and will be bound by such acceptance.

3. Communication Of Acceptance: The acceptance must be signified (i.e. Indicated or declared). In other words, the acceptance is complete only when it has been communicated to the offeror. A mere mental determination to acceptance in eyes of law unless there is some external manifestation of that determination by words or conduct.

Example: X offered to supply coal to a Railway Company. The manager of the company accepted the offer and put it in the drawer of his table and forgot all about it. It was held that no contract was made because acceptance was not communicated. {**Brogden V. Metropolitan Railway Co**}.

4. By whom Acceptance must be communicated by the offeree himself or by a person who has the authority to accept. In other words, if acceptance is communicated by an unauthorized person, it will not give rise to legal relations.

Example: P applied for the post of headmaster in a school. The managing committee passed a resolution approving P to the post but this decision was not communicated to

P. But one member of managing committee in his individual capacity and without any authorized informed P about the decision. Subsequently, the managing committee cancelled its resolution and appointed someone else. P filed a suit for breach of contract. It was held that P's suit was not maintainable because there was no communication of acceptance, as he was not informed about his appointment by some authorized person. {**Powell v. Lee**}.

5. **To Whom** Acceptance must be communicated to the offeror himself. In other words, if acceptance is communicated to an unauthorized person, it will not give legal rise to relations.

6. **Time Limit:** The acceptance must be given within the time prescribed (if any) or within reasonable time (if no time is prescribed). What is reasonable time depends upon the facts and circumstances of case.

Example: An offer to buy shares of a company was made in June but the acceptance was communicated in November, it was held that the offeror was not bound by the acceptance because the acceptance was not given within a reasonable time. {**Ramsgate Victoria Hotel Co. v. Montefiore**}.

7. **Before Lapse of Offer:** The acceptance must be given before the offer lapses or is withdrawn. In other words, if an acceptance is made after the lapse or withdrawal of the offer, it will not give rise to legal relation.

Example: X offered by a letter to sell his car for Rs.1 lakh. Subsequently, X withdrew his offer by a telegram, which was duly received by Y. After the receipt of telegram, Y sent his acceptance to X. In this case, the acceptance is invalid because it was made after the effective withdrawal of the offer.

PROVISIONS RELATING TO COMMUNICATION OF OFFER AND ACCEPTANCE

The communication of offer and acceptance must complete so as to bind the concerned parties because as soon as the communication is complete the parties loose the right of

withdrawal or revocation. The legal provisions relating to communication of offer and acceptance are as under:

1. **When is Communication of Offer Complete?** The communication of offer is complete when it comes to knowledge of the person to whom it is made. In case an offer is made by post, its communication will complete when the letter containing the offer reaches the offeree.

Example: X of Agra sends a letter by post to Y of Delhi offering to sell his car for Rs.1 lakh. The letter is posted on 1st January and this letter reached on 7th January. The communication of the offer is complete on 7th January.

Note: An offer accepted without its complete communication does not bind the offerer.

2. **When is Communication of Acceptance Complete:** The communication of acceptance is complete at different times for the proposer and acceptor. The rules regarding the communication of acceptance are as under:

The communication of acceptance is complete...	When does the communication of acceptance complete?
(i) As against the proposer	When it is put in a course of transmission to him, so as to be out of the power of the acceptor. In case of acceptance made by post, the proper becomes bound by the acceptance as soon as the properly addressed and stamped letter of acceptance is duly posted even if such letter of acceptance is lost or delayed in post.
(ii) As against the	When it comes to the knowledge of the proposer.

accepter	In case of acceptance made by post, the acceptor becomes bound by the acceptance only when the letter of acceptance is actually received by proposer.
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Example: X of Agra sends a letter by post to Y of Delhi offering to sell his car for Rs.1 lakh. The letter is posted on 1st January and this letter reaches Y on 7th January. Y sends his acceptance by post on 10th January but X receives this letter of acceptance on 15th January. In this case the legal position relating to the communication of offer and acceptance is as under:

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

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

3. Position of Contracts over telephone/telex/fax A contract by telephone/telex/fax is treated on the same principle as an oral agreement made between two parties when they are face to face with each other. In such case, the will complete only when the acceptance is received by the proposer and not when it is transmitted by the acceptor. Therefore, the acceptor must ensure that his acceptance is properly received by the proposer.

Example: X made an offer to Y over telephone. While Y was conveying his acceptance, the line went dead and X could not hear anything. In this case, there was no contract at that merchant.

PROVISIONS RELATING TO REVOCATION OF OFFER AND ACCEPTANCE

1. Meaning of Revocation: The terms 'revocation' means 'taking back' or 'withdrawal'.

2. What is the Time Limit within which Offer can be Revoked: According to **Section 5** of the Indian Contract Act, an offer may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. We know that communication of acceptance is complete as against the proposer when a properly addressed and stamped letter of acceptance is duly posted by the acceptor. Hence, an offer can be revoked at any time before the letter of acceptance is duly posted by the acceptor. Thus the proposer may revoke his offer by a speedier mode of communication which will reach before the letter of acceptance is posted by the acceptor.

Example: X of Agra offers by a letter dated 1st January sent by post to sell his car to Y of Delhi for Rs.1 lakh. Y accepts the offer on 7th January at 1 p.m. by letter sent by post. Here, X may revoke his offer at any time before 1 p.m. on 7th January but not afterwards.

Notes:

- (i) Revocation must always be expressed.
- (ii) Revocation must move from the offeror himself or a duly authorized agent.
- (iii) Notice of revocation of a general offer must be given through the same channel by which the original offer was made.
- (iv) Offer cannot be revoked even if the letter of acceptance is lost or delayed in transit.

3. What is the Time Limit within which Acceptance can be Revoked: According to **Section 5** of the Indian Contract Act, “An acceptance **may be** revoked at any time **before** the communication of the **acceptance** is complete as **against** the acceptor, but not afterwards.” We know that communication of acceptance is complete as against the acceptor when the letter of acceptance is actually received by the proposer. Hence, an acceptance can be revoked at any time before the letter of acceptance is actually received by the proposer. Thus an acceptor may revoke his acceptance by a speedier mode of communication, which will reach before the letter of acceptance is received by the proposer.

Example: X of Agra offers by a letter dated 1st January sent by post to sell his car to Y of Delhi for Rs.1 lakh. Y accepts the offer on 7th January at 1 p.m. by a letter sent by post. X receives the letter of acceptance on 15th January at 3 p.m. Here, Y may revoke his acceptance at any time before 3 p.m. on 15th January but not afterwards.

☀ **Acceptance is to Offer what a Lighted Match is to a Train of Gunpowder:** The position relating to revocation of proposal and acceptance has been described by the following words

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

This statement primarily holds good under English law.

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

When a lighted match is shown to a train of gunpowder, it explodes and something happens which cannot be undone. Similarly, an offer once accepted cannot be revoked. But so long a lighted match is not shown, the gunpowder remains inert and can be removed, similarly an offer can be revoked before it is accepted.

Similarly, once acceptance is given it cannot be revoked. But under Indian Contract Act, acceptance can be revoked by resort in to quicker means of communication so that the offeror learns about it before acceptance. Thus, the above statement doesn't hold in relation to revocation of acceptance under Indian law.

4. Simultaneous delivery of Letter of Acceptance and the telegram Containing Revocation of Acceptance: In case the letter of acceptance and the telegram containing revocation of acceptance are delivered to the proposer at the same time, the formation of contract depends upon the fact which one is read first by the offeror. The contract shall be said to have been formed if the letter of acceptance is read first but shall not be said to have been formed if the telegram containing revocation of acceptance is read first. Generally, it is presumed that a man of ordinary prudence will first read the telegram. Hence the revocation will be quite effective.

5. No Revocation in case of Contract over Telephone or Telex or Fax: In case of contracts over telephone or telex or fax, the question of revocation does not arise because there is instantaneous communication of the offer and its acceptance (i.e. the offer is made and accepted at the same time).

6. When is Communication of Revocation Complete [Section 4]: The communication of revocation is complete at different times for person who makes it and the person to whom it is made. The rule regarding the communication revocation are as under:

The communication of revocation is complete...	When does the communication of revocation complete?
(i) As against the person who makes it	When it is put in a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it.

(ii) As against the person to whom it is made

When it comes to his knowledge.

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

1. **By Revocation:** An offer lapses if the offeror revokes the offer before its acceptance by the offeree. According to Section 5 of the Indian Contract Act, a proposal may be revoked at any time before the communication of acceptance is complete as against the proposer but not afterwards.

Example I: X of Agra offers by a letter dated 1st January sent by post to sell his car to Y of Delhi for Rs.1 lakh. Y accepts the offer on 7th January at 1 p.m. by a letter sent by post. Here, X may revoke his offer at any time before 1 p.m. on 7th January but not afterwards.

2. **By Lapse of Time:** An offer lapses if it is not accepted within the fixed time (if any prescribed in the offer) or within reasonable time (if no time is prescribed in the offer).

Example: an offer to buy shares of a company was made in June but the acceptance was communicated in November. It was held that offer to buy shares had lapsed because it was not accepted within a reasonable time. {**Ramsgate Victoria Hotel Co. v. Montefiore**}

3. **By Death or Insanity of the Offeror or Offeree:** An offer lapses by the death or insanity of the offeror if the fact of his death or insanity comes to the knowledge of the acceptor before he makes his acceptance. In other words, if the offer is accepted in ignorance of the death or insanity of the offeror, there will be a valid contract. It may be

noted that in English law the death of the offeror terminates the offer even if acceptance is made in ignorance of the death.

4. By Failure of Accept condition Precedent: An offer lapses if it is accepted without fulfilling the conditions of the offer.

Example: X offered to sell his car to Y for Rs.1 lakh subject to the condition that Y should pay an advance of Rs.20,000/- before certain date. Y accepted the offer but did not send an advance of Rs.20,000/-. In this case, the offer has lapsed because the advance was not paid.

5. By Counter Offer: An offer lapses if the counter offer is made because a counter offer amounts to rejection of the original offer. Counter means making a fresh offer instead of accepting the original offer.

6. By not Accepting in the Prescribed Mode or usual Mode: An offer if it is not accepted in the specific manner (if any, prescribed in the offer) or in some usual and reasonable manner (if no manner has been prescribed in the offer).

7. By Rejection of Offer by Offeree: An offer lapse if it is rejected by the offeree. An offer is said to be rejected if the offeree expressly rejects it or accepts it subject to certain conditions. It may be noted that once an offer is rejected, it cannot be revived subsequently.

8. By Subsequent illegality or Destruction of Subject Matter of the Offer: An offer lapses if it becomes illegal or the subject matter is destroyed before its acceptance by offeree.

Example I: X of Delhi offered supply of 100 tones of sugar to Y at Mumbai a certain date. Before Y accepts this offer, the Central Government issued an order prohibiting the inter-state movement of sugar. Here, X's offer has come to an end.

MEANING AND IMPORTANCE OF CONSIDERATIONS**MEANING OF CONSIDERATION**

Consideration is one of the essential elements of a valid Contract. The term 'Consideration' means something in return, i.e. quid-pro-quo. What is 'something' has been explained by Justice Ired J. in a leading English case **Currie v. Misa** as under:

“A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”

Section 2(d) of the Indian Contract Act, 1872 defines consideration as under;

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

ESSENTIAL ELEMENTS OF VALID CONSIDERATION

On the basis of definition of consideration as per Section 2(d), the essential elements of valid consideration are shown below:

Let us discuss them one by one.

(a) It must be given only at the Desire of the Promisor: An act constituting consideration must have been done at the desire or request of the promisor. Thus, an act done at the desire of a third party or without the desire of the promisor cannot constitute a valid consideration.

(b) It may Move from any Person: An Act constituting consideration may be done by the promisee himself or any other person (i.e. stranger to consideration). Thus, it is immaterial who furnishes the consideration and therefore, may move from the promisee or any other person.

Example: X, by a deed of gift transferred certain property to her daughter Y with a direction that Y should pay Z an annuity. On the same day, Y executed a deed in writing in favor of Z and agreed thereby to pay the annuity. Later, Y refused to pay the annuity on the plea that no consideration had moved from Z. **It was held** that Z was entitled to maintain suit because a consideration need not necessarily move from the promisee, it may move from any other person. (i.e. X in the present case).

(c) It may be Past or Present or Future: The consideration may be past, present or future.

<u>Past Consideration</u>	<p>The consideration, which has already moved before the formation of agreement.</p> <p>Example: X renders some service to Y at Y's request in the month of May. In June, Y promises to pay X Rs.1000/- for his past services. Past services amount to past consideration. X can recover A's 1000/- from Y.</p>
<u>Present Consideration.</u>	<p>The consideration, which moves simultaneously with promise, is called present consideration.</p> <p>Example: In case of cash sale, promise to pay the price and promise to deliver the goods are performed simultaneously.</p>
<u>Future Consideration.</u>	<p>The consideration, which is to be moved after the formation of agreement, is called future consideration.</p> <p>Example: X promises to deliver certain goods to Y after 10 days and Y promises to pay after 10 days from the date of delivery.</p>
Tutorial Note: - The English Law does not recognize the past consideration.	

(d) It must be of some Value: The consideration need not be adequate to promise but it must be of some value in the eye of the law. It is understood in the sense of something in return and that something can be anything, adequate or grossly inadequate. **According to Explanation 2 of Section 25**, an agreement to which the

consent of the promisor is freely given in not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promissory was freely given.

Example: A agrees to sell a horse worth Rs.1000/- for Rs.10/-. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should taken into account in considering whether or not A's consent was freely given.

(e) It must be Real and non-Illusory: The consideration must be real and not illusory.

Example: X engages Y for doing a certain work and promises to pay reasonable remuneration. This promise is not enforceable because the consideration is uncertain.

(f) Something other than the Promisor's Existing Obligation: The act constituting consideration must be something which the promisor is not already bound to do because a promise to do what a promisor is already bound to do adds nothing to the existing obligation.

Example: X promises Y, his advocate, t pay an additional sum of the suit was successful. The suit was declared in favour of X but X refused to pay additional sum. It was held that Y could not recover additional sum because the promise to pay additional sum was void for want of consideration as Y was already bound to render his best services under the original agreement. {**Ramchandra Chintamana v. Kalu Raju**}

(g) Lawful: The consideration must neither be unlawful nor opposed to public policy.

Example I: X promises Y to pay Rs.1000/- to beat Z, Y beats Z and claims Rs.1000/- from X, X refuses to pay. Y cannot recover because the agreement is void on the ground of unlawful consideration.

STRANGER TO A CONTRACT

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

Example: X owes Y Rs. 1 lakh and sells his property to Z. Z promises to payoff Xs debt to Y. Z fails to pay. Y cannot sue Z because he is a stranger to a contract.

Exceptions:

The rule that a **stranger to a contract cannot sue**, is subject to the following **exception**:

(a) In case of Trusts: The beneficiary (i.e. the person for whose benefit the trust has been created) may enforce the contract.

Example: X transferred certain properties to be held by Y for the benefit of Z. Z can enforce the agreement even though he is not a party to the agreement. **{M. K. Rapsi v. John}**

(b) In case of Family settlement: The person for whose benefit the provision is made under family arrangement may enforce the contract.

Example: A provision of marriage expenses of a female member was made in a Joint Hindu Family. On partition, the female member sued for such expenses. It was held that she was entitled to sue. **{Rakhmanbai v. Govind}**

(c) Acknowledgement: The person who becomes an agent of third part by acknowledgment or otherwise, can be sued by such third party.

Example: X receives Rs.1000/- from Y for paying the same to Z. X acknowledges this receipt to Z. Z can recover the amount from X because X will be regarded as Z's agent.

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

CONTRACTS WITHOUT CONSIDERATION

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

consideration is void. For example, X promises to pay Rs.5000/- to his girlfriend Y. Y cannot enforce this promise because she is not giving anything to X for this promise.

Exceptions to the General Rule No Consideration, No Contract

The following are the exceptions to the general rule No Consideration, No Contract:

(a) Agreements Made on Account of Natural Love and Affection [Section 2(1)].

Such agreement made without consideration is valid if;

- (i) it is expressed in writing,
- (ii) it is registered under the law,
- (iii) it is made on account of love and affection, and
- (iv) it is between parties standing in a near relation to each other.

Note: Nearness of relation by itself does not necessarily import love and affection.

Example: A Hindu husband by a registered document promised to pay his wife Rs.1000/- per month as her pin-pocket money. This agreement is valid.

(b) Promise to Compensate [Section 25(2)]: Such promise made without consideration is valid if;

- (i) it is a promise to compensate (wholly or in part); and
- (ii) the person who is to be compensated has already done something voluntarily or has done something which the promisor was legally bound to do.

Example : X finds Y's purse and gives it to him. Y promises to give Rs.500/- to X. This is a valid contract even though the consideration did not move at the desire of Y, the promisor.

(c) Promise to Pay Time Bared Debt [Section 25(3)]: Such promise without consideration is valid if;

- (i) it is made in writing,
- (ii) it is signed by the debtor or his agent, and
- (iii) it relates to a debt which could not be enforced by a creditor because of limitation.

Note:

According to the law of limitation, a debt that remains unpaid or unclaimed for a period of 3 years becomes a time barred debt, which is legally not recoverable. But a promissory note issued in personal capacity by the wife of a debtor to pay his time barred debt of her husband is not enforceable. {**Pestonjee v. Bai Meharbai**}

(d) Completed Gifts [Explanation to Section 25]: The gifts actually made by a donor and accepted by the donee are valid even without consideration. Thus a completed gift needs no consideration.

Example: X transferred some property to Y by a duly written and registered deed as a gift. This is a valid contract even though no consideration moved.

(e) Agency [Section 185] No consideration is necessary to create an agency.

FREE CONSENT**CONSENT****Meaning of Consent:**

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

Effect of Absence of Consent:

When there is no consent at all, the agreement is void ab-initio, i.e. it is not enforceable at the option of either party.

FREE CONSENT**Meaning of Free Consent [Section 14]**

Free consent is one of the essential elements of a valid contract as it is evidenced by Section 10, which provides that all agreements are contract if they are made by the free consent of the parties. According to Section 14, Consent is said to be free when it is not caused by (a) coercion, or (b) under influence, or (c) fraud, or (d) misrepresentation, or (e) mistake.

Effect of absence of Free Consent [Section 19]

When there is consent but it is not free (i.e. when it is caused by coercion or undue influence or fraud or misrepresentation), the contract is usually voidable at the option of the party whose consent was so caused.

Example – X threatens to kill Y if he does not sell his house to X. Y agreed to sell his house to X. In this case, Y’s consent has been obtained by coercion and therefore, it cannot be regarded as free.

COERCION

Meaning of Coercion [Section 14]

Coercion means compelling a person to enter into contract under a pressure or a threat. According to Section 15, a contract is said to be caused by coercion when it is obtained by (a) committing any act which is forbidden by the Indian Penal Code; or (b) threatening to commit any act which is forbidden by the Indian Penal Code; or (c) unlawful detaining of any property; or (d) threatening to detain any property.

Example I - X beats Y and compels him to sell his car for Rs.50000/-. Here, Y's consent has been obtained by coercion because beating someone is an offence under the Indian Penal Code.

Note: The Indian Penal Code need not be in force in place where the coercion is employed.

Against Whom/by Whom Coercion may be exercised

Coercion may proceed from any person, and may be directed against any person, even a stranger.

Example – X threatens to kill Z, Y's son, if Y refuses to sell his house to him. Y agrees to sell his house. Here, Y's consent has been obtained by coercion though Z is a stranger to the contract.

.Effect of threat to File a Suit

A threat to file a suit (whether civil or criminal) does not amount to coercion unless the suit is on false charge. Threat to file a suit on a false is an action forbidden by the Indian penal code and thus will amount to an act of coercion.

Effect of threat to commit suicide

A suicide and a 'threat to commit suicide' are not punishable under the Indian Penal Code. It does not mean that 'suicide and threat to commit suicide are permitted by Indian Penal Code. The question whether a threat to commit suicide amounts to coercion or not was considered by Madras High Court in case of *Chickham Ammiraju v. Seshamma*. In case, a person threatened to commit suicide if his wife and son did not execute a release deed in a favour of his brother in respect of certain property. It was held that through a threat to commit suicide is not punishable under the Indian Penal Code, it is deemed to be forbidden by that code. Hence, the threat to commit suicide amounted to coercion and the release deed was therefore, voidable.

Duress V. Coercion: The English law uses the term 'duress' for coercion. However, the two are different in the following way:

- a) Duress does not include detaining of property or threat to detain property.
- b) Duress can be employed only by a party to the contract or his agent.

Effects of Coercion [Sections 19, 64, 72]

The effects of coercion are as follows:

Effects	Provision
(a) Option of aggrieved party to avoid the contract.	When consent to an agreement is obtained by coercion, the agreement is a contract voidable at the option of the party whose consent was obtained by coercion (also called aggrieved party), [Section 19]
(b) Obligation of aggrieved party to restore benefit.	The party rescinding a voidable contract shall restore the benefit received by him under the contract, to the person from whom the benefit was received. [Section 64]
(c) Obligation of other party to repay or return	A person to whom money has been paid or anything delivered under coercion must repay or return it. [Section 72]

Burden or Onus of Proof

The burden of providing that consent was obtained by coercion, and the aggrieved party would not have entered into contract had coercion been employed, lies on the party intending to avoid the contract.

UNDUE INFLUENCE

Meaning of Undue Influence [Section 16(1)]

The term 'undue influence' means dominating the will of the other person to obtain an unfair advantage over the other. According to Section 16(1), a contract is said to be induced by undue influence.

- (a) Where the relations subsisting between the parties are such that one of them is in a position to dominate the will of the other, and
- (b) The dominant party uses that position to obtain an unfair advantage over the other.

Presumption of Domination of Will [Section 16(2)]

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

<i>Circumstances</i>	Examples
(a) Where he holds a real or apparent authority over the other.	Master and servant, parent and child, Income Tax Officer and assessee, Principal and a temporary teacher.
(b) Where he stands in a fiduciary relation to the other.	Trustee and beneficiary, spiritual adviser (Guru) and his disciples, solicitors and client, guardian and ward.
(c) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.	Medical attendant and patient.

No Presumption of Domination of Will

According to judicial decisions held in various cases, there is no presumption of undue influence in the following relationships:

- (a) Husband and wife (other than pardanashin)

- (b) Landlord and tenant
- (c) Creditor and debtor

Effect of Undue Influence [Section 19A]

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Discretion of Court: Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any such benefit there under, upon such terms and conditions as the court may seem just.

Burden of Proof

When a contract is avoided on the ground of undue influence, the liabilities of dominant party and weaker party to prove are as under:

<p>The weaker party has to prove</p> <p>(a) That the other party was in a position to dominate the will.</p> <p>(b) That the other party actually used his influence to obtain an unfair advantage.</p> <p>(c) That the transaction is unconscionable (unreasonable)</p>	<p>In case of unconscionable transaction the dominant party has to prove that such contract was not induced by undue influence.</p> <p>Note: A transaction is said to be unconscionable if the dominant party makes an exorbitant profit of the other's distress.</p>
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Example – X was in great need of money. The market rate of interest prevailing at that time was 15% to 24%. A lender agreed to grant the loan at 30% because of stringency in the money market. This cannot be called as unconscionable transaction merely because of an unusual high rate of interest. However, if the lender agreed to grant the loan at a

rate, which is so high (say 75% or 100%) then the court considers it unconscionable, and the transaction will be called unconscionable.

Contracts with Pardanashin Woman

Meaning of Pardanashin Woman: A woman who observes complete seclusion (i.e. who does not come in contact with people other than her family members) is called pardanashin woman.

Legal Presumption: A contract with a pardanashin woman is presumed to have been included by undue influence.

Burden of Proof: The other party who enters into contract with a pardanashin woman must prove;

- (a) that he made full disclosure of all the facts to her;
- (b) that she understood the contracts and the implications of the contract;
- (c) that she was in receipt of competent independent advice before entering into the contract.

Comparison between Coercion and Undue Influence Similarities: In case of both coercion and undue influence, the consent is not free and the contract is voidable at the option of the aggrieved party.

Distinction: Coercion differs from the undue influence in the following respects:

<u>Basis of Distinction</u>	<u>Coercion</u>	<u>Undue Influence</u>
1. Relationship	Parties to contract may or may not be related to each other.	Parties to a contract are related to each other under some sort of relationship.

2. Consent		Consent is obtained by giving a threat of an offence or committing an offence.	Consent is obtained by dominating the will.
3. Nature of pressure		It involves physical pressure.	It involves moral pressure.
4. Who can exercise		Even a stranger to the contract can exercise it.	It can be exercised only by a party to a contract and not by a stranger.
5. Restoration of benefit		The aggrieved party has to restore the benefit received under Section – 64.	The party avoiding the contract may or may not return the benefit under Section 19A.
6. Presumption		Coercion has to be proved by the party alleging it, in no case it is presumed by the law.	The law under certain circumstances may presume it. The party against whom such presumption lies must disprove it.
7. Nature of Liability		The party committing the crime make be punishable under I. P. C.	It doesn't involve any criminal liability.

Rebutting Presumption:

The presumption of undue influence can be rebutted by showing;

- (a) That the dominant party has made a full disclosure of all the facts to the weaker party before making the contract.
- (b) That the price was adequate; and

- (c) That the weaker party was in receipt of competent independent advice before entering into the contract.

FRAUD

Meaning and Essential Elements of Fraud [Section 17]

Meaning: The term ‘fraud’ means a false representation of fact made wilfully with a view to deceive the other party. Section 17 defines the fraud as follows:

‘**Fraud**’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent or to induce him, to enter into the contract:

(a) **The suggestion**, as to a fact, of threat which is not true, by one who does not believe it to be true, e.g. X sells to Y locally manufactured goods as imported goods charging a higher price. It amounts to fraud.

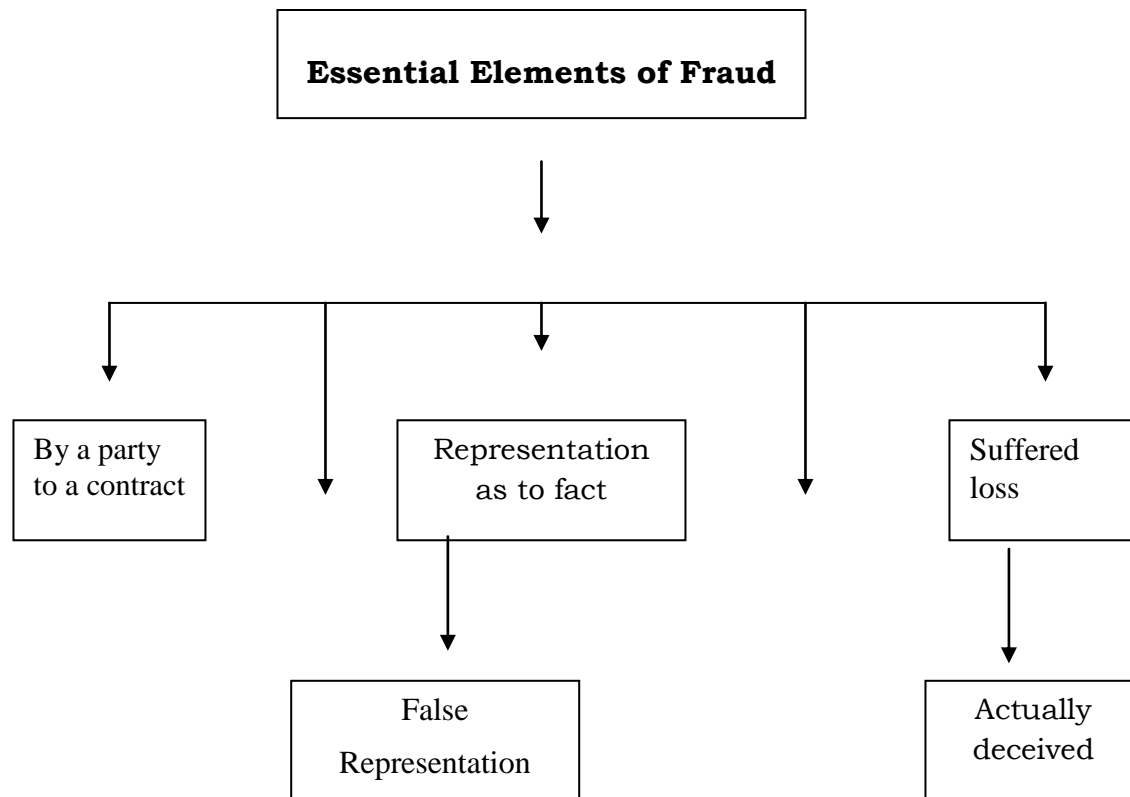
(b) **The active concealment** of a fact by one having knowledge or belief of the fact. Mere concealment is no fraud. But where steps are taken by a seller concealing some material facts so that the buyer even after a reasonable examination cannot trace the defects, it will amount to fraud, e.g. X a furniture dealer, conceals the cracks in furniture sold by him by using some packing material and polishing it in such a way that the buyer even after reasonable examination cannot trace the defect, it would then amount to fraud through active concealment.

(c) A **promise** made **without** any intention of performing it; e.g. in *Shireen v. John*, AIR (1952) Punj 227, a man and a woman underwent a ceremony of marriage with the husband not regarding it as a real marriage. Held, the husband had no intention to perform the promise from the time he made it and hence the consent of the wife was obtained under fraud.

(d) Any such **act** or omission as the **law** specially **declares** to be **fraudulent**.

(e) **Any** other **act** fitted to **deceive**. It covers those acts, which deceive but are not covered under any other clause.

(b) **Essential Elements:** on the basis of aforesaid definition of fraud, the essential elements of fraud are shown below in Figure.



Let us discuss them one by one:

(i) **By a party to a contract:** The fraud must be committed by a party to a contract or by anyone with his connivance or by his agent. Thus, the fraud by a stranger to the contract does not affect the validity of the contract.

Example – The directors of a company issued a prospectus containing false statements. A shareholder who had subscribed for the shares on the faith of the prospectus wanted to avoid the contract. It was held that he could not do so because the false statement made by directors amounted to fraud. **{Reese River Silver Mining Co. v. Smith}**

(ii) **False Representation:** There must be a false representation and it must be made with the knowledge of its falsehood. Where the representation was true at the time when it was made but becomes untrue before the contract is entered into and the

party who made the representation knows this fact, it must be corrected. If it is not so corrected, it will amount to a fraud.

Example - X fraudulently informs Y that X's estate is free from encumbrance. On the faith of X's statement, Y buys the estate. Actually the estate is subject to mortgage. Here, Y may avoid the contract because X with the intention to deceive Y induced Y to enter into a contract.

(iii) **Representation as to Fact:** The representation must relate to a fact. In other words, a mere opinion, a statement of expression or intention does not amount to fraud.

(iv) **Actually deceived:** The fraud must have actually deceived the other party who has acted on the other party is not actually deceived is not a fraud.

Example – X had defective cannon. In order to conceal the defect, he put a metal plug on it. Y bought this cannon without examining. When Y used it, it burst. Y refused to pay the balance. It was held that Y was liable to pay, as he was not actually deceived by fraud because he would have bought it even if no deceptive plug were inserted.
{Horsefull v. Thomas}

(v) **Suffered Loss:** The party acting on the representation must have suffered some loss.

Effects of Fraud [Section 19]

The effects of fraud are as follows:

(a) The party whose consent was caused by fraud can rescind (cancel) the contract but he cannot do so in the following cases;

(i) Where silence amounts to fraud, the aggrieved party cannot rescind the contract if he had the means of discovering the truth with ordinary diligence;

(ii) Where the party gave the consent in ignorance of fraud;

(iii) Where the party after becoming aware of the fraud takes a benefit under the contract;

(iv) Where an innocent third party before the contract is rescinded acquired for consideration some interest in the property passing under the contract;

(v) Where the parties cannot be restored to their original position.

(b) The party whose consent was caused by fraud may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if representation made had been true.

Example – A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(c) The party whose consent was caused by fraud, can claim damage if he suffers some loss.

Silence as to Fraud

General Rule: According to explanation to Section 17, "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud."

Example – A sells, by auction, to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud by A

Example – In *shri Krishna v. Kurukshetra University AIR 1975 SC 376*) a candidate failed to mention the fact of shortage of attendance in the examination form. Held, no fraud.

Exceptions to the General Rule: The general rule that silence doesn't amount to fraud has the following exceptions;

Where the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak. Such duty arises in the following two cases:

(i) Where parties stand in fiduciary relationship like parent-child, trustee-beneficiary.

Example - A sells by auction to B, a horse that A knows to be unsound. B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(ii) Where the silence itself is equivalent to speech.

Example - B says to A, “If you do not deny it, I shall assume that the horse is sound.” A says nothing. Here A’s silence is equivalent to speech. If the horse turns out to be vicious A can be held liable for fraud.

(iii) **Half Truth:** Half-truth is worse than a blatant lie. Partial truthful disclosures may easily deceive the other party, e.g., prospectus of a company disclosing only average dividend declared by the company in the last 5 years instead of the actually dealing dividends over that period is a glaring example of half truth amounting to fraud.

MISREPRESENTATION

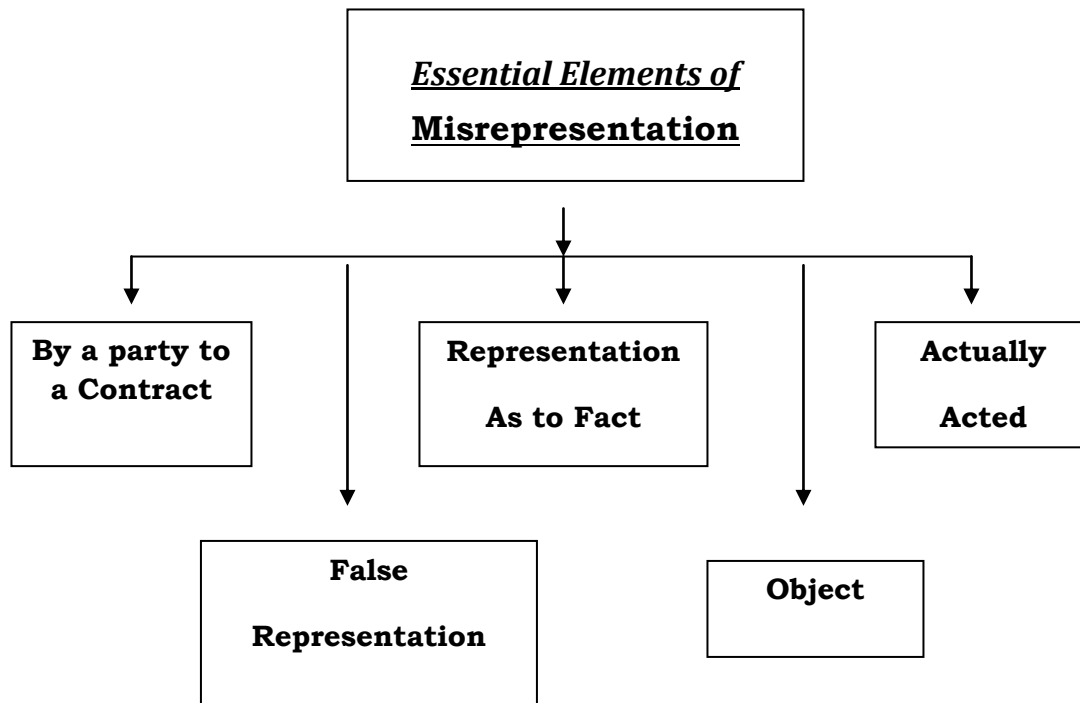
Meaning and Essential Elements of Misrepresentation [Section 19]

(a) **Meaning:** The term ‘Misrepresentation’ means a false representation of fact made innocently or non-disclosure of a material fact without any intention to deceive the other party. Section 18 defines the term ‘misrepresentation’ as follows:

“Misrepresentation” means as includes –

- (a) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (b) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
- (c) Causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing, which is the subject of the agreement.

(b) **Essential Elements:** On the basis of the aforesaid definition of misrepresentation, the essential elements of misrepresentation are shown below in Figure.



- (i) **By a party to a contract**: The representation must be made by a party to a contract or by anyone with his connivance or by his agent. Thus, the representation by a stranger to the contract does not affect the validity of the contract.
- (ii) **False representation**: There must be a false representation and it must be made without the knowledge of its falsehood i.e. the person making it must honestly even it is to be true.
- (iii) **Representation as to Fact**: The representation must be related to a fact. In other words, a mere opinion, a statement of expression or intention does not amount to misrepresentation.

Example - X sold his Hotel to Y and stated that a tenant who is most desirable occupies a part of the hotel. In fact the rent from the tenant could only be recovered under pressure and was currently much in arrear. It was held that Y was entitled to avoid the contract because X's statement amounted to misrepresentation. **{Smith's Case}**.

- (iv) **object**: The representation must be made with a view to including the other party to enter into contract but without the intention of deceiving the other party.
- (v) **Actually Acted**: The other party must have acted on the faith of the representation.

Effects of Misrepresentation [Section 19]

The effects of misrepresentation are as follows: -

(a) Right to Rescind the Contract: The party whose consent was caused by misrepresentation can rescind (cancel) the contract but he **cannot** do so in the following cases:

- (i)** Where the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence;
- (ii)** Where the party gave the consent in ignorance of misrepresentation;
- (iii)** Where the party after becoming aware of the misrepresentation take a benefit under the contract;
- (iv)** Where an innocent third party, before the contract is rescinded, acquired for consideration some interest in the property passing under the contract;
- (v)** Where the parties cannot be restored to their original position.

Example - X, leads Y erroneously to believe that 1000 mounds of indigo are made annually at X's factory. Y examines the accounts of X's factory which shows that only 800 mounds of indigo have been made. After this Y buys the factory. Here, the contract is not voidable on account of X's misrepresentation because Y after becoming aware of misrepresentation take the benefit under the contract.

(b) Right to Insist upon Performance: The party whose consent was caused by misrepresentation may if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

MISTAKE

Meaning of Mistake [Section 20]

A mistake is said to have occurred where the parties intending to do one thing by error do something else. Mistake is an erroneous belief concerning something. The mistake can be of two types shown below:

Let us discuss them one by one:

1. Mistake of Law [Section 21]

Type of Indian Law	Effect
(a) Mistake of Indian Law	The contract is not voidable because everyone is supposed to know the law of his country.
(b) Mistake of Foreign Law	A mistake of foreign law is treated as mistake of fact, i.e. the contract is void if both parties are under a mistake as to a foreign law because one cannot be expected to know the law of other country.

II Mistake of Fact: Mistake of fact can be either bilateral mistake or unilateral mistake.

(a) Bilateral Mistake [Section 20]: The term ‘bilateral mistake’ means where both the parties to agreement are under a mistake. According to Section 20, “Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.” Thus, the following three conditions must be satisfied before declaring a contract void under this section:

- (i) Both the parties must be under a mistake.
- (ii) Mistake must be of fact but not of law.

According to explanation to Section 20, “An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact.”

Example - X buys a painting believing it to be worth Rs.50000/- while in fact it is worth only Rs.5000/-. The contract is not void.

(iii) Mistake must relate to an essential fact.

Example - A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Mumbai. It turns out that, before the date of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of facts. The agreement is void.

Bilateral Mistake as to the Subject Matter: An agreement is void where there is a bilateral mistake as to the subject matter. A bilateral mistake as to the subject matter includes the following:

- (i) Mistake as to the existence of subject matter.
- (ii) Mistake as to the quantity of subject matter.
- (iii) Mistake as to the quality of subject matter.
- (iv) Mistake as to the price of subject matter.
- (v) Mistake as to the identity of subject matter.
- (vi) Mistake as to the title of subject matter.

Example I - A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The agreement is void because there is bilateral mistake as to the existence of subject matter.

Example II- A, agrees to buy from B all his horses believing that B has two horses but B actually has three horses. The agreement is void because there is bilateral mistake as to the quantity of subject.

Example III- A agrees to buy a particular horse from B. Both believe it to be a racehorse but it turns to be a carthorse. The agreement is void because there is bilateral mistake as to the quantity of the subject matter.

Example IV-A agrees to buy a particular horse from B who mentioned in his letter the price as Rs.1150/- instead of 5150/-. The agreement is void because there is bilateral mistake as to the price of the subject matter.

Example V –A agrees to buy from B a certain horse. B has one racehorse and one carthorse. A thinks that he is buying racehorse but B thinks that he is selling carthorse. The agreement is void because there is bilateral mistake as to the identity of subject matter.

Example VI - A agrees to buy a particular horse from b. A already owns that horse. The agreement is void because there is bilateral mistake as to the title of the subject matter.

Bilateral Mistake as to the Possibility of Performance: The agreement is void where there is a bilateral mistake as to the possibility of performance. In other words, where the parties to an agreement believe that the agreement is capable of performance,

while in fact it is not so, the agreement is treated as void. The impossibility may either be physical or legal.

(b) Unilateral Mistake [Section 22]: The term ‘unilateral mistake’ means where only one party to the agreement is under a mistake. According to Section 22, “A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter of fact.”

Exceptions: The agreement is void where a unilateral mistake relates to the identity of the person contracted with or as to the nature of contract.

Effects of Mistake

The effects of mistake are as follows:

(a) In case of Bilateral Mistake as to essential fact.	The agreement is void.
(b) In case of Unilateral Mistake	
(i) As to the identity of the person contracted with	The agreement is void.
(ii) As to the nature of contract	
(iii) As to other matter	The agreement is void.
	The agreement is not void.
(c) Obligation of aggrieved party	He must restore any benefit received by him under the contract to the other party from whom the benefit had been received [Section 64].
(d) Obligation of other party	The person to whom money has been paid or anything delivered by mistake must repay or return it. [Section 72]

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

The object and the consideration of an agreement must be lawful; otherwise, the agreement is void. According to Section 23 of The Indian Contract Act, 1872, the consideration or the object of an agreement is unlawful in the following cases:

(a) **If it is forbidden by Law:** If the object or the consideration of an agreement is the doing of an act, which is forbidden (i.e. prohibited) by the law, the agreement is void. An act is said to be forbidden by law when it is punishable either by the criminal law of the country or by special legislation.}

Example – X granted a loan to the guardian of a minor to enable him to celebrate the minor's marriage. It was held that X could not recover back because agreement is void as its object (i.e. minor's marriage) is illegal. {**C. Srinivas v. K. Raj Rama Mohana Rao**}

(b) **If it Defeats the Provisions of any Law:** If the object or the consideration of an agreement is of such nature that, if permitted, it would defeat the provisions of any law, the agreement is void.

(c) **If it is Fraudulent:** If the object of an agreement is to defraud others, the agreement is void.

Example – A, B and C enter into an Agreement of the division among them of gains acquired, or be acquired, by them by fraud. The agreement is void, as its object is unlawful. If the object of an agreement is to be defraud other, the

Example II – A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(d) **If it involves or Implies Injury to a Person or Property of Another:** If the object of an agreement is to injure a person or the property of another, the agreement is void.

Example – X promised to pay Rs.10,000/- to Y when he agreed to publish a libel (i.e. defamatory article against someone). It was held that Y could not recover the amount because the agreement was void as it involved injury to someone. {**Clay v. Yates**}

(e) If the Court Regards it as Immoral or Opposed to Public Policy: If the object or consideration is immoral or is opposed to the public policy, the agreement is void.

Example – A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay Rs.1000/- to A. The agreement is void, because it is immoral.

Example V – Agreements for past or future cohabitation are void because the consideration, which is immoral at the time when it passes, cannot become legal by passage of time. {S. Yellappa v. Y. Sabu (Bombay High Court)}

ILLEGAL AGREEMENTS

Meaning of Illegal Agreements:

Illegal agreements are those agreements, which are:

- (a) The collateral transactions to an illegal agreement also become illegal and hence, cannot be enforced.
- (b) No action can be taken for the recovery of money paid or property transferred under an illegal agreement and for the breach of an illegal agreement.
- (c) In case of an agreement containing the promise, some part of which is legal and other part illegal, the legal position is as under:

Case	Provision
1. If the illegal part cannot be separated from the legal part.	The whole agreement is altogether illegal.
2. If the illegal part can be separated from the legal part.	The Court will enforce the legal part and Reject the illegal part.

Example – X lent Rs1 lakh to Y to enable him to purchase certain smuggled goods from Z. X cannot recover the amount from Y if he knows the Y's purpose of borrowing.

VOID AGREEMENTS IF CONSIDERATION OR OBJECTS UNLAWFUL IN PART

According to Section 24, if one of the several considerations or objects of an agreement is unlawful, the agreement is void.

AGREEMENTS OPPOSED TO PUBLIC POLICY

It is not easy to define the term 'Public Policy' with any degree of precision because 'public policy' by its very nature, is highly uncertain and keeps on fluctuating with the passage of time. An agreement, which conflicts with morals of the time and contravenes any, established interest of society might be said to be opposed to public policy. In India, it has been left to Court to hold any contract as unlawful on the ground of being opposed to public policy.

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

(a) Agreements of Trading with Enemy: Agreements made with an alien enemy are illegal on the ground of public policy.

(b) Agreement for Stifling Prosecution: An agreement for stifling prosecution is illegal on the ground of public policy.

Example: X, who knows that Y has committed a murder, receives Rs.7 lakh from Y in consideration of not exposing Y. This agreement is illegal.

(c) Agreements in the Nature of Maintenance and Champerty: Maintenance is an agreement whereby one party having no interest in suit, agrees to assist another to maintain suit. For example, X promises to pay Y Rs.5000/- if Y files a suit against Z. This is a maintenance agreement. Champerty is an agreement whereby one party agrees to

assist another in recovering property and in turn is to share in the proceeds of the action.

Example – X, agreed to pay Rs.10,000/- to Y to enable him to file a suit for the recovery of his property and Y promised to give him 314 share I the property, if recovered. The agreement was held to be champertous and void. {**Nuthahi Venkataswami v. Katta Nagl**}

Position in England: Both of these agreements are declared illegal and void.

Position in India: All of these agreements are not illegal. The Court will refuse to enforce such agreements if its object is not bonafide or the terms of reward are unreasonable in the opinion of court.

(d) **Agreement for the Sale/Transfer of Public Offices and Titles:** The agreements for the sale or transfer of public offices or to obtain public titles like Padma Shree are illegal on the ground of public policy.

Example – X promises to pay Y Rs.50,000/- if Y secures him an employment in Government Service. This agreement is opposed to public policy.

Agreements in Restraint of Parental

Rights: An agreement, which prevents a parent to exercise his right of guardianship, is void on the ground of public policy.

Example – G, a father having two sons, agreed to transfer guardianship in favour of A and also agreed not to revoke the transfer during his life. Subsequently, G filed a suit for the recovery of boys. It was held that he had a right to revoke his authority and get back his children.

(e) **Agreement in Restraint of Personal Liberty:** An agreement that unduly extracts the personal liberty of any person is void on the ground of public policy.

Example – X borrowed Rs.1 lakh from Y on the promise that he would not, without the Y's written permission leave his job, borrow money, dispose of his property or change his residence. It was held that the agreement was illegal on the ground of public policy. **{Harwood v. Miller's Timber and Trading Co.}**

(f) **Agreement Tending to Create monopoly:** An agreement, which tends to create monopoly, is void on the ground of public policy.

Example – A local body granted a monopoly to X to sell vegetables in a particular locality. This agreement is void on the ground of being opposed to public policy.

(g) **Agreements Interfering with Course of Justice:** An agreement which interferes with course of justice is void on the ground of being opposed to public policy.

(h) **Marriage Brokerage Contracts:** A marriage contract is one whereby one or more persons receive money or money's worth in consideration of marriage.

(i) **Agreement in Restraint of Marriage {Section 26}:** Every agreement in restraint of marriage of any person other than a minor is void.

(j) **Agreement in Restraint of Trade {Section 27}:** Every agreement, by which any one is restrained from exercising a lawful profession trade or business of any kind, is to the extent void.

(k) **Agreement in Restraint of Legal Proceeding {Section 28}:** An agreement which restrains a party absolutely from enforcing his legal rights arising under a contract or an agreement which curtails the period of limitation within which the legal rights may be enforced is void.

VOID AGREEMENTS AND CONTINGENT CONTRACTS**Meaning of Void Agreements**

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

The following types of agreements have expressly been declared void under various sections of the Indian Contract Act.

1. Agreements by or with person's incompetent to contract (Section 10 & 11).
2. Agreements entered into through a mutual mistake of fact between the parties (Section 20).
3. Agreement, the object or consideration of which is unlawful (Section 23)
4. Agreement, the consideration or object of which is partly unlawful (Section 24).
5. Agreement made without consideration (Section 25).
6. Agreements in restraint of marriage (Section 26).
7. Agreements in restraint of trade (Section 27).
8. Agreements in restraint of legal proceedings (Section 29).
9. Wagering agreement (Section 30).
10. Impossible agreements (Section 56).
11. An agreement to enter into an agreement in the future.

Agreements from No 1 to 5 have already been discussed in earlier chapters. The other agreements are discussed this chapter.

AGREEMENTS IN RESTRAINT OF MARRIAGE

According to Section 26 of the Indian Contract Act, every agreement in restraint of the marriage of any person other than a minor is void.

Example I – X promised to marry Y only and none else, and to pay Rs.2000/- in default. X married Z and Y sued X for recovery of Rs.2000/-. It was held that Y could not recover anything because the agreement was in restraint of marriage. **{Lowe v. Peers}**

It may be noted that an agreement which provides for a penalty upon remarriage may not be considered as a restraint of marriage.

Example II - An agreement between two co-widows that if one of them remarried, she should forfeit her right to her share in the deceased husband's property, was not void because no restraint was imposed upon either of the two widows from remarrying.

Example III - Nkiah Nama (i.e. a marriage agreement in Muslims) which authorizes wife to divorce herself and to claim maintenance from the husband on his marrying a second wife, was not void because no restraint was imposed upon husband from marrying a second wife. {**Badu v. Badarannessa**}.

AGREEMENTS IN RESTRAINT OF TRADE

According to Section 27 of Indian Contract Act, 1872, "every agreement by which anyone is restrained from exercising a lawful profession, trade or business of an kind, is to that extent void." This is because Article 19 (9) of the Constitution of India regards the freedom of trade and commerce as a right of every individual. Therefore, no agreement can deprive or restrain a person from exercising such a right.

Onus of Proof: Where an agreement is challenged on the ground of its being in restraint of trade, the party supporting the contract must show that the restraint is reasonably necessary to protect his interests, and the party challenging the contract must show that the restraint is injurious to the public.

Let us discuss them one by one:-

Exceptions to the Rule that **"An Agreement in Restraint of Trade is Void."**

I. Exceptions Under Statutory Provisions:

(a) **Sale of Goodwill** [Exception 1 to Section 27]: An agreement, which restrains the seller of goodwill from carrying on a business, is valid if all the following conditions are fulfilled:

- (i) Such restrictions must relate to a similar business.
- (ii) Such restriction must be within specified local limits.
- (iii) Such restriction must be for the time so long as the buyer or any person deriving title to the goodwill from him carries on a like business in the specified local limits.

(iv) Such specified local limits must be reasonable having regard to the nature of the business. Thus, the buyer of good will may restrain the seller for carrying on any business similar to the one sold by him within certain vicinity and for a certain period of time provided the restrictions in regard to time and vicinity are found reasonable.

(b) Partners Agreements: The Indian Partnership Act, 1932, recognizes the following agreements in restraint of trade as valid:

(i) Restriction on existing partner [Section 11(2)] - A partner shall not carry on any business other than that of the firm while he is a partner.

(ii) Restriction on outgoing partner (Section 36(2)) – an outgoing partner may agree with his partners that he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Such agreement shall be valid only if the restrictions are reasonable.

(iii) Restriction on partners upon or in anticipation of the dissolution of the firm [Section 54] - Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within specified period or within specified local limits. Such agreement shall be valid only if the restrictions are reasonable.

(iv) Restriction in case of sale of goodwill [Section 55(3)] – a partner may upon the sale of the goodwill of a firm, make an agreement that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits. Such agreement shall be valid if the restrictions are reasonable.

II. Exceptions Under Judicial Interpretations:

(a) Trade Combinations: Trade combinations which have been formed to regulate the business or to fix prices are not void, the trade combinations which tend to create monopoly and which are against the public interest are void.

Example –: An agreement by two firms to avoid competition is void because it tends to create monopoly and is against the public interest. **{Jai Ram v. Kahna Ram}**

(b) Sole Dealing Agreements: Agreements to deal in the products of a single manufacturer or to sell the whole procedure to a single dealer are valid if their terms are reasonable.

Example –: An agreement by a person to sell all the mica produced by him to the plaintiffs and not to another firm, and not to keep any in stock, is valid. **{Subha Naidu v. Har Badsha Sahib}**

(c) Service Agreements: A clause in service agreement may or may not be in restraint of trade. An analysis of some of the clauses of service agreement is as under:

Clause	Whether held as restraint of Trade
(i) A clause to serve the employer for a stipulated period.	Such agreements if reasonable, do not amount to restraint of trade and hence, are enforceable.
(ii) A clause to prevent the employee from accepting any other engagement during his employment.	Such agreements do not amount to restraint of trade and hence, are enforceable.
(iii) A clause to prevent the employee from accepting a similar engagement after the termination of his services.	(a) Such agreements do not amount to restraint of trade and hence, are enforceable by law.
(a) If a restraint is intended only to protect an employer against an employee making use of trade secrets learned by him in the course of his employment.	Example: An employee who possesses certain trade secrets, agreed not to carry on the similar business during 5 years after termination of service {Forster & Sons Ltd. V. Sugget}
(b) If a restraint is intended to serve any other purpose (say to avoid competition).	(b) Such agreements amount to restraint of trade and hence, are not enforceable by law. Example: an agreement to restrain a servant from completing for 5 years after the period of service, is void. {Brahmaputra Tea Co., v. E. Scarth}

AGREEMENTS IN RESTRAINT OF LEGAL PROCEEDINGS:

According to Section 28, the following two agreements amount to restraint of legal proceedings and are thus void to the extent.

(a) Agreements Restricting Enforcement of Right: An agreement by which any party is restricted absolutely from enforcing his legal rights under or in respect of any contract is void to that extent.

Example: A clause in a contract provided that no action should be brought upon it in case of breach. Such a clause is void because it restricts both parties from enforcing their legal rights.

Note: - where two courts have jurisdiction to try a suit, an agreement between the parties that the suit should be filed in one of those courts alone and not in the other is not invalid.

[CO Milton & Co. & v. Ojha Automobile Co.]

(b) Agreements Limiting the Period of Limitation: An agreement, which limits the time within which an action may be brought so as to make it shorter than that prescribed by the Law of Limitation, is void because its object is to defeat the provisions of law.

Example: A clause in a contract provides that no action should be brought after two years. Such a clause is void because it limits the period of limitation to two years which is less than the period of limitation (i.e. three years) prescribed by the law of limitation.

UNCERTAIN AGREEMENTS

An uncertain agreement means an agreement the meaning of which is not certain or capable of being made certain. Such agreements are void.

Example: A agrees to sell B a hundred tons of oil. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

WAGERING AGREEMENTS (SECTION 30)

Meaning of Wagering Agreements

An agreement between two persons under which money or money's worth is payable by one person to another on the happening or non-happening of a future uncertain event is called a wagering event. Such agreements are chance or oriented and therefore, completely uncertain.

Essentials of Wagering Agreement

The aforesaid definition highlights the following essentials of a wagering agreement:

- (a) **Promise to pay Money or Money's Worth:** The wagering agreement must contain a promise to pay money or money's worth.
- (b) **Uncertain Event:** The performance of the promise must depend upon the determination of an uncertain event. An event is said to be uncertain when it is yet to take place or it might have already happened but the parties are not aware of its result.
- (c) **Mutual Chances of Gain or Loss:** Each party must stand to win or lose upon the determination of an uncertain event. If either of parties may win but cannot lose or may lose but cannot win, it is not a wagering agreement.
- (d) **Neither Partly to have Control over the Event:** neither party should have control over the happening of the event one-way or the other.
- (e) **No other Interest in the Event:** Neither party should have interest in the happening or non-happening of the event other than the sum or stake he will win or loose.

Example of Wagering Agreements

- (a) An agreement to settle the difference between the contract price and market price of certain goods or shares on a particular day.
- (b) A lottery (i.e. a game of chance), but parties running a Govt. approved lottery cannot be prosecuted.
- (c) An agreement to buy a lottery ticket.
- (d) A crossword puzzle in which prizes depend upon correspondence of the competitor's solution with previously prepared solution kept with the editor of newspapers is a lottery and hence a wagering transaction [**State of Bombay v. R.M.D. Chamarbaughwala**]. But a crossword puzzle is generally a game of skill and intelligence and hence nor a wager.

Effect of Wagering Agreement (Section 30) The effects of wagering agreements are given as under:

- (a) Agreements by way of wager are void in India.
- (b) Agreements by way of wager have been declared illegal in the states of Maharashtra and Gujarat.
- (c) No suit can be filed to recover the amount won on any wager.
- (d) Transactions, which are collateral to wagering agreements, are not void in India except in the State of Maharashtra and Gujarat.
- (e) Transactions, which are collateral to wagering agreements, are illegal in the states of Maharashtra and Gujarat.

Example: A Cricket match is to be held between India and Pakistan. **X** agrees to pay Rs.1 lakh to **Y** if India wins the match and agrees to deposit the money with **Z** a third person of confidence for this purpose. **X** borrows Rs.1 lakh from **W**. The implications of this case are summarized as under:

- (a) The agreement between **X** and **Y** is a wagering agreement because the performance of an agreement depends upon the happening or non-happening of a future uncertain event and each party stands to win or lose.
- (b) If India wins the match, **Y** (a winner) cannot recover the amount but **X** (a loser) can recover if the amount has not been paid to **Y**. Thus, a winner cannot recover the amount but a loser can if the amount has not been paid to the winner.
- (c) If India wins the match and **Z** (a stakeholder) pays the money to **y** (a winner), **X** (a loser) cannot recover it from **Z** [**Bridger v. Savage**].

DISTINCTION BETWEEN CONTRACTS OF INSURANCE AND WAGERING AGREEMENT

The contracts of insurance differs from the wagering agreements in the following respects:

Basis of distinction	Contracts of Insurance	Wagering agreement
1. Insurable Interest	Person having an insurable interest can insure his life or property.	Parties to a wagering agreement need not have insurable interest.
2. Actual amount payable.	In case of contracts of insurance except life insurance, the actual amount payable need not necessarily be the full amount for which the property is insured.	In case of wagering agreements, the actual amount payable is usually fixed.
3. Beneficial/against the public policy.	These are regarded as beneficial to the public policy.	These are considered to be against public policy.

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4. Gamble	Such agreements do not tantamount to gambling as they involve the element of investment and protection.	Being chance oriented, these are closer to gambling.

AGREEMENTS CONTINGENT ON IMPOSSIBLE EVENTS (SEC - 36)

According to Section 36 of the Indian Contract Act, 1872 contingent agreements to do or not to do anything, if an impossible event happens are void whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Example: A agrees to pay Rs.1000/- if B marries C (a Hindu) who is already married to D. This agreement is void.

AGREEMENTS TO DO IMPOSSIBLE ACTS (SEC - 56)

According to Section 56 of the Indian Contract Act, 1872, **“An agreement to do an impossible act is void”**.

Example: A undertakes to put life into the dead wife of B. This agreement is void.

RESTITUTION [SEC – 64 & 65]

Restitution means **‘return or restoration of benefit’**. The provisions relating to ‘restitution’ are given below:

Case	Provision
(a) When a person at whose option a contract is voidable rescinds it [Section – 64].	The party rescinding a voidable contract must restore the benefit to the person from whom he has received it.
(b) When an agreement is discovered to be void or the contract becomes void [Section – 65].	The person who has received any benefit or advantage under such agreement of contract must restore it or compensate for it to the person from whom he has received it.

Example: A, a lady singer contracts with B the manager of a theatre to sing at his theatre for two nights every week during the next two months and B agrees to pay her Rs.100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre and B in consequence rescinds the contract, B must pay to A for the five nights on which she has sung.

Non-applicability of the Principle of Restitution

The principle of restitution does not apply to contracts, which are void ab-initio with the exception where the minor has entered into agreement by misrepresenting his age.

Example: X pays Rs.1000/- to Y to beat Z. Y does not beat Z. X claims Rs.1000/- from Y. X cannot recover anything because this agreement is void ab-initio.

MEANING AND ESSENTIAL FEATURES OF A CONTINGENT CONTRACT

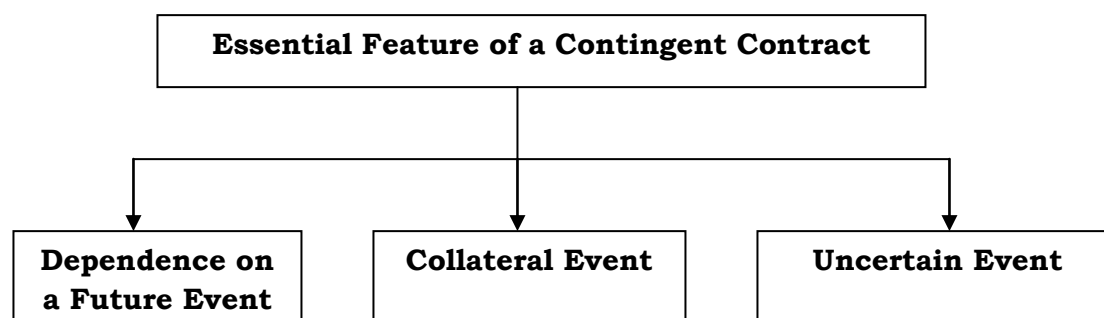
A '**contingent contract**' is a contract to do or not to do something if some event, collateral to such contract, does or does not happen. Insurance contracts provide the best example of contingent contracts.

Example - I: A contracts to pay B Rs.10,000/- if B's house is burnt. This is a contingent contract.

Example – II: A promises to pay B Rs.1 crore if a certain ship does not return within a year.

Essential Features of a Contingent Contract

The essential features of a Contingent Contract are shown below;



Let us discuss them one by one.

- (a) **Dependence on a Future Event:** The performance of a contingent contract depends upon the happening or non-happening of some future event.
- (b) **Collateral Even:** The event must be collateral to the contract.
- (c) **Uncertain Event:** The event must be uncertain.

Note: The performance of a contingent contract must depend upon the happening or non-happening of an event and not on the mere will of the promisor. For **Example:-** If A promises to pay to B Rs.10,000/- if he so chooses, it is not a contingent contract.

RULES REGARDING CONTINGENT CONTRACTS [SEC – 32 TO 36]

The various rules regarding the enforcement of contingent contract are given below:

Kind of contingent Contract	Rule Regarding Enforcement
1. Contracts contingent upon the happening of an uncertain future event. (Section – 32)	<p>Law cannot enforce such contracts unless and until that event has happened. If the vent becomes impossible, such contracts become void.</p> <p>Example: A makes a contract with B to buy B's horse if A survives C. Law cannot enforce this contract unless and until C dies in A's lifetime.</p> <p>Example: A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contact cannot be enforced by law unless and until C refuses to buy the horse.</p>

2. Contracts contingent upon the non-happening of a certain future event. (Section-33)	<p>Such contracts can be enforced when the happening of that event becomes impossible and not before.</p> <p>Example: A agrees to pay B a sum of money if a certain ship does not return. This ship is sunk. The contract can be enforced when the ship sinks.</p>
3. Contracts contingent upon the future conduct of a living person (Section – 34).	<p>If the uncertain event is the future conduct of a living person, such event shall be considered impossible if that such person does anything by which it becomes impossible to perform the contract within any definite time.</p> <p>Example: A agrees to pay to B a sum of money if B marries to C. C marries to D. The marriage of B to C must now be considered impossible, although it is possible that D may dies, and that C may afterwards marry to B.</p>
4. Contracts contingent upon the happening of an uncertain specified event within a fixed time (Section 35).	<p>Such contracts become void if before the expiry of fixed time;</p> <p>(a) Such event does not happen, or (b) Such event becomes impossible.</p> <p>Example: A promises to pay to B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and become void if the ship is burnt within the year.</p>

5. Contracts contingent upon the non-happening of an uncertain specified event within a fixed time. (Section – 36).	Such contracts can be enforced by law if before the expiry of fixed time; (a) Such event does not happen, or (b) It becomes certain that such event will not happen. Example: A promises to pay to B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.
6. Agreements contingent upon impossible events. (Section – 36)	Such agreements are void whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

DISTINCTION BETWEEN A WAGERING AGREEMENT AND A CONTINGENT CONTRACT

A wagering agreement differs upon a contingent contract in the following ways:

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

MEANING OF DISCHARGE OF A CONTRACT

Discharge of a contract means termination of the contractual relations between the parties to a contract. A contract is said to be discharged when the rights and obligations of the parties under the contract come to an end.

Modes of Discharge of Contract

A contract can be discharged by performance in any of the following ways:

(a) By Actual Performance: A contract is said to be discharged by actual performance when the parties to the contract perform their promises in accordance with the terms of the contract.

(b) By attempted Performance or Tender: So far as the tenderer of performance is concerned, a contract is said to be discharged by attempted performance when the promisor has made an offer of performance to promisee but it has not been accepted by the promisee.

Discharge by Mutual Agreement

Since a contract is created by mutual agreement, it can also be discharged by mutual agreement. A contract can be discharged by mutual agreement in any of the following ways:

(a) Novation (Section – 62): Novation means the substitution of a new contract for the original contract. Such a new contract may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract. Such a new contract may be either between the same parties or between different parties. The consideration for the new contract is the discharge of the original contract.

Example: A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B no longer exists and a new debt from C to B has been contracted.

(b) Rescission (Section 62) Rescission means cancellation of the contract by any party or all the parties to a contract.

Example: X promises Y to sell and deliver 100 bales of cotton on 1st October at his godown and Y promises to pay for goods on 1st November. X does not supply the goods. Y may rescind the contract.

(c) Alteration (Section 62) Alteration means a change in the terms of a contract with mutual consent of the parties. Alteration discharges the original contract and creates a new contract. However, parties to the new contract must not change.

Example: X promises to sell and deliver 100 bales of cotton on 1st October and Y promises to pay for goods on 1st November. Afterwards, X and Y mutually decide that the goods shall be delivered in five equal instalments at Z's godown.

(d) Remission (Section 63) remission means acceptance by the promisee of a lesser fulfilment of the promise made. According to Section 63, 'Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for which performance, or may accept instead of it any satisfaction which he thinks fit.'

Example: A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(e) Waiver: Waiver means intentional relinquishment of a right under the contract. Thus, it amounts to releasing a person of certain legal obligation under a contract.

Example: A promises to supply goods to Y. Subsequently, Y exempts X from carrying out the promise. This amounts to waiving the right of performance on the part of Y.

Discharge by Operation of Law

A contract may be discharged by operational of law in the following cases.

(a) By Death of the Promisor: A contract involving the personal skill ability of the promisor is discharged o the death of the promisor.

(b) By Insolvency: When a person is declared insolvent, he is discharged from his liability up to the date of his insolvency.

(c) By Unauthorised Material Alteration: If any party makes any material alteration in the terms of the contract without the approval of the other party, the contract comes to and end.

(d) By the Identity of Promisor and Promisee: When the promisor becomes the promisee, the other parties are discharged.

Example: X draws a bill receivable on Y who accepts the same. X endorses the bill in favour of Z who in turn endorses in favour of Y. Here, Y is both promisor and promisee and hence the other parties are discharged.

Discharge by Impossibility of Performance

The effects of impossibility of the performance of a contract ma be discussed under the following two heads:

- (a)** Effects of Initial Impossibility
- (b)** Effects of Supervening Impossibility

(a) Effects of Initial Impossibility (Section 56 Para's 1 and 3): Initial impossibility means the impossibility existing at the time of making the contract. The effects of initial impossibility are as under;

Case	Effects
1. Where both the promisor and promisee know about the initial impossibility.	Such agreement is void ab-initio. Example: X undertakes to put life into the dead wife of Y. This agreement is void.
2. Where both the promisor and promisee do not know the initial impossibility.	Such agreement is void on the ground of mutual mistake. Example: X agrees to sell his horse to Y. Unknown to both the parties, the horse was dead at the time of making the agreement. This agreement is void.
3. Where the promisor alone knows about the initial impossibility.	Such promisor must compensate for any loss, which such promisee sustains through the non-performance of the promise.

2. Where an act becomes unlawful by reason of some event beyond the control of promisor.	The contract to do such an act becomes void when the act becomes unlawful. (Section – 56 Para 2).
3. Where the promisor alone knows about the impossibility.	Such promisor must compensate the promisee for any loss, which such promisee might have suffered on account of non-performance of the promise. (Section – 56 Para 2).

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4. Where an agreement is discovered to be void or where a contract becomes void.	<p>Any person who has received any benefit under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it. (Section 65).</p> <p>Example: X contracts to sign for Y at a concert for Rs.1000/-, which is paid in advance. X is too ill to sign. X must refund Rs.1000/- to Y.</p>	

(b) Effects of Supervening Impossibility (Sec –56 Para 2): Supervening impossibility means impossibility which does not exist at the time of making the contract but which arises subsequently after formation of the contract. The effects of supervening impossibility are as under:

Case	Effect
1. Where an act becomes impossible after the contract is made.	The contract to do such an act becomes void when the act becomes impossible. (Section – 56 Para 2).

Cases when a Contract is discharged on the Ground of Supervening Impossibility:

A contract is discharged by supervening impossibility in the following cases:

(a) Destruction of Subject Matter: The contract is discharged if the subject matter of the contract is destroyed after the formation of the contract without any fault of either party.

Example: X agreed to sell his crop of wheat. The entire crop was destroyed by fire though no fault of the party. The contract was discharged.

(b) Death or Personal Incapacity: The contract is discharged on the death or incapacity or illness of a person if the performance of a contract depends on his personal skill or ability.

Example: X agreed to sign on a specified day. X fell seriously ill and could not perform on that day. The contract was discharged.

(c) Declaration of War: The pending contracts at the time of declaration of war are either suspended or declared as void.

Example: X contracts to take in cargo for Y at a foreign port. X's government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared.

(d) Change of Law: The contract is discharged if the performance of the contract becomes impossible or unlawful due to change in law after the formation of the contract.

Example: X agreed to sell his land to Y. After the formation of the contract the Government issued a notification and acquired the land. The contract was discharged. {Shyam Sunder v. Durga}.

(e) Non-Existence or Non-Occurrence of a Particular State of Things Necessary for Performance: The contract is discharged if that particular state of thing, which forms the basis of a contract, ceases to exist or occur.

Example: The contract is discharged if that particular state of thing, which forms the basis of a contract, ceases to exist or occur.

Cases when the Contract is not discharged on the Ground of supervening Impossibility: Impossibility of performance is, as a rule, not an excuse for non-performance. It means that when a person has promised to do something, he must perform his promise unless the performance becomes absolutely impossible. A contract is not discharged by the supervening impossibility in the following cases:

(a) Difficulty of Performance: A contract is not discharged simply on the ground that its performance has become more difficult, more expensive or less profitable than that agreed at the time of its formation.

Example: X agreed to supply coal within a specified time. He failed to supply in time because of government's restriction on the transport of coal from collieries. Here X will not be discharged because the coal was available in the open market from where X could have obtained.

(b) Commercial Impossibility: A contract is not discharged simply on the ground of commercial impossibility, i.e. when the contract becomes commercially unviable or unprofitable.

Example: X, a furniture manufacturer agreed to supply certain furniture to Y at an agreed rate. Afterwards, there is sharp increase in the rates of the timber and rates of wages. Since, it was no longer profitable to supply at the agreed rate, X did not supply. X will not be discharged on the ground of commercial impossibility.

(c) Default of a Third Party: A contract is not discharged if it could not be performed because of the default of third party on whose work the promisor relied.

Example: X entered into a contract with Y for the sale of goods to be manufactured by Z, a manufacturer of those goods. Z did not manufacture those goods. X will not be discharged and will be liable to Y for damages.

(d) Strikes, Lockouts and Civil Disturbances: A contract is not discharged on the grounds of strikes, lockouts and civil disturbances unless otherwise agreed by the parties to the contract.

Example: X agreed to supply to Y certain goods to be imported from Algeria. The goods could not be imported due to riots in that country. It was held that this was no excuse for non-performance of the contract. [**Jacobs v. Credit Lyonnais**].

(e) Partial Impossibility: A contract is not discharged simply on the ground of impossibility of some of the objects of the contract.

Example: X agreed to let a boat to H (i) to w the naval review at the coronation of king and (ii) to cruise round the fleet. Due to illness of the king, the naval review was cancelled but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged.

Discharge by Lapse of Time

A contract is discharged if it is not performed or enforced within a specified period, called period of limitation. The Limitation Act, 1963 has prescribed the different periods for different contracts, e.g. period of limitation for exercising right to recover a debt is 3 ears, and to recover an immovable property is 12 years. The contractual parties cannot exercise their right after the expiry of period of limitation.

Example: On 1st July 2011 X sold goods to Y for Rs.1 lakh and Y has made no payment till Aug 2014. State of legal position as on 1st Aug 2014 (a) if no credit period was allowed (b) if 2 months credit period was allowed.

Solution:

Case (a) The contract is discharged by lapse of time (i.e. 3 years) from 1st July 2011 because the debt has become time barred and hence X cannot exercise his right to recover this debt.

Case (b) The contract is not discharged by lapse of time because the period of limitation is year to expire on 31st Aug 2014 (i.e.3 year from the expiry of the credit period).

Discharge by Breach of Contract

A contract is said to be discharged by breach of contract if any party to the contract refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. A breach of contract may occur in two ways.(refer to next chapter)

BREACH OF CONTRACT***MEANING OF BREACH OF CONTRACT***

A breach of contract occurs if any party refuses or fails to perform his part of contract or his act makes it impossible to perform his obligation under the contract. In case of breach, the aggrieved party (i.e. the party not at fault) is relieved from performing his obligation and gets a right to proceed against the party at fault. A breach of contract may arise in two ways: - **(a)** Anticipatory breach and **(b)** Actual breach.

ANTICIPATORY BREACH OF CONTRACT**Meaning of Anticipatory Breach of Contract (Sec – 39)**

Anticipatory breach occurs when the party declares his intention of not performing the contract before the performance is due. Thus, when a party refuses to perform a contract even before it is due for performance, it is called anticipatory breach.

Modes of Declaring an Intention not performing the Contract (Section - 39)

A party may declare his intention of not performing the contract in the following ways:

(a) When a party to a contract has refused to perform his promise.

Example: X, a farmer agrees to sell to Y his entire crop of 10 tons of wheat @ Rs.8000/- per ton to be delivered on 20th October. On 1st October, X informs Y that he is not going to supply the goods. X has committed anticipatory breach of contract by express repudiation.

(b) When a party to a contract has disabled himself from performing his promise in it, entirely.

Example: X, a farmer agrees to sell to Y his entire crop of 10 tons of wheat @ Rs.8000/- per ton to be delivered on 20th October. On 1st October, X sold his entire crop to Z @ 10000/- per ton. X has committed anticipatory breach of contract by implied repudiation.

Options Available to Aggrieved Party (Section – 39)

In case of anticipatory breach, the aggrieved party has the following two options:

- (a) He can rescind the contract and claim damages for breach of contract without waiting until the due date for performance, or
- (b) He may treat the contract as operative and wait till the due date for performance and claim damages if the promise still remains unperformed.

Consequences of Treating Contract as Operative

In case of anticipatory breach, if the aggrieved party treats the contract as operative and waits till the due date for performance, the consequences will be as follows:

- (a) The promisor may perform his promise or before the due date of performance and the promisee will be bound to accept the performance.
- (b) The promisor may take advantage of the discharge by supervening impossibility arising between the date of breach and the due date of the performance and in such a case, the promisee shall lose his right to sue for damages.

Example: X, a farmer agreed to sell to Y his entire crop of wheat @ Rs.8000/- per ton to be delivered on 20th October. On 1st October, X informed Y that he was not going to supply the goods. Y decided not to rescind the contract on 1st October and to wait till 20th October. On 19th October, the entire crop was destroyed by fire without the fault of either party. Since the contract had become void on the ground of impossibility of performance, Y had lost his right to sue X for damages.

Amount of Damages

The amount of damages in each of the options exercised by an aggrieved party will be calculated as under

<i>Option Exercised</i>	<i>Amount of Damages</i>
I. When the aggrieved party rescinds the contract at the date of breach.	The amount of damages will be equal to the difference between the price prevailing on the date of breach and the contract price.

II. When the aggrieved party does not rescind the contract at the date of breach.	The amount of damages will be 3equal to the difference between the price prevailing on the due date of performance and the contract price.
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Example: X, a farmer, agreed to sell t Y his entire crop of 10 tons of wheat @ Rs.8000/- per ton to be delivered on 20th October. On 1st October X informed Y that he was not going to supply the goods. Calculate the amount of damages, which could be recovered by Y from X **(a)** If Y rescinded the contract on 1st October when the market price of wheat was Rs.10000/- per ton, **(b)** If Y did not rescind the contract on 1st October and waited till 20th October when the market price of wheat was Rs.12000/- per ton.

Solution:

	A	B	C = (A-B)	D	E = (C*D)
Case	Market price Per ton	Contract price per ton	Difference per ton	Quantity in tons	Amount of
1. If Y rescinded the Contract.	Rs.10000/-	Rs.8000/-	Rs.2000/-	10	Rs.20000/-
2. If Y did not rescinded the Contract.	Rs.12000/-	Rs.8000/-	Rs.4000/-	10	Rs.40000/-

ACTUAL BREACH OF CONTRACT

Meaning of Actual Breach of Contract

Actual breach of contract may take place in any of the following two ways:

(a) On Due Date of Performance: If any party to contract refuses or fails to perform his part of the contract at the time fixed for performance, it is called an actual breach of contract on due date of performance.

Example: X agreed to sell to Y 10 tons of wheat @ Rs.8000/- per ton to be delivered in two equal instalments on 20th October and 21st October. On 20th October, x refused to deliver the goods. It is an actual breach of contract on due date of performance.

(b) During the Course of Performance: If any arty has performed a part of the contract and then refuses or fails to perform the remaining part of the contract, it is called breach of contract during the course of performance.

Example: X agreed to sell to Y 10 tons of wheat @ Rs.8000/- per ton t be delivered in two equal instalments on 20th October and 21st October.

On 20th October, X delivered 5 tons and refused to deliver remaining 5 tons. It is an actual breach of contract during the course of performance.

Consequences of Actual Breach (Section – 55)

The consequences of actual breach depend upon whether the time was the essence of the contract or not. The consequences I both the cases may be summarised as under:

Case	Where time is the essence of a contract.	Where time is not the essence of a contract
I. Whether the contract becomes voidable at the option of the promisee?	Yes	No
II. Whether the promsee is entitled to claim compensation for any loss occasioned to him by the non-performance of the promise at the stipulated time?	Yes	Yes

(i) Where performance beyond the stipulated time is not accepted.		
(ii) Where performance beyond the stipulated time is accepted.	<i>No</i> Unless the promisee gives notice to the promisor of his intention to do so.	<i>No</i> Unless the promisee give notice to the promisor of his intention to do so.

Example: X, a singer, enters into a contract with Y, the manager of a theatre, to sing at his theatre two nights in every week for the next two months. Y agrees to pay her Rs.100/- for each performance. On the sixth night, X wilfully absents herself from the theatre. In this case, Y has the following two options:

(a) Y may rescind the contract and claim compensation for the loss occasioned to him by X's failure to sing on the sixth night.

(b) Y may permit X to sing on the seventh night and claim compensation for loss from X by giving a notice to X of his intention to do so.

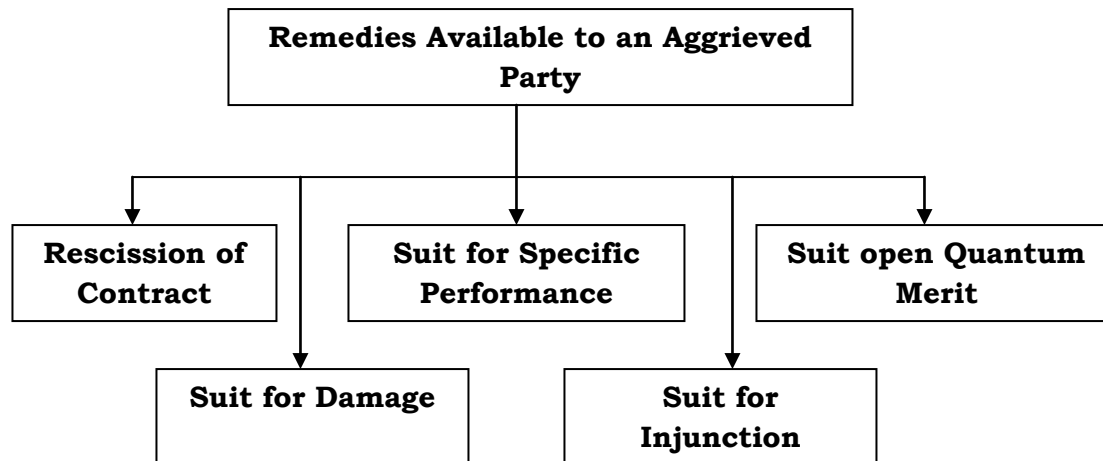
REMEDIES FOR BREACH OF CONTRACT

Meaning of Remedy

A remedy is the course of action available to an aggrieved party (i.e. the party not at default) for the enforcement of a right under a contract.

Remedies for Breach of Contract

The various remedies available to an aggrieved party are as shown below in the figure:



Let us discuss them one by one:

1. Rescission if contract (Section – 39): In case of breach of a contract, the promise may put an end to the contract. In such a case, the aggrieved party is discharged from all the obligations under the contract and is entitled to claim compensation for the damage, which he has sustained because of the non-performance of the contract.

Example: X agrees to supply 10 tons of wheat to Y on 20th October. Y promises to pay for the goods on its receipt. X does not supply the goods on the due date. Here, Y is discharged from the liability of paying the price. Y is entitled to rescind the contract and to claim compensation for the damage, which he has sustained because of non-supply of goods on the due date.

2. Suit for Damages: damages are monetary compensation allowed for loss suffered by the aggrieved party due to breach of a contract. The object of awarding damages is not to punish the party at fault but to make good the financial loss suffered by the aggrieved party due to the breach of contract. The types of Damages as follows

(a) Ordinary Damages: Ordinary damages are those, which naturally arise, in the usual course of things from such breach. These damages can be recovered if the following two conditions are fulfilled:

(i) The aggrieved party must suffer by breach of contract, and

(ii) The damages must be proximate (i.e. direct) consequences of the breach of contract and not the indirect consequences.

Measures of Ordinary Damages: In a contract for the sale of goods, the measure of ordinary damages is the difference between the contract price and the market price of such goods on the date of breach.

Example: On 1st December, X contracted to sell and deliver 50 tons of wheat @ Rs.8000/- per ton to Y on 1st January. On 20th December Y, afterwards, contracted to sell those goods to Z at Rs.10000/- per tons. X failed to deliver goods on 1st January when the price of the wheat was Rs.9500/- per ton. Y is entitled to recover Rs.75000/- [Le (Rs.9500 – Rs.8000) x 50]. Y is not entitled to recover Rs.1,00,000/- as profit which would have arisen to Y from the sale to Z because the profit is the indirect consequences of the breach of contract.

(b) Special Damages: Special damages are those, which may reasonably be supposed to have been in the contemplation of both parties as the probable result of the breach of contract. These damages can be recovered if the special circumstances, which would result in a special loss in case of breach of a contract, are communicated to the promisor, e.g. loss of profit on account of default by the other party to the contract can be claimed only when an advance notice of such damages has been given before.

Example: A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contract to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January it falls down, and has to be rebuilt by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(c) Exemplary or Punitive or Vindictive Damages: Exemplary damages are those, which are in the nature of punishment. The court may award these damages in case of (i) a breach of promise to marry, where damages shall be calculated on the basis of mental injury sustained by the aggrieved party, and (ii) Wrongful dishonour of a cheque by a banker. In case of wrongful dishonour of a cheque, the rule is smaller the amount

of the cheque, larger will be the amount of damages awarded. A trader may recover such damages as wrongful dishonour of cheque shall adversely affect his goodwill but a non-trader whose cheque is wrongfully dishonoured will have to prove the losses of goodwill before claiming such damages.

(d) Nominal Damages: Nominal damages are those, which are awarded where there is only a technical violation of a legal right but the aggrieved party has not in fact suffered any loss because of breach of contract. These damages are called nominal because they are very small, say, one rupee. The court may or may not award these nominal damages.

(e) Damages for Inconvenience and Discomfort: If a party have suffered physical inconvenience and discomfort due to breach of contract, that party can recover the damages for such inconvenience and discomfort.

Example: H with his wife and children booked a ticket for a midnight train, to be transported to a particular place where he lived. They were, however, transported to a wrong place and they had to walk several miles on a drizzling night and as a result, his wife caught cold and he had to incur some medical expenses. It was held that he could recover compensation for inconvenience and not for medical expenses for the sickness of his wife because it was very remote consequence.

(f) Liquidated Damages and Penalty: When the parties to a contract at the time for formation of contract, specify a sum which will become payable by the party responsible for breach, such specified sum is called:

(i) Liquidated Damages: If the specified sum represents a fair and genuine pre estimate of the damages likely to result due to breach;

(ii) Penalty: If the specified sum is disproportionate to the damages likely to result due to breach.

In India, there is no distinction between penalty and liquidated damages. The Courts in India allow only reasonable compensation not exceeding the specified sum (**Section – 74**). **But** under English law, liquidated damages are enforceable and not penalty.

(g) Forfeiture of Security deposit (or Earnest Money): A clause in a contract, which provides for forfeiture of security deposit in the event of failure to perform is in the nature of a penalty. In such cases, the court may award reasonable compensation only.

3. Suit for Specific Performance: Suit for specific performance means demanding the court's direction to the defaulting party to carry out the promise according to the terms of the contract.

Example: X agreed to sell an old painting to Y for Rs.50000/-. Subsequently, X refused to sell the painting. Here, Y may file a suit against X for the specific performance of the contract.

Cases where suit for specific performance is not maintainable.

- Where the damages are considered as an adequate remedy.
Where the contract is of personal nature, e.g. contract to marry.
- Where a company beyond its powers makes the contract as lay down in its Memorandum of Association.
- Where the court cannot supervise the performance of the contract.
- Where one of the parties is a minor.
- Where the contract is inequitable to either party.

4. Suit for Injunction: suit for injunction means demanding court's stay order. Injunction means an order of the court, which prohibits a person to do a particular act. Where a party to a contract does something, which he promised not to do, the court may issue an order prohibiting him from doing so.

Example: W agreed to sing at L's theatre only during the contract period. During the contract period, W made contact with Z to sing at another theatre and refused to perform the contract with L. It was held that W could be restrained by injunction from singing from Z [**Lumely v. Wagner**].

5. Suit for Quantum Merit: quantum Merit means as much as is earned. Right to Quantum Merit means a right to claim the compensation for the work already done.

Example: C an owner of a magazine engaged P to write a book to be published by instalments in his magazine. After a few instalments were published, the publication of the magazine was stopped. It was held that P could claim payment for the part already published [**Planche v. Calbum**].

CONTRACTS OF INDEMNITY & GUARANTEE

Contracts of Indemnity

Meaning and Definition The term ‘indemnity’ means to make good the loss suffered by a party. According to sec.124

“A contract by which one party promises to **save** the other from **loss** caused to him **by** the conduct of the Promissory himself **or** by the conduct of any **other** person, is **called** a contract of indemnity.” The **person** who promises to **compensate** for the loss is called the “**indemnifier**” and the person **to whom** this promise is made or whose loss is to be made good is known as “**indemnity-holder**” or “**indemnified**”.

Example: ‘A’ contracts to indemnify ‘B’ against the consequences of any proceedings which ‘C’ may take against ‘B’ in respect of a certain sum of money. This is a contract of indemnity.

ESSENTIALS OF VALID CONTRACT OF INDEMNITY

Under a contract of indemnity, **loss to promisee** is essential. The law relating to indemnity is **not exhaustive** and hence Courts **in India** shall **follow the English Law** in this regard. In English Law, indemnity is **defined** as a “promise to save another harmless from the loss caused as a result of a transaction entered into at the instance of the Promisor”. Thus, the contract of **indemnity** must **specify** that indemnity holder shall be protected from the **loss caused due to:**

- 1.Action of the **promissory** himself. Or
- 2.The action of any **other person**.or
- 3.**Any event** or accident which is **not** in the control of the parties.

A contract of **indemnity** like any other contract may be **express or implied**.

In a contract of indemnity, all the **essentials of a valid contract** must be present. Thus, if the object or consideration of an indemnity agreement is unlawful, it cannot be enforced.

Example

‘A’ asks ‘B’ to beat ‘C’ promising to indemnify him against the consequences. The promise of ‘A’ cannot be enforced. Suppose ‘B’ beats ‘C’ and is fined Rs.1000, ‘B’ cannot claim this amount from ‘A’ because the object of the agreement is unlawful.

▪ **Rights of Indemnity-holder**

As per Section 125 of the Indian Contract Act, the indemnity-holder is entitled to recover from the Promisor:

1. All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies. All costs of suit which he has paid in bringing or defending the suit provided: (a) he acted under the authority of the indemnifier and; (b) he acted in such away as a prudent man would act in his own case.

All sums, which he may have paid under the terms of any compromise of any, such suit, if which it would have been prudent for the promisee to make.

▪ **Rights of Indemnifier**

The Act makes no mention of the rights of an indemnifier. It has been held in *Jaswant Singh v. State of Punjab* that his rights, in such cases, are similar to the rights of a surety under Section 141, viz., he becomes entitled to the benefits of all the securities which the creditor has against the principal debtor whether he was aware of them or not.

▪ **COMMENCEMENT OF INDEMNIFIER’S LIABILITY**

An important question with respect to contracts of indemnity is as to when does the indemnifier become liable to pay, or, when is the indemnity-holder entitled to recover on his indemnity? The indemnity-holder is entitled to above-mentioned rights as soon as his liability has become certain although he has himself paid nothing. Indemnity is not necessarily repayment after payment. Indemnity-holder has incurred an absolute liability, he is entitled to ask the indemnifier to save him from that liability and pay it off. In simple words, the liability of indemnifier commences as soon as the liability of the indemnity-holder becomes absolute.

CONTRACTS OF GUARANTEE

▪ **Meaning and Definition**

According to Section 126 of the Indian Contract Act, ‘A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ‘surety’; the person in respect of whose default the guarantee is given is called ‘the principal debtor’; and the person to whom the guarantee is given is called ‘the creditor’.

Example

When 'A' requests 'B' to lend Rs.10, 000 to 'C' and guarantees that 'C' will repay the amount within the agreed time and that on 'C' failing to do so, he will himself pay to 'B', there is a contract of guarantee.

In the above example, 'B' is the creditor, 'C' the principal debtor and 'A', the surety or guarantor.

In India a contract of guarantee may either be oral or in writing, but under English Law it must be in writing.

From the above definition, it is clear that in a contract of guarantee there are, in effect, three contracts, a principal contract between the principal debtor and the creditor, and a secondary contract between the creditor and the surety.

Then, there is a third implied contract between the surety and the principal debtor where by principal debtor is under an obligation to indemnify the surety; if the surety is made to pay or perform.

- ***Essential Features of Guarantee***

Following are the requisites of a valid guarantee:

- **Existence of a debt**

The purpose of a guarantee being to secure a debt, the existence of a recoverable debt is necessary. It is of the essence of a guarantee that there should be someone liable as a principal debtor and the surety undertakes to be liable on his default. If there is no valid existing debt, there can be no valid guarantee.

Example

'A' gives the guarantee to 'B' for the payment of a time-barred debt due from 'C'. This is not a valid contract of guarantee because the primary liability between 'B' and 'C' is not enforceable by law. In case 'A' pays the amount, he cannot recover it from 'C'.

- **Consideration [Section 127]**

Like every other contract, a contract of guarantee should also be supported by some consideration. But there need not be direct consideration between the surety and the creditor. Section 127 clearly says that anything done, or any promise made, for the benefit of a principal debtor, may be sufficient consideration to the surety for giving the guarantee.

Examples

‘B’ requests ‘A’ to sell and deliver to him goods on credit. ‘A’ agrees to do so provided ‘C’ will guarantee the payment of the price of the goods. ‘C’ guarantees the payment in consideration of ‘A’ s promises to delicate goods. This is a sufficient consideration for ‘C’s promise.

‘A’ sells and delivers goods to ‘B’. ‘C’ afterwards requests ‘A’ not to sue ‘B’ for the debt for a year, and premises that if he does so, ‘C’ will pay in default of payment by ‘B’. ‘A’ agrees not to sue as requested. This is a sufficient consideration for ‘C’ s promise.

‘A’ sells and delivers goods to ‘B’. ‘C’ afterwards, without consideration, agrees to pay for them in default of ‘B’. The agreement is void.

- There should be no misrepresentation or concealment [Section 142-143]

A contract of guarantee is not a contract “ uberrimae fidei” (requiring utmost good faith). Nevertheless, the suretyship relation is one of trust and confidence, and the validity of the contract depends upon good faith on the part of the creditor. A creditor must disclose all those facts, which, under the circumstances, the surety would expect not to exist. So where guarantee is given for goods conduct of an employee, will discharge the surety.

Example

‘A’ employs ‘B’ as clerk to collect money for him. ‘B’ fails to account for some of his receipts, and ‘A’ in consequence, calls upon him (‘B’) to furnish security for his duly accounting. ‘C’ gives the guarantee for ‘B’ s duly accounting. ‘A’ did not inform ‘c’ about ‘B’ s previous conduct. ‘B’, afterwards, makes default. Here the guarantee given by ‘C’ is invalid because it was obtained by concealment of facts by ‘A’

- ***Writing not necessary [Section 126]***

Section 126 expressly declares that a guarantee may be either oral or written. However, in England under the provisions of Section 4 of the Statute of frauds, a guarantee is not enforceable unless it is “in writing and signed by the party to be charged”.

Distinction between Contract of Indemnity and Contract of Guarantee

L.C. Mather in his book “Securities Acceptable to the Lending Banker” has very briefly, but excellently, brought out the distinction between indemnity and guarantee by the following illustration. A contract in which ‘A’ says to ‘B’, ‘If you lend Rs. 20,000 to ‘C’, I

will see that your money comes back is an indemnity. On the other hand, an undertaking in these words, 'If you lend Rs. 20,000 to 'C', and he does not pay you, I will' is a guarantee.

Following are the main points of difference between a contract of indemnity and a contract of guarantee:

In a contract of indemnity there are only two parties, i.e., indemnifier and the indemnity-holder while in a contract of guarantee there are three parties, viz., principal debtor, creditor and the surety.

In a contract of indemnity there is only one contract, where in a contract of guarantee, there are three contracts.

In a contract of indemnity, the liability of indemnifier is primary and independent while in a contract of guarantee the liability of surety is secondary i.e., it arises only on the default of principal debtor. The primary liability is that of the principal debtor.

In a contract of indemnity, indemnifier's liability arises only on the happening of a contingency, while in a contract of guarantee there is an existing duty or debt, the performance of which is guaranteed by the surety.

In a contract of guarantee, if the principal debtor fails to pay and the surety discharges his debt, the surety can proceed against the principal debtor in his own right, while in a contract of indemnity, the indemnifier cannot sue the third party in his own name unless there is an assignment in indemnifier's favour. If there is no such assignment, the indemnifier must bring the suit in the name of the indemnity-holder.

▪ Extent of Surety's Liability (Section 128)

Unless the contract provides otherwise, the liability of the surety is co-extensive with that of the principal debtor (Section 128). In other words, the surety is liable for all those amounts; the principal debtor is liable for.

Example

'A' guarantees to 'B' the payment of a bill of exchange by 'C', the acceptor. 'C' dishonors the bill. 'A' is liable not only for the amount of the bill but also for any interest and charges which may have become due thereon.

The liability of a surety is called as secondary or contingent, as his liability arises only on default by the principal debtor. But as soon as the principal debtor defaults, the liability of the surety will be liable for all those sums for which the principal debtor is liable. The creditor may file a suit against the surety without suing the principal debtor. Further, where the creditor holds securities from the principal debtor for his debt, the creditor

need first exhaust his remedies against the securities before suing the surety, unless the contract specifically so provides.

The creditor is even not bound to give notice of the default to the surety, unless it is expressly provided for.

▪ **Condition precedent to Liability**

Where there is a condition precedent to the surety's liability, he will not be liable unless that condition is first fulfilled.

Thus, where a person gives a guarantee upon a contract that creditor shall not sue until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join

▪ **Surety's right to limit his liability**

The above principle, viz., the liability of surety is co-extensive with that of principal debtor, applies only where the surety undertakes to be liable for the whole debt. But it is open to him to place a limit upon his liability. He may expressly declare his guarantee to be limited to a fixed amount, for example that "my liability under this guarantee shall not at any time exceed the sum of Rs. 5 lacs. In such a case, wherever may be due against the principal debtor, the liability of the surety cannot go beyond the sum so specified.

▪ **Position of Surety in case of a Minor Principal Debtor**

According to the decision of the Bombay High Court in *Kashiba v. Shripat* (1927) the surety can be held liable, though a minor debtor is not liable. But, the later decisions of the Bombay High Court have taken a contrary view. In *Manju Mahadeo v. Shivappa Manju* and in *Pestonji Mody v. Meherbai*, it was held that as, under Section 128, the liability of the surety is co-extensive with that of the principal debtor; it can be no more than that of the principal debtor. The surety, therefore, cannot be held liable on a guarantee given for the default by a minor. If a minor cannot be held liable for any amount, the liability of the guarantor being secondary liability does not arise at all. The same view was endorsed by the Madras High Court in the case of *E. Nambiar v. Moolaki Raman* (1957). It was held that unless the contract otherwise provides, a guarantor for a minor cannot be held liable.

▪ **Surety a Favoured Debtor**

Surety has always been considered a 'Favoured Debtor'. Surety is liable only when principal debtor does not pay, i.e., liability is of secondary nature, the primary liability

that of the principal debtor. Surety is considered with favour both in law and equally. This fact is brought out by the following provisions contained in law of indemnity and guarantee.

Surety is liable only for the unpaid balance.

Surety is not liable for fruitless litigation that the creditor may bring against the principal debtor the creditor has given a sufficient notice to this effect to the surety.

Surety is not bound by admissions and acknowledgements made by the principal debtor before the creditor nor is he liable for judgements obtained against the principal debtor.

The surety will not be liable where the creditor has obtained guarantee by misrepresenting a material fact relating to the contract or by keeping silent as to material circumstances, e.g., obtaining a guarantee for the good conduct of an employee without disclosing to the surety his previous dishonesty.

The liability of a surety can in no case be more than that of the principal debtor. It may however, be restricted by a special term to that effect.

▪ **KINDS OF GUARANTEES**

Contract of guarantee may be classified into two types: (i) Specific guarantee; and (ii) Continuing guarantee.

▪ **Specific Guarantee**

When a guarantee is given in respect of a single debt or specific transaction and is to come to an end when the guaranteed debt is paid or the promise is duly performed, it is called a specific guarantee. A specific guarantee, once given, cannot be revoked. Even the death of the surety will not result in revocation of specific guarantee and the legal successor shall continue to remain liable, if course, up to the net value of the assets inherited by him.

▪ **Continuing Guarantee (Section 129)**

A guarantee, which extends to a series of transactions, is called a continuing guarantee.

Examples

'A', in consideration that 'B' will employ 'C' in collecting the rents of 'B' s zamindari, promises 'B' to be responsible, to the amount of Rs.5, 000, for the due collection and payment to 'B' of those rents. This is a continuing guarantee/

'A' guarantees payment to 'B', a tea-dealer, to the amount of Rs. 50,000, for any tea he may from time to time supply to 'C'. 'B' supplies 'C' with tea to the value of Rs. 50,000, and 'C' pays 'B' for it. Afterwards, 'B' supplies 'C' with tea to the value of Rs. 1,00,000. 'C' fails to pay. The guarantee given by 'A' was a continuing guarantee, and he is accordingly liable to 'B' to the extent of Rs.50, 000.

▪ **Revocation of continuing guarantee [Section 130]**

A contract of guarantee may, at any time, be revoked by the surety as to future transactions, by notice to the creditor.

Examples

'A', in consideration of 'B' s discounting bills of exchange for 'C', guarantees to 'B', for twelve months, the due payment of all such bills to the extent of Rs. 50,000. 'B' discounts bills for 'C' to the extent of Rs. 20,000. Afterwards at the end of three months, 'A' revokes the guarantee. This revocation discharges 'A' from all liability to 'B' for any subsequent discount. But 'A' is liable to 'B' for Rs. 20,000, on default of 'C'.

'A' guarantees to 'B', to the extent of Rs. 10,000, that 'C' shall pay all the bills that 'B' shall draw upon 'C' a bill for Rs.10, 000, 'C' accepts the bill. 'A' gives notice of revocation, 'C' dishonors the bill at maturity, 'A' is liable upon his guarantee.

▪ **JOINT DEBTOR AND SURETYSHIP**

Where two persons contract with third person to undertake a certain liability, and also contract with each other that one of them be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second the third person under the first contract is not affected by the existence of the second contract (amongst themselves), although such third person may have been aware of its existence (Section 132).

Example

'A' and 'B' make a joint and several promissory note to 'C'. 'A' makes it, in fact, as surety for 'B'. 'C' knows this at time when the note is made. The fact that 'A', to the knowledge of 'C', made the note as surety for 'B', is no answer, to a suit by 'C' against 'A' upon the note.

- ***Guarantee When Invalid***

A guarantee shall be invalid in the following cases:

Guarantee obtained by misrepresentation (Section 142): Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by concealment (Section 143): Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance, is invalid.

Example

'A' guarantees to 'C' payment for iron to be supplied by him to 'B' to the amount of 2,000 tonnes. 'B' and 'C' have privately agreed that 'B' should pay five rupees per ton beyond the market price, such excess to be applied in liquidation for an old debt. This agreement is concealed from 'A'. 'A' is not liable as a surety.

Guarantee on contract that creditor shall not act on it until co-surety joins:

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid, if that other person does not join.

- ***Rights of a Surety***

Rights of a surety may be classified under three heads:

Rights against the creditor,

Rights against the principal debtor, and

Rights against co-sureties.

- ***Rights against the Principal debtor***

The surety has the following two rights against the principal debtor:

Right of subrogation: Section 140 lays down that Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the rights which the creditor had against the principal debtor. This right of the surety is called 'subrogation'. It means that on payment of the guaranteed debt, or performance of the guaranteed duty, the surety steps into the shoes of the creditor.

- **Right of Indemnity:** Section 145 of the Act vest in the surety another right i.e., right of indemnity. In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. The surety is, however, not entitled to claim any sums, which he has paid wrongfully.

Example

'B' is indebted to 'C', and 'A' is surety for the debt. 'C' demands payment from 'A' and, on his refusal, sues him for the amount, 'A' defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from 'B' the amount paid by him for costs, as well as the principal debt.

- ***Rights against the Creditor***

Against the creditor, surety has the following three rights:

- **Rights to securities:** When the surety has paid off the liabilities of principal debtor to the creditor, he becomes entitled to claim all the securities which were given by the principal debtor to the creditor at the time when the contract of suretyship was entered into (Section 141). It is immaterial whether the surety has knowledge of those securities or not. If the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Examples

'C' advances to 'B', his tenant, Rs. 50,000 on the guarantee of 'A'. 'C' has also further security for the Rs. 50,000 by a mortgage of 'B's' furniture. 'C' cancels the mortgage 'B' becomes insolvent and 'C' sues 'A' on his guarantee. 'A' is discharged from liability to the amount of the value of the furniture.

‘A’, as surety for ‘B’, makes a bond jointly with ‘B’ to ‘C’, to secure a loan from ‘C’ to ‘B’. Afterwards, ‘C’ obtains from ‘B’ a further security for the same debt. Subsequently, ‘C’ gives up the further security. ‘A’ is not discharged.

- **Right to set off:** When the creditor sues the surety for payment of principal debtor’s liabilities, the surety can claim set off, or counter claim, if any, which the principal debtor had against the creditor.
- **Right to seek dismissal of employee in case of fidelity Guarantee:** In case of fidelity guaranteed, the surety can direct creditor to dismiss the employee whose honesty he has guaranteed, in the event of proved dishonesty of the employee. The creditor’s failure to do so will exonerate the surety from his liability.
- **Right to file Quia timet action:** At any time before the guaranteed debt has become due and before the surety is called upon to pay the amount he has guaranteed, he has the right to file a “Quia timet action” against the debtor. However, in such a case, the surety must undertake to indemnify the creditor for the risk, delay and expense, which he may incur in doing so.
- **Rights against co-sureties**

In case of joint guarantee, unless otherwise agreed, liability of co-sureties is joint as well as several. A co-surety has following right of contribution from the other sureties:

- ***Right of Contribution***

Section 146 provides for a right of contribution between co-sureties is joint as well as several. A co-surety has following rights against other co-sureties:

Examples

‘A’, ‘B’ and ‘C’ who are sureties to ‘D’, enter into three several bonds, each in a different penalty, namely, ‘A’ in the penalty of Rs. 10,000. ‘B’ in that of Rs 20,000.

If one of the sureties becomes insolvent, the solvent co-sureties shall have to contribute the whole amount equally.

- **Liability of co-sureties who have guaranteed different sums (Section 147):** Co-sureties who have guaranteed different sums are bound under Section 147 to contribute equally, subject to the limit fixed by their guarantee, and not proportionately to the liability undertaken.

Examples

‘A’, ‘B’ and ‘C’ who are sureties to ‘D’, enter into three several bonds, each in a different penalty namely, ‘A’ in the penalty of Rs. 10,000. ‘B’ in that of Rs. 20,000, ‘C’ in that of Rs. 40,000, conditioned for ‘D’ duly accounting to ‘E’. ‘D’ makes default to the extent of Rs. 30,000. ‘A’, ‘B’ and ‘C’ are liable to pay Rs. 10,000 each.

In the above example, if ‘D’ makes default to the extent of Rs. 40,000, ‘A’ shall be liable to pay Rs. 10,000 (the maximum amount guaranteed by him), and ‘B’ and ‘C’ Rs.15, 000 each.

- ***Discharge of Surety***

A surety is discharge from liability on a guarantee under the following circumstances:

by revocation from liability on a guarantee,

by the conduct of the creditor, or

by the invalidation of the contract of guarantee.

- ***By Revocation of the Contract of guarantee***

Notice by Surety (Section 130): The liability of a surety under a contract of guarantee may at any time be revoked by the surety, as to the future transactions, by notice to the creditor.

Example

‘A’, in consideration of ‘B’ s discounting, at ‘A’ s request, bills of exchange for ‘C’, guarantees to ‘B’, for twelve months, the due payment of all such bills to the extent of Rs. 50,000. ‘B’ discounts bills for ‘C’ to the extent of Rs. 20,000. Afterwards, at the end of three months. ‘A’ revokes the guarantee. The revocation discharges ‘A’ from liability to ‘B’ for any subsequent discount. But ‘A’ is liable to ‘B’ for Rs20, 000 on default of ‘C’.

However, where one of the co-sureties informs the creditor that the debtor is likely to wind-up his business and withdraws his guarantee and the other surety does not take such step, the Himachal Pradesh High Court in *Anil Kr. And Others v. Central Bank of India* (1997) has held that the other surety shall be liable along with principal debtor for the repayment of the loan.

- **Death of Surety (Section 131):** In the absence of a contract to the contrary, a continuing guarantee is revoked by the death of the surety as to the future transactions. The estate of deceased surety is, however, liable for those transactions which had already taken place during the lifetime of the deceased. Surety's estate will not be liable for the transactions taking place after the death of surety even if the creditor had no knowledge of surety's death.

- **Novation:** contract of guarantee is discharged by novation i.e., when a fresh contract is entered into, either between the same parties or between other parties, the consideration being the mutual discharge of the old contract. The original contract of guarantee comes to an end and so the surety stands discharged with regard to the old contract.

- ***By Conduct of the Creditor***

By Variance in terms of Contract (Section 133): Any variance made without the surety's consent, in terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Example

'A' becomes surety to 'C' for 'B' s conduct as a manager in 'C' s bank. Afterwards 'B' and 'C' contract, without 'a' s consent that 'B' s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. 'B' allows a customer to overdraw, and the bank loses a sum of money. 'A' is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

- **Release or discharge of the Principal debtor (Section 134):** The surety is discharged by any contract between the creditor and the principal debtor, by which the

principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Example

'A' contract with 'B' for a fixed price to build a house for 'A' within a stipulated time, 'B' supplying the necessary timber. 'C' guarantees 'A' s performance of the contract. 'B' omits to supply the timber. 'c' is discharged from his suretyship.

▪ ***By Invalidation of the Contract***

A contract of guarantee, like any other contract, may be avoided if it becomes void or voidable at the option of the surety. A surety may be discharged from liability in the following cases:

- **Guarantee obtained by misrepresentation:** When a misrepresentation is made by the creditor or with his knowledge or consent, relating to a material fact in the contract of guarantee, the contract is invalid (Section 142).
- **Guarantee obtained by concealment:** when a guarantee is obtained by the creditor by means of keeping silence regarding some material part of circumstances relating to the contracts, the contract is invalid (Section 143).
- **Failure of co-surety to join a surety:** When a contract of guarantee provides that a creditor shall not act on it until another person has joined it as a co-surety, the guarantee is not valid if that other person does not join (Section 144).

Contracts of Indemnity and Guarantee

A contract by which one party promises to the other party from loss caused to him by the conduct of promiser or any other person is called a contract of indemnity. Such contract can be express or implied. The person who promises to indemnify is called indemnifier and the person to whom the promise is made is called indemnity-holder.

The indemnity-holder, when sued, is entitled to recover from the indemnifier: (i) all damages which he may be compelled to pay; (ii) all costs of suit which he may have to pay; and (iii) all sums which he may have paid under the terms of the compromise of any such suit. He can recover from the indemnifier

A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the Surety, the person for whom the guarantee is given is called the Principal Debtor, and the person for whom the guarantee is given is called the Creditor.

A contract of guarantee can be specific or continuing. Specific guarantee relates to a single transaction while continuing guarantee extends to a series of transactions. A specific guarantee cannot be revoked but a continuing guarantee can be revoked: (i) by notice to the creditor, (ii) by death of the surety, and (iii) by variance in the terms of the contract between the principal debtor and the creditor.

Bailment & Pledge

Bailment implies a sort of relationship in which the personal property of one person temporarily goes into the possession of another. The ownership of the articles or goods is in one person and the possession with another. Delivering a watch or any other article for repair, or leaving a scooter or car at a parking lot, depositing luggage in a cloakroom, delivery of gold to a goldsmith for making ornaments or delivering cloth to a tailor for stitching, are familiar situations which create the relationship of bailment.

▪ *Definition of Bailment*

Sec 146 According to sec-146 Bailment in “The **delivery** of goods by one to another person **for some purpose**, upon a contract that they shall, **when** the purpose is **accomplished**, be **returned** or otherwise **disposed** of **according** to the **directions** of the person delivering them.” The **person delivering** the goods **is** called the ‘**Bailor**’, and the **person to whom** goods are **delivered** is called the ‘**Bailee**’. The explanation to Sec 146 clarifies that delivery of possession is not necessary where one person, already in possession of goods, contracts to hold them as bailee.

▪ **Essentials of valid Contract of Bailment:-**

For creating a relationship of bailment the following features must be present.

1

1.Contract:-Contract between the bailor and bailee, may be **either** express or implied.

2.Delivery of Goods: The essence of bailment is delivery of goods by one person to another . Delivery of goods may, however, be actual or constructive. Handing over goods to the bailee may make actual delivery. Constructive delivery may be made by

doing something, which has the effect of putting the goods in the possession of the intended bailee or any person authorized to hold them on his behalf (Sec- 149).

Example

‘A’, holding goods on behalf of ‘B’, agrees to hold them on behalf ‘C’, there is constructive transfer of possession

‘A’, a seller of TVs, sells a Samsung TV to ‘B’ who leaves the in the possession of ‘A’ to be collected after sometime, ‘A’ becomes a bailee, although originally he was the owner.

‘A’ keeps certain valuables in a locker with a bank. Arrangement is not bailment; since valuables remain in the possession of the owner because the key to the locker remains in his possession.

It needs to be noted that bailment is concerned with only goods. Currency, i.e., the legal tender (and not old coins), is not goods. ‘A’ deposit of money’, therefore, is not bailment.

3.Purpose: In a bailment, the goods are delivered for some purpose. The purpose for which the goods are delivered is usually in the contemplation of both the bailor and the bailee.

4.Return or disposal of goods:- It is important that the goods, which form the subject matter of the bailment, should be returned to the bailor or disposed of according to the directions of bailor, after the accomplishment of purpose or after the expiry of period of bailment.

▪ *Kinds (Forms) of Bailment*

In *Coggs v. Bernard* (1703), Lord Holt, Chief Justice, classified bailment’s into six kinds as follows

- **Deposit.** Delivery of goods by one man to another to keep for the use of the bailor.
- **Commodatum.** Goods lent to friend gratis to be used by him.
- **Hire.** Goods lent to the bailee for hire, i.e., in return for payment of money.

- **Pawn or Pledge.** Deposit of goods with another by way of security for money borrowed.
- Delivery of goods for being transported, or something to be done about them, by the bailee for reward.
- Delivery of goods as in (5) above, but without reward.

Duties of Bailor

A bailor has the following duties:

1. Duty to disclose faults in the goods (Section 150). The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks. If the does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Example

‘A’ the owner of a motorcycle allows ‘B’, his friend, to take his motorcycle for a joy ride. ‘A’ knows that the brakes of the motorcycle were not working well. ‘A’ does not disclose this fact to ‘B’, consequently, ‘B’ meets with an accident. ‘A’ is liable to compensate ‘B’ for damages.

‘A’ delivers to ‘B’, certain chemicals, to be carried to Mumbai. These chemicals have a tendency to burst, if not kept below a certain temperature. ‘A’ does not tell ‘B’, to take this precaution. While carrying the chemicals, the chemicals burst and injure ‘B’. ‘A’ is liable for all the damages.

In case of gratuitous bailment the bailor is responsible only for those defects, which he was aware of and did not disclose to the bailee.

If the goods are bailed for hire, the bailor is responsible for such damage whether he was or was not aware of the existence of such faults in goods bailed. The logic behind holding the bailor liable even for defects not known to him is that since the bailment is for a price, it is the duty of the bailor to keep the goods in a fit and defect-free condition.

Example

'A' hires a VCP from 'B'. VCP has developed short-circuit but 'B' is not aware of it. The moment 'A' plugs VCP, it explodes damaging his TV set as well as wiring. 'B' is liable for 'A' s loss.

- **Duty to bear expenses (Section 158)**

In case of gratuitous bailment

In the absence of contract to the contrary, the bailor must repay to the bailee all necessary expenses incurred by him for the purpose of the bailment.

In case of non-gratuitous bailment, the bailor is liable for only extra-ordinary expenses.

Examples

'A' horse is taken on hire for a journey. The ordinary expenses like feeding the horse etc. shall be borne by the bailee but in case horse falls ill, the money spent in his treatment will be regarded as an extra-ordinary expenditure and borne by the bailor.

'A' lends his car to a friend 'B'. The car runs out of petrol. 'B' has the right of recover the amount paid by him for petrol (ordinary expenses). In case, the car breaks down, he can also recover the repair charges paid by jim (extra-ordinary expenses).

- **Duty to indemnify the bailee (Section 164):** It is the duty of the bailor to indemnify the bailee, for any loss, which the bailee may suffer because of the bailor's title being defective. The reason for this is that the bailor was not entitled to make the bailment or to receive back the goods bailed or to give directions regarding the goods bailed.

- **Duty to bear risks:** It is the duty of bailor to bear the risk of loss, deterioration and destruction of the things bailed, provided the bailee has taken reasonable care to protect the goods from loss, etc.

- **Duty to receive back the goods:** It is the duty of the bailor that when the bailee, in accordance with the terms of bailment, returns the goods to him, the bailor should receive them. If the bailor without any reasonable reason, refuses to take the goods back, when they are offered at a proper time and at a proper place, the bailee can claim compensation from the bailor for all necessary and incidental expenses, which the bailee might have incurred in keeping the goods safely.

- **To compensate bailee for loss for termination of bailment before time (Section 159):** The bailor must compensate the bailee for the loss or damage suffered by the bailee that is in excess of the benefit received, where he had lent the goods gratuitously and decides to terminate the bailment before the expiry of the period of bailment.

- ***Duties of Bailee***

Duties of a bailee include:

- **To take care of the goods bailed (Section 151).** In case of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

In case, bailee has taken the amount of care as described above, he shall not be responsible, in the absence of any special contract, for the loss, destruction or deterioration of the thing bailed (Section 152).

Thus, where 'A' lends his car to 'B'. 'B' is under obligation to park the car at a parking place, if any, and to roll-up all the windows and lock all the doors. In spite of such an amount of care, the car is stolen, 'B' shall not be liable for the loss.

However, the burden of proof that bailee had exercised reasonable care shall always be on the bailee [R.C. Deboo v. M.V. Hindlaker (1995)]

- **Not to make unauthorized use of goods (Section 154).** In case the bailee makes unauthorized use of goods, i.e., uses them in a way not warranted by the terms of bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Examples

'A' lends a horse to 'B' for his own riding only. 'B' allows 'C', his wife, to ride the horse. 'C' rides with care, but the horse accidentally falls and is injured. 'A' is liable to make compensation to 'B' for the injury done to the horse.

'A' hires a horse in Calcutta from 'B' expressly to march to Banaras. 'A' rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. 'B' is liable to make compensation to 'A' for the injury to the horse.

- **Not to mix bailer's goods with his own goods.** Bailee is under a duty to keep the goods of the bailor separate from his own. Sections 155 to 157 of the Act lays down this duty in the following ways:

If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced (Section 155).

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expenses of separation or division, and any damages arising from the mixture (section 156).

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods (section 157).

- **To return the goods bailed (section 160).** It is the duty of the bailee to return, or deliver, according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose, for which they were bailed, has been accomplished.

- **To return any accretion to the goods bailed (section 163).** In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions any increase or profit, which may have accrued from the goods, bailed.

Example

'A' leaves a cow in the custody of 'B' to be taken care of. The cow gives birth to a calf. 'B' is bound to deliver the cow as well as the calf to 'A'.

- **Duty not to set up adverse title.** The bailee is duty not to do any act which is inconsistent with the title of the bailor. He should not set up his own title or the title of a third party on the goods bailed to him

- **Right of Bailor**

The rights of a bailor are;

- **Enforcement of bailee's duties:** Duties of the bailee, looked from bailor's point of view, are the rights of a bailor. A bailor can thus enforce, by suit, all duties of the bailee.
- **To claim damages:** it is an inherent right of the bailor to claim damages for any loss that might have been caused to the goods bailed, due to the bailee's negligence (Section 151).
- **To terminate the contract of bailment (section 153).** The bailor has a right to terminate the contract of bailment if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Example

'A' lets to 'B', for hire, a horse for his own riding. 'B' drives the horse in his carriage. 'A' has a right to terminate the bailment.

- **To claim compensation:** If any damage is caused to the goods bailed because of the unauthorized use of the goods, the bailor has a right to claim compensation from the bailee. In the same way the bailor has a right to claim compensation, if some loss is caused to the goods bailed, due to unauthorized mixing by bailee, of bailee's own goods with the goods of the bailor (Section 154, 155 and 156).
- **To demand return of goods (Section 159).** In case of gratuitous (without reward) bailment of goods, the bailor can demand back the goods at any time even though the goods were bailed for a specified time or purpose. But, if the bailee had acted in such a manner that the return of the goods before the stipulated time would cause loss exceeding the benefit which he has derived from using the goods, the bailor is duty bound to compensate the bailee.

Example

'A' lends a book to 'B', for examinations. Before 'B' has taken his examinations, 'A' seeks return of his book. 'A' must compensate 'B' for any loss occasioned to him.

- **To claim increase or profit from goods bailed.** In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, any increase or profit, which may have accrued from the goods bailed.

Example

‘A’ pledges certain shares with ‘B’, Company issues bonus shares against the same. ‘B’ must not only return original shares but also bonus shares.

- ***Rights of Bailee***

- **To enforce bailor’s duties.** The duties of the bailor are, in fact, if looked from the point of view of bailee, the bailee’s rights. Thus, bailee can sue bailor for (a) claiming damages resulting from non-disclosure of faults in the goods, (b) seeking indemnity for loss because of defective title of the bailor, (c) for extraordinary expenses; etc.

- **To deliver goods to any one of the joint bailors (Section 165):** If the goods are owned and bailed by more than one person, the bailee has a right, in the absence of a contrary contract, to deliver back the goods to any one of the joint owners, or may deliver the goods back according to the directions of, one joint owner, without the consent of all.

- **Delivery of the goods to bailor even if his title is defective (Section 166):** If the title of bailor is defective and the bailee, in good faith, returns the goods to the bailor or according to the directions of bailor, the bailee is not liable to the true owner in respect of a such delivery.

- **Right of Lien (Section 170-171).** The bailee has a right to claim his lawful charges and if they are not paid, bailee is given the right to retain the goods until the charges due in respect of those goods are paid. This right is known as bailee’s right of lien. Lien may be of two types:

- General Lien
- Particular Lien

- **General Lien** means the right to retain goods not only for demands arising out of the goods retained but for a general balance of account in favour of certain persons.

- **Particular lien**, on the other hand, means the right to retain the particular goods in respect of which the claim is due.

Bailee's right of lien is particular in certain cases whereas general in other cases.

- **Particular lien** is conferred upon a bailee by virtue of the provisions of Section 170. It reads:

Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives the remuneration for the services he has rendered in respect of them."

Example

'A' delivers a rough diamond to 'B', a jeweler, to be cut and polished, which is accordingly done. 'B' is entitled to retain the stone till he is paid for the services he has rendered.

- **Bailee's General lien.** The provisions of Section 171 empower certain categories of bailees to exercise a general lien. These include: bankers, factors, wharfingers, attorneys of High court and policy case brokers. These bailees can retain all goods of the bailor so long as anything is due to them, unless there is contract to the contrary. Any other bailee can have general lien, only if expressly so authorized (Section 171).

- **Rights against wrongful deprivation or injury to goods (Section 180-81).** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or causes them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. Now, whatever is obtained by way of relief or compensation in such a suit shall, as between the bailor and the bailee, be dealt with according to their respective interest.

- ***Finder of Goods***

- **Duties of a Finder**

Finding is not keeping. A finder of lost goods is treated as the bailee of the goods found as such and is charged with the responsibilities of a bailee, besides the responsibility of exercising reasonable efforts in finding the real owner.

Thus, the duties of a finder include:

The finder should take reasonable care of the goods found.

He should not put the goods for his personal use.

He should not mix the goods found with his own goods.

He should find the real owner of the goods and entrust the goods to him.

❖ *Rights of a Finder*

A finder enjoys certain rights also. His rights include:

- **Right of lien (Section 168):** A finder of goods has the right keep the goods in his possession till he is paid his expenses. This right to retain goods is available against the true owner until the finder receives compensation for expenses and trouble incurred by him in finding the true owner and in preserving the goods found. However, he has no right to sue owner for such compensation.

- **Right to sue for reward (Section 168):** If the true owner of goods has declared some reward for the return of lost goods, the finder can sue the owner for declared some. He will have the right of lien, over the goods till he receives the reward.

- **Right of sale:** A finder of goods has a right to sell the goods found by him under the following circumstances:

- The goods found are commonly the subject of sale; and
- The owner cannot, with reasonable diligence, be found and if found, refuses to pay the lawful charges to the finder; or
- The thing is in danger of perishing or of losing the greater part of its value; or
- When the lawful charges of the finder for preservation and finding out the owner, amount to two-third or more of the value of the thing.

- ***Termination of Bailment***

A contract of bailment terminates or comes to an under the following circumstances:

- **On the expiry of the stipulated period.** Where bailment is for a specific period, it comes to an end on the expiry of the specified period.

- **On the accomplishment of the specified purposes.** In case, bailment is for a specific purpose it terminates as soon as the purpose is accomplished.

Example

'A' lets to 'B' certain tents and crockery on marriage of his daughter. The same must be returned as soon as marriage function is over

- **By bailee's act inconsistent with conditions.** If the bailee does any act, with regards to the goods bailed, inconsistent with the conditions of the bailment may be terminated any time (Section 159).

Example

'A' lets to 'B' for hire, a horse for his own riding. 'B' drives the horse in his carriage 'A' shall have the option to terminate of the bailment.

- **Termination of Gratuitous Bailment.** A gratuitous bailment may be terminated any time (Section 159). However, the Section provides that if premature termination causes any loss to the bailee exceeding the benefit derived from the bailment, the bailor must indemnify.

- **By death.** A gratuitous bailment terminates by the death of either the bailor or the bailee (Section 162)

Pledge

- ***Meaning and Definition of Pledge***

Pledge (or Pawn) is a special kind of bailment. Section 172 defines pledge as "the bailment of goods as security for payment of a debt or performance of promise". The bailor is, in this case called, the 'pawnor' and the bailee is called 'pawnee'.

- ***Right of Duties of a Pawnee***

- **Right of retainer (Section 173):** The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest due on the debt, and all necessary expenses incurred by him with respect to the possession or for the preservation of the goods pledged.

- **Right of retention in regard to subsequent advances (Section 174):** Subject to a contract to the contrary, the pawnee would not be entitled to retain the goods with respect to subsequent advances made by the pawnee, provided this has not been expressly surrendered by a contract.

- **Right to extraordinary expenses incurred (Section 175):** The pawnee is entitled to receive from the pawnor extraordinary expenses for the preservation of the goods of the pledged.

- **Rights where pawnor makes default (Section 176):** According to Section 176, in case the pawnor fails to pay his debt or complete the performance of obligation at the case the pawnor fails to pay his debt or complete the performance of obligation at the stipulated time, the pawnee can exercise any of the following rights:

- Bring suit against the pawnor upon the default in redemption of the debt or performance of promise; and retain possession of goods pledged as collateral security; or

- Sell the things pledged on giving the pawnor reasonable notice of sale. In case, the goods pledged when sold do not fully meet the amount of the debt, pawnee can proceed for the balance. If, on the other hand, there is any surplus that has to be accounted for to the pawnor.

Before, sale can be executed, a reasonable notice must be given to pawnor so that:

- The pawnor may meet his obligation as a last chance;
 - He can supervise the sale to see that it fetches the right price.

In *Prabhat Bank Ltd. v. Babu Ram* (1966), the learned judge observes that – “What is contemplated by Section 176 is not merely a notice but a ‘reasonable notice’, meaning there by a notice of intended sale of the security by the creditor within a certain date so as to afford an opportunity to the debtor to pay the amount with the mentioned in the notice.”

- **Notice of sale is essential even where the agreement specifically excludes it.** In the above case, the Allahabad High Court held that such a clause in the agreement would be inconsistent with the provisions of the Act and as such void and unenforceable.

- **Effect on validity of sale where reasonable notice is not given. The sale made by the pawnee.** The pawnee without giving a reasonable notice to the pawnor is not void, i.e., cannot be set aside. The pawnee will be liable to the pawnor for the damages.

▪ **Right against the true owner of goods (Section 178A):** When a Pawnor has acquired possession of pledged goods, under a voidable contract, but the contract has not been rescinded, at the time of pledge, the pawnee acquires a good title to the goods, even against the true owner, provided the pawnee had no notice of the pawnor's defect in title and he acts in good faith [See *Philips v. Brooks* (Page 31-32)]

- Duties
- A pawnee has the following duties:
 - Duty to take reasonable care of the pledged goods.
 - Duty not to make unauthorized use of goods pledged.
 - Duty to return the goods when the debt has been repaid or the promise has been performed.
 - Duty not to mix his own goods with the goods pledged.
 - Duty not to do any act, which is inconsistent with the terms of pledge.
 - Duty to deliver increase (if any), to the goods pledged.

❖ Rights and Duties of Pawnor

❖ Rights

▪ **Right to redeem goods.** The pawnor has a right to claim back the security pledged on repayment of the debt with interest and other charges (Section 177). The period for a suit against a pawnee to recover the things pledged is 3 years from the date of pawnee's refusal to do so after demand. (The Limitation Act, 1963).

▪ **Right to reasonable notice.** The pawnor has a right to receive a reasonable notice in case the pawnee intends to sell the goods and in case he does not receive the notice, he shall have a right to claim any loss that may result on such sale.

▪ **Right to surplus.** In case of sale, the pawnor is entitled to receive from the pawnee any surplus that may remain with him after the debt is completely paid-off.

▪ **Right to accretion.** The pawnor has a right to claim any accruals to the goods pledged.

- **Right to compensation.** If any loss is caused to the goods because of mishandling or negligence on the part of the pawnee, the pawnor has a right to claim the same.

❖ Duties

- To disclose faults. A pawnor must disclose to the pawnee any material faults or expenditure incurred by the pawnee for the preservation of the goods.
- To pay extraordinary expenses. A pawnor is responsible to meet any extraordinary expenditure incurred by the pawnee for the preservation of the goods.
- To bear deficiency on sale. Where the pawnee has exercised his right of sale of goods, any shortfall has to be made good by the pawnor.
- To indemnify. The pawnor is liable for any loss caused to the pawnee because of defects in his (pawnor's) title to the goods.

❖ Pledge by Non-Owners

Normally, only the owner of goods can effect a valid pledge. However, the Indian Contract Act recognizes pledge by the following also as valid:

- **Pledge by a mercantile agent:** Where a mercantile agent is with the consent of the owner, in possession of goods or, the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be valid, provided that the pawnee acts in good faith and has at the time of pledge, no notice of the fact that the agent has no authority to pledge. The necessary conditions of validity under the Section are as follows:

- The person pledging the goods must be a mercantile agent.
- Mercantile agent must be in possession either of the goods or the documents of title to goods,
- Such possession must be with the consent of the owner.
- Pledge must have been made by the mercantile agent in the ordinary course of business.
- The pawnor must act in good faith; and
- The pawnee should have no notice of the pawnor's defect of title, if any.

- **Pledge by person in possession under a voidable contract (Section 178-A).** Where a person obtains possession of goods under a voidable contract the pledge created by him is valid* provided:
 - The contract has not been rescinded before the contract of pledge, and
 - The pawnee acts in good faith and without notice of the pawnor's defect of title.
- **Pledge by co-owner in possession.** One of several joint owners of goods in sole possession thereof with the consent of the test may make a valid pledge of the goods [Shadi Ram v. Mehtab Chand 1895]
- **Pledge by a person having limited interest (Section 179).** Where a person pledges goods in which he has only a limited interest, the pledge goods to the extent of the amount advanced thereupon.

Example

'X' pledges certain gold ornaments worth Rs. 1,00,000 with 'Y' against an advance of Rs.60,000. 'Y' pledges the same for Rs.90,000 with 'Z'. The pledge by 'Y' with 'Z' is valid only to the extent of Rs.60,000 plus interest due thereon.

- **Pledge by seller or buyer in possession.** A seller, in whose possession, the goods have been left after sale or a buyer who with the consent of the seller, obtains possession of the goods, before sale, can make a valid pledge, provided the pawnee acts in good faith and he has no knowledge of the defect in title of the pawnor.

Example

'A' buys a TV from 'B', but leaves the TV with the seller. 'B' then pledges the TV with 'C', who does not know of sale to 'A'. This is a valid pledge.

Contract of Agency

Contract of Agency. According to Section 182 of the Contract Act "An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal'." Thus, an agent is a connecting link between his principal and third parties.

Who can appoint an Agent

Section 183, in this regard, provides “Any person who is of the age of majority according to law to which he is subject, and whop is of sound mind, may employ an agent.” Thus a minor, or a person of unsound mind cannot appoint an agent.

Who may be an Agent

Since agent is a mere connecting link or a conduit between the principal and the third party, it is immaterial whether or not the agent is legally competent to contract. Thus, there is no bar to the appointment of a minor as an agent. However, in considering the contract of agency itself (i.e., the relation between principal and agent), the contractual capacity of the agent becomes important. Section 184 reads, “As between the principal and third persons any person may become an agent, but no person who is not of the age of majority persons any person may become an agent, so as to be responsible to his principal according to the provisions in that behalf.” Thus, if the agent happens to be a person incapable of contracting, then the principal cannot hold the agent liable, in case he misconducts or has been negligent in performance of his duties.

Example

‘X’ appoints ‘Y’, a minor, to sell his car for not less than Rs. 50,000. ‘Y’ sells it for Rs. 40,000. ‘X’ will be held bound by the transaction and further shall have no right against ‘Y’ for claiming the compensation for having not obeyed the instructions, since ‘Y’ is a minor and a contract with a minor is ‘void – ab – initio’.

▪ **Distinction between Agent and Servant**

There is similarity between an agent and a servant in as much as both are employed to act for and on behalf of principal. However, there is a lot of difference between the two. An agent has the authority to create contractual relationship between the principal and third party, but a servant ordinarily has no such authority. A servant usually serves only one master but an agent may work for several principals at the same time. A servant is generally paid salary or wages, whereas an agent may be paid on commission basis. Thus we find that an agent is not a servant though a servant may be authorised to serve as an agent.

▪ **Modes of Creation of Agency**

- Express agreement,
- Implied agreement,
- Ratification, and

- Operation of Law
- **Express Agreement (Section 186 and 187).** As per Section 186, a contract of agency may be express or implied. As per section 187, an authority is express when it is given by words, spoken or written. A person may be appointed agent, either by words of mouth or by writing. No particulars form is required for appointing an agent. The usual form of a written contract of agency is the power of attorney on a stamped paper.

Example

‘A’ is residing in Delhi and he has a house in Kolkata. ‘A’ appoints ‘B’, by a deed called the power of attorney, as caretaker of his house. Agency is created by express agreement.

- **Implied Agency (Section 187).** An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealings.

Example

‘A’ owns a shop in Noida, living himself in Delhi, and visiting the shop occasionally. The shop is managed by ‘B’, and he is in the habit of ordering goods from ‘C’ in the name of ‘A’ for the purposes of the shop, and of paying for them out of ‘A’ s funds with ‘A’ s knowledge. ‘B’ has an implied authority from ‘A’ to order goods from ‘C’ in the name of ‘A’ for the purpose of the shop.

- **Implied agency included:**
 - Agency by estoppel
 - Agency by holding out, and
 - Agency by necessity
- **Agency by Estoppel (Section 237).** When a person has, by his conduct or statement, induced others to believe that a certain person is his agent, he is estopped from subsequently denying it, Lord Halsbury says, “Estoppel arises when you precluded from denying the truth of anything which you have represented as fact, although it is not a fact.”

Example

'P' allows 'A' telling 'C' that 'A' is 'P's agent. Later on, 'C' supplies certain goods to 'A' thinking him to be 'P' agent. 'P' shall be held liable to pay the price to 'C' By allowing 'A' to represent himself as his agent, 'P' leads 'C' to believe that 'A' is really his agent.

- **Agency by Holding Out.** Though part of the law of estoppel, some affirmative conduct by the principal is necessary in creation of agency by holding out.

Example

'P' allows his servant 'A' to buy goods for him on credit from 'C' and pays for them regularly. On one occasion, 'P' pays his servant cash to purchase the goods on credit pocketing the money, 'C' can recover the price from 'P' since through previous dealings 'P' has held out his servant 'A' as his agent.

- **Agency of Necessity (Section 189).** An agent has authority, in an emergency, to do all such acts, for the purpose of protecting the principal from loss, that would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Example

A horse was sent by rail and at the destination it was not taken delivery of by the owner. The station master had to feed the horse. Held, the station master became the agent by necessity and hence the owner must compensate him. [Great Northern Railway V. Swafield].

To constitute a valid agency of necessity, following condition must be satisfied:

- Agent should not be in a position or have any opportunity to communicate with his principal within the time available.
- There should have been actual and definite commercial necessity for the agent to act promptly.
- The agent should have acted bonafide and for the benefit of the principal.

- The agent should have adopted the most reasonable and practicable course under the circumstances, and
- The agent must have been in possession of the goods belonging to his principal and which are the subject of contract.
- **Agency by Ratification (Section 196 – 200).** Section 196 recognizes the creation of agency by subsequent ratification by the principal of the contracts entered into by the agent on his behalf but without his authority. Where a person acts for someone but without his knowledge or authority and the other person subsequently accepts or ratifies the act, agency by ratification arises and the ratifier is bound by the act on his behalf. Thus, agency by ratification tantamounts to prior authority.

Example

The case of Bolton Partners v. Lambert is a good illustration on the point. In this case, 'L' made an offer to 'X' managing director of a company. 'X' accepted the offer through he had no authority to do so. 'L' subsequently withdrew the offer, but the company ratified 'X' s acceptance. Held, 'L' was bound. The ratification related back to the time 'X' accepted the offer, thus rendering the revocation of the offer inoperative. An offer once accepted cannot be withdrawn.

Ratification may be expressed or implied (Section 197).

Also called Agency by Ostensible Authority. Another situation for agency by ostensible authority is that of agency by legal presumption. For instance, where a married woman is cohabiting with her husband, there is a presumption of the fact that she has authority to pledge his credit for necessities.

Example

'A' without authority, buys goods, for 'B' Afterwards 'B' sells them to 'C' on his own account; 'B's conduct implies a ratification of the purchase made for him by 'A'.

'A' without 'B's authority, lends 'B' s money's to 'C'. Afterwards 'B' accepts interest on the money from 'C'. 'B' s conduct implies a ratification of the loan.

- **Requisites of a valid ratification**
- The agent must be contract as agent; he must not allow the third party to believe that he is the principal. A man cannot enter into a contract at his own and later shift it to another.
- The principal must have been in existence at the time the agent originally acted. This condition is significant in case of joint stock companies.
- The principal must not only be in existence but must also have contractual capacity at the time of the contract as well as at the time of ratification. Thus, a minor on whose behalf a contract is made cannot ratify it on attaining majority.
- Ratification must be made within a reasonable. What is reasonable time shall vary from case to case?
- The act to be ratified must be a lawful one. There can be no ratification of an illegal act or an act, which is void – ab – initio.
- The principal should have full knowledge of the facts. Section 198 states “ No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective”.
- Ratification, if made, shall be of the contract as a whole (Section 199). The principal cannot reject the burdens and accept only the benefits.
- Ratification of a contract not within the principal’s authority is ineffective. This again basically is relevant in case of companies. Acts of directors which are ultra virus the power of a company cannot be ratified by the company.
- Ratification cannot be made so as to subject a third party to damages or terminate any right or interest of a third person (Section 200).

Examples

'A' not being authorized thereto by 'B', demand on behalf of 'B', the delivery of some property of 'B', from 'C' who is in possession of it. This demand cannot be ratified by 'B', so as to be binding on 'A'.

'A' holds a lease from 'B', terminable on three months notice. 'C', an unauthorized person, gives notice of termination to 'A'. The notice cannot be ratified by 'B', so as to be binding on 'A'.

- **Agency by Operation of Law**

A pretended agent is one who represents to be an agent of another. For example, in case of partnership, every partner, as per the provisions of the partnership Act, automatically becomes the agent of other partners.

- **Pretended Agent**

A pretended agent is one who represents to be an agent of another when in reality he has no such authority from him at all. Section 235 provides that a person untruly representing himself to be an authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other, in respect of any loss or damage which he has incurred by so dealing. The agent has, however, no right to proceed against that person for the performance of the contract.

- **Agency Relationship between Husband and Wife**

Marriage does not of itself create the relation of agent and principal. A wife, in order to bind her husband by her dealing, must receive authority from the husband either expressly or implication from his conduct. The following principles may be noted in this connection

- If husband and wife are living together, and the wife is charged with the duty of looking after the household, presumption is raised that she has got the authority to pledge her husband's credit for necessaries (*Dagenham v. Mellon*). Authority of a wife

in such cases is called ostensible authority. However, a wife shall not have the ostensible authority to bind her husband.

- Where the wife is forbidden from purchasing anything on credit or from contracting debts.
- Where the goods purchased on credit are not necessities.
- Where the wife is given sufficient money for purchasing necessities, or she has means of her own, either in money or in earning capacity;
- Where the trader has been expressly warned by the husband not to give credit to his wife.
- When the wife live apart from the husband under justifiable circumstances, the husband would, in law, be liable to maintain her, and he would be bound to pay her bills for maintenance during that period. But, if she is living separately without any valid reasons, then she cannot pledge her husband's credit even for necessities.
- **Scope and Extent of Agent's Authority**
Scope and extent of an agent's authority is determined by:
 - Actual authority
 - Apparent or Ostensible authority
- **Actual authority** is created by agreement between principal and the agent. The agreement may be expressed or implied.
- **Apparent or Ostensible Authority.** Section 188 that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business?

Example

'A' employs 'B' as his agent to carry on his business of a ship builder. 'B' may purchase timber and other materials, and hire workmen for the purpose of carrying on the business.

Again, Section 237 provides that “ When an agent has, without authority, done acts or incurred obligations to third person on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent’s authority”.

Example

‘A’ consigns goods to ‘B’ for sale, and gives him instructions not to sell below a fixed price. ‘C’, being ignorant of ‘B’ s instructions enters into a contract with ‘B’ to buy the goods at a price below the reserved price. ‘A’ is bound by the contract.

Though the scope of authority of an agent under normal circumstances is defined in Section 188, still, in cases of emergency he would have larger powers. Section 189, in this regard, enacts as follows; “ An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances”. In such cases the authority is deemed to be conferred by what has been described above as agency by necessity.

▪ **Sub – Agent and Substituted Agent**

The general rule is that an agent cannot appoint an agent. ‘ Delegatus no potest delegare’ is the governing rule. It means a delegate cannot further delegate. An agent being a delegate cannot transfer his duties to another. The principle underlying the rule is that the principle engages an agent ordinarily on personal consideration and thus may not have the same confidence in the person appointed by the agent. Hence, sub – agency is not generally recognized. However, Section 190 deals with the circumstances as to when and how far an agent can delegate his duties. An agent may appoint an agent in the following circumstances:

- Where expressly permitted by the principal; Where the ordinary custom of trade permits delegation : The nature of agency is such that it cannot be accomplished without the appointment of a sub – agent: Where the nature of the job assigned to the agent is purely clerical and does not involve the exercise of discretion; In an unforeseen emergency

Under the above mentioned circumstances, if an agent appoints another person in the matter of the agency, that other person may assume the position of either a sub – agent or a substituted agent.

❖ Sub – Agent

Section 191 states that a ‘sub – agent’ is a person employed by, and acting under the control of the original agent in the business of the agency.

Since the sub – agent is appointed by the act and under the control of the agent, there is no privity of contract between the sub- agent and the principal. The sub – agent therefore, cannot sue the principal for remuneration and similarly, the principal cannot sue the sub – agent for any moneys due from him. Each of them can proceed only against his immediate contract party, viz., the agent except. Where the sub – agent A sub – agent properly appointed can, however, represent the principal and bind him for his acts as if he were an agent originally appointed by the principal. But where an agent, without having authority to do so, has appointed a sub – agent, the principal is not represented by or responsible for the acts of such a sub – agent. He (the sub –agent) can only bind the agent by contracts entered into with third parties.

- **Termination of sub – agent’s authority (Section 210).** The termination of the authority of an agent causes the termination of the authority of all sub – agents appointed by him.

- **Substituted Agent**

Where an agent appoints or names another person for being appointed as an agent in his place, such person is called a substituted agent. According Section 194, “ where an agent, holding an express or implied authority to name another persons has named another person accordingly, such person is not a sub – agent but an agent of the principal for such part of the business of the agency as is entrusted to him.”

Examples

‘A’ directs ‘B’, his seller, to sell his estate by auction, and to employ an auctioneer for the purpose. ‘B’ names ‘C’, an auctioneer, to conduct the sale. ‘C’ is not a sub – agent, but is ‘A’ s agent for the conduct of the sale.

‘A’ authorizes ‘B’, a merchant in Kolkata to recover the moneys due to ‘A’ from ‘C & Co.’. ‘B’ instructs ‘D’, a solicitor to take proceedings against ‘C & Co.’, for the recovery of the money. ‘D’ is not a sub – agent but is solicitor for ‘A’.

❖ Duties of an Agent

The duties of an agent towards his principal are:

- To conduct the business of agency according to the principal's directions (Section 211). **This duty of the agent has to be literally complied with i.e., the agent is not supposed to deviate from the directions of the principal even for the principal's benefit. If he does so, any loss occasioned thereby shall have to be borne by the agent, whereas, any surplus must be accounted for to the principal.**

Examples

In *Lilley v. Doubleday* (1881), 'A' was directed by his principal to warehouse the goods at a particular warehouse. 'A' warehoused a portion of the goods at another place, equally good but cheaper. These goods were destroyed by fire. Held, the agent 'A' was liable to make good the loss.

The principal instructed his agents to deliver goods only against cash but the agent delivered them on credit, he was held liable for the price which the purchaser failed to pay [*Paul Bier v. Chottalal*].

In the absence of instructions from the principal, however, the agent should follow the custom of the business at the place where it is conducted (Section 211).

Example

'A' an agent engaged in carrying on for 'B' a business in which it is custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. 'A' must make good to 'B' the interest usually obtained by such investment.

- The agent should conduct the business with the skill and diligence that is generally possessed by person engaged in similar business, **except where the principal knows that agent is wanting in skill (Section 212).**

Example

'A', an agent for the sale of goods, having authority to sell on credit, sells to 'B' on credit, without making the proper and usual enquiries as to the solvency of 'B'. 'B' at the time of such sale, is insolvent. 'A' must make compensation to his principal in respect of any loss thereby sustained.

‘A’ an insurance broker, employed by ‘B’ to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequences of the omission of the clauses nothing can be recovered from the underwriters. ‘B’ is bound to make good the loss to ‘A’.

- **To render proper accounts (Section 213).** Rendering accounts does not mean showing the accounts but the accounts supported by vouchers – (Anandprasad V. Dwarkanath).

- **In case of difficulty to communicate with the principal (Section 214).** It is the duty of an agent, in case of difficulty, to use all reasonable diligence, in communicating with his principal, and in seeking to obtain his instructions. In case of emergency, however the agent can do all that reasonable man would under similar circumstances do with regard to his own goods, he becomes an agent by necessity.

- **Not to make any secret profits.** An agent, except the lawful deduction towards his remuneration and expenses, should deliver to the principal all moneys including secret commission received by him.

- **Not to deal on his own account.** An agent should not deal on his own account without first obtaining the consent of his principal. If he does so, the principal can claim from the agent any benefit which he might have obtained [H. Wilson & Co. v. Bata (1927)].

Further, in case an agent deals on his own account, he shall cease to be entitled for his remuneration.

- **Agent not entitled to remuneration for business misconducted.** An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which has been misconducted (section 220).

Examples

‘A’ employs ‘B’ to recover Rs. 1,00,000 from ‘C’ and to lay it out on good security. ‘B’ recovers Rs. 1,00,000 and lays out Rs.90,000 on good security, but lay out Rs. 10,000 on security which he ought to have known to be bad whereby ‘A’ loses Rs.2,000. ‘B’ is entitled to remuneration for recovering the Rs.1,00,000 and for investing the Rs.90,000. he is not entitled to any remuneration for recovering Rs.10,000 and he must make good the Rs.2,000 to ‘A’

‘A’ employs ‘B’ to recover Rs.1,00,000 from ‘C’. Through ‘B’s misconduct the money is not recovered. ‘B’ is entitled to no remuneration for his services, and must make good the loss.

- **An agent should not disclose confidential information supplied to him by the principal** [Weld Blundell V. Stephens (1920)].

When the principal dying or becoming of unsound mind terminates an agency. the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him (Section 209)

❖ Rights of an Agent

An agent has the following rights

- **Right to remuneration (Section 219).** An agent is entitled to his agreed commission or remuneration and if there is no agreement, to a reasonable remuneration.

But, the remuneration does not become payable unless he has carried out the object of agency, except where there is a contract to the contrary. Now, when shall the object of agency be deemed to have been carried out or the act assigned to the agent completed, shall depends on the terms of the contract. Thus, commission becomes payable to the broker, when he has procured a party who is willing to negotiate on reasonable terms and is desirous of entering into a contract with the principal [Sheikh Farid Baksh V. Hasgualal Singh(1937)].

However, an agent who is guilty of misconduct in the business of agency is not entitled to any remuneration in respect of that part of the business which he has misconducted (Section 220).

- **Right of Retainer (Section 217).** Section 217 of the Contract Act empowers the agent to retain, out of any sums received on account of the principal in the business of the agency for the following payments:

- All money due to himself in respect of advances made,

- In respect of expenses properly incurred by him in conducting such business, and
 - Such remuneration as may be payable to him for acting as agent.
-
- **Right of Lien (Section 221).** Besides, the right of retainer, agent has another right, i.e., right to retain his principals goods, papers and other movable or immovable properties service charges. This lien of the agent is the particular lien. Since the lien is a possessory right, it cannot be exercised once the possession is lost.
-
- **Right of Indemnification.** Section 222 provides that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Example

'B' at Indonesia, under instructions from 'A' of Kolkata contracts with 'C' to deliver certain goods to him. 'A' does not send the goods to 'B', and 'C' sues 'B' for breach of contract. 'B' informs 'A' of the suit, and 'A' authorizes him to defend the suit. 'B' defends the suit, and is compelled to pay damages and costs, 'A' is liable to 'B' for such damages, costs and expenses.

Agent's right to be indemnified extends even for those acts which are apparently lawful but are injurious to a third person (Section 223). However, the right to indemnify is not available against those acts which on the face of it are unlawful or are criminal in nature.

- **Right to Compensation.** The agent has the right to receive compensation for the injuries or losses suffered due to the principals neglect or want of skill (Section 225).

Example

'A' employs 'B' as a brick layer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put and 'B' is, consequence, hurt, 'A' must pay compensation to 'B'.

It should, however, be noted that if the injury is caused by negligence of the agent himself, then he cannot claim any compensation.

❖ Liability of Principal to Third Parties

- **Agent acting within authority.** An agent being a mere connecting links binds the principal for all his acts done within the scope of his authority. Section 226 provides that “Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.”
- **Agent acting within ostensible authority.** The principal is liable for the acts of the agent falling not only within the actual authority but also with the scope of his apparent or ostensible authority.
- **Where an agent exceeds his authority** and the part of what he does, which is within is authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and the principal(Section 227).
- **Where an agent** does more than he is authorized to do and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound by the transaction (Section 228).
- **Misrepresentation by the agent.** The principal will be liable even for misrepresentations made or frauds committed, by an agent in matters beyond his authority, do not effect the principal (Section 238).
- **Undisclosed Principal.** The principal remains liable to the third parties even where his name was not disclosed. The third parties can, on discovering his name, proceed against him on the contract.
- **The principal is bound** by any notice or information given to the agent in the course of business transacted by him.
- **The liability of the principal** continues even in cases where agent is held personally liable. Section 233 provides an option to the third parties to either sue the principal or agent or both.

❖ **Personal Liability of an Agent**

An agent is held personally liable to the third parties in the following cases:

- **Foreign principal.** Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad (Section 230).
- **Undisclosed Principal.** Where the agent does not disclose the name of his principal (Section 230).
- **Principal cannot be sue.** Where the principal, though disclosed, cannot be sued (Section 230). For instance, where principal is minor.
- **Exceeds authority.** Where an agent acts either without any authority or exceeds his authority, he will be held personally liable if his acts are not ratified by the alleged principal.
- **Where an agent expressly agrees to be personally bound.**
 - Where an agent signs a negotiable instrument in his own name. In case an agent signs a negotiable instrument without making it clear that he is signing it as an agent only, he may be held personally liable on the same. He would be personally liable as the maker of the note, even though he may be described in the body of the note as the agent.
 - Agent with special interest. An agent with special interest or with a beneficial interest, e.g., a factor or auctioneer, can sue and be sued personally (Subramanaya v.Narayana)
 - Guilty of fraud. When an agent is guilty of fraud or misrepresentation in matters which so not fall within his authority (Section 138).
 - Trade usage. Where trade usage or custom makes an agent personally liable.
 - Agency coupled with interest. Where the agency is one coupled with interest (Section 202).

❖ **Agency coupled with Interest**

Agency is said to be coupled with interest where the agent has himself an interest in the subject-matter of the agency (Section 202).

Example

Where an agent is appointed to sell properties of the principal and to pay himself out of such sale proceeds the debt due to the agent.

❖ Termination of Agency (Section 201)

▪ **By revocation by the Principal.** The principal may, by notice, revoke the authority of the agent at any time. Where the agent is appointed to do a single act, agency may be revoked any time before the commencement of the act. In case of a continuous agency, notice of revocation is essential to the agent as well as to the third parties who have acted on the agency with the knowledge of the principal.

However, where an agency is for a fixed period of time, and contract of agency is revoked without sufficient cause, compensation must be paid to the agent (Section 205).

The Agency is irrevocable in the following two cases:

- Where the authority of the agent is one coupled with interest; i.e., the agent has an interest in the subject-matter of the contract.
- After the authority has been partly exercised, so far as regards such acts and obligations already done in the agency (Section 204).

Examples

‘A’ authorizes ‘B’ to buy 1,000 bales of cotton on account of ‘A’, and to pay for it out of ‘A’ s money remaining in ‘B’ s hands. ‘B’ buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. ‘A’ cannot revoke ‘B’ s authority to pay for the cotton.

‘A’ authorizes ‘B’ to buy 1,000 bags of cottons on account of ‘A’ and to pay for it out of ‘A’ s money remaining in ‘B’ s hands. ‘B’ buys 1,000 bales of cotton in ‘A’ s name, so as not to make himself personally liable for the price. ‘A’ can revoke ‘B’ s authority to pay for the cotton.

- On the expiry of fixed period of time. When the agency is for a fixed period of time, it comes to an end on the expiry of that time.
- On the performance of the specific purpose. Where an agent is appointed to do a particular act, it terminates when that act is done or when the performance becomes impossible.
- Insanity or Death of the principal or agent. Death or insanity of the principal or the agent, terminates the agency. But an agent, in such a case, should take all reasonable steps for the preservation of property, on behalf of the principal or the legal representatives of the principal, as the case may be (Section 209).
- An agency shall also terminate in case subject-matter is either destroyed or rendered unlawful.
- Insolvency of the Principal. Insolvency of the principal, not of the agent, terminates the agency.
- By renunciation of agency by the Agent. If principal, can cause termination of agency by revocation, an agent may renounce his agency by giving a sufficient notice to that effect. Where, however, an agency is for affixed period and the agency is renounced without a sufficient cause, the principal must be compensated (Section 205).

- ***When Termination of agency takes effect***

- **As regards the agent.** The termination of the authority of an agent does not, so far as regard the agent take effect before it becomes known to him (Section 208).
- **As regards third parties.** As regards third parties, they can continue to deal with the agent till they come to know of the termination of the authority (Section 208).

Examples

'A' directs 'B' to sell goods for him, and agrees to give 'B' five 'B' percent (5%) commission on the price fetched against the goods. 'A' afterwards, by letter revokes 'B' s authority. 'B' after the letter is sent, but before he receives it, sells the goods for Rs.10,000. The sale is binding on 'A', and 'B' is entitled to Rs.500 as his commission.

;A' at Chennai, by letter directs 'B' to sell for him some cotton lying in a warehouse in Mumbai, and afterwards, by letter, revokes his authority to sell, and directs 'B' to send the cotton to Chennai. 'B', after receiving the second letter, enters into a contract with 'C' who knows of the first letter, but not of the second. For the sale to him of the cotton 'C' pays 'B' the money, with which 'B' absconds, 'C' s payment is good as against 'A'.

'A' directs 'B', his agent, to pay certain money to 'C'. 'a' dies and 'D' takes out probate (confirmation by the court) to his will. 'B' after 'A' s death, but before hearing of it, pays the money to 'C'. The payment is good as against 'D', the executor.

❖ *Unnamed and Undisclosed Principal*

▪ **UNNAMED PRINCIPAL**

Where an agent, though discloses the fact that he is an agent working for some principal conceals the name of the principal, such a principal may be called an unnamed principal.

The liability of an unnamed principal is similar to that of a disclosed principal must exist and must also be the principal at the time the contract is made. He cannot be into existence as a principal after the contract has been concluded.

▪ **UNDISCLOSED PRINCIPAL**

Where an agent not only conceals the name of the principal but the very fact that there is a principal, the principal is called as an undisclosed principal. In such a case the third parties are not aware of the existence of the principal and regard the agent as the person contracting for himself. The third parties, thus, must look to the agent for repayment or performance and the agent may sue or be sued on the contract legal position in this regard may be noted as follows

If the principal wishes to intervene he may require the performance of the contract but the other party has as against him (principal) the same rights as he would have had as against the agent if the agent had been principal (section 231)

Para II of section 231 provides that in such a case if the principal discloses himself before the contract is completed the other contracting party may refuse to fulfil the contract if he can show that if he had known who was the principal in the contract, or if he had known that the agent was not the principal, he would not have entered into the contract.

The principal, if he requires performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract (Section 232).

Example

'A' who owes Rs. 10,000 to 'B' sells Rs.20,000 worth of wheat to 'B'. 'A' is acting as agent for 'C' in the transaction, but 'B' has no knowledge nor reasonable ground of suspicion that such is the case. 'C' cannot compel 'B' to take the wheat without allowing him to set off 'A's debt.

In contracts with a concealed principal, the agent is, in the absence of a contract to the contrary, personally liable to the third party. The third party may hold either the agent or principal or both liable (Section 233).

Example

'A' enters into a contract with 'B' to sell him 100 bales of cotton and afterwards discovers that 'B' was acting as agent for 'C'. 'A' may sue either 'B' or 'C' or both, for the price of the cotton.

PART B (30 MARKS)



COMMERCIAL LAWS

CHAPTER 11 REGISTRATION ACT, 1908

Registration means ***recording of the contents of a document with a Registering Officer and preservation of copies of the original document.*** The Registration Act, 1908 is the law relating to registration of documents.

The object and purpose of the Act among other things:-

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

DOCUMENTS

Any material or non-material things which contain any information is known as document.

Documents can be classified into two classes:

- (a) Those whose registration is compulsory; (Section 17)
- (b) Those whose registration is optional. (Section 18)

DOCUMENTS WHOSE REGISTRATION IS COMPULSORY

SECTION 17

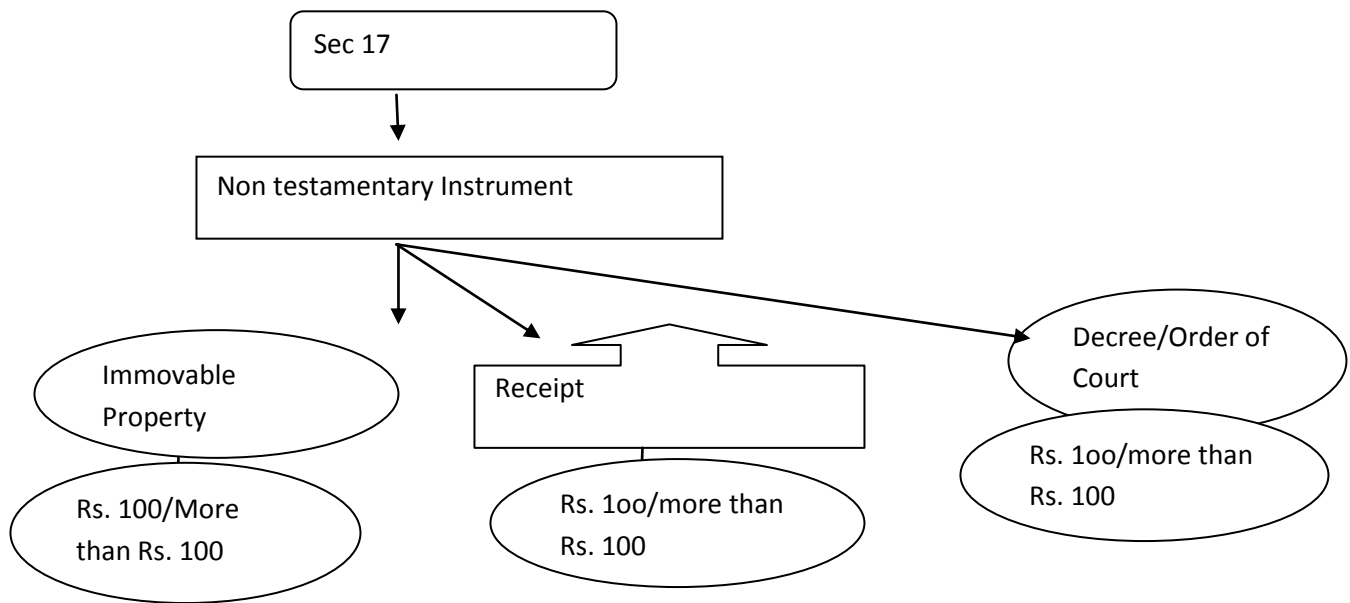
According to Section 17 of the Registration Act, 1908, documents whose registration is compulsory are the following:-

- (a) Instruments of gift of immovable property.
- (b) non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest whether vested or contingent, of the value of **one hundred rupees and upwards**, in **immovable property**.

A document which is plainly intended to be operative immediately is non-testamentary.

- (c) Non-testamentary instruments which acknowledge the **receipt** or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of an interest of the value of **Rs. 100 or upwards** in **immovable property**.
- (d) Non-testamentary instruments transferring or assigning any **decree or order of a Court** or any award in order to create interests as mentioned in or a transfer of a decree or order of a court or of any award when such decree or order or award operates to create, declare, etc. any interest of the value of **Rs. 100 and upwards** in **immovable property**, requires registration.
- (e) Authorities to adopt a son which is not conferred by will.
- (f) A lease of immovable property is compulsory registrable:
 - (i) if it is from year to year; or
 - (ii) if it is for a term exceeding one year; or
 - (iii) if it reserves a yearly rent

Documents whose registration is compulsory



EXCEPTIONS TO SECTION 17(1)

SECTION 17(2)

The registration of the non-testamentary documents mentioned in clauses of Section 17(1) is subject to the exceptions provided in **Sub-section (2) of Section 17**. Some are as follows:-

- (a) any instrument relating to shares in Joint Stock Company; or
- (b) any debentures issued by any such Company; or
- (c) any grant of immovable property by the Government;etc.

DOCUMENTS OF WHICH REGISTRATION IS OPTIONAL

SECTION 18

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

- (a) instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of value **less than** one hundred rupees, in immovable property;
- (b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any right, title or interest of value **less than** one hundred rupees, in immovable property;

- (c) leases of immovable property for any term **not** exceeding one year.
- (d) instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of a value **less than** one hundred rupees, to or in immovable property;
- (e) wills
- (f) Other documents not required by Section **17(2)** to be registered.

TIME LIMIT FOR PRESENTATION

➤ **DOCUMENTS EXECUTED IN INDIA**

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

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

➤ **DOCUMENTS EXECUTED OUT OF INDIA**

As per Section 26 Where the registering officer is satisfied that the document was executed outside India and it has been presented for registration within **four months** after its arrival in India, he may accept such document for registration on payment of proper registration fee.

A document executed outside India is not valid unless it is registered in India.

RE-REGISTRATION

SECTION 23A

Section 23A provides for the re-registration of certain documents. The section is mainly intended to deal with situations where the original presentation was by a person not duly authorised.

If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within **four months** from the date he **became aware** of the fact that registration of document is invalid.

The document if registered under section 23A shall be deemed to have been **registered** from the date of its **original registration**.

INSTRUMENTS OF GIFT OF IMMOVABLE PROPERTY

In a case where the donor dies before registration, the document may be presented for registration after his death and if registered it will have the same effect as registration in his life time. On registration the deed of gift operates as from the date of execution.

It was held in **Kalyana Sundram v. Karuppa**, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, *the former has done everything in his power to complete the donation and to make it effective*. And if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. *Neither death nor the express revocation by the donor, is a ground for refusing registration*, provided other conditions are complied with.

PLACE OF REGISTRATION

- (a) Section 28 provides that documents affecting **immovable property** shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the relevant **property is situated** and,
- (b) any **other document** may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was **executed** or in the office of any other Sub-Registrar under the **State Government** at which all the persons executing desire the document to be registered.
- (c) A copy of a **decree or order** may be registered with the Sub-Registrar within whose sub-district it was **made**. If the decree or order **does not affect immovable property**, it may be presented for registration in the office of any other Sub-Registrar under the State Government at whose office all persons claiming under the decree or order desire it to be registered.

- (d) In **Delhi**, a document relating to property situated any where **in India** may be registered (Section 30).

PRESENTING OF DOCUMENTS FOR REGISTRATION

Section 32 specifies the **persons who can present documents for registration** at the proper registration office. Such persons are as follows:-

- (a) some person executing or claiming under the document, or in the case of a copy of a decree or order, claiming under the decree or order, or
- (b) the representative or assign of such person, or
- (c) the agent of such person, representative or assign, *duly authorised by power-of-attorney executed and authenticated by the Registrar within whose district or sub-district the principal resides.*

REGISTERED DOCUMENT WHEN OPERATIVE

SECTION-47

A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration.

As between two registered documents, the **date of execution** determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one (**K.J. Nathan v. S.V. Maruthi Raj,**)

EFFECT OF NON-REGISTRATION OF DOCUMENTS

Section 49 of the Act provides that document required by Section 17 if not registered **shall not:**

- (a) take affect against any immovable property comprised therein; or
- (b) confer any power to adopt; or
- (c) be received as evidence of any transaction affecting such property or conferring such power.

However, as provided in Section 49, proviso, an unregistered document affecting immovable property and required to be registered may be received as evidence of a

contract in a suit for part performance under **Section 53A** of the **Transfer of Property Act, 1882**.

REGISTERED DOCUMENTS RELATING TO PROPERTY WHEN TO TAKE EFFECT AGAINST ORAL AGREEMENT

Registered documents relating to any property whether movable or immovable shall take effect against any oral agreements or declaration relating to such property **unless followed by delivery of possession** which constitutes a valid transfer under any law for the time being in force.

CERTIFICATE OF REGISTRATION

After all the applicable provisions are complied with, the registering officer shall endorse thereon a certificate containing the word “registered” along with the number, and page of the book in which the document has been copied. The certificate shall be signed, sealed and dated by the registering officer.

The certificate of registration in respect of a document is **prima facie evidence** that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law.

REFUSAL TO REGISTER BY THE SUB-REGISTRAR

REASONS FOR REFUSAL TO REGISTER TO BE RECORDED

Every Sub-Registrar refusing to register a document, **except on the ground** that the property to which it relates is **not situated** within his sub-district, shall make an order of refusal and record his reasons for such order give a copy of the reasons so recorded to parties.

Registration cannot be refused on the ground of undervaluation for stamp or any other extraneous reason.

APPEAL TO REGISTRAR

An appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration to the Registrar to whom such Sub-Registrar is subordinate within **30 days** from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of **denial of execution**.

If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall register the same,

APPLICATION TO REGISTRAR

Refusal to register on the ground of **denial of execution** is governed by Section 73, under which the aggrieved party can make an “application” not appeal within **30 days** to the Registrar. If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered

INSTITUTION OF SUIT IN CASE OF ORDER OF REFUSAL BY REGISTRAR

Where the Registrar refuses to order the document to be registered any person claiming under such document, may, within thirty days after the making of the order of refusal, institute in the **Civil Court**, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.

CHAPTER 12 POLLUTION LAW**POLLUTION CONTROL AND ENVIRONMENT PROTECTION****SUSTAINABLE DEVELOPMENT**

The word sustainable is derived from the sustain or sustained. The synonyms of the word sustained includes perpetual, prolonged, steady.

Sustainable development is a broad concept that balances the ***need for economic growth with environmental protection and social equity.***

It is a process of change in which the exploitation of resources, the directions of investment, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.

The principles of sustainable development as laid down in strategy for sustainable living, focus on respect and care for the community of life, improving the quality of human life, conserving the earths vitality and diversity, minimizing the depletion of non-renewable resources, keeping within the earths carrying capacity, changing personal attitudes and practices, enabling communities to care for their own environments, providing a natural framework for integrating development and conservation.

ENVIRONMENTAL PROTECTION IN INDIA – REGULATORY FRAMEWORK

Following Acts constitute the regulatory framework for environmental protection in india:-

- 1. WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974**
- 2. AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981,**
- 3. THE ENVIRONMENT (PROTECTION) ACT, 1986**

4. PUBLIC LIABILITY INSURANCE ACT,1991**5. NATIONAL ENVIRONMENT TRIBUNAL ACT,1995.**

All the abovementioned Acts are administered by **Ministry of environment and forests**, Government of India.

WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974**OBJECT OF ACT**

Act has been enacted to provide for the **prevention and control of water pollution** and **maintaining or restoring wholesomeness of water**, and for the **establishment of Boards**, with a view to carrying out these purposes, for the prevention and control of water pollution.

DEFINITIONS**➤ OCCUPIER**

Occupier in relation to any factory or premises means the person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.

➤ POLLUTION

Pollution means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or any other liquid, gaseous or solid substance into water (whether directly or indirectly) which is likely to, create or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms.

➤ SEWAGE EFFLUENT

Sewage effluent means effluent from any sewerage system or sewage disposal works and includes sullage from open drains.

➤ **TRADE EFFLUENT**

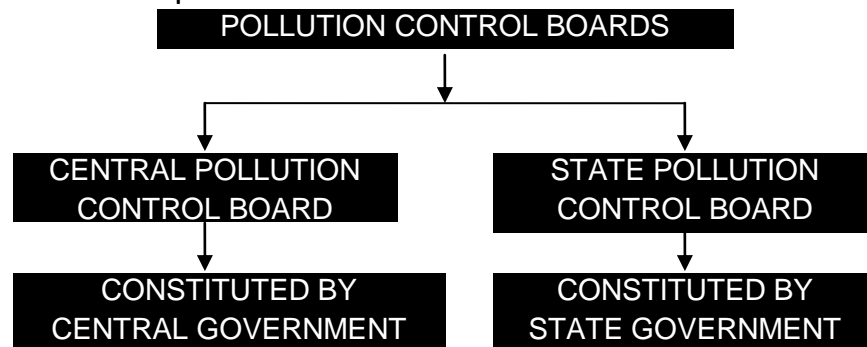
Trade effluent includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process or treatment and disposal system, other than domestic sewage.

CENTRAL AND STATE POLLUTION CONTROL BOARDS

Section 3 of the Act provides for the constitution of the Central Pollution Control Board for prevention and control of water pollution.

The Central Pollution Control Board constituted shall exercise the powers and perform the functions of the Central Pollution Control Board under the Act.

Section 4 of the Act provides for the constitution of the State Pollution Control Board for prevention and control of water pollution.



PREVENTION AND CONTROL OF WATER POLLUTION

1. PROHIBITION ON USE OF STREAM OR WELL FOR DISPOSAL OF POLLUTING MATTER

Section 24 prohibits any person to knowingly cause or permit any poisonous, or polluting matter to enter whether directly or indirectly into any stream or well, or sewer or on land.

This section also prohibits any person to knowingly cause or permit to enter into any stream any other matter which may tend either directly or indirectly to impede the proper flow of water of the stream.

However, no person shall be guilty of an offence in respect of matters mentioned above by reason only of having done or caused to be done any of the following acts, namely:

- (a) constructing, or maintaining across or on the bank of any stream any buildings, bridge, dam, or other permanent works which he has a right to construct.

- (b) depositing any materials on the bank for the purpose of reclaiming land provided such materials are not capable of polluting such stream;
- (c) putting into any stream any sand or gravel or other natural deposit which has flowed from or been deposited by current of such streams;
- (d) causing or permitting, with the consent of the State Board, the deposit accumulated in a well, pond or reservoir to enter into any stream.

2. RESTRICTION ON NEW OUTLETS AND NEW DISCHARGES

Without the previous consent of the State Pollution Control Board no person is authorised to:-

- (a) establish or take any steps to establish any industry, operation or process which is likely to discharge sewage or trade effluent into a stream or well.
- (b) bring into use any new or altered outlet for discharge of sewage; or
- (c) begin to make any new discharge of sewage or trade effluent.

The application for consent should be made in the specified form and manner accompanied by the prescribed fee. While granting consent for establishment of any industry, operation etc. or for bringing into use any new or altered outlet, the Board may impose conditions as to the point of discharge of sewage or trade effluent.

3. FURNISHING OF INFORMATION TO STATE BOARD

Section 31 requires the person incharge of any place to intimate to the State Board, the occurrence of any accident or event as a result of which any poisonous, noxious or polluting matter is being discharged, or is likely to be discharged in such stream or well and as a result of such discharge, the water in such stream or well being polluted or is likely to be polluted. The provisions of this section are also applicable to any local authority which operates any sewage system or sewage works.

4. EMERGENCY MEASURES IN CASE OF POLLUTION OF STREAM OR WELL

Where it appears to the State Board that any poisonous, noxious or polluting matter is present in any stream or well it may carry out such operations as it may consider necessary for all or any of the following purposes, namely:-

- (a) removing that matter from stream or well and disposing it of in such manner as the Board considers appropriate;
- (b) remedying or mitigating any pollution caused by its presence in the stream or well,
- (c) issuing orders immediately restraining or prohibiting the person concerned from discharging any poisonous, noxious or polluting matter into the stream or well.

POWER OF STATE BOARD**1. POWER TO OBTAIN INFORMATION**

State Board is empowered to make the survey of any area and keep records of flow or volume and other characteristics of any stream or well .The State Board has also been empowered to receive informations from any person, who is abstracting water from or is discharging sewage or trade effluent into any such stream or well in substantial quantities.

2. POWER TO TAKE SAMPLES OF EFFLUENTS

State Board is empowered to take for the purpose of analysis samples of water from any stream or well.

when a sample is taken, the person taking the sample shall;-

- (a) serve on the occupier or his agent, a notice,
- (b) in the presence of the occupier or his agent collect a sample for his analysis;
- (c) cause the sample to be placed in a container to be marked, sealed and signed by both the persons taking the sample and the occupier or his agent;
- (d) send, without delay, the container to the laboratory established or recognised by the State Board .
- (e) On receipt of the report from laboratory, the State Board shall send one copy of the same to the occupier.

3. POWER OF ENTRY AND INSPECTION

The State Board is empowered to authorise any person to enter into any place, for the purpose of:-

- (a) performing any of the functions of the State Board;
- (b) determining whether any provisions of the Act or Rules made thereunder or any notice, order, direction given under the Act is being or has been complied with or not;

Every person is bound to render all assistance to the person empowered by the State Board to enter such premises for inspection. A person who wilfully delays or obstructs entry of such person into the premises shall be guilty of an offence under the Act.

4. POWER TO GIVE DIRECTIONS

The Board may issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

The power to issue direction would include the power to direct;-

(i) closure, prohibition or regulation of any industry, operation and process; or

(ii) the stoppage, or regulation of supply of electricity, water or any other service.

APPEAL

Any person aggrieved by an order of the State Board may within 30 days from the date on which the order is communicated to him, prefer an appeal to appellate authority constituted by State Government .

PENALTIES

Failure to comply with the provisions of Act are punishable with imprisonment for a term which shall not be less than **one year and six months** but which may extend to **six years** and with **fine**. Where failure continues, an additional fine is also leviable which may extend to Rs. **5,000** for every **day** of continuing failure.

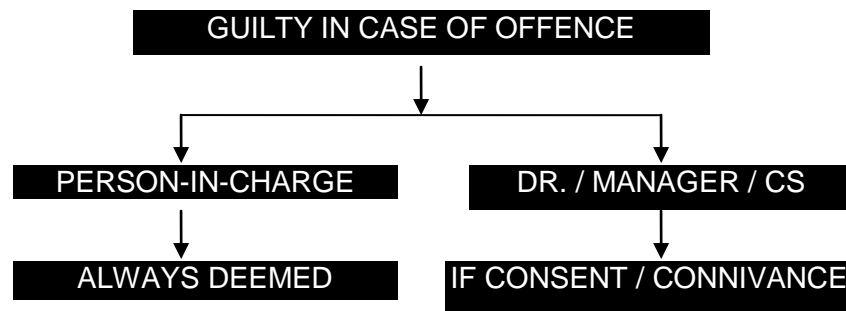
Where failure continues **beyond** a period of **one year** after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than **two years** but which may extend to **seven years** and with **fine**.

OFFENCES BY COMPANIES

Where an offence has been committed by a company, every person who at the time the offence was committed was **in charge** of, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any **director, manager, Company Secretary**, such director, manager, Company Secretary shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

However, if any such person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence, he shall not be liable to punishment.



WATER (PREVENTION AND CONTROL OF POLLUTION) CESS ACT, 1977

This Act authorises the levy and collection of a cess on water consumed by person carrying on certain industries

and by local authorities. The object of the Cess Act is to ensure that the State or Central Boards are able to raise sufficient finance in the effective discharge of functions contemplated under the Pollution Control Laws.

AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

OBJECT OF ACT

An Act to provide the **prevention, control and abatement of air pollution**, for the **establishment**, with a view to carrying out the aforesaid purposes, of **Boards**, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith.

DEFINITIONS

➤ AIR POLLUTANT

Air Pollutant means any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.

➤ AIR POLLUTION

Air Pollution means the presence in the atmosphere of any air pollutant.

➤ **CONTROL EQUIPMENT**

Control Equipment means any apparatus, device, equipment or system to control the quality and manner of emission of any air pollutant and includes any device used for securing the efficient operation of any industrial plant.

➤ **OCCUPIER**

Occupier in relation to any factory or premises, means the person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.

CENTRAL AND STATE POLLUTION CONTROL BOARDS

Section 3 of the Act provides for the constitution of the Central Pollution Control Board for prevention and control of air pollution.

The Central Pollution Control Board constituted shall exercise the powers and perform the functions of the Central Pollution Control Board for the prevention and Control of Air Pollution under the Act.

Section 4 of the Act provides that at the State level in which the Water (Prevention and Control of Pollution) Act, 1974 is in force, and the State Government concerned has constituted a State Pollution Control Board then such State Board shall be the State Board for Prevention and Control of Air Pollution under the Act.

Section 5 of the Act provides that where, in any State there is no such State Pollution Control Board the State Government shall constitute a State Board for prevention and control of air pollution.

FUNCTIONS OF THE BOARDS

following are the functions of the Boards:-

- (a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;
- (b) to advise the Government on any matter concerning the prevention, control or abatement of air pollution;
- (c) to collect and disseminate information relating to air pollution;
- (d) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it

may consider necessary to take steps for the prevention, control or abatement of air pollution;

- (e) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air pollution and take steps for the prevention, control or abatement of pollution in such areas;
- (f) to lay down, standards for the quality of air.
- (g) to perform such other functions as may be prescribed by Government

PREVENTION AND CONTROL OF AIR POLLUTION

1. PROHIBITION ON CERTAIN USAGES IN ‘POLLUTION CONTROL AREA’

Section 19 empowers the State Government to declare, after consultation with the State Board, any area or areas within the State as air pollution control area or areas for the purpose of the Act. State Government after consultation with the State Board can prohibit the use of any fuel other than approved fuel, in any air pollution control area. No appliance, other than an approved appliance, shall be used in the premises situated in an air pollution control area.

2. INSTRUCTIONS TO MOTOR VEHICLES AUTHORITIES

Under Section 20 of the Act, The State Government shall, in consultation with the State Board, give such instructions as it may deem necessary to the concerned authority in charge of registration of motor vehicles under the Motor Vehicles Act, 1939 (now Motor Vehicles Act, 1988), with a view of ensuring that standards for emission of air pollutants from automobiles laid down by the State Board are complied with.

3. RESTRICTIONS ON ESTABLISHMENT OF CERTAIN INDUSTRIAL PLANTS

Section 21 of the Act deals with restriction on establishment of certain industrial plants. Accordingly, **no person** is allowed, **without the previous consent of the State Board**, to **establish** or **operate** any industrial plant in an air pollution control area. In case, a person **already operates** in any such air pollution control area, such person is also required to make the application in the prescribed manner within **3 months** of the declaration of that area to be an air pollution control area. Within a period of 4 months after the receipt of the application, the State Board may, grant the consent applied for, subject to such conditions and for such period as may be specified therein.

Every person to whom consent has been granted by the State Board has been put under obligation to comply with the following conditions, namely:

- (a) the control equipment as the State Board may approve shall be installed and operated in the premises.
- (b) the existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board;
- (c) the control equipment referred to in clause (i) or clause (ii) shall be kept at all times in good running condition;
- (d) chimney, wherever necessary, as the State Board may approve in this behalf shall be erected or re-erected in such premises;
- (e) such other conditions as the State Board may specify in this behalf, and

POWER OF STATE BOARDS

1. POWER TO ENTRY AND INSPECTION

The State Board is empowered to authorise any person to enter into any place, for the purpose of:-

- (a) performing any of the functions of the State Board;
- (b) determining whether any provisions of the Act or Rules made thereunder or any notice, order, direction given under the Act is being or has been complied with or not;

Every person is bound to render all assistance to the person empowered by the State Board to enter such premises for inspection. A person who wilfully delays or obstructs entry of such person into the premises shall be guilty of an offence under the Act.

2. POWER TO OBTAIN INFORMATION

For the purposes of carrying out the functions entrusted, the State Board or any officer empowered may call for any information from the occupier. Also for the purposes of verifying the correctness of such information, the State Board or such officer shall have the right to inspect the premises.

3. POWER TO TAKE SAMPLES

State Boards are empowered to take samples for the purpose of analysis, samples of air or emission from any chimney, flue or duct or any other outlet in such manner as may be prescribed.

when a sample of emission is taken, the person taking the sample shall:-

- (a) serve on the occupier or his agent, a notice,

- (b) in the presence of the occupier or his agent collect a sample of emission for his analysis;
- (c) cause the sample to be placed in a container to be marked, sealed and signed by both the persons taking the sample and the occupier or his agent;
- (d) send, without delay, the container to the laboratory established or recognised by the State Board .
- (e) On receipt of the report from laboratory, the State Board shall send one copy of the same to the occupier.

STATE AIR LABORATORY

The State Government is authorised to establish, one or more laboratories to carry out functions entrusted to the State Air Laboratory under the Act. The State Government may after consultation with the State Board, make rules prescribing the functions and procedures of the Laboratory. State Government can appoint such persons as it thinks fit having the prescribed qualifications, as Government analysts for the purpose of analysis of samples of air or emissions.

4. POWER TO GIVE DIRECTIONS

The Board may issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

The power to issue direction would include the power to direct;-

- (i) closure, prohibition or regulation of any industry, operation and process; or
- (ii) the stoppage, or regulation of supply of electricity, water or any other service.

APPEAL

Any person aggrieved by an order of the State Board may within 30 days from the date on which the order is communicated to him, prefer an appeal to appellate authority constituted by State Government .

PENALTIES

Failure to comply with the provisions of Act are punishable with imprisonment for a term which shall not be less than **one year and six months** but which may extend to **six years** and with **fine**. Where failure continues, an additional fine is also leviable which may extend to Rs. **5,000** for every **day** of continuing failure.

Where failure continues **beyond** a period of **one year** after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than **two years** but which may extend to **seven years** and with **fine**.

CONTROL OF NOISE POLLUTION

In order to control the noise pollution caused from various sources such as industrial activity, construction activity, generator sets, loud speakers, public address system, music systems, vehicular horns and other mechanical devices the Central Government has framed rules known as '**The Noise Pollution (Regulation and Control) Rules, 2000**.

An area comprising 100 metres around hospitals, educational institutions and courts has been declared as the **silence area/zone**. A loud speaker or a public address system shall not be used at night (**between 10:00 p.m. to 6:00 a.m.**) except in closed premises for communication.

Whoever commits any offence of playing music or uses any sound amplifiers, beats a drum or blows a horn, etc. in a silence zone/area shall be liable to a penalty.

THE ENVIRONMENT (PROTECTION) ACT, 1986**OBJECT OF ACT**

Although various legislations dealt with several environmental matters, Therefore, the need was felt for a general legislation for environmental protection.

Act provides for the **protection and improvement of environment** and the **prevention of hazards** to human beings, other living creatures, plants and property.

DEFINITIONS**➤ ENVIRONMENT**

Environment include water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

➤ **ENVIRONMENT POLLUTANT**

Environment Pollutant means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be injurious to environment.

➤ **ENVIRONMENTAL POLLUTION**

Environmental Pollution, means the presence in the environment of any environmental pollutant.

➤ **HANDLING**

Handling in relation to any substance means the manufacture, processing, treatment, package, storage transportation, use, collection, destruction, conversion, offering the sale, transfer or the like of such substance.

➤ **HAZARDOUS SUBSTANCE**

Hazardous Substance means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, micro-organism, property or the environment.

➤ **OCCUPIER**

The term Occupier in relation to any factory or premises has been defined to mean a person who has control over the affairs of the factory or the premises and includes in relation to any substance, the person in possession of the substance.

PREVENTION AND CONTROL OF ENVIRONMENTAL POLLUTION

1. ENVIRONMENTAL CLEARANCE AND LOCATION OF INDUSTRIES

Environment Protection Rules, 1986, empowers the Central Government to prohibit or restrict the location of industries after taking into consideration factors, such as standards for quality of environment in an area, the maximum allowable limits of concentration of environmental pollutants for an area, the likely emission or discharge from the proposed industry, .

It has been notified that the setting up of any new industrial project or the expansion or modernisation of any existing industry shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central or any State Government, as the case may be.

Any person wishing to undertake any of these operations in the said area is required to submit an application in the prescribed form along with an Environment Impact Statement and an Environmental Management Plan to the Secretary, Ministry of Environment and Forests, New Delhi,

Clearance would be so accorded only on the basis of an **Environmental Impact Assessment** of the project and the necessary **Environmental Management Plan** for the prevention, elimination or mitigation of the adverse impacts, right from the inception stage of the project.

2. OBLIGATION TO FURNISH INFORMATION

Section 9 casts upon certain persons an obligation to furnish information to authorities and agencies in cases where the discharge of any environmental pollutant is in excess of the prescribed standards occurs or is apprehended to occur due to any accident or event.

On receipt of such information, the authorities concerned are required to take the necessary remedial measures and the expenses, if any, incurred, in respect thereof may be recovered from the person concerned as arrears of land revenue or of public demand.

3. ENVIRONMENTAL AUDIT

Rule 14 of the Environment Protection Rules, 1986 provides for the submission of environmental audit report. Accordingly, every person carrying on an industry, operation or process requiring consent under Water (Prevention and Control of Pollution) Act or Air (Prevention and Control of Pollution) Act or both or authorisation under the Hazardous Wastes (Management and Handling) Rules, 1989 is required to submit an environmental audit report in **Form V** for the financial year ending on **31st**

March every year on or before the **15th of May**, to the concerned State Pollution Control Board.

GENERAL POWERS OF THE CENTRAL GOVERNMENT

1. POWER TO ISSUE DIRECTIONS

[[

The central government may issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

The power to issue direction would include the power to direct;-

- (i) closure, prohibition or regulation of any industry, operation and process; or
- (ii) the stoppage, or regulation of supply of electricity, water or any other service.

2. POWER TO MAKE RULES

Section 6 empowers the Central Government, to make rules for all or any following matters:-

- (a) the standards of quality of air, water or soil for various areas and purposes;
- (b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;
- (c) the procedures and safeguards for the handling of hazardous substances;
- (d) the prohibition and restrictions on the handling of hazardous substances in different areas;
- (e) the prohibition and restrictions on the location of industries and the carrying on of processes and operations in different areas;
- (f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing of remedial measures for such accident.

3. POWER TO ENTRY AND INSPECTION

The central government is empowered to authorise any person to enter into any place, for the purpose of:-

- (a) performing any of the functions entrusted to him;

- (b) determining whether any provisions of the Act or Rules made thereunder or any notice, order, direction given under the Act is being or has been complied with or not;

Every person is bound to render all assistance to the person empowered by the C/G to enter such premises for inspection. A person who wilfully delays or obstructs entry of such person into the premises shall be guilty of an offence under the Act.

4. POWER TO TAKE SAMPLES OF EFFLUENTS

Central Government is empowered to take for the purpose of analysis samples.

when a sample is taken, the person taking the sample shall:-

- (a) serve on the occupier or his agent, a notice,
- (b) in the presence of the occupier or his agent collect a sample for his analysis;
- (c) cause the sample to be placed in a container to be marked, sealed and signed by both the persons taking the sample and the occupier or his agent;
- (d) send, without delay, the container to the Environmental laboratory.
- (e) On receipt of the report from laboratory, the State Board shall send one copy of the same to the occupier.

ENVIRONMENTAL LABORATORIES

Section 12 of the Act empowers the Central Government to establish by notification in the official Gazette, one or more environmental laboratories or recognise one or more laboratories or institutes as environmental laboratories to carry out certain functions under the Act.

FUNCTIONS OF ENVIRONMENTAL LABORATORIES:-

- (a) To evolve standardised methods for sampling and analysis of various types of environmental pollutants;
- (b) To analyse samples sent by the Central Government
- (c) To carry out such investigations as may be directed by the Central Government
- (d) To send periodical reports regarding its activities to the Central Government;
- (e) To carry out such other functions as may be entrusted to it by the Central Government from time to time.

OFFENCES AND PENALTIES

Section 15 makes contravention of any of the provisions of the Act punishable with imprisonment upto **5 years** or with fine upto **Rs. 1 lakh** or with **both**. An additional fine of **Rs. 5,000** would also be leviable for **every day** of continuing default.

Section 15 further provides that where such contravention **continues** beyond a period of **one year** from the date of conviction, the offender shall be punishable with imprisonment upto **seven years**.

OFFENCES BY COMPANIES

Where an offence has been committed by a company, every person who at the time the offence was committed was **in charge** of, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any **director, manager, Company Secretary**, such director, manager, Company Secretary shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

OFFENCES BY GOVERNMENT DEPARTMENTS

In the case of an offence committed by any department of the Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

PUBLIC LIABILITY INSURANCE ACT, 1991

OBJECT OF ACT

The Public Liability Insurance Act, 1991, was enacted for the purpose of providing **immediate relief** to the **persons affected by accidents** occurring while handling any hazardous substance and for other incidental and connected matters.

DEFINITIONS

➤ **ACCIDENT**

Accident means an accident involving a fortuitous or sudden or unintentional occurrence while handling any hazardous substance resulting in continuous, or repeated exposure to death of, or injury to, any person or damage to any property but does not include an accident by reason only of war or radio-activity.

➤ **HANDLING**

Handling in relation to any substance means the manufacture, processing, treatment, package, storage transportation, use, collection, destruction, conversion, offering the sale, transfer or the like of such substance.

➤ **HAZARDOUS SUBSTANCE**

Hazardous Substance means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling is liable to cause harm to human beings, other living creatures, micro-organism, property or the environment.

➤ **OWNER**

Owner means a person who **owns** or **has control** over handling any hazardous substance at the time of accident and include partners of a firm, members of an association and in the case of a company, its **directors, managers, secretaries**, or other officers who is directly incharge of and is responsible to, the company for the conduct of its business.

MAJOR PROVISIONS OF THE ACT

1. LIABILITY TO GIVE RELIEF

Section 3 of the Act incorporates the **principle of liability without fault** and imposes on the owner liability to give relief in case of death or injury to any person or damage to any property, resulting from an accident occurring while handling any hazardous substance.

2. COMPULSORY INSURANCE

Section 4 requires the owner to take out **one or more insurance policies, before starting the handling of hazardous substance**. Such insurance policy should provide for contract of insurance, whereby he is insured against liability to give relief under Section 3(1) of the Act.

3. VERIFICATION AND PUBLICATION OF ACCIDENT

Section 5 of the Act requires the **collector to verify**, whenever it comes to his notice that an accident has occurred at any place within his jurisdiction, the occurrence of such accident and cause publicity to be given in such manner as he deems fit for inviting applications for claim for relief as provided under the Act.

4. APPLICATION FOR CLAIM FOR RELIEF

Section 6 deals with manner of making application for claim for relief and provides that an application for claim for relief may be made by the:-

- (a) person who has sustained injury;
- (b) by owner of the property to which damage has been caused;
- (c) in the case of death resulting from accident, by all or any of the legal representatives of the deceased;
- (d) by any agent duly authorised by such person or owner of such property.

Every application is required to be submitted to collector in the prescribed form alongwith prescribed documents.

5. AWARD OF RELIEF

Section 7 of the Act requires the **collector**, on receipt of application for claim for relief, **to hold an inquiry** into the claim or each of the claims, after giving notice of application to owner and after giving the parties an opportunity of being heard and make an award determining the amount of relief payable to person or persons. Sub-section (3) **requires the insurers to deposit, within 30 days** from the date of announcement of the award, the amount in such manner as specified by the collector.

6. ESTABLISHMENT OF ENVIRONMENT RELIEF FUND

Section 7A of the Act empowers the Central Government to establish Environment Relief Fund, by notification in the official Gazette, to be utilised for paying relief under the award made by the collector under Section 7 of the Act.

PENALTIES

Failure to comply with the provisions of Act are punishable with imprisonment for a term which shall not be less than **one year and six months** but which may extend to **six years** and with **fine**. Where failure continues, an additional fine is also leviable which may extend to Rs. **5,000** for every **day** of continuing failure.

Where failure continues **beyond** a period of **one year** after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than **two years** but which may extend to **seven years** and with **fine**.

NATIONAL ENVIRONMENT TRIBUNAL ACT, 1995

OBJECT OF ACT

With a view to giving relief and compensation for damages to persons, property and the environment, the National Environment Tribunal Act, 1995 was enacted to:-

- (a) provide for **strict liability for damages** arising out of any accident occurring while handling any hazardous substance and
- (b) establish a National Environment Tribunal for **effective and expeditious disposal of cases** arising from such accident.

MAJOR PROVISIONS OF THE ACT

COMPENSATION FOR DEATH, INJURY TO A PERSON AND DAMAGE TO PROPERTY AND ENVIRONMENT

Section 3(1) states that where death of or injury to any person (other than workman) or damage to any property or environment has resulted from an accident, the owner shall be liable to pay compensation for such death, injury or damage.

A claimant in any claim for compensation, is under no obligation to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.

Section 4 deals with application for claim for compensation and provides that an application for compensation may be made to National Environment Tribunal:--

- (a) by the person who has sustained the injury;
- (b) by the owner of the property to which the damage has been caused;
- (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased;
- (d) by any agent duly authorised by such person or owner of such property or all or any of the legal representatives of the deceased as the case may be;
- (e) by any representative body or organization, functioning in the field of environment and recognised by the Central Government,
- (f) by the Central Government or a State Government or a local authority

The application for compensation shall not be entertained unless it is made within five years of the occurrence of accident.

HEADS UNDER WHICH COMPENSATION FOR DAMAGES MAY BE CLAIMED

The Schedule to the Act lists out the following heads under which compensation for damages may be claimed:

- (a) Death;
- (b) Permanent, temporary, total or partial disability or other injury or sickness;
- (c) Loss of wages due to total or partial disability or permanent or temporary disability;
- (d) Medical expenses incurred for treatment of injuries or sickness;
- (e) Damage to private property;
- (f) Expenses incurred by the Government or any local authority in providing relief, aid and rehabilitation to the affected persons;
- (g) Loss to Government or local authority arising out of, or connected with, the activity causing any damage;
- (h) Claims on account of any harm, damage or destruction to the fauna including milch and draught animals and aquatic fauna;
- (i) Claims on account of any harm, damage or destruction to the flora including aquatic flora, crops, vegetables, trees and orchards;
- (j) Loss of business or employment or both;
- (k) Any other claim arising out of or connected with, any activity of handling of hazardous substance.

OBJECTIVE OF THE ACT

National Green Tribunal Act, 2010 provides for the establishment of a National Green Tribunal for the ***effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources*** including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

NATIONAL GREEN TRIBUNAL - POWERS

The following are the powers of the National Green Tribunal:-

- (1) The Green Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice.
- (2) The Tribunal shall have power to regulate its own procedure.
- (3) The Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.
- (4) The Tribunal shall have, for the purposes of discharging its functions, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters:
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) requiring the discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) requisitioning any public record or document or copy of such record or document from any office;
 - (e) issuing commissions for the examination of witnesses or documents;
 - (f) reviewing its decision;
 - (g) dismissing an application for default or deciding its ex parte;
 - (h) setting aside any order of dismissal of any application for default or any order passed by it ex parte,
 - (i) pass an interim order (including granting an injunction or stay) after providing the parties concerned an opportunity to be heard, on any application made or appeal filed under this Act;
 - (j) pass an order requiring any person to cease and desist from committing or causing any violation of any enactment specified in Schedule I;
 - (k) any other matter which may be prescribed.
- (5) All proceedings before the Tribunal shall be deemed to be judicial proceedings and the Tribunal shall be deemed to be a civil court.

CHAPTER 13 INDUSTRIES (DEVELOPMENT AND REGULATION ACT ,1952

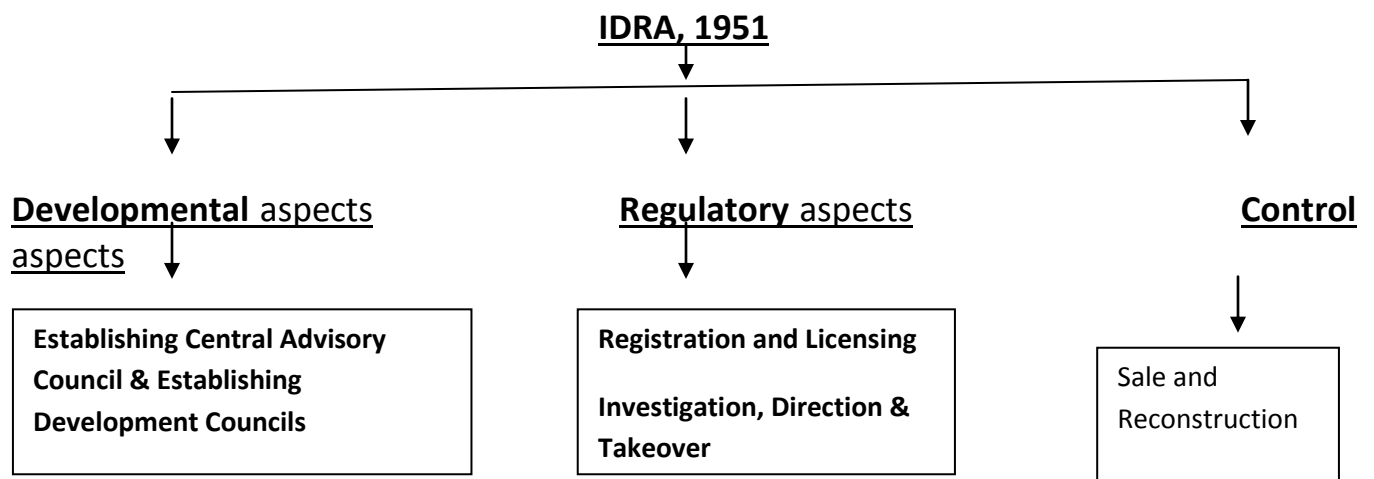
The Industries (Development and Regulation) Act, 1951 is an important piece of legislation affecting the industrial sector of the country. *The **object** of Industries (Development and Regulation) Act is to provide to the Central Government means of implementing the Industrial Policy.*

The Act is implemented through Department of Industrial Policy and Promotion and Secretariat of industrial assistance, **Ministry of Commerce & Industry.**

SCOPE OF THE ACT

The preamble to the Act states that the I (D&R) Act is an Act ‘to provide for the development and regulation of certain industries’. These industries are specified in the **First Schedule** to the Act. The scope of the Act is therefore, limited to the industries mentioned in the First Schedule known as ‘**scheduled industries**’.

SCHEME OF THE ACT



IMPORTANT DEFINITIONS

- **SCHEDULED INDUSTRY**
SECTION 3(i)

Scheduled industry means and include any of the industries specified in the **First Schedule** of the Act.

- **EXISTING INDUSTRIAL UNDERTAKING**
SECTION 3(bb)

Existing industrial undertaking means:-

(a) an industrial undertaking which was in existence on the commencement of this Act and which belongs to any of the industries specified in First Schedule as originally enacted **or** for the establishment of which, effective steps had been taken before such commencement, and

(b) an industrial undertaking pertaining to any of the industries added to the First Schedule by an amendment thereof, an industrial undertaking which is in existence on the coming into force of such amendment **or** for the establishment of which, effective steps had been taken before the coming into force of such amendment.

'Effective steps' means one or more of the following:-

- (a) 60% or more of the capital issued by a public company has been paid up;
- (b) a substantial part of the factory building has been constructed;
- (c) a firm order has been placed for a substantial part of the plant and machinery required for the undertaking.

- **FACTORY**

Factory means any premises including the precincts thereof in any part of which a manufacturing process is being carried on or is ordinarily so carried on :-

- (a) **with the aid of power** provided that **50 or more** workers are working or were working thereon on any day of the preceding twelve months, or
- (b) **without the aid of power** provided that **100 or more** workers are working or were working thereon on any day of the preceding twelve months.

- **INDUSTRIAL UNDERTAKING**
SECTION 3(d)

Industrial undertaking means and include any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government.

- **NEW ARTICLE**
SECTION 3(dd)

New article in relation to an industrial undertaking means:-

- (a) any article which falls under an item in the First Schedule other than the item under which articles ordinarily manufactured or produced in the industrial undertaking at the date of registration or issue of the licence or permission as the case may be, fall;
- (b) any article which bears a mark as defined in the Trade Marks Act or which is subject of a patent, if at the date of registration or issue of the licence or permission, as the case may be, the industrial undertaking was not manufacturing or producing such article bearing that mark or which is the subject of that patent.

- **OWNER**

owner mean the person who, or the authority which, has the ultimate control over the affairs of the undertaking and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent shall be deemed to be the owner of the undertaking.

It may be noted that the term 'person' employed in the definition would include both natural and artificial persons. Bodies corporate owning industrial undertakings would also be covered within the above definition.

ANCILLARY AND SMALL SCALE INDUSTRIES

Ancillary and Small Scale Industries are outside the purview of the I(D&R) Act. The reason behind this exclusion is that the ancillary and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under the Act to enable them to maintain their viability and strength so as to be effective in promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment.

SMALL SCALE INDUSTRIAL UNDERTAKING

An industrial undertaking in which the investment in fixed assets in plant and machinery, whether held on ownership terms or on lease or on hire purchase, does not exceed rupees **one crore**.

ANCILLARY INDUSTRIAL UNDERTAKING

An Ancillary industrial undertaking means any industrial undertaking which is engaged or is proposed to be engaged:-

- (a) in the manufacturing or production of parts, components, sub-assemblies, tooling or the rendering of services
- (b) supply or proposes to supply not more than **fifty per cent** of its production or services, as the case may be, to one or more other industrial undertakings and
- (c) Where its investment in fixed assets in plant and machinery, whether held on ownership terms or on lease or on hire purchase, does not exceed **rupees one crore**.

No small scale or ancillary industrial undertaking referred to above shall be subsidiary of, or owned or controlled by any other industrial undertaking.

'Controlled by any other industrial undertaking to have the meaning as under'

Where two or more industrial undertakings are set up by the same person as a proprietor, each of such industrial undertakings shall be considered to be controlled by the other industrial undertaking or undertakings,

CALCULATION OF VALUE OF PLANT AND MACHINERY

In calculating the value of plant and machinery for the purposes of small scale/ancillary industrial undertaking, the **original price** thereof, irrespective of whether the plant and machinery are new or second hand, shall be taken into account.

However, in calculating the value of plant and machinery, the following shall be excluded, namely:-

- (a) the cost of equipments such as tools, jigs, dies, moulds and spare parts for maintenance and the cost of consumable stores;
- (b) the cost of installation of plant and machinery;
- (c) the cost of research and development equipment and pollution control equipment;
- (d) the cost of generation sets and extra transformer installed by the undertaking as per the regulations of the State Electricity Board;
- (e) the bank charges and service charges paid to the National Small Industries Corporation or the State Small Industries Corporation;
- (f) the cost involved in procurement or installation of cables, wiring, electrical control panels which are necessary for safety measures;
- (g) the cost of gas producer plants;
- (h) transportation charges (excluding of sales-tax and excise) for indigenous machinery from the place of manufacturing to the site of the factory;
- (i) charges paid for technical know-how for erection of plant and machinery;
- (j) cost of fire fighting equipments.

In the case of **imported machinery**, the following shall be **included** in calculating the value, namely:-

- (a) import duty (excluding miscellaneous expenses as transportation from the port to the site of the factory, demurrage paid at the port);
- (b) the shipping charges;
- (c) customs clearance charges; and
- (d) sales tax

➤ **DEVELOPMENT OF THE SCHEDULED INDUSTRIES**

The development of the Scheduled Industries is sought to be secured primarily through the following agencies :-

1. CENTRAL ADVISORY COUNCIL

SECTION 5

Central Government by notified order, had established a council which is known as the Central Advisory Council, for **advising** the Government on **matters** concerning the **development and regulation of scheduled industries**.

Council shall **consist** of a **chairman** and such **other members** not exceeding **thirty** in number, to be appointed by the Central Government from among persons who are, in its opinion, capable of representing the interest of (i) owners of industrial undertakings (ii) persons employed in industrial undertakings (iii) consumers (iv) and such other class of persons including primary producers, as in the opinion of the Central Government ought to be represented on the Advisory Council.

2. DEVELOPMENT COUNCIL

SECTION 6

Central Government by notified order, had established body of persons which is known as the Development Council.

Development Council **consist** of such **members** who, in the opinion of the Central Government, are ((i) persons capable of representing the interests of owners (ii) persons having special knowledge of matters relating to the technical or other aspects of the scheduled industry (iii) persons capable of representing the interests of persons employed (iv) persons capable of representing the interests of consumers

The Central Government may assign to a Development Council, any of the functions specified in the Second Schedule to the Act in order to increase the efficiency or productivity in the scheduled Industry or group of scheduled Industries for which the Development Council is established.

The functions which may be assigned to Development Council include:-

- (a) Recommending targets for production, and reviewing progress from time to time.
- (b) Suggesting norms of efficiency with a view to eliminating waste, obtaining maximum production, improving quality and reducing costs.
- (c) Promoting the training of persons engaged
- (d) Promoting or undertaking scientific industrial research,
- (e) Promoting improvements and standardisation of accounting and costing methods and practices.etc.

COLLECTION OF CESS

SECTION 9

Section 9 empowers the Central Government to levy and collect cess on all goods manufactured and produced in any specified scheduled industry and hand over the proceeds to the Development Council established for that industry. The Development Council, in turn, is required to utilise the proceeds, to promote scientific and industrial research, training with reference to the scheduled industry and to meet its administrative expenses.

➤ REGULATION OF SCHEDULED INDUSTRIES

Regulation of industries is sought to be achieved by means of registration of existing industrial undertakings; licensing of new industrial undertakings; and licensing for producing or manufacturing new articles.

REGISTRATION OF EXISTING INDUSTRIAL UNDERTAKINGS

SECTION 10

Section 10 requires the owner of every existing industrial undertaking (not being the Central Government) to register the undertaking in the prescribed manner within the prescribed period. The Central Government has also been put under obligation to register its own existing industrial undertakings. On such a registration the owner of the undertaking is issued a certificate of registration containing the productive capacity of the industrial undertaking and other prescribed particulars.

Issue of Certificate of Registration

Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, after such investigation as it may consider necessary, grants the applicant a certificate of registration containing, besides other prescribed particulars, the productive capacity of the undertaking.

CIRCUMSTANCES WHEN REGISTRATION IS NOT NECESSARY

Registration of an undertaking will not be necessary if the undertaking;-

- (a) is a small scale industrial undertaking or
- (b) is otherwise exempt from the licensing/registration provisions of the Act or,
- (c) is not satisfying the definition of the term 'factory' under the Act.

PENALTY FOR FAILURE TO REGISTER

The owner of an industrial undertaking is liable to be punished with imprisonment up to **six months** or fine, which may extend to **5,000 Rupees** or with both.

POWER OF CENTRAL GOVERNMENT TO REVOKE REGISTRATION

The Central Government has been empowered to revoke the registration if it is satisfied that :-

- (a) it was obtained by misrepresentation or
- (b) the undertaking has ceased to be registrable by reason of any exemption granted under this Act; or
- (c) for any other reason the registration has become useless or ineffective

The Central Government is however, required to give an opportunity to the owner of the undertaking to be heard, before revoking the registration.

LICENSING OF INDUSTRIAL UNDERTAKINGS/ INDUSTRIAL LICENCE**SECTION 11 & 13**

An Industrial licence is a written permission from the Government to an industrial undertaking to manufacture specified articles, listed in the First Schedule and includes particulars of industrial undertaking, its location, articles to be manufactured, the capacity on the basis of maximum utilisation of plant and machinery etc.

Application in **form-FC-IL** (*Form-EE for COB licence*) for licence should be submitted to Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, Udyog Bhawan, New Delhi-110011. The application, should be submitted along with a crossed demand draft of Rs.2500/- drawn in favour of the Pay & Accounts officer, payable at the

State Bank of India, Nirman Bhawan, New Delhi. Approvals are normally granted within 4-6 weeks of filling the application.

WHEN LICENCE IS REQUIRED

An industrial licence is required for the following purposes:-

- (a) for establishment of New Undertaking
- (b) for Producing or Manufacturing New Articles
- (c) for Carrying on Business Without Registration
- (d) for Carrying on Business After the Revocation of Certificate of Registration
- (e) for Carrying on Business by an Industrial Undertaking to which the Act did not originally apply but becomes applicable after the commencement of the Act for any reason.
- (f) Licence for Change in Location
- (g) Licence for Effecting Substantial Expansion of an industrial undertaking registered or in respect of which a licence or permission has been issued.

***‘Substantial expansion’** means the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking or which is of such nature as to amount virtually to a new industrial undertaking **but does not include** any such expansion as is normal to the undertaking having regard to its nature and the circumstances relating to such expansion.*

It should also be noted that any increase in production by 25% over the licensed capacity being in the nature of expansion would not amount to substantial expansion if:-

- (a) no additional plant and machinery has been installed except minor balancing equipment indigenously procured;
- (b) no additional expenditure had been incurred or foreign exchange was involved; and –
- (c) the extra production does not give rise to any additional demand for scarce raw materials.

CARRY ON BUSINESS (COB) LICENCE

A COB licence is required when a small scale unit exceeds the prescribed small scale limit of investment in plant and machinery by way of natural growth and continues to manufacture small scale reserved items(s). Also, if exemption from Industrial licensing granted for any item is withdrawn, the industrial undertakings manufacturing such item(s) require COB licence.

POWER OF THE CENTRAL GOVERNMENT TO REVOKE/AMEND LICENCES IN CERTAIN CASES

Section 12 of the Act empowers the Central Government to revoke the licence issued under Section 11 if it is satisfied, either on a reference made to it in this behalf or otherwise that the licensee has, without reasonable cause, failed to establish or to take effective steps to establish the new industrial undertaking within the prescribed time or the extended time, as the case may be.

WHEN LICENCE IS NOT REQUIRED

SECTION 29B

The Act empowers the Central Government to grant exemptions from licencing requirements to any undertakings.

All industries except:-

- (a) industries reserved for the public sector
- (b) Industries retained under compulsory licensing
- (c) industries engaged in manufacture of items reserved for the small scale sector and if located in the restricted area according to their locations,
are exempt from the requirements of obtaining Industrial license.

LOCATIONAL POLICY

Industrial undertakings are free to select the location of a project. However, in the case of cities with population of more than one million (as per the 1991 census), the proposed location should be at least **25 KM** away from the Standard Urban Area limits of that city unless, it is to be located in an area designated as an industrial area before the 25th July, 1991.

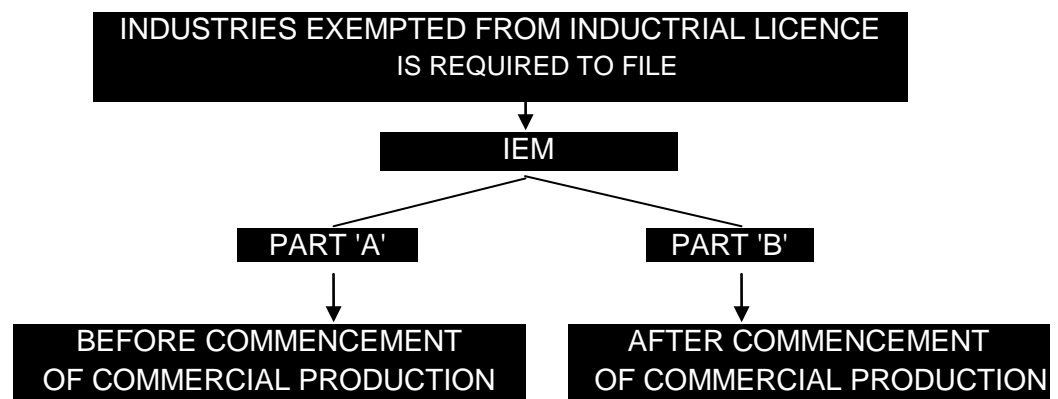
Industries related to electronics, computer software and printing (and any other industry which may be notified in future as non polluting industry) are **exempt** from such locational restriction. Small scale units are also free from locational restrictions.

INDUSTRIAL ENTREPRENEUR MEMORANDUM (IEM)

Industrial undertakings exempt from obtaining an industrial licence are required to file Industrial Entrepreneur Memorandum (IEM) in Part 'A' (as per prescribed format) with the Secretariat of Industrial Assistance (SIA), Department of Industrial Policy and Promotion, Government of India, and obtain an acknowledgment. The IEM should be

submitted along with a crossed demand draft of Rs. **1000/-** drawn in favour of The Pay & Accounts Officer, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, payable at the State Bank of India, Nirman Bhawan Branch, New Delhi, where the number of items proposed to be manufactured in the unit is up to **10**. For more than 10 items, an additional fee of **Rs.250 up to 10 additional items**, needs to be paid through crossed demand draft.

No further approval is required. Immediately after commencement of commercial production, Part B of the IEM has to be filled in the prescribed format. The facility for amendment of existing IEMs has also been introduced.



ENVIRONMENTAL CLEARANCES

Entrepreneurs are required to obtain Statutory clearances relating to Pollution Control and Environment for setting up an industrial project and expansion/ modernisation of existing projects. Environment Protection Act, 1986 has listed 32 projects in respect of which environmental clearance needs to be obtained from the Ministry of Environment, Government of India. This list includes industries like petro-chemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilisers, dyes, paper etc.

However if **investment is less than Rs. 1000 million and 500 million in case of expansion/modernisation** projects, such clearance is not necessary, **unless it is for pesticides, bulk drugs and pharmaceuticals, asbestos** and asbestos products, integrated paint complexes, mining project, distilleries, dyes, and electroplating industries.

Further, any item reserved for the small scale sector with investment of less than Rs 10 million is also exempt from obtaining environmental clearance from the Central

Government. Powers have been delegated to the State Governments for grant of environmental clearance for certain categories of thermal power plants.

➤ **CONTROL OVER SCHEDULED INDUSTRIES**

Control over the industries is sought to be exercised by causing **investigation** into the working of these industries and in appropriate cases **taking over** of direct management and control.

INVESTIGATION

SECTION 15, 15A & 16

Section 15 of the Act empowers the Central Government to cause an investigation to be made into scheduled industries or industrial undertakings.

Under this section the Central Government may make or cause to be made a full and complete investigation into any scheduled industry or industrial undertaking, in respect of which, if it is of the opinion that:-

- (a) there has been or is likely to be, a substantial fall in the volume of production
- (b) there has been or is likely to be a marked deterioration in the quality of any article
- (c) there has been or is likely to be a rise in the price of any article for which there is no justification
- (d) it is necessary to take any such action for the purpose of conserving any resources of national importance
- (e) the industrial undertaking is being managed in a manner highly detrimental to the scheduled industry or to public interest.

In **Juggilal Kamlatpat Cotton Spinning Mills v. Union of India** it was held that, the opinion, the Central Government is required to form before passing an order of investigation under this section is to be on a subjective satisfaction, which has to be based on relevant material. Before passing an order the party must be heard.

INVESTIGATION INTO THE AFFAIRS OF A COMPANY IN LIQUIDATION

Section 15A contains provisions for conducting an investigation into the affairs of a company owning an industrial undertaking.

The prerequisites for conducting such an investigation are:-

- (a) the company is either being wound up by or under the supervision of a High Court;
- (b) the business of such company is not being continued; and
- (c) the Central Government is of the opinion that it is necessary in the interests of the general public and in particular in the interests of production, supply or distribution

of articles, to investigate into the possibility of running or restarting the industrial undertaking.

If the above circumstances are present in a particular case, the Central Government may make an application to the High Court praying for permission to make or cause to be made an investigation into possibility of re-starting or running the industrial undertaking. On application by the Central Government under this section the High Court **shall**, notwithstanding anything contained in the Companies Act, 1956, or in any other law for the time being in force, grant the permission prayed for.

In **Union of India v. Anglo-French Textiles Limited**, the Madras High court held that even though the application for winding up a company is pending before the Court, it can take the expression being wound up by or under the supervision of the High Court to include a case where a petition under Section 433 of the Companies Act is pending.

On the other hand, the Calcutta High Court in **Union of India v. Shalimar Works Limited** held that the expression being wound up by or under the supervision of the High Court would mean that the company is directed to be wound up, and hence the Court held that the proper stage for application under Section 15A is when the order for winding up has been made by the Court and not before that.

DIRECTIONS AFTER INVESTIGATION

Section 16 of the Act provides that after investigation under Section 15, if the Central Government is satisfied that action under Section 16, is desirable, it may issue such directions to the industrial undertaking or undertakings as may be appropriate in the circumstances

TAKE-OVER OF INDUSTRIAL UNDERTAKINGS

SECTION 18A, 18AA, 18B & 18FA

Section 18A empowers the Central Government to take over an industrial undertaking whose affairs had been investigated under Section 15, Section 18AA sets out the circumstances under which the Central Government can take over an industrial undertaking without any investigation.

TAKE OVER AFTER INVESTIGATION

Section 18A empowers the Central Government to take over the management of an industrial undertaking under certain circumstances.

Where the Central Government is of opinion that:-

- (a) an industrial undertaking to which directions have been issued in pursuance of Section 16 has failed to comply with such directions; or
- (b) an industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest,

it may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the undertaking .

EFFECT OF NOTIFIED ORDER

SECTION 18B

- (a) All persons in charge of the management, of the industrial undertaking shall be deemed to have vacated their office as such.
- (b) Any contract of management between the industrial undertaking and any director shall be deemed to have terminated.
- (c) The persons or body of persons authorised under Section 18A shall take over the management of industrial undertaking.
- (d) Section 18E of the Act provides that, notwithstanding anything contained in the Companies Act, or in the memorandum or articles of association of an undertaking taken over by the Central Government:-

- (i) it shall not be lawful for the shareholders of such undertaking or any other person to
 - nominate or appoint any person to be a director of the undertaking;
- (ii) no resolution passed at any meeting of the shareholders of such undertaking shall be
 - given effect unless approved by the Central Government;
- (iii) no proceeding for the winding up of such undertaking or for the appointment of a
 - receiver in respect thereof shall lie in any court except with the consent of the Central Government.

TAKE-OVER WITHOUT INVESTIGATION

Section 18AA empowers the Central Government to take over industrial undertakings without investigation under certain circumstances. It empowers the Central Government to authorise, by a notified order, any person or body of persons to take-over the management of whole or part of any industrial undertaking and to exercise prescribed functions of control, provided the Government is satisfied that:-

- (a) the persons in charge of such industrial undertaking have, by reckless investments or creation of encumbrances on the assets of the industrial undertaking, or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured.
- (b) such industrial undertaking has been closed for a period of **not less than three months** and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the company owning the industrial undertaking and the condition of the plant and machinery of such undertaking are such that it is possible to restart the undertaking and such restarting is necessary in the interests of the general public.

Such notified order shall have effect for a period not exceeding **five years** as may be specified in the order, but may be extended by the Central Government for a period of 2 years at a time subject to a maximum of **12 years**.

In *Swadeshi Cotton Mills v. Union of India*, the Supreme Court held that in respect of such take overs without investigation, hearing at pre decisional stage must be given and the rule of *audi alterem partem* could not be dispensed with.

TAKE-OVER OF INDUSTRIAL UNDERTAKING OWNED BY COMPANY IN LIQUIDATION

Section 18FA provides that after the necessary investigations have been made under Section 15A if the Central Government is of the opinion that there are possibilities of running or restarting an industrial undertaking, it may make an application to the High Court praying for permission for appointment of any person or body of persons to take over the management or control of the whole or any part of the industrial undertaking.

As soon as such an application is made by the Central Government, the High Court **shall** make an order empowering the Central Government to authorise any person or body of persons to take over the management of the industrial undertaking or to exercise such functions of control in relation to the whole or any part of the industrial undertaking for a period not exceeding **five years**. Any extension beyond this period is granted by the **High Court** for a period not exceeding **two years** at a time provided total period of extension after the expiry of the initial period of five years should not exceed **twelve years**.

LIQUIDATION OR RECONSTRUCTION OF COMPANIES

Section 18FC of the Act confers powers on the Central Government to call upon the authorised person to submit a report on the affairs and working of the industrial undertaking whose management or control has been taken over under Sections 18A, 18AA or 18FA.

Section 18FD provides **two alternatives** to the Central Government in respect of receipt of the report from the authorised person. The Central Government can either decide to:-

- (a) sell the undertaking as a running concern or
- (b) it may decide to prepare a scheme for the reconstruction of the company.

The **decision to sell the undertaking** as a running concern may be taken by the Central Government on being satisfied that:-

- (a) in the case of the company owning the industrial undertaking, which is not being wound up by the High Court, its financial conditions and other circumstances are such that it is not in a position to meet the current liabilities out of its current assets.
- (b) in the case of the undertaking concerned owned by a company and is being wound up by the High Court, its assets and liabilities are such that in the interests of its creditors and contributories, the industrial undertaking should be sold as running concern.

The **decision to prepare a scheme of reconstruction** of the company owning the industrial undertaking may be ordered by the Central Government, if it is satisfied that:-

- (a) it is in the interest of the general public, or
- (b) it is in the interest of the shareholders, or
- (c) such a course of action is necessary to secure the proper management of the company owning the industrial undertaking.

In case the scheme of reconstruction is to be prepared in relation to an undertaking owned by a company being wound up by or under the supervision of the High Court, prior permission of the High Court is to be obtained.

CHAPTER 14 THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006

The Act provides for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

ENTERPRISE-MEANING

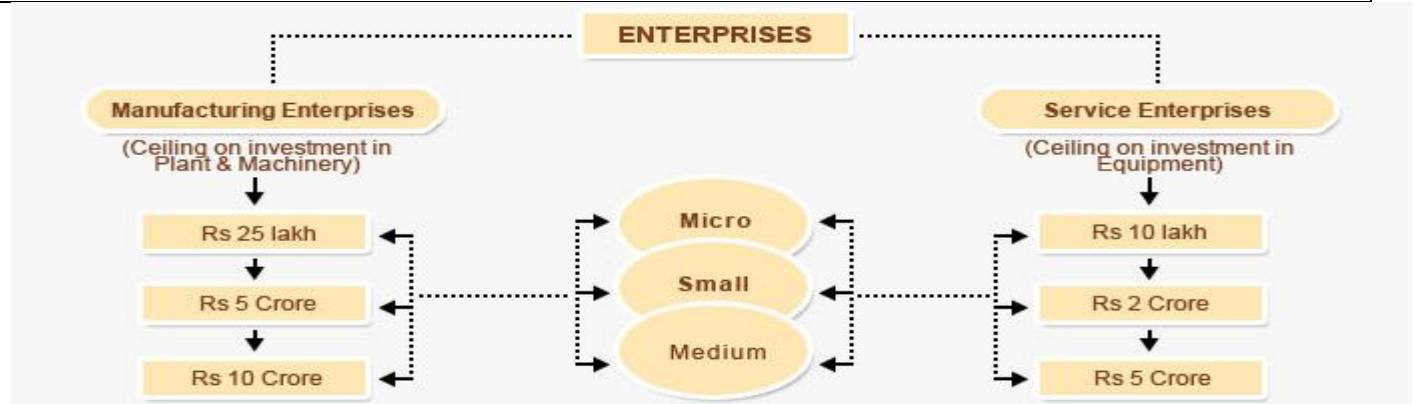
Section 2(c) of the Act defines the term Enterprise as an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (IDRA) or engaged in providing or rendering of any service or services.

MICRO, SMALL AND MEDIUM ENTERPRISES – MEANING**CLASSIFICATION OF ENTERPRISES****SECTION-7**

Section 7 empowers the Central Government to classify any class or classes of enterprises, by whatever name called,—

(a) in the case of the enterprises engaged in the **manufacture or production** of goods pertaining to any industry specified in the First Schedule to the IDRA as—

- a **micro enterprise**, where the investment in plant and machinery does not exceed **twenty-five lakh** rupees;
- a **small enterprise**, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed **five crore** rupees; or
- a **medium enterprise**, where the investment in plant and machinery is more than five crore rupees but does not exceed **ten crore** rupees;



(b) in the case of the enterprises engaged in providing or rendering of services, as—

- a **micro enterprise**, where the investment in equipment does not exceed **ten lakh** rupees;
- a **small enterprise**, where the investment in equipment is more than ten lakh rupees but does not exceed **two crore** rupees; or
- a **medium enterprise**, where the investment in equipment is more than two crore rupees but does not exceed **five crore** rupees.



It has been clarified that the cost of pollution control, research and development, industrial safety devices and such other items as may be specified shall not be included in calculating the investment in plant and machinery.

MEMORANDUM OF MICRO, SMALL AND MEDIUM ENTERPRISES

SECTION- 8

Any person who intends to establish;-

- (a) a **micro** or **small** enterprise, may, **at his discretion**, or
- (b) a **medium** enterprise engaged in providing or rendering of **services** may, **at his discretion**; or
- (c) a **medium** enterprise engaged in the **manufacture** or **production** of goods pertaining to any industry specified in the First Schedule to the IDRA, **is required to file the memorandum** of micro, small or, medium enterprise with such authority as may be specified by the State Government or the Central Government.

Penalty for contravention

Any person who has not filed aforesaid memorandum has been made punishable;-

- (a) in the case of the first conviction, with fine which may extend to rupees **one thousand**;
- (b) and in the case of any second or subsequent conviction, with fine which shall not be less than rupees one thousand but may extend to rupees **ten thousand**.

MEASURES FOR PROMOTION, DEVELOPMENT AND ENHANCEMENT OF COMPETITIVENESS

PROMOTION AND DEVELOPMENT

MICRO, SMALL & MEDIUM ENTERPRISES DEVELOPMENT (MSMED) ACT, 2006

- The Government of India has enacted the Micro, Small and Medium Enterprises Development (MSMED) Act, on June 16, 2006 .



These measures may include development of skill in the employees, management and entrepreneurs, provisioning for technological upgradation marketing assistance or infrastructure facilities and cluster development of such enterprises with a view to strengthening backward and forward linkages.

CREDIT FACILITIES

The policies and practices in respect of credit to the micro, small and medium enterprises should be progressive and such as may be specified in the guidelines or

instructions issued by the Reserve Bank to ensure timely and smooth flow of credit, minimise the incidence of sickness and enhance the competitiveness of such enterprises.

PROCUREMENT PREFERENCE POLICY

With a view to facilitating promotion and development of micro and small enterprises, section 11 requires the Central Government or the State Government to notify preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises.

FUND

Section 12 provides for the **constitution of one or more Funds** and to credit thereto any grants made by the **Central Government**. Section 13 obliges the Central Government to **credit** to the Fund or Funds by way of grants such sums of money as may be considered necessary.

The Fund or Funds should be utilised exclusively for the specified measures. Central Government has the responsibility for the coordination and ensuring timely utilisation and release of sums in accordance with prescribed criteria.

NATIONAL BOARD FOR MICRO, SMALL AND MEDIUM ENTERPRISES

Section 3 empowers the Central Government to establish National Board for Micro, Small and Medium Enterprises with its head office at Delhi.

Functions of board

Section 5 empowers the Board subject to the general directions of the Central Government to, perform all or any of the following functions, namely:-

- (a) examine the factors affecting the promotion and development of micro, small and medium enterprises
- (b) review the policies and programmes of the Central Government in regard to facilitating the promotion and development such enterprises.
- (c) make recommendations on matters referred to above.
- (d) advise the Central Government.

ADVISORY COMMITTEE

Section 7(2) empowers the Central Government to constitute an Advisory Committee.

Functions of Advisory Committee;-

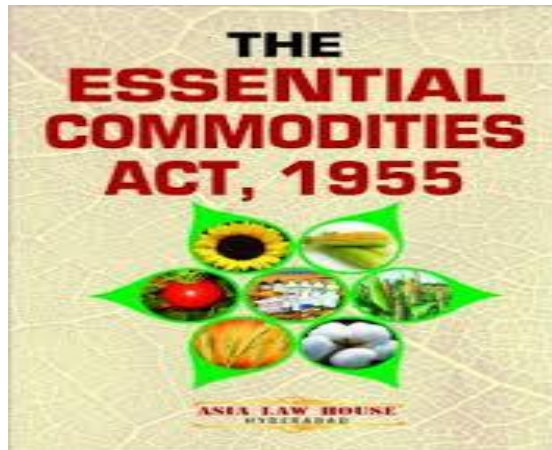
- (a) To examine the matters referred to it by the Board in connection with any subject referred to in Section 5 and furnish its recommendations to the Board.
- (b) To advise Central Government on any of the matters specified in Act/ Rules.

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL

Section 20 empowers the **State Government** to establish by notification, one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

CHAPTER 15 ESSENTIAL COMMODITIES ACT, 1955**OBJECT OF THE ACT**

The object of the Act is to secure ***equitable distribution and availability at fair prices of essential commodities in the interest of the general public***. Act intends to control the production, supply and distribution of essential commodities in the interest of the general public.

**DEFINITIONS****➤ ESSENTIAL COMMODITY**

Section 2A defines the "essential commodity" as to mean a commodity specified in the Schedule.

The Schedule to the Act lists out following commodities:-

- 1) drugs;
- 2) fertilizers, whether inorganic, organic or mixed;
- 3) foodstuffs, including edible oilseeds and oils;
- 4) hank yarn made wholly from cotton;
- 5) petroleum and petroleum products;
- 6) raw jute and jute textiles;
- 7) (i) seeds of food-crops and seeds of fruits and vegetables;
(ii) seeds of cattle fodder; and
(iii) jute seeds

In addition to above central government has power to notify any other article as essential commodity which is within the scope of Entry 33 in list III in the Seventh Schedule to the Constitution.

➤ COLLECTOR

“Collector” includes an Additional Collector, and such other officer not below the rank of sub-divisional Officer as may be authorised to perform the functions and exercise the powers of the Collector under the Act

POWER OF CENTRAL GOVERNMENT UNDER THE ACT

SECTION -3

➤ POWER TO ISSUE ORDERS

Act empowers Central Government to issue orders for regulating or prohibiting the production, supply and distribution of essential commodities in the following cases:-

- (a) To secure the equitable **distribution** of essential commodities;
- (b) To secure the **availability** of essential commodities at fair price; or
- (c) To secure any essential commodity for the **defence** of India.

Contents of order

Central Government may issue an order which may provide for all or any of the following matters:

- (a) Regulating the production or manufacture of any essential commodity by licences, permits etc;
- (b) Regulating the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity by licences, permits etc;
- (c) Bringing under cultivation any waste land for growing thereon of food crops for otherwise maintaining or increasing the cultivation of food crops;
- (d) Controlling the price at which any essential commodity may be bought or sold;
- (e) Regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs which are likely to be detrimental to the public interest;
- (f) For the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals;
- (g) For the seizure of nay articles, premises, aircraft, vessels, vehicles or other conveyances and animals by a person authorized to make such entry, search or examination.

➤ POWER TO DO PRICING OF ESSENTIAL COMMODITIES

Act empowers Central Government to fix prices of essential commodities When sold to Central/State Government, the price may be :-

- (a) **The agreed price**, where the price can be agreed upon consistently with the controlled price fixed under this section.
- (b) **Controlled price** where no such agreement can arrive.
- (c) **Market price** existing on the date of sale, where the above two clauses can not be applied.

Pricing during Emergency

Central Government can fix prices of essential commodities to be sold to general public in situation of emergency, which shall be effective for **3 months**. The price as fixed may be:-

- (a) **The agreed price**, where the price can be agreed upon consistently with the controlled price fixed under this section .
- (b) **Controlled price** where no such agreement can arrive.
- (c) **Market price** existing on the date of sale, where the above two clauses can not be applied.

➤ **POWER TO DO PRICING FOR SUGAR**

Act empowers Central Government to fix prices be paid to producers of sugar in case sold to:-

- (a) Central government,
- (b) State government,
- (c) Agent of government,
- (d) Any other class of person specified in order of Central government.

➤ **POWER TO APPOINT CONTROLLER**

Central government can appoint controller to exercise notified function in relation to control as per instruction of central government.

CONFISCATION OF ESSENTIAL COMMODITIES

➤ **SEIZURE AND CONFISCATION OF ESSENTIAL COMMODITIES**

*The expression ‘seize’ means to **take possession contrary to the wishes of the owner of the property and that such action is unilateral action of the person seizing.** The person from whom anything is seized loses, from the moment of seizure, the right or power to control or regulate the use of that thing.*

‘Confiscation’ is a mode by which Courts can dispose off the property which is seized.

Section 6A provides that where any essential commodity is seized in pursuance of an order made under Section 3, a report of such seizure shall be made, to the collector of the district in which such essential commodity is seized.

if the collector is satisfied that there has been contravention of the order he may pass order for confiscation of:-

- (a) the essential commodity so seized,
- (b) any package, covering or receptacle in which such essential commodity is found, and
- (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity.

Issue of Show Cause Notice before Confiscation of Essential Commodity

Before passing an order for confiscation the owner of the essential commodity is required to be given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods to provide him an opportunity of making a representation in writing within a reasonable time and give him a reasonable opportunity of being heard in the matter.

➤ SALE OF THE CONFISCATED COMMODITY

Where the collector is of the opinion that the seized essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do he may :-

- (a) order the same to be sold at the controlled price
- (b) where no such price is fixed, order the same to be sold by public auction.

Provided that in case of **foodgrains**, the collector may, order the same to be sold through **fair price shops** at the price fixed by the Central Government or by the State Government.

➤ DISPOSAL OF SALE PROCEEDS OF CONFISCATED GOODS

The sale proceeds of the essential commodity sold, after deduction of the expenses **shall be paid** to the owner or person from whom it is seized in the following circumstances:-

- (a) where no order of confiscation is ultimately passed by the Collector;

- (b) where an order passed on appeal so requires, or
- (c) where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made, the person concerned is acquitted.

➤ **APPEAL AGAINST CONFISCATION ORDER**

Any person aggrieved by an order of confiscation may appeal to the State Government concerned within **one month** from the date of passing the order. If the appeal has been decided in favour of appellant, he is entitled to the possession of the confiscated goods.

OFFENCES AND PENALTIES

Section 10A of the Act declares that every offence punishable under the Act shall be **cognizable** and **non-bailable**.

Section 11 lays down that before a Court can take cognizance of any offence punishable under the Act, the following **three conditions** must be satisfied:-

- (a) there must be a report in writing,
- (b) the report must be made by a public servant,
- (c) **Presence of Mens Rea :-**

Mens rea means **guilty mind**. The legal position is that mens rea would be presumed but it is a rebuttable presumption, and the burden is on the accused to rebut the said presumption. The reverse burden lying on accused can be discharged by preponderance of probabilities.

OFFENCES BY COMPANIES

In case of contravention by a company, every person who, at the time of the contravention, was **in charge** of the conduct of the business of the company, shall be deemed to be guilty of the contravention, and shall be liable to be punished accordingly.

Where an offence is committed by a company, if it is proved that the offence had been committed with the consent or connivance of or is attributable to any neglect on the part of any **Director, Manager, Secretary** or other officer of the company, such a person shall be deemed to be guilty of that offence, and is liable to be proceeded against and punished accordingly.

Any such person can, however, escape liability if he proves that the contravention took place without his knowledge, or that he exercised all due diligence to prevent it.

CHAPTER 16 STANDARDS OF WEIGHTS AND MEASURES ACT, 1976

Weights and measures are ranked among the necessities of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family. **They facilitate fair trade and competition, promote efficiency which leads to overall growth of the economy.**



The branch of knowledge concerning weights and measures is technically known as **metrology**.

Legal Metrology is the name by which the *law relating to weights and measures* is known in international parlance. Legal metrology can be **defined** as that part of metrology which deals with units of measurement, methods of measurement and measuring instruments.

DEFINITIONS**➤ CALIBRATION**

Calibration means **all the operations** which are **necessary** for the purpose of **determining** the values of the **errors** of a weight or measure and, if necessary, to determine the other metrological properties of such weight or measure, and **includes** the **actual fixing** of the positions of the **guage-marks** or **scale-marks** of a weight or measure.

➤ DEALER

Dealer means a person who, carries on, the business of buying, selling, supplying or distributing any such weight or measure and includes—

- (a) a commission agent
- (b) an importer
- (c) a manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure to any person other than a dealer.

➤ **MANUFACTURER**

Manufacturer means a person who:-

- (a) makes or manufactures such weight or measure,
- (b) makes or manufactures one or more parts, and acquires the other parts, after assembling those parts,
- (c) assembles any parts thereof

➤ **REFERENCE STANDARD**

Reference standard means the set of standard weight or measure which is made or manufactured by or on behalf of the Central Government for the verification of any secondary standard.

➤ **SECONDARY STANDARD**

Secondary standard means the set of standard weight or measure which is made or manufactured by or on behalf of the Central or State Government for the verification of any working standard.

➤ **WORKING STANDARD**

Working Standard means the set of standard weight or measure which is made or manufactured by or on behalf of Government for the verification of any standard weight or measure, other than a national prototype or national reference or secondary standard [Section 2(ze)].

➤ **WEIGHING OR MEASURING INSTRUMENT**

Weighing or Measuring Instrument means any **object, instrument**, apparatus or device, or any combination thereof, which is, or is **intended to be used**, exclusively or additionally for the purpose of making any **weightment or measurement**, and includes any appliance, accessory or part associated with any such object, instrument, apparatus or device [Section 2(zc)].

➤ **WEIGHT OR MEASURE**

Weight or Measure means a weight or measure specified by or under this Act, and includes a weighing or measuring instrument [Section 2(zd)].

➤ **INTER-STATE TRADE OR COMMERCE**

Inter-State trade or commerce in relation to any weight or measure or other goods which are bought, sold, supplied, distributed or delivered by weight, measure or number, **means** the purchase, sale, supply, distribution or delivery which:-

- (a) occasions the movement of such weight, measure or other goods from one State to another, or
- (b) is effected by a transfer of documents of title to such weight, measure or other goods during its movement from one State to another.

Where the movement of any such weight, measure or other goods commences and terminates in the same State, it shall not be deemed to be a movement of such weight, measure or other goods from one State to another merely by reason of the fact that in the course of such movement it passes through the territory of any other State.

LEGISLATIVE FRAMEWORK OF STANDARDS OF WEIGHTS AND MEASURES IN INDIA

In order to ensure proper enforcement of standards of weights and measures, Standards of Weights & Measures Act was passed in year 1976.

The directorate of Weights & Measures is the authority in india with regards to legal metrology.

Director (Weights & Measures/ Legal Metrology) is the nodal authority, at the national level.

Controller (Weights & Measures/ Legal Metrology) is the concerned authority, at the state level.

RESPONSIBILITIES OF DIRECTORATE OF WEIGHTS & MEASURES

Responsibilities of directorate are:-

- (a) Formulating rules under the Act.
- (b) Giving specifications of weighing and measurement instruments.
- (c) Conducting surveys and collecting statistical data
- (d) Planning and co-ordinating activities of state organizations
- (e) Collecting and spreading information on consumer protection.
- (f) Formulate measures to curb unfair trade practice.
- (g) Implement recommendations proposed by OIML (International Organization of Legal Metrology)

RERSTRICTIONS ON MANUFACTURE, DISTRIBUTION ETC.**SECTION -39**

No person shall make, manufacture, distribute, deliver or sell any commodity in a package form, **unless** such package bears thereon the following in the prescribed manner:-

- (a) Identity of commodity;
- (b) Net quantity in terms of standard unit;
- (c) Unit sale price;
- (d) Sale price of package; and
- (e) Accurate numbers of the commodity in the package, if so required.

STANDARDS OF WEIGHTS AND MEASURES (PACKAGED COMMODITIES) RULES, 1977

The Standards of Weights and Measures (Packaged Commodities) Rules, 1977 framed under Standards of Weights and Measures Act, 1976 apply to commodities in the packaged form which are, or are intended or likely to be (i) sold, distributed or delivered or offered or displayed for sale, distribution or delivery or (ii) stored for sale, or for distribution or delivery in the course of inter-State trade and commerce.

DEFINITIONS

➤ PRE-PACKED COMMODITY

“Pre-packed commodity” means a commodity which, without the purchaser being present, is placed in a package of whatever nature, whether sealed or open so that the commodity contained therein has a pre-determined value.

➤ RETAIL PACKAGE

“Retail package” means the packages which are included for retail sale to the ultimate consumer for the purpose of consumption as the commodity contained therein and includes the imported packages. The ultimate consumer however does not include industrial or institutional consumer.

➤ WHOLESALE PACKAGE

“Wholesale package” means a package containing—

- (a) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to single consumer; or
- (b) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities.

IMPORTANT PROVISIONS

1. DECLARATIONS ON PACKAGES

Rule 4 provides that no person shall pre-pack or cause or permit to be pre-packed any commodity for sale, distribution or delivery unless the package in which the commodity is pre-packed bears thereon, or on a **label securely affixed** thereto, such declarations as are required to be made under the Rule 6.

2. SPECIFIC COMMODITIES TO BE PACKED AND SOLD IN RECOMMENDED STANDARD PACKAGES

Rule 5 provides that the commodities should be packed for sale, distribution or delivery in such standard quantities as are specified in Third Schedule.

3. DECLARATIONS TO BE MADE ON EVERY PACKAGE

As per the provisions of **rule 6**, every package should bear thereon or on a label securely affixed thereto a definite and plain declaration as to --

- (a) the name and address of the manufacturer, packer and for any imported package the name and address of the importer.
- (c) the common or generic names of the commodity contained in the package.
- (d) the net quantity, of the commodity contained in the package
- (e) the month and year in which the commodity is manufactured or packed or imported;
- (f) the retail sale price of the package;
- (g) where the sizes of the commodity contained in the package are relevant, the dimensions of the commodity contained in the package
- (h) such other matter as are specified in these rules.

4. PRINCIPAL DISPLAY PANEL

'Principal display panel', in relation to a package, has been defined under section 2(w) to mean the total surface area of the package where the information is required to be given.

Rule 7 specifies the area, size, letter, etc. of the principal display panel in different cases.

5. DECLARATIONS WHERE TO APPEAR

Rule 8 provides that every declaration shall appear on the principal display panel.

6. MANNER IN WHICH DECLARATIONS TO BE MADE

Rule 9 requires every declaration to be made on a package to be legible and prominent, painted or inscribed on the package in a colour that contrasts conspicuously with the background of the label.

7. DECLARATION OF NAME AND ADDRESS OF MANUFACTURER **RULE 10**

Every package should bear on it, the name and complete address of the manufacturer, packer, and in case of imported packages, the name and address of the importer.

8. GENERAL PROVISIONS RELATING TO DECLARATION OF QUANTITY **RULE 11**

- (a) In declaring the net quantity of the commodity contained in package, the weight of wrappers and materials other than the commodity shall be excluded.

- (b) the quantity declared on the package shall correspond in the quantity which will be received by the consumer,
- (c) the declaration of quantity on such package shall not be qualified by the words 'When packed' or the like.
- (d) Where the commodity in a package is likely to undergo variations in weight or measure on account of environmental conditions and such variation is negligible, the declaration of quantity in relation to such package shall be made after taking into account such variation.

9. MANNER IN WHICH DECLARATION OF QUANTITY SHALL BE EXPRESSED
RULE 12

The declaration of quantity shall be expressed in terms of such unit of weight, measure or number or a combination of weight, measure or number as would give an accurate and adequate information to the consumer with regard to the quantity of the commodity contained in the package.

10. RESTRICTION ON WHOLESALE DEALER OR RETAIL DEALER
RULE-23

No wholesale dealer or retail dealer shall sell, distribute, deliver, display or store for sale any commodity in the packaged form unless the package complies, in all respects, with the provisions of the Act and the Rules.

Wholesale dealer in relation to any commodity in packaged form means a dealer who does not directly sell such commodity to any consumer but distributes or sells such commodity through one more intermediaries.

Retail dealer in relation to any commodity in packaged form means a dealer who directly sells such packages to the consumer and includes, in relation to packages as are sold directly to the consumer, a wholesale dealer who makes such direct sale.

11. EXAMINATION OF PACKAGES
RULE-24

The Director or any other authorised person can examine the packages and carry out tests at the premises of the manufacturer or packer in order to ascertain whether any package complies with the provisions Rules in all respects.

The results of the test should be entered in the prescribed form which should be signed by the manufacturer/packer etc. On completion of the examination, the Director or the authorised person would make a report containing his findings.

Any package which does not confirm to all or any of the provisions of the Act or Rules shall not be sold, distributed or delivered until it has been repacked, reprocessed or relabelled as per provisions of Act or Rules.

12. ACTION TO BE TAKEN ON COMPLETION OF EXAMINATION

In terms of **rule 26**, ordinarily **any test** in relation to net quantity contained in a package **shall not be** carried out at the premises of the retail dealer or the whole-sale dealer unless—

- (a) a **complaint** is received by the Director or the authorised person to the effect that the packet sold or delivered to the complainant **does not contain the quantity declared** on such packet or on the label affixed thereto;
 - (b) the Director or the authorised person has reason to suspect that any packet has been **tampered** with or there has been any **pilferage** of the commodity contained in the packet;
 - (c) the Director or the authorized person has reason to suspect that any package or any label affixed thereto **does not bear** thereon all or any of the **declarations** which are required to be made under these rules.
-
- Where any test is carried out, the director or the authorized person **shall verify** whether the quantity contained in the package corresponds to the declared quantity and where the quantity contained in the package is **less than** the declared quantity, whether the **deficiency** is **more** than **twice** the **maximum permissible error**.
 - Where the error is **more than twice** the maximum permissible error, the Director or the authorized person shall **seize** such package and take **appropriate action** against the retail dealer or the wholesale dealer, as the case may be, in accordance with the prescribed provisions.

MAXIMUM PERMISSIBLE ERROR

“Maximum permissible error” means maximum permissible error in relation to the quantity including quantity declared to be given free by manufacturer/packer contained in an individual package, as error in deficiency which does not exceed the limits of error specified in **Schedule II**.

The extent of maximum permissible error with respect to various commodities is determined after taking into account all the causes that may lead to variation in the quantity such as unavoidable deviation in weighing or measuring or counting, exposure to climatic conditions, transport, storage and the nature of the container or the packaging material.

13. DECEPTIVE PACKAGES

A ‘Deceptive package’ is one which is designed to deliberately give to the consumer an **exaggerated** or **misleading impression** as to the quantity of the commodity contained therein **except** where bigger dimensions of the package are necessary to protect the contents of the package. In this context **Rule 28** empowers the Director or authorised person to require the manufacturer or packer to repack or relabel such deceptive packages.

14. REGISTRATION OF MANUFACTURERS PACKERS’ AND IMPORTERS

In terms of **Rule 35**, every person who **pack** any commodity or **imports** any commodity for sale, distribution or delivery is required to make an application accompanied by a fee of Rs.500 to Director for registration of his or its name.

Such application shall be made within **90 days** from such packing or importing any commodity.

Every application should contain (a) the name of the applicant, (b) the complete address of the premises at which the pre-packing of one or more commodities is made by the applicant, and (c) the name of the commodity or commodities prepacked or imported by the applicant.

NON-APPLICABILITY OF RULES

RULE-34

Rule does not apply in the following cases:-

- (a) Where the net weight or measure of the commodity is **10 gms.** Or 10 ml. or **less**,
- (b) Where any package containing fast food items is packed by **restaurant/hotel** and the like;
- (c) Where any package contains scheduled formulations and nonscheduled formulations according to **Drugs (price control) Order, 1995**.
- (d) Where any package contains **agricultural** farm produces of **more than 50 kg**.

PENALTY

Rule 39 dealing with penalty for contravention of rules provides that if any person contravenes the provisions of rule 6, or tempers with, obliterates or alters any declaration made on any package in accordance with these rules, he shall be punishable with fine, which may extend to **two thousand** rupees.

CHAPTER 17 THE SOCIETIES REGISTRATION ACT, 1860**Introduction:-**

The object of Societies Registration Act, is to provide for the registration and administration of literary, scientific and charitable societies.

The expression 'charitable purposes' has been defined as including "relief of the poor, education, medical relief and the advancement of any other object of general public utility but not including a purpose which relates exclusively to religious teaching or worship."

This definition excludes a purpose which relates exclusively to religious teaching or worship.

Societies Registration Act, 1860 is a Central Act. However, "Unincorporated association" is a State subject. Normally, there should have been only state laws on this subject. But Societies Registration Act was passed in 1860, i.e., much before bifurcation of powers between Center and States was specified.

- Though the Act is still in force, it has been repealed in many states and those states have their own Acts.
- Thus, practically, the Societies Registration Act, 1860 which is Central Act, is mainly for academic purpose.

Procedure for the Registration of Society

- Corporate associations formed for commercial purposes are registered under the Companies Act, 1956.
- Such associations may also be formed for promoting art, charity, research, religion, and commerce etc.
- The Societies Registration Act, 1860 was passed for the registration of such associations or societies in order to give them the status of a corporation or a legal person.

Mode of formation of Society (Sec. 1-3)

- Societies formed by Memorandum of Association and registration (Sec. 1).
- Any 7 or more persons associated for any such purpose as promotion of art,

culture, science or religion may form themselves into a society under the Act.

- They can do so by subscribing their names to a Memorandum of Association and filing the same with the Registrar of Joint Stock Companies.

The Memorandum of Association shall state:

(1) The name of the society;

(2) The object of the society;

(3) The names, addresses, and occupations of the governors, council directors. Committee, or other governing body to whom by the rules of the Society, the management of its affairs is entrusted.

Along with the M.A., the following documents are required to be filed with the Registrar:-

- A copy of rules and regulations of society certified as correct copy by not less than 3 members of the governing body.
- The prescribed fee of Rs. 50/-.
- When the Registrar is satisfied that the society has complied with the statutory requirements as to registration, he issues and acknowledges it in the form of a certificate of registration.
- This certificate is conclusive evidence of due registration.

Effect of registration. When a society is registered under the Act; it becomes a body corporate with perpetual succession and a common seal.

- It also becomes a legal person with separate existence distinct from its members and can acquire and hold property and sue and be sued.
- In the absence of registration, the society has no legal status and as such it cannot sue or be sued.

Alteration of the objects (Sec. 12)

- Sec. 12 provides for the alteration of the objects for which the society is formed with a view to alter extend or abridge them within the meaning and scope of the Act. The procedure for doing so is as follows:
- The governing body of the society has to submit the proposition to the members of the society in a written or printed report.
- It may also convene a special meeting for the consideration of the report according to the regulations of the society.
- The report shall be delivered or sent by post to every member of the society 10

days previous to the special meeting convened by the governing body for the consideration thereof.

- The members present at such meeting must agree to the proposition by three-fifths of the votes delivered in person or by proxy and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of 1 month after the former meeting.
- **MEMBER (SEC. 15)** : A member of a society registered under the Act shall be a person who having been admitted therein according to the rules and regulations thereof shall have paid a subscription or shall have signed the list of the members thereof, and shall not have resigned in accordance with such rules and regulations.
- But no person shall be entitled to vote or be counted as a member whose subscription at the time shall have been in arrear for a period exceeding 3 months.

LIABILITY OF MEMBERS (SEES. 10 & 11)

- According to Sec. 10, a member is liable to be sued as strangers in the following cases:-
- A person whose subscription is in arrear according to the rules of society he is bound to pay.
- He has possessed, detained, or destroyed any property of the society contrary to the rules of the society.

Members guilty of offences punishable as strangers (Sec. 11)

A member of a society shall be subject to prosecution like a stranger if he-

- (a) steals or embezzles any money or other property of the society, or
- (b) willfully and maliciously destroys or injures any property of the society.
- (c) forges any deed, bond, security for money receipt or other instrument, whereby the funds of the society may be exposed to loss.

DISSOLUTION OF SOCIETY (SEES. 13)

- A society may be dissolved voluntarily if not less three/ fifth of the members of the society determine that it shall be dissolved. Upon such determination, the society

shall be dissolved immediately, or at the time agreed upon. After this, all necessary steps shall be taken for the disposal and settlement of the property of the society. its claims and liabilities according to the rules of the society.

- If any Government is a member of, or a contributor to, or otherwise interested in any society registered under the Act, such a society cannot be dissolved without the consent of the Government of the State of registration.

NO MEMBER TO RECEIVE PROFIT (SEC. 14). If upon the dissolution of a society registered under the Act, there remains after the satisfaction of all its debts and liabilities any property whatever the same is not to be paid to or distributed among the members of the society.

- It is, however, given to some other society to be determined by the votes of not less than three fifths of the members present personally or by proxy at the time of the dissolution or by the Court.

CHAPTER 24 INDIAN TRUST ACT , 1882**DEFINITION & MEANING OF TRUST[SECTION 3]**

A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner (trustee), or declared and accepted by him, for the benefit of another, or of another (actual owner)

The person who reposes or declares the confidence is called the **author of trust or the settler**. The person who accepts the confidence is called the **trustee**. The person for whose benefit the confidence is accepted is called the **beneficiary**. The subject matter of the trust is called the trust-property or the **trust money**.

The following are the essential elements of a trust :

- (i) The author or the settler of the trust
- (ii) The trustee
- (iii) The beneficiary
- (iv) The trust Property
- (v) The object of the Trust
- (vi) The instrument of the trust

PURPOSE FOR OBJECT OF TRUST [SECTION 4]

Section 4 provides that a trust can be created only for a lawful purpose. The purpose of a trust is lawful, unless:

- (a) It is forbidden by law;
- (b) It is of such nature that, if permitted, it would defeat the provision of any law ;
- (c) It is fraudulent
- (d) It involves or impels injury to the person or property of another
- (e) The court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. Where a trust has been created for two purposes, of which one is lawful and other unlawful and the two purposes are such that they can't be separated, the whole trust is void [**Choral Bhandari v. Deputy Commercial Tax Officer**]

CERTAINTIES OF A TRUST [SECTION 6]

Section 6 provides that for a trust to be validity created, following four things are necessary:

1. Certainty as to intention: Law looks at the intent rather than at the form .Therefore, no special form of words is necessary for the creation of valid trust .The intention to create a trust must be indicated word or acts with reasonable Certainty.
2. Certainty as to purpose: indefiniteness or uncertainty in relation to the purpose or object of a trust may render the entire trust void .The object of the must be expressly defined.
3. Certainty as to trust property: There must be reasonable certainty about the subject matter i.e. trust property, of the trust.
4. Certainty as to Beneficiary: For constitution of trust, beneficiaries must be indicated with reasonable certainty; otherwise the trust would be void for uncertainty.

DUTIES OF TRUSTEE

Trustee is not bound to accept the trust However, once accepted. He can't renounce it Except with the prior permission of civil court or beneficiary, if he is a major or by virtue of Special power in the in the instrument of civil court or beneficiary, if he is a major or by virtue of special power if the instrument of trust.

- 1) Once the trustee accepts the trust ,he is bound to fulfill the purpose of trust and to obey the Directions given at the time of creations of the trust.However,it can be modified with the consent of beneficiary, being competent to contract .section 11 further provides that aTrustee is not bound to obey any direction when to do so would be impracticable, illegal or
- 2) Manifestly injurious to the beneficiaries
- 3) To protect title to trust property.
- 4) Not to setup title adverse to beneficiary.
- 5) To take such care of the trust property as a man of ordinary prudence would take of his own property.
- 6) To convert perishable property to permanent and immediately profitable character.
- 7) To be impartial.

- 8) To prevent wastage of the trust property.
- 9) To keep proper account and information of the trust property.
- 10) To invest trust money in prescribed security and not other.

RIGHTS AND POWERS OF TRUSTEE

1. Right to title deed.
2. Right to re-imbursement of expenses.
3. Right to apply to court for opinion on management of trust property.
4. Right to settlement of account.
5. Right to do all acts which are necessary, reasonable and proper for trust property or protection of beneficiary.
6. Power to convey a property, when he is authorized to sell.
7. Power to vary investment from one security to another.
8. Power to apply trust property for the maintenance of beneficiary, if the beneficiary is a minor.
9. Power to give receipts.
10. Power to compound or compromise.

RIGHTS OF BENEFICIARY

1. Right to rent and profits of the trust property.
2. Right to the specific execution of the trust.
3. Right to inspect and take copies of the trust accounts.
4. Right to transfer the beneficial interest, if he is competent to contract.
5. Right to sue for execution.
6. Right to proper trustees
7. Right to follow the trust property which has gone into hands of a third person.

LIABILITIES OF BENEFICIARY

If a beneficiary commits a breach of trust or obtains any advantage therefrom or becomes aware of a breach of trust committed or deceived the trustee. The other

beneficiary are entitled to have his beneficial interest impounded against him, until the loss ,caused by the breach has been compensated .

EXTINCTION OF TRUST [SECTION 77]

A trust is extinguished when

- The purpose is completely fulfilled
- It propose become unlawful or the fulfillment of its purpose becomes impossible because of destruction of the trust property or otherwise ;
- The trust ,being recoverable ,is expressly revoked .

EXTINCTION OF TRUST [SECTION 78]

A trust created by will can be revoked at the pleasure of the trustee

A trust created otherwise can be revoked only:

- a) By the consent of all the beneficiaries, if they are competent to contract.
- b) in exercise of a power of revocation expressly reserved by the author of the trust, if the
- c) trust has been created either by a non- testamentary instrument or by words of mouth.
- d) at the pleasure of author of the trust, if the trust is for the payment of the debts of the
- e) Author of the trust and has not been communicated to the creditors.

It may be noted that clause (c) applies only to a trust solely for the payments of debts and not to a trust-deed created for the payment of debits and other purposes.

IIIUSTRATION TO CLAUSE(C):

A conveys property to in trust to sell the same and pay out of the proceeds, the claims Of A 'creditors A reserves no power of revocation If no communication has been made to the creditors of A regarding the creation of trust, A may revoke the trust.

Hower,if the creditors are parties to the arrangement, then the trust cannot be revoked without the consent of creditors.

CONSTRUCTIVE TRUST

Constructive trust is a trust which is not created by words spoken or written but it is implied from the facts and circumstances of the case.

In the following case, there is a constructive trust:

- a) Seller lien for unpaid price.
- b) Where a mortgagee sells the mortgaged property under his power of sale he is trustee of any surplus realized.
- c) Where a person makes property or he is in a fiduciary position then in respect of the profits there is a constructive trust.

For e.g., instructs A his agent, to sell certain goods at price not below Rs.1000/,-.A Represent to that he has sold the goods for Rs.1,000/-, but in fact he keeps the goods with himself. A, in this case, is a constructive trustee for p of the goods or of any profit which he make by the actual sale of the goods.

DOCTRINE OF CY PRES

CY pres ' mean near to it. The doctrine of cy pres applies only to charitable trust.

Doctrine of cy

Pres provides the following :

“where a clear charitable in tension is charitable intention is expressed it will not be permitted to fail because the mode, if specified can't be executed but the law will substitute another mode cy press ,i.e as near as possible to the mode specified by the doner”

In **Rajabather Mudailiar v. M.s Vadivelu** ,the supreme Court held the following “ The Cy pres doctrine applies where a charitable trust is initially possible but letter becomes impossible .In such cases the Court may apply the property cy pres i.e. to some other charities as near as possible ,resembling the original trust “

Trustee not allowed to set off the profits and the loss caused by his negligence in respect of one portion of the trust property , can't set off against his liability a gain

(profits) which has accrued in respect of another portion of the trust property .However, where loss and gain arise out of a same transaction ,the trustee may be allowed to set off .

Difference between trust and bailment

1. A trustee becomes the owner of the trust property whereas the bailee does not become the owner of the property.
2. The obligation of bailee is legal ,whereas that of a trustee is equitable .
3. A bailment may be only in respect of movable property .However ,where loss and gain arise out of movable property as well as immovable property .
4. In a bailment, generally property comes back to the bailer ,whereas in a trust ,generally property comes to back to the another .

Difference between trust and agency

The fundamental difference between trust and agency are given below :

1. An agent has no title to the property .A trustee is full owner of the trust property .
2. An agent acts on behalf of the principal .A trustee acts in his own right
3. An agent is not personally liable ,if he acts on behalf of the principle .On the other hand a trustee is personally liable .

Best wishes to my Dear students for exams.....

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