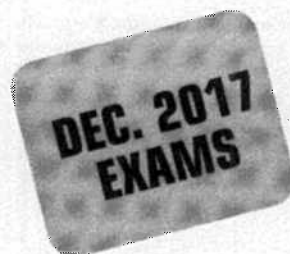


TAXMANN®'S

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N.S. ZAD



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ABOUT THE AUTHOR

Shri N S Zad obtained his Commerce degree from Shivaji University of Kolhapur and cleared CS Final Exam in June 2005 held by Institute of Company Secretary of India. He is in teaching line from last 14 years and has vast teaching experience for various professional courses like CA, CS & CMA at IPCC/ Executive/ Inter & Final Level. He has practical experience for working with medium and large size organizations and firm of Practicing Company Secretaries.

He is also writing books for CS Examination and following books are available which are published by Taxmann :

- ◆ Question Bank with Model Test Papers (*For CS Foundation*)
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- ◆ Cost & Financial Management (*For CA IPCC*)
- ◆ Company Law (*For CS Executive*)
- ◆ Capital Market & Securities Laws (*For CS Executive*)

ABOUT THE AUTHOR

The author of this book is a well-known and respected figure in the field of psychology. He has spent many years studying the human mind and behavior, and his research has been widely cited in the scientific literature. His book is a comprehensive and accessible introduction to the field of psychology, covering a wide range of topics from the basics of psychology to the latest research in the field. The author's writing is clear and engaging, making this book a valuable resource for students and professionals alike. He is also a highly respected teacher and mentor, and his book is a testament to his expertise and passion for the field of psychology.



PREFACE TO SECOND EDITION

I am indeed gratified by the students, teachers and institutions response to my First Edition. It is a pride and pleasure that I place Second Edition of my book "Economic & Commercial Laws".

The Economic Laws derive their origin, authority and strength from the provisions of the Constitution of India. Economic Laws reforms are an ongoing and continuous process and the Government has been introducing new laws and amending the existing ones in response to the emerging needs of the industries in a constantly dynamic economic environment.

The subject of Commercial Laws is subjected to constant refinement through new primary legislations, rules and regulations made thereunder and Court decisions on specific legal issues. Keeping all the above aspects in mind and difficulty faced by students for preparation of this subject. I am presenting this book specifically in Question & Answer format for easy preparation of subject.

The book is a comprehensive work, with lucid and systematic presentation for theory questions and practical case laws. All the questions and practical case laws are arranged topic-wise and section-wise covering all the **past 48 exams** from **June 1994** to **June 2017** so that student can get 360 degree view of CS Examination pattern. Further all the theory questions, practical case laws are answered as per the latest applicable provisions and amendments made in respective laws.

I assure you all that CS Executive students studying for Economic & Commercial Laws paper from this book will come out with flying colours.

I shall be grateful for any of your suggestion to improve the book further. I am also thankful to Taxmann Publication and their staff for their co-operation in the presenting book to students all over India.

I thank you, one and all.

N S ZAD



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INDIAN STAMP ACT, 1899

INTRODUCTION : *The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments. The purpose of enacting such an Act is to raise revenue for the government. Additionally, payment of stamp duty imparts legality to the document and this can be submitted as an authentic document in Courts. It is a tax, similar to sales tax (VAT) and income tax collected by the Government. Stamp Duty is payable u/s 3 of the Indian Stamp Act, 1899. Rates of Stamp Duty payable for different types of documents are as per Schedule I. Stamp Duty must be paid in full and on time. If there is a delay in payment of stamp duty, it attracts penalty. A stamp duty paid document gets evidentiary value and is admitted as evidence in Court. Document not properly stamped, is not admitted as evidence by the Court.*

Union List, Entry 91 gives power to the Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. The power to reduce or remit duties on these instruments is vested in the Union Government as per Section 9 of the Act.

State List, entry 63 confers on the States power to prescribe the rates of stamp duties on other instruments. As per "Principles" for levy of duty fall in the Concurrent List, entry 44.

The Indian Stamp Act, 1899 extends to the whole of India except the State of Jammu and Kashmir. It came into force on 1.7.1899.

DEFINITIONS

Question 1] Define the term: 'Conveyance' as per Indian Stamp Act, 1899

Ans.: Conveyance [Section 2(10)] : The term conveyance includes a conveyance on sale and every instrument by which property, whether movable or immovable is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I.

It does not include a will.

Thus, all transfers of property whether movable or immovable, on sale are chargeable as conveyances. *(excluding which are not otherwise specially provided for by the Schedule)*

Transfer provided in Schedule I : Composition deed, exchange of property, gift, lease, mortgage, re-conveyance, release, settlements, transfer of lease and declaration of trust.

Question 2] Define the term: 'Instrument' as per Indian Stamp Act, 1899

CS (Inter) - June 2004 (4 Marks)

Ans.: Instrument [Section 2(14)] : 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 memoranda or accounts.

Any instrument mentioned in **Schedule I** is chargeable to duty as prescribed in that Schedule. Thus, if instrument is not specified in Schedule, no stamp duty is payable.

Judicial Views:

- ◆ An unsigned draft document is not an instrument.
- ◆ An entry in a register, containing the terms of hiring of machinery is an instrument, where it is authenticated by the thumb impression of the hirer.
- ◆ A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a particular period and that it will be repaid with interest on the due date is an instrument.
- ◆ Photocopy of an agreement is not an instrument as defined u/s 2(14) of the Act. [Ashok Kalam Capital Builders v. State & Anr., AIR 2010 (NOC) 736 (Del)]

Question 3] Are the following 'instruments' under the Indian Stamp Act, 1899:

A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a particular period of time and that it will be repaid with interest on the due date?

An unsigned draft document?

CS (Inter) - June 2004 (2 × 2 = 4 Marks)

Ans.:

- (i) A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a particular period of time and that it will be repaid with interest on the due date is an 'instrument' as defined in Section 2(14) and liable to stamp duty as prescribed in Schedule I.
- (ii) An unsigned draft document is not an instrument; because it does not create or purport to create any right and hence not liable to stamp duty.

Question 4] Define the term: 'Executed/Execution' as per Indian Stamp Act, 1899

Ans.: Executed/Execution [Section 2(12)]: The words "executed" and "execution" used with reference to instruments mean "signed" and "signature" respectively.

Signature includes mark by an illiterate person. [Section 3(52), General Clauses Act, 1897]

An instrument which is chargeable with stamp duty only on being "executed" is not liable to stamp duty until it is signed.

Question 5] Define the term: 'Impressed Stamp' as per Indian Stamp Act, 1899

Ans.: Impressed Stamp [Section 2(13)]: Impressed stamp includes:

- (a) Labels affixed and impressed by the proper officer and
- (b) Stamps embossed or engraved on stamp paper.

The rules framed under the Act prescribe to what documents impressed stamps are to be used. The term includes both a stamp impressed by the Collector and also a stamp embossed on stamp paper. Special adhesive stamps are labels.

Judicial view:

It was held that the instrument is duly stamped, if it has been duly stamped at the time of execution and is admissible in evidence, though the stamp is subsequently removed or lost. [*Mt. Mewa Kunwari v. Bourey*, AIR 1934 All. 388]

Question 6] Define the term: 'Duly Stamped' as per Indian Stamp Act, 1899

Ans.: Duly Stamped [Section 2(14)]: Duly stamped in relation to instrument means instrument having proper amount of stamp and such stamps has been affixed or used in accordance with the law for the time being in force.

Question 7] Define the term: 'Chargeable' as per Indian Stamp Act, 1899

Ans.: Chargeable [Section 2(6)]: Chargeable as applied to an instrument executed or first executed after the commencement of the Act means chargeable under the Act and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or where several persons executed the instrument at different times, first executed.

Question 8] Define the term: 'Lease' as per Indian Stamp Act, 1899

Ans.: Lease [Section 2(16)]: Lease means a lease of immovable property and also includes:

- (a) a patta;
- (b) a kabuliyat or other undertaking in writing, not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property;
- (c) any instrument by which tolls of any description are let;
any writing on an application for a lease intended to signify that the application is granted.

A patta is an instrument given by the Collector of District or any other receiver of the revenue, to the cultivator, specifying the condition or conditions upon which the lands are to be held and the value or proportion of the produce to be paid therefor.

A Kabuliyat is executed by the lessee, accepting the terms of the lease and undertaking to abide by them. Although, it is not a lease u/s 105 of the Transfer of Property Act, it is expressly included in the definition for the purposes of the Stamp Act.

Toll is a tax paid for some liberty or privilege, such as for passage over a bridge, ferry, along a highway or for the sale of articles in a market or fair or the like. It does not include *octroi* or *chungi*.

Question 9] Define the term: 'Receipt' as per Indian Stamp Act, 1899

Ans.: Receipt [Section 2(23)]: Receipt includes any note, memorandum or writing:

- (a) whereby any money or any bill of exchange, cheque or promissory note is acknowledged to have been received; or
- (b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt; or
- (c) whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged; or
- (d) which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person.

- ◆ A mere acknowledgement in writing of the receipt of *immovable* property will not attract clause (b).

- ◆ Under clause (c), any acknowledgement in satisfaction or discharge of any debt or demand or any part thereof is covered; for instance, a receipt given by the secretary or other manager of a club acknowledging payment of the club dues comes within the sub-clause.
- ◆ An ordinary cash memo issued by a shopkeeper or another person selling the goods or other merchandise is not a receipt, unless it contains an acknowledgement of receipt of the money.
- ◆ A letter acknowledging the receipt of money or cheque is a receipt.
- ◆ A document merely saying that the signatory has received a sum of ₹ 500 is a receipt.

Stamp duty on receipt is Re.1 for receipt above ₹ 5,000. [Section 30]

Question 10] Define the term: 'Marketable Security' as per Indian Stamp Act, 1899

Ans.: Marketable Security [Section 2(16A)]: Marketable security means a security of such a description as to be capable of being sold in stock market in India or in the United Kingdom.

Question 11] Define the term: 'Stamp' as per Indian Stamp Act, 1899

Ans.: Stamp [Section 2(24)]: Stamp means any mark, seal or endorsement by any agency or person duly authorized by the State Government and includes an adhesive or impressed stamp for the purposes of duty chargeable under this Act.

Question 11A] Define the term 'bill of lading' under the Indian Stamp Act, 1899.

CS (Executive) - Dec 2015 (5 Marks)

Ans.: Bill of Lading [Section 2(4)]: Bill of Lading includes a "through bill lading" but does not include a mate's receipt.

A bill of lading is a receipt by the master of a ship for goods delivered to him for delivery to X (a person) or his assigns. Three copies are made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship and one is forwarded to X, the consignee, who, on receipt of it, acquires property in the goods. It is a written evidence of a contract for the carriage and delivery of goods by sea, for certain freight.

When goods are delivered on board a ship, the receipt is given by the person in-charge. This receipt is known as the mate's receipt. The shipper of the goods returns this receipt to the master before the ship leaves and receives from him bill of lading for the goods, signed by the master.

Question 11B] What do you mean by 'promissory note'? State the requisites of a promissory note with the help of some illustrations.

CS (Executive) - June 2015 (5 Marks)

Ans.: Promissory instrument is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument.

Requisites of a promissory note:

- (1) A promissory note must be **in writing**, duly **signed** by its maker and properly **stamped** as per Indian Stamp Act.
- (2) It must contain an unconditional undertaking or promise to pay. Mere acknowledgement of indebtedness is not enough.

Example 1: If someone writes 'I owe ₹ 5,000 to Satya Prakash', it is not a promissory note.

Example 2: If it is written 'I promise to pay Suresh ₹ 5,000 after my sister's marriage', is not a promissory note.

- (3) It must contain a **promise to pay money only**.

Example: If someone writes 'I promise to give Suresh a Maruti car it is not a promissory note.

(4) The parties (i.e. maker & payee) to a promissory note **must be certain**.

(5) A promissory note may be payable on demand or after a certain date.

Example: If it is written 'three months after date I promise to pay Satinder or order a sum of rupees Five Thousand only' it is a promissory note.

(6) The sum payable mentioned must be certain or capable of being made certain.

INSTRUMENT CHARGEABLE WITH DUTY

Question 12] Describe the instruments chargeable with duty under the Indian Stamp Act, 1899 and the exceptions thereto?

CS (Final) - Dec 1998 (8 Marks)

CS (Executive) - Dec 2011 (4 Marks)

Ans.: Instruments chargeable with duty [Section 3]: Subject to the provisions of the Act and the exceptions contained in **Schedule I**, the following instruments shall be chargeable with a duty of the amount indicated in that schedule as the proper duty, namely:

- (a) Instrument mentioned in 1st Schedule executed in India
- (b) Bill of exchange (except payable on demand) and promissory note
- (c) Every instrument executed out of India but related to property in India.

However, no duty shall be chargeable in respect of:

- (a) Instrument executed by and in favour of Government.
- (b) Instrument related to sale or deposition of ship or vessels registered under **Merchant Shipping Act, 1894** or the **Indian Registration of Ships Act, 1841**
- (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.

Judicial View:

If a contract of purchase and sale or a conveyance by way of purchase and sale, can be, or is carried out without an instrument the case is not within Section 3 and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. If anyone carries through a purchase and sale without an instrument, then the Legislature has not reached that transaction. [*Commissioners of Inland Revenue v. G. Angus, (1889) 23 QBD 579, followed in re Swadeshi Cotton Mills, AIR 1932 All 291*]

Question 12A] List any ten instruments which are chargeable with duty under the Indian Stamp Act, 1899.

CS (Executive) - Dec 2010 (4 Marks)

Ans.: Some of the instruments which are chargeable with duty under Schedule I of the Indian Stamp Act, 1899 are as follows:

- | | |
|--|-------------------------------------|
| (1) Administration Bond | (6) Indemnity-bond |
| (2) Agreement relating to Deposit of Title-deeds, Pawn or Pledge | (7) Mortgage-deed |
| (3) Bill of Exchange | (8) Promissory-note |
| (4) Bond | (9) Release |
| (5) Debenture | (10) Security Bond or Mortgage-deed |
| | (11) Settlement |

Question 12B] Abhay's agricultural land was purchased by the government for the purpose of construction of a factory but no duty was paid for this transfer by the government. Abhay wanted to take back his land on the ground that government has not paid the duty and, therefore, no sale deed was executed. Will Abhay succeed? Give reasons.

CS (Executive) - Dec 2008 (5 Marks)

Ans.: As per **Section 3**, no duty shall be chargeable in respect of instrument executed by and in favour of Government. Since, Abhay's agricultural land was purchased by the government no stamp duty is required to be paid on it and instrument of transfer is valid. Thus, Abhay cannot take back his land on the ground that government has not paid the duty.

EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY

Question 13] How duty is payable in case of several documents?

Explain the term 'distinct matters' relating to instruments liable for payment of duty under the Indian Stamp Act, 1899.

CS (Inter) - Dec 2003 (5 Marks)

Ans.:

- (1) **Several instruments used in single transaction of sale, mortgage or settlement [Section 4]:** In case of sale, mortgage or settlement, if there are several instrument for one transaction, stamp duty is payable only on one instrument and on other instrument nominal stamp duty of Re. 1 is payable.
- (2) **Instruments relating to several distinct matters [Section 5]:** If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duty payable on separate instrument.
- (3) **Instruments coming within several descriptions in Schedule I [Section 6]:** If a particular instrument which cover only one matter but comes under more than one description as per Schedule to Stamp Act, then highest rate of duty will be the duty payable.

Example:

- Where a deed contains a stipulation binding the executants to deliver his sugarcane crop to the obligee and also provides that the sugarcane crop is hypothecated as security for payment of money advanced by the obligee, the deed fulfils the dual character of the *mortgage* and a *bond* and is therefore chargeable to the highest of the duties by virtue of Section 6.
- Where an attested instrument, containing an undertaking to pay money, evidences also a pledge of immovable property as security for the money due, the higher of the stamp duty payable on its character as a bond and on its character as a pledge, was held leviable.
- An instrument which can be treated both as dissolution of partnership and as an instrument of partition has to be charged to the duty prescribed for partition deed, which is the higher of the two.

Judicial Views: [Section 4]

- ◆ P 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 Re. 1. [ILR 13 Bom 281]
- ◆ Subsequent to a sale of immovable property, two declarations were executed reciting that the sale was subject to an equitable mortgage created by the vendor. These declarations were held to be chargeable, together with the sale deed, as having completed the conveyance. The two declarations come within the provisions of Section 4 and the duty is Re. 1 in each case. [Somaiya Organics Ltd. v. Chief Controlling Revenue Authority, AIR 1972 All 252]
- ◆ Brother X executed in favour of brother Y a gift of all his property. By another deed, brother Y made provision for the living expenses of brother X and hypothecating in favour of brother X a part of the

property included in the above mentioned gift deed, in order to secure the payment of the living expenses. It was held that the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied. [*Maharaj Someshar Dutt*, ILR 37 All 264]

- ◆ B conveyed the whole of his property to three persons who undertook to provide for him and to perform his obsequies. By another document, the three donees agreed to provide for B. This was mentioned in the deed executed by A also. It was held that the two documents had to be construed as part of the same act; the first was liable to duty as a conveyance while the second was liable to a duty of Re. 1 only. [*Dadoba v. Krishna*, ILR 7 Bom. 34]
- ◆ 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.
- ◆ 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.
- ◆ A grant of annuity by several persons requires only one stamp because there is only one transaction.

Judicial Views: [Section 5]

- ◆ 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 and hence Section 5 will be applied. [*Chinmoyee Basu v. Sankare Prasad Singh*, AIR 1955 Cal. 561]
- ◆ Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities. Section 5 applies and hence stamp duty is aggregate as if two separate documents are executed even if it executed by one document. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.
- ◆ The position is the same where a person is an executive or administrator and signs an instrument containing a disposition by him in his personal capacity and *also* a disposition as executor. The two capacities are different, Section 5 applies and hence stamp duty is aggregate as if two separate documents are executed even if it executed by one document. [*Member, Board of Revenue v. Archur Paul Benthall*, AIR 1956 SC 35]
- ◆ A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable u/s 5, where they have no common interest as there is one instrument which relates to several distinct matters and hence stamp duty payable is aggregate amount of stamp duty payable as if separate instruments are executed.

Question 14] Ronie executed a document in favour of his friend Wellwisher on a stamp paper of ₹ 100 conveying him certain immovable property absolutely for a consideration of ₹ 10,000. On the same deed of sale, the nephew of the executant, belonging to the undivided family, endorsed his consent to the sale. No separate stamp was affixed to such consent. Is this valid?
CS (Final) - June 2002 (6 Marks)

Ans.: According to Section 4, if there are several instrument for one transaction, stamp duty is payable only on one instrument and on other instrument nominal stamp duty of Re. 1 is payable.

As per the facts given in case, instrument conveying immovable executed by Ronie will require full stamp duty and consent of nephew will require nominal stamp duty of Re. 1 as case clearly falls u/s 4, reason being there are several instrument for one transaction of sale.

Question 15] Subsequent to the sale of a house, the seller executed a declaration that the sale was subject to an equitable mortgage created by him. What is the stamp duty payable on the instrument of declaration?
CS (Final) - June 2001 (4 Marks)

Ans.: According to **Section 4**, if there are several instrument for one transaction, stamp duty is payable only on one instrument and on other instrument nominal stamp duty of ₹ 1 is payable.

The facts of the given case are similar to *Somaiya Organics Ltd. v. Chief Controlling Revenue Authority*, AIR 1972 All 252, wherein it was held that if subsequent to a sale of immovable property, two declarations were executed reciting that the sale was subject to an equitable mortgage created by the vendor, then these declarations were held to be chargeable, together with the sale deed, as having completed the conveyance. The two declarations come within the provisions of Section 4 and the duty is Re. 1 is payable on declaration.

Question 16] Ram executed a gift deed of certain immovable properties in favour of his brother Shyam. By another deed, Shyam made provision for the living expenses of Ram and created a charge in his favour on some properties included in the above mentioned gift deed in order to secure the payment of these living expenses. The government authority insists that deed executed by Shyam is liable to full duty. Decide with reasons. CS (Inter) – Dec 2003 (5 Marks)

Ans.: According to **Section 4**, if there are several instrument for one transaction, stamp duty is payable only on one instrument and on other instrument nominal stamp duty of Re. 1 is payable.

Facts of the case are similar to *Maharaj Someshar Dutt*, ILR 37 All 264, where it was held that, when two deeds (documents) are executed by 2 brother, one document transferred all the property by way of gift and was stamped to it is full value, second document provided expenses during the life time of transferor, the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied and hence on second document nominal stamp duty of Re.1 is payable.

Question 17] Arjun executed a power of attorney both in his personal capacity and in his capacity as an executor, trustee, manager and liquidator in favour of Bheem. Decide the liability of duty payable on the instrument. CS (Inter) – Dec 2005 (5 Marks)

Ans.: According to **Section 5**, if one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duty payable on separate instrument.

Where a person possessing a 'representative capacity' such as trustee and a personal capacity and if he delegates his powers under both the categories then Section 5 is attracted and stamp duty payable is aggregate amount of stamp duty payable on separate instrument.

Question 18] What are the provisions of Indian Stamp Act, 1899 regarding chargeability of duty when of bond, debenture are issued by Local Authorities?

Ans.: Bonds, debentures or other securities issued on loans under Local Authorities Loan Act, 1879 [Section 8]: When local authority issues bond, debenture or other securities as per the provisions of Local Authorities Loan Act, 1879 then such local authority is chargeable with a stamp duty of 1% of total amount. Such securities need not to be stamped. Further no stamp duty is payable on renewal, consolidation, sub-division or otherwise.

Question 19] Whether stamp duty is payable for securities dealt in depository?

Ans.: Securities dealt in depository not liable to stamp duty [Section 8A]: After the Depositories Act came into existence; Indian Stamp Act inserted Section 8A. Accordingly, securities issued in electronic form need not be stamped provided the issuer pays consolidated stamp duty on the total amount of securities issued. Also transfer of registered ownership of share from a person to a depository or from a depository to a beneficial owner shall not be liable to any stamp duty. Similarly transfer of beneficial ownership dealt by Depository shall not be liable for stamp duty under Article 62 of the Schedule I.

REDUCTION, REMISSION & COMPOUNDING OF STAMP DUTY

Question 20] What are the provisions of reduction, remission & compounding of duties by Government under Indian Stamp Act, 1899?

Ans.: Power to reduce, remit or compound duties [Section 9]: This Section empowers the government to reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debenture by companies.

'Government' means Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and 'State Government' in case of stamp duties on other documents.

METHODS OF STAMPING & CANCELLATION

Question 21] Explain the methods of stamping under the Indian Stamp Act, 1899.

CS (Inter) - Dec 2007 (5 Marks)

Ans.: Duties how to be paid [Section 10]: All duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamps according to the provisions contained in the Act, or when no such provision is applicable thereto, as the State Government concerned may by rule, direct.

The rules may provide following matters:

In the case of each kind of instrument.	The description of stamps which may be used.
In the case of instruments stamped with impressed stamps.	The number of stamps which may be used.
In the case of bills of exchange or promissory notes.	The size of the paper on which they are written.

There are two types of stamping, namely;

- (1) Adhesive stamping and
- (2) Impressed stamping.

Question 22] On which type of instruments adhesive stamp can be used

Bills of exchange and promissory notes drawn or made out of India may be stamped with adhesive stamp.

CS (Inter) - Dec 2013 (2 Marks)

Ans.: Use of adhesive stamps [Section 11]: The following instrument may be stamped with adhesive stamp.

- ◆ Instrument chargeable with duty up to 10 naya paise. (except parts of bills of exchange payable otherwise than on demand and drawn in set)
- ◆ Bill of exchange & promissory note.
- ◆ Entry as Advocate or Vakil on the roll of High Court
- ◆ Notorial act.
- ◆ Transfer instrument of shares.

Question 23] What are the modes of cancellation of adhesive stamps?

CS (Executive) - June 2012 (5 Marks)

Any instrument bearing an adhesive stamp which has not been cancelled be deemed to be unstamped. Discuss this statement quoting relevant case laws.

CS (Final) - June 1996 (10 Marks)

Ans.: Cancellation of adhesive stamps [Section 12(1)]: Any person affixing any adhesive stamp has to cancel it. If it is not cancelled as above then it should be cancelled by person executing it. A stamp has to be cancelled in such manner that it cannot be used again.

Effect of not cancelling the stamps [Section 12(2)]: If stamps are not cancelled then instrument is treated as deemed to be unstamped.

Mode of cancellation of adhesive stamp [Section 12(3)]: Cancellation of an adhesive stamp may be done by the person by writing.

- ◆ His name or initial or
- ◆ Name or initial of his firm or
- ◆ Any other effectual manner.

Penalty for failure to cancel adhesive stamp [Section 63]: Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in manner prescribed by that section, shall be punishable with fine which may extend to ₹ 100.

Judicial Views:

- ◆ Stamps may be effectively cancelled by drawing a line across it. [*Mahadeo vs. Sheroji Ram Teli*, ILR 41 All 169; AIR 1919 All 196]
- ◆ If stamp is possible to use second time it is not effectual cancellation. [*Hafiz Allah Baksh vs. Dost Mohammed*, AIR 1935 Lah. 716]
- ◆ Drawing a diagonal line across the stamp is effectual cancellation. [*Melaram vs. Brijlal*, AIR 1920 Lah. 374]
- ◆ Putting a date subsequent to the date of drawing bill is not effectual cancellation. [*Daya Ram vs. Chandulal*, AIR 1925 Bom. 520]
- ◆ Cross mark by illiterate person is effectual cancellation. [*Kolai Sai vs. Balai Jajam*, AIR 1925 Rang. 209]
- ◆ Putting two lines crossing each other is effective cancellation. [AIR 1961 Raj. 43]

Question 23A] Four adhesive stamps were used on an instrument. First adhesive stamp had a single line drawn across the face of the stamp. On the second stamp, there were two parallel lines. The third stamp had three parallel lines, and the fourth stamp had two lines crossing each other. What are the provisions for cancellation of adhesive stamps and which adhesive stamps referred to above will be considered to have been properly cancelled? CS (Executive)-Dec 2009 (6 Marks)

Ans.: As per Section 12(3), cancellation of an adhesive stamp may be done by the person by writing:

- ◆ His name or initial or
- ◆ Name or initial his firm or
- ◆ Any other effectual manner.

Stamps may be effectively cancelled by drawing a line across it. [*Mahadeo v. Sheroji Ram Teli*, ILR 41 All 169; AIR 1919 All. 196]

Drawing a diagonal line across the stamp is effectual cancellation. [*Melaram v. Brijlal*, AIR 1920 Lah. 374]

Where one of the four stamps used on an instrument had a single line drawn across the face of the stamp, the second had two parallel lines, the third three parallel lines and the fourth two lines crossing each other, it was held that the stamps must be regarded as having been cancelled in manner so that they could not be used again. [*In re, Tata Iron Steel Company*, AIR 1928 Bom. 80]

Thus keeping in view above, all the four stamps are effectively cancelled.

Question 24] How instruments stamped with impressed stamps has to be written?

Ans.: Instruments stamped with impressed stamps how to be written [Section 13]: 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.

Only one instrument to be on same stamp [Section 14]: Only one instrument chargeable to duty shall be written on stamp paper. However, endorsement of duly stamped instrument is permitted.

Instrument written in contrary to Sections 13 & 14 shall be deemed to be unstamped. [Section 15]

DENOTING DUTY

Question 25] 'Denoting' is a concept primarily to help the Government in collection of stamp duty state briefly whether it is true?

CS (Final) - June 2002 (6 Marks)

Write a short note on: Denoting Duty

CS (Inter) - June 2008 (4 Marks)

Ans.: Denoting Duty [Section 16]: Where the stamp duty to be paid on particular instrument or exemption of such instrument from duty depends upon another instrument, then if both are produced before Collector of Stamps he can denote & certify on first instrument that proper stamp duty is paid or no duty is required to be paid.

TIME OF STAMPING INSTRUMENTS

Question 26] State the provisions of Indian Stamp Act, 1899 relating to 'timing of stamping the instrument'.

At what point of time stamping be done for instruments executed inside India.

CS (Final) - Dec 2000 (2 Marks)

Ans.: Sections 17, 18, 19 deals with timing of stamping instrument.

- (1) **Instruments executed in India [Section 17]:** Instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution.
- (2) **Instruments executed out of India [Section 18]:** Instrument executed out of India may be stamped within 3 months after it is 1st received in India.
- (3) **Bills & Notes drawn out of India [Section 19]:** It should be stamped by 1st holder in India before he presents for payment or endorses or negotiates in India.

Question 27] In respect of foreign instruments, other than bills and notes received in India, what is the time limit prescribed for stamping those instruments?

CS (Final) - Dec 2000 (2 Marks)

CS (Inter) - Dec 2006 (4 Marks)

Ans.: As per Section 18, instrument executed out of India may be stamped within 3 months after it is 1st received in India.

Question 28] Whether a receipt stamped subsequent to its execution but before being produced in the Court is admissible in the evidence?

CS (Final) - Dec 2000 (2 Marks)

Ans.: A receipt stamped subsequent to its execution but before being produced in the Court was held not to have stamped in time and accordingly not admissible in the evidence under the provision of Indian Stamp Act, 1899.

VALUATION OF DUTY

Question 29] How is ad valorem duty calculated in respect of marketable security under the Indian Stamp Act, 1899?

CS (Final) - Dec 2001 (4 Marks)

Discuss provisions relating to valuation of instruments for levy of duty under the Indian Stamp Act, 1899.

CS (Inter) - June 2003 (8 Marks)

Discuss the provisions relating to valuation of instruments chargeable with ad valorem duty in cases where the value of the subject matter is indeterminate under the Indian Stamp Act, 1899.

CS (Inter) - June 2005 (6 Marks)

Ans.: Chapter II Sections 20 to 28 deals with various provisions relating to 'valuation for duty'.

- (1) **Conversion of amount expressed in foreign currencies [Section 20]:** When an instrument is chargeable with *ad valorem* duty then foreign currency value should be converted into Indian value at rate of exchange on date of instrument.
- (2) **Stock and marketable securities how to be valued [Section 21]:** Value of marketable securities should be as per **average price** on the date of instrument.
 - If shares are quoted on stock exchange, price in stock market can be taken for calculating average price.
 - If shares are not quoted on stock exchange, price will be average of latest private transaction.
 - If there are no private transactions also, then value should be taken at par.
- (3) **Effect of statement of rate of exchange or average price [Section 22]:** If instrument states current market value or rate, it will be presumed that instrument is properly stamped.
- (4) **Instruments reserving interest [Section 23]:** If document mentions interest to be charged, valuation will be done without considering interest portion.
- (5) **How transfer in consideration of debt, or subject to future payment, etc., to be charged [Section 24]:** If property is transferred in satisfaction of debt due, then it will be considered in valuation purpose.

Explanation: In the case of a sale of property subject to a mortgage or other encumbrance, any unpaid mortgage with the interest due, shall be deemed to be part of the consideration for the sale.

However where property is subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

Illustrations (As given in Indian Stamp Act, 1899):

- A owes B ₹ 1,000. A sells a property to B, the consideration being ₹ 500 and the release of the previous debt of ₹ 1,000. Stamp duty is payable on ₹ 1,500.
- A sells property to B for ₹ 500 which is subject to a mortgage to C for ₹ 1,000 and unpaid interest ₹ 200. Stamp duty is payable on ₹ 1,700.
- A mortgages a house of the value of ₹ 10,000 to B for ₹ 6,000. B afterwards buys the house from A. Stamp duty is payable on ₹ 10,000 less the amount of stamp duty already paid for the mortgage. Thus, stamp duty is payable on ₹ 4,000.

- (6) **Valuation in case of annuity [Section 25]:** Some agreement provides for payment of annuity or periodic payment and not lump sum payment. In such case valuation is done as follows:
 - ◆ **If period of annuity is definite:** Total amount payable during that period will be considered.
 - ◆ **If annuity is payable perpetually/indefinite time:** Total amount payable within 20 years from the date of 1st payment due will be considered for valuation.
 - ◆ **If payment of annuity is subject to living or death of a person:** Total amount payable within first 12 years will be considered.
- (7) **Stamp where value of subject matter is indeterminate [Section 26]:** When value of subject matter cannot be ascertained precisely on the date of execution, stamp should be fixed on estimated basis of valuation. However, in such case, the maximum amount that can be claimed on such instrument will be only the value on which stamp duty has been paid, and nothing more.

Question 30] Rajesh mortgages a building of the value of ₹ 70,000 to Suresh for ₹ 50,000. Rajesh, subsequently, sells the building to Suresh. An unpaid amount of ₹ 5,000 against interest is also outstanding at the time of sale. Determine the value on which the stamp duty is payable in this transfer of property.

CS (Inter) – Dec 2004 (5 Marks)

Ans.: According to **Section 24**, if property is transferred in satisfaction of debt due, then it will be considered in valuation purpose. However, as per **Explanation to Section 24**, where property is subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer, the amount of any duty already paid in respect of the mortgage.

Considering above provision duty payable will be calculated as follows:

Sale price of building	70,000
Add: Interest accrued on loan	5,000
	75,000
Mortgage loan amount	(50,000)
Amount on which duty is payable	25,000

Question 31] What are the provisions regarding regulating the under valuation of property in a conveyance deed, under the Indian Stamp Act, 1899 for the purpose of stamp duty?

CS (Final) - June 1995 (5 Marks)

What are the consequences, if full disclosure regarding a main of duty with instrument is chargeable is not made?

Ans.: **Facts affecting duty to be set forth in instrument [Section 27]:** Consideration and all other facts affecting the chargeability of any instrument with duty and amount of duty shall be fully and truly set forth in the instrument. Thus, when above facts are not stated there is contravention of Section 27 and Collector can direct the prosecution of a person u/s 64.

But contravention of Section 27 does not render the document inadmissible or liable to be impounded u/s 33 as held in *Vinayak Dattartaya vs. Hasan Ali*, AIR 1961 MP 6.

Question 32] Discuss the rule for apportionment of the consideration in cases of certain conveyances arising out of property being contracted to be sold to one party and there-after conveyed in parts to different parties under Section 28 of the Indian Stamp Act, 1899.

Ans.: **Stamp duty when conveyances executed in parts [Section 28(1)]:** Where property has been sold for one consideration by document executed to purchaser in separate parts, total consideration shall be apportioned in different documents as the parties think fit.

When two or more documents are executed for one property in such case parties can apportion the consideration as they think fit.

Similar provision is applicable when property is sold to two or more person in parts. **[Section 28(2)]**

When person purchase a property and immediately sales it to some other person then sale price to such other person has to be taken into account for stamp duty purpose in case of his purchase. **[Section 28(3)]**

Example: N purchase some property from K and sold it to P before executing conveyance between N & K. In such case consideration payable by P to N will be the value for stamp duty for transaction between N & K.



Similar procedure has to be applied if property is sold by purchaser to other person in parts and documents are executed by original seller in favour of different persons in parts. **[Section 28(4)]**

If N sales property to P and conveyance deed is first excused between N & P and stamp duty is paid on the basis of consideration paid by P to N. In such case, when conveyance is executed between K & P, stamp duty of ₹ 5 is payable. **[Section 28(5)]**

PERSON LIABLE TO PAY DUTY

Question 33] Who are the persons liable to pay the stamp duty under Indian Stamp Act, 1899?

CS (Final) - June 2003 (5 Marks)

Which party is responsible for payment of duty on different kinds of instruments under the Indian Stamp Act, 1899?

CS (Inter) - Dec 2004 (5 Marks)

Ans.: Duties by whom payable [Section 29]:

Instrument/deed/document	Person liable to pay stamp duty
Instrument listed in Section 29(a) <ul style="list-style-type: none"> - Administration Bond - Agreement relating to Deposit of Title-deeds, Pawn or Pledge - Bill of Exchange - Bond - Bottomry Bond - Customs Bond - Debenture - Further Charge - Indemnity-bond - Mortgage-deed - Promissory-note - Release - Respondentia Bond - Security Bond or Mortgage-deed - Settlement - Transfer of shares, in an incorporated company or other body corporate - Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by Section 8 - Transfer of any interest secured by a bond, mortgage-deed of policy of insurance 	A person drawing, making/executing such instrument
Policy of fire insurance	Insurance company
Policy other than fire insurance	Person taking the policy
Conveyance or re-conveyance	Grantee (grantee means purchaser or beneficiary)
Lease	Lessee
Counter part of lease	Lessor
Instrument of exchange	Parties in equal shares
Certificate of sale	Purchaser
Instrument of partition	Parties in there proportion

Question 34] Who are the persons liable to pay the stamp duty under Indian Stamp Act, 1899 in following cases?

- (i) Mortgage deed
- (ii) Policy of insurance other than fire Insurance
- (iii) Transfer of shares in company

CS (Final) – June 2003 (5 Marks)

Ans.: Duties by whom payable [Section 29]:

Instrument/deed/document	Person liable to pay stamp duty
Mortgage-deed	A person drawing, making/executing such instrument
Policy of insurance other than fire Insurance	Person taking the policy
Transfer of shares in company	A person drawing, making/executing such instrument

ADJUDICATION AS TO STAMPS

Question 35] You are Company Secretary of Dowell Industries (India) Ltd. You are about to execute an agreement with third party on behalf of the company. However you are not sure as to correct stamp duty payable. State how will you go about to determine as to correct stamp duty with which the agreement is chargeable.

CS (Final) – June 2000 (8 Marks)

Ans.: Adjudication as to proper stamp [Section 31]: If any person is not sure about the duty payable on any instrument, then he can apply to the Collector of stamps for his opinion regarding duty payable.

Fee: Such application has to be made with a fee of ₹ 5

Documents to be attached: While making application to the collector following documents should be attached:

- Abstract of the instrument
- Affidavit
- Other evidences as may be required by Collector
- Fee.

Question 36] Enumerate the provisions of Section 32 of the Indian Stamp Act, 1899 with regard to certification of the instrument whether chargeable or not chargeable with duty by the collector of stamps.

CS (Final) – Dec 2000 (7 Marks)

Ans.: Certificate by Collector [Section 32]: A person who has paid stamp duty and has executed an instrument can apply to Collector of stamps to take his opinion, whether proper duty is paid or not.

- On receiving such application Collector may certify by an endorsement that fully duty is paid or
- He may certify that no duty required to paid.

Time limit for giving certificate by Collector:

Instrument executed in India	1 month
Instrument executed outside India	3 months
Bill of exchange or promissory note	Before drawing or executing

If instrument, bill of exchange or promissory note brought after above mentioned period are not eligible to take opinion of Collector u/s 32.

INSTRUMENTS NOT DULY STAMPED – TREATMENT & CONSEQUENCES

Question 37] Discuss in brief the various provisions of Indian Stamp Act, 1899 relating to impounding of instruments.

State the legal remedies available to the officer concerned for an unstamped receipt under the Indian Stamp Act, 1899. CS (Inter) – June 2008 (4 Marks)

State the law of inadmissibility in evidence of an instrument not duly stamped. CS (Executive) – Dec 2013 (3 Marks)

Explain the Collector's power to stamp an instrument which is impounded. CS (Inter) – June 2014 (4 Marks)

Ans.: Following are the various provisions relating to impounding of instruments:

(1) **Impounding of instrument not duly stamped [Section 33]:** If any instrument is not duly stamped then it can be impounded under this section by:

- Arbitrator
- Court
- Public officer (Police officer is excluded i.e. to say he cannot impound the instrument).

Object: The object of this section is to protect the revenue.

When to be impounded: Such instrument has to be impounded before it is accepted as evidence.

Judicial Views:

- ◆ Court cannot impound the instrument where instrument not relating to case and which the witness had not been asked to produce, has been produced. [*Nathuram vs Narayandas*, ILR 1943 Nag. 520; AIR 1943 Nag. 97]
- ◆ Court before which a copy of a document (i.e. Xerox copy) has been produced cannot compel the party to produce the original document with a view to impounding it. In such case party can refuse to obey the court order. [*Ultam Chand vs Permanad*, AIR 1942 Lah. 265]
- ◆ Unstamped document found during search & produced before Court can be impounded. [*Emperor vs Balu Kuppayyan*, ILR 25 Mad. 525]

- (2) **Impounding of unstamped receipt [Section 34]:** Unstamped receipts can be impounded by public accountant or he may require the receipt to be stamped.
- (3) **Instruments not duly stamped inadmissible in evidence [Section 35]:** Separately discussed.
- (4) **Admission of instrument – Where not be questioned [Section 36]:** Once a document is admitted in evidence (whether rightly or wrongly) it not permissible to the Court whether it is Court of appeal, revision or of first instance to go behind that order.
- (5) **Admission of improperly stamped instrument [Section 37]:** The State Government may make rules for instrument which bears a stamp of sufficient amount but of improper description and on payment of stamp duty of proper description any instrument so certified shall be deemed to have been duly stamped as from the date of its execution.
- (6) **Dealing of instrument impounded [Section 38]:** The Court impounding the instrument and realizing the penalty has to forward an authenticated copy of the instrument and the amount of penalty recovered to the Collector of stamps or to other authorized person.
- (7) **Collector's power to refund penalty paid u/s 38 [Section 39]:** Collector has powers to refund penalty paid.
 - If instrument is written in contravention of Section 13/14, he can refund whole duty and
 - In any other case, he can refund any penalty in excess of ₹ 5

(8) **Collector's power to stamp instruments impounded [Section 40]:** When the Collector impounds any instrument u/s 33, or receives any instrument sent to him u/s 38 he shall adopt the following procedure:

- (a) If he is of opinion that such instrument is duly stamped, or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be.
- (b) If he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty together with a penalty of ₹ 5; or an amount up to 10 times of the proper duty or of the deficient portion of duty.

When such instrument has been impounded only because it has been written in contravention of Section 13 or 14; the Collector may remit the whole penalty.

Question 38] What are the shortcomings of an instrument not duly stamped?

CS (Final) – June 2001 (3 Marks)

Discuss the evidentiary value of an instrument not duly stamped under the Indian Stamp Act, 1899.

CS (Executive) – June 2013 (3 Marks)

"If once the 'instrument' has been admitted in evidence, it shall not be questioned later on in the same suit on the ground that it does not bear the adequate stamp duty or no stamp."

CS (Executive) – June 2016 (5 Marks)

Ans.: Instruments not duly stamped inadmissible in evidence [Section 35]: Shortcomings of the instrument not duly stamped are as follows:

- ◆ Such instrument cannot be accepted as evidence by Civil Court or Arbitrators.
- ◆ No one can act upon it.
- ◆ It cannot be registered.
- ◆ Such instrument cannot be authenticated by public officer or public authorities.

However, if proper stamp duty & penalty is paid then above mentioned shortcomings go and it becomes valid.

An insufficiently stamped instrument is not invalid and it can be admitted in evidence on payment of penalty as follows:

- (a) Instrument chargeable to duty exceeding 10 naya paisa can be admitted in evidence on payment of **regular duty (+) penalty**. (Such penalty can be ₹ 5 or 10 times of proper duty whichever is more)
- (b) A receipt which is not duly stamped can be accepted as evidence on paying penalty of Re. 1.

If contract or agreement is effected by more than one letter then contract will be treated as 'duly stamped' if any one of the letters bears proper duty.

Instrument not duly stamped can be accepted as evidence in Criminal Court.

Instrument not duly stamped is also admissible if it is executed by government or in respect of which certificate of collector is given u/s 32.

Question 38A] Achal gives an instrument to Basu which is unstamped. This instrument is also not registered –

- (i) Will the instrument be admitted in evidence?
- (ii) Will the situation change if the instrument is stamped but not registered before passing to Basu and Basu get it registered subsequently?

CS (Executive) – June 2013 (5 Marks)

Ans.: Instruments not duly stamped inadmissible in evidence [Section 35]: Shortcomings of the instrument not duly stamped are as follows:

- ◆ Such instrument cannot be accepted as evidence by Civil Court or Arbitrators.
- ◆ No one can act upon it.
- ◆ It cannot be registered.
- ◆ Such instrument cannot be authenticated by public officer or public authorities.

However, if proper stamp duty & penalty is paid then abovementioned shortcomings go and it becomes valid.

Keeping in view the above provisions answer to given case is as follows:

- (i) Instrument cannot be admitted in evidence since it is not stamped.
- (ii) If instrument is stamped before registration then it can be registered subsequently.

Question 38B] An instrument bears a stamp of sufficient amount, but of improper description. Can be certified as duly stamped? How the instrument can be rectified and what would be date of execution?
CS (Executive) – June 2013 (5 Marks)

Ans.: Admission of improperly stamped instrument [Section 37]: Opportunity is given under this section to a party for getting a mistake rectified when a stamp of proper amount, but of improper description has been used.

The State Government may make rules for instrument which bears a stamp of sufficient amount but of improper description. On payment of stamp duty of proper description any instrument so certified shall be deemed to have been duly stamped as from the date of its execution.

Question 39] A document, which is apparently an agreement granting a franchise, is produced in the Court, but is not stamped.

Examine whether:

- (i) the document is void
- (ii) the document can be admitted on payment of penalty and
- (iii) the parties are liable to be prosecuted.

CS (Inter) – June 2003 (6 Marks), June 2007 (5 Marks)

Ans.: As per Section 35, an instrument not duly stamped is inadmissible as evidence.

- (1) However, it does not become void.
- (2) Upon payment of duty with penalty, the unstamped instrument becomes valid and admissible as evidence.
- (3) As per **Section 43**, a party responsible for improperly or unstamped instrument will be liable to be prosecuted only if Collector of Stamps is of the opinion that if it has done so with intent to evade proper amount of stamp duty.

Question 40] Enumerate the Collectors power to refund the penalty recovered by a Court on impounding a document not duly stamped when produced before it and to stamp an instrument impounded under the Indian Stamp Act, 1899.
CS (Final) – June 1999 (6 Marks)

Ans.: Under Section 38, the Court or authority impounding the instrument and realizing the penalty has to forward an authenticated copy of the instrument and the amount of penalty recovered to the Collector of stamps.

According to **Section 39**, Collector of stamps has powers to refund penalty paid.

- If instrument is written in contravention of Section 13 or 14 he can refund whole duty and
- In any other case he can refund any penalty in excess of ₹ 5

Question 41] Write a short note on: Instrument unduly stamped by accident or mistake.

An instrument has not been duly stamped by accident or mistake or due to urgent necessity, but the same had to be validated u/s 41 of the Indian Stamp Act, 1899 after a lapse of 1 year from the date of execution. Examine validity.

CS (Final) – Dec 1997 (5 Marks)

Whether the Collector of stamps is bound to stamp the instruments when those are brought before him after expiry of the prescribed period?

CS (Final) – Dec 2000 (2 Marks)

Ans.: Instruments unduly stamped by accident [Section 41]: If a person on his own motion brings an instrument before Collector of stamps on which proper stamp duty is not paid by accident, mistake or urgent necessity within a period of 1 year, then Collector may receive the short/deficient amount and validate it.

If such instrument is brought after a period of 1 year then Collector may impound it u/s 33 & recover duty and penalty as per Section 40.

Where the instrument having been brought to the notice of the Collector within the period of 1 year, the Collector may refer the case to the Chief Controlling Revenue Authority in case he has doubt and proceed in accordance with the decision of such authority. However, where no such reference is made by the Collector, the Collector's decision would be final, and the Chief Controlling Revenue Authority cannot interfere with his decision.

Question 42] Can prosecution be taken against person for offence under Indian Stamp Act, 1899?

Ans.: Prosecution for offence against Stamp law [Section 43]: A party responsible for improperly or unstamped instrument will be liable to be prosecuted only if Collector of Stamps is of the opinion that if it has done so with intent to evade proper amount of stamp duty.

Question 43] When can a person paying duty or penalty recover the same under the provisions of Indian Stamp Act, 1899

CS (Final) – Dec 1997 (5 marks)

Ans.: Persons paying duty or penalty may recover same in certain cases [Section 44]: If any person has paid any penalty u/s 29, 35, 31, 40 or 41 but was not bound to bear the expenses of providing the same. In such cases he can recover the duty paid or penalty paid from the person who was required to bear it.

Question 44] Can penalty paid u/s 35 or 40 be refunded? By whom? How much? What is the time limit for making application for refund of such penalty?

Ans.: Power to Revenue Authority to refund penalty or excess duty [Section 45]:

- (1) Where any penalty is paid u/s 35 or 40, the Chief Controlling Revenue Authority may, upon application in writing made within 1 year from the date of the payment, refund such penalty wholly or in part.
- (2) Where, it is opinion of the Chief Controlling Revenue Authority that excess stamp duty is charged and paid u/s 35 or 40, such authority may, upon application in writing made within 3 months of the order charging the same, refund the excess.

Question 45] Can person sending the impounded instrument to Collector incurs any liability for loss or damage of instrument during the course of transmission?

Ans.: Non-liability for loss of instruments sent u/s 38 [Section 46]: If any instrument sent to the Collector u/s 38 is lost, destroyed or damaged during transmission, the person sending the same shall not be liable for such loss, destruction or damage.

When any instrument is about to be so sent, the person from whose possession it came into the hands of the person impounding the same, may require a copy to be made at the expense of such first mentioned person and authenticated by the person impounding such instrument.

Question 46] What are the provisions of Indian Stamp Act, 1899 regarding unstamped bills and promissory notes?

Ans.: Power of payer to stamp bills and promissory notes received by him unstamped [Section 47]:

If unstamped bill of exchange or promissory note is presented for payment, the person to whom it is so presented may affix the necessary adhesive stamp and can cancel such stamps. On cancellation he can deduct amount equal to stamp affixed by him from the sum payable on such bill of exchange or promissory.

However, nothing contained in this section shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill or note.

Question 47] State the provisions of Indian Stamp Act, 1899 relating to recovery of duties and penalties.

Ans.: Recovery of duties & penalties [Section 48]: All duties, penalties, and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person from whom the same are due, or by any other process for the time being in force for the recovery of arrears of land-revenue.

ALLOWANCES & REFUNDS FOR STAMPS IN CERTAIN CASES

Question 48] Refund/Allowance where stamp paper gets spoiled and where it is executed but not used.

Ramesh & Prem wanted to execute a document, keeping that in mind, the documents were duly stamped. Now, that a dispute has arisen and they do not want to go ahead with the document. Accordingly documents remained unexecuted (i.e. unsigned). Explain the time limit for making application for refund u/s 49 of the Indian Stamp Act, 1899. Also explain the time limit for the application for relief and refund, if the document are executed by any of the parties.

CS (Final) – Dec 2003 (5 marks)

Ans.: Allowance for spoiled stamps before document is executed [Section 49(a) to (c)]: If after purchase of stamp paper it becomes unfit because of it is spoiled, obliterated or there is error while writing on it, then application can be made for refund. However, such stamp paper should not be executed (i.e. signed).

Allowance for spoiled stamps after document is executed [Section 49(d)]: If bill of exchange (not payable on demand) or promissory note is signed but has not been accepted or made use in any manner and have not been delivered to any person, allowances for impressed stamp can be claimed.

If stamp paper is purchased and executed (i.e. signed) after writing, refund can be claimed in following circumstance.

- (1) Document was found void under any law.
- (2) Document found unfit for purpose for which it is purchased.
- (3) One of the party refuses to sign.
- (4) Purpose fails as one of the party refuses to act on the same.
- (5) If it is deficient in value.
- (6) If it is inadvertently spoiled.

Time limit for making application [Section 50]: The application for relief u/s 49 shall be made within the following periods:

In the cases mentioned in 49(d)(5)	Within 2 months of the date of the instrument
In the case of a stamped paper on which no instrument has been executed by any of the parties	Within 6 months after the stamp has been spoiled
In the case of a stamped paper in which an instrument has been executed by any of the parties	Within 6 months after the date of the instrument, or If it is not dated, within 6 months after the execution by the person by whom it was first or alone executed.
When the spoiled instrument has been sent out of India, the application may be made	Within 6 months after it has been received back in India
When from unavoidable circumstances, any instrument for which another instrument has been substituted cannot be given up to be cancelled within the aforesaid period; the application may be made	Within 6 months after the date of execution of the substituted instrument.

Question 49] Write a short note on: Allowances for printed form

Your company use printed forms on stamp papers. However, now it is felt that they will not required in near future. As a Company Secretary advice regarding cancelling such stamp paper and getting the amount refunded as per Section 51 of Indian Stamp Act, 1899.

Ans.: Allowance in case of printed forms no longer required by corporations [Section 51]: If some companies, banks or incorporated bodies purchase stamp papers and print their forms on such paper and if there are unable to use the same for any reason, they can claim refund.

Time limit: No time limit has been prescribed.

Who can allow such refund?

- Chief Controlling Revenue Authority.
- Collector, if authorized by Chief Controlling Revenue Authority.

Question 50] Write a short note on: Allowance for misused stamps

Your company has purchase some stamps but latter on it was found that stamp paper purchased are higher value than required. As a company Secretary advise to M.D.

Ans.: Allowance for misused stamps [Section 52]: If wrong types of stamps are inadvertently used or in advertently higher duty stamps are used, then refund/allowance can be claimed.

Procedure: Application has to be made to Collector within 6 months from the date of purchase.

Allowance for spoiled or misused stamps how to be made [Section 53]: In any case in which allowance is made for spoiled or misused stamps, any one of following course may be adopted by Collector.

- (1) Collector may give other stamps of the same description and value.
- (2) Collector may give stamps of any other description to the same amount in value.
- (3) Collector may give same value in money, deducting ten naya paisa for each rupee or fraction of a rupee. (Money will be given after deducting 10% of value of stamps)

Question 51] Write a short note on: Allowance for stamps not required for use

You have purchased some stamp, but soon after purchase find that they have no immediate use. You want to get the refund the amount paid for stamp? Is this possible? What is the procedure? How much you can get refund?

Ans.: Allowance for stamps not required for use [Section 54]: If a person does not need stamps brought by him for immediate use, he can claim allowance/refund.

Conditions: Stamps should not be spoiled or rendered unfit.

Procedure: Application has to be made to Collector within 6 months from the date of purchase.

How much amount is refunded: Collector can repay to the person applied the value of such stamp deducting 10 naya paisa for each rupee or portion of rupee. (Thus, effectively 90% amount can be refunded). Where the person is a licensed vendor of stamps, the Collector may refund whole amount.

Question 51A] Mention the circumstances under which refund of stamp duty or penalty may be made by the revenue authorities. CS (Executive) – June 2011 (4 Marks)

Ans.: As per the provisions of Sections 49 to 54 depending upon circumstances stamp duty can be refunded in following cases:

- (1) Spoiled stamps [Section 49]
- (2) Printed forms no longer required by corporations [Section 51]
- (3) Misused stamps [Sections 52 & 53]
- (4) Stamps not required for use [Section 54]

Question 52] Write a short note on: Allowances on renewal of certain debenture.

Your company wants to renew the old debenture. Explain with reference to provision of Indian Stamp Act, 1899.

Ans.: Allowance on renewal of certain debentures [Section 55]: If old debenture is renewed and on both stamp duty is paid then stamp duty on old debenture is refundable.

Condition: Old debenture should be produced before cancellation to Collector.

Explanation to Section 55 says that provisions are also applicable in following cases:

- ◆ Issue of 2 or more debenture in place 1 old debenture. (Sub-division)
- ◆ Issue of 1 new debenture in place 2 or more old debenture. (Consolidation)
- ◆ Substitution of the name of the holder at the time of renewal for the name of the original holder.
- ◆ Alteration of rate of interest or the dates of payment.

Question 53] Write a short note on: Reference and Revision under the Indian Stamp Act, 1899.

Ans.: **Reference by Collector to CCRA [Section 56]:** Collector of stamps is main authority under the Act. His powers are subject to control of Chief Controlling Revenue Authority (CCRA). If Collector feels doubt as to the amount of duty with which any instrument is chargeable, he may refer it for the decision of CCRA. The CCRA shall consider the case and send a copy of its decision to the Collector who shall proceed to assess and charge the duty in conformity with such decision.

Reference by CCRA to High Court [Section 57]: If CCRA cannot decide a case then it may refer such case to High Court. Similarly, if any other Court feels doubt about the amount of duty payable, can make a reference to High Court.

Question 54] What is 'e-stamping'? Also, discuss its benefits.

CS (Executive) – Dec 2016 (5 Marks)

Ans.: E-Stamping is a computer based application and a secured way of paying Non-Judicial stamp duty to the Government. e-Stamping is currently operational in the states of Gujarat, Karnataka, NCR Delhi, Maharashtra, Assam, Tamil Nadu, Rajasthan, Himachal Pradesh, Uttarakhand and Uttar Pradesh, and the union territories of Dadra & Nagar Haveli, Daman & Diu, Puducherry. The prevailing system of physical stamp paper/franking is being replaced by E-stamping system. Stock Holding Corporation of India Limited (SHCIL) has been promoted by All India Public Financial Institutions and Insurance Majors. SHCIL is known for its security, integrity, wide network and focus on technology. SHCIL is the only Central Record Keeping Agency (CRA) appointed by the Government of India. The CRA is responsible

for User Registration, Imprest Balance Administration and overall E-Stamping application operations and maintenance. CRA will appoint ACC's who will issue certificates to the clients at their counters.

Benefits of E-Stamping:

- ◆ E-Stamp Certificate can be generated within minutes
- ◆ E-Stamp Certificate generated is tamper proof
- ◆ Authenticity of the e-Stamp certificate can be checked through the inquiry module
- ◆ E-Stamp Certificate generated has a Unique Identification Number
- ◆ Specific denomination is not required.
- ◆ E-stamp certificate can be check by any person through recommended site.

2

C H A P T E R

ARBITRATION & CONCILIATION ACT, 1996

INTRODUCTION : An Uttar Pradesh based postman Umakant Mishra, who allegedly stolen a money order worth ₹ 57.60 in 1984, has been declared innocent in the case after 29 years. The case is not relevant for our current discussion on arbitration, but one must observe from this case is that 29 years is not a small period and hence it is rightly said that justice delayed is justice denied. This should not happen in commercial disputes. A quick remedy and decision is very important for the growth of trade and commerce and here comes the importance of arbitration which is alternative to Court procedure. In arbitration, with the consent of both the parties a private judge is appointed. Such a person is known as arbitrator or if more than one persons are appointed they are known as Arbitral Tribunal. Arbitrator is not expected to follow technical formalities of the Court and hence decision will be fast.

Conciliation is the amicable settlement of dispute between the parties, with the help of a conciliator. In arbitration, there is a decision (called award) of arbitral tribunal, while in conciliation, it is the decision of the parties. The advantage of conciliation is that in arbitration, there is 'win-lose' situation, as one of the parties is bound to lose and feel frustrated. In conciliation, there is 'win-win' situation, as both parties agree to discuss among themselves and arrive at a mutually agreed compromise.

In the past, statutory provisions on arbitration were contained in three different enactments, namely, The Arbitration Act, 1940, The Arbitration (Protocol & Convention) Act, 1937 and The Foreign Awards (Recognition & Enforcement) Act, 1961. The Arbitration Act laid down the framework within which domestic arbitration was conducted in India, while the other two Acts dealt with foreign awards. The Arbitration & Conciliation Act, 1996 has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961, consolidated and amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also defines the law relating to conciliation, providing for matters connected therewith.

The Arbitration & Conciliation Act, 1996 is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules, 1976. The Statement of Objects and Reasons of the Act recognizes that India's economic reforms will become effective only if the nation's dispute resolution provisions are in tune with international regime.

Question 1] Write a short note on: Alternative Dispute Resolution (ADR)

What is meant by Alternative Dispute Resolution (ADR)? Which are the areas in which ADR works?

CS (Executive) – June 2016 (5 Marks)

Ans.: Alternative Dispute Resolution (ADR) refers to any means of settling disputes outside the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration. As burgeoning court queues, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programs. Some of these programs are voluntary; others are mandatory.

While the two most common forms of ADR are arbitration and mediation, negotiation is almost always attempted first to resolve a dispute. It is the pre-eminent mode of dispute resolution. Negotiation allows the parties to meet in order to settle a dispute. The main advantage of this form of dispute settlement is that it allows the parties themselves to control the process and the solution.

In India we have system of 'Panchyat' where senior people from village would resolve dispute between people. Similarly in Arbitration two parties in dispute appoint third person to solve their dispute. Thus, dispute gets solved out of Court and hence it is known as Alternate Dispute Resolution (ADR).

The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties only in India but also to parties all over the world. The ICADR is a Society registered under **Societies Registration Act, 1860**; it is an independent non-profit making organization. It maintains panels of independent experts in the implementation of ADR processes.

Areas in which ADR works: Almost all disputes including commercial, civil labour and family disputes, in respect of which the parties are entitled to conclude a settlement, can be settled by an ADR procedure. ADR techniques have been proven to work in the business environment, especially in respect of disputes. Involving joint ventures, construction projects, partnership differences, intellectual property, personal injury, product liability, professional liability, real estate, securities, contract interpretation and performance and insurance coverage.

Question 2] Outline the objectives of the Arbitration and Conciliation Act, 1996.

CS (Inter) - Dec 2007 (5 Marks)

Ans.: The Arbitration & Conciliation Act, 1996 has been enacted keeping the following objective in mind:

- ◆ To provide for fair and neutral procedure for settlement of dispute.
- ◆ To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation.
- ◆ To provide for procedure regarding selection and functioning of arbitral tribunal.
- ◆ To provide well defined work area for arbitral tribunal and conciliator.
- ◆ To minimize the supervisory role of courts in the arbitral process.
- ◆ To permit an Arbitral Tribunal to use mediation conciliation or other procedure during the arbitral proceedings to encourage the settlement of disputes.
- ◆ To provide that every final arbitral award is enforced in the same manner as if it were the decree of the Court.
- ◆ To provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal; and
- ◆ To cover areas of national and international commercial arbitration and conciliation.
- ◆ To help in enforcement of foreign awards.

Question 3] What is ad hoc arbitration?

CS (Executive) - Dec 2014 (5 Marks)

Ans.: An ad hoc arbitration is one which is not administered by an institution and therefore, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, procedure for conducting the arbitration, etc.

Ad hoc arbitration is a proceeding that is not administered by others and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support, provided the parties approach the arbitration in a spirit of cooperation. Ad hoc proceedings can be more flexible, cheaper and faster than an administered proceeding. The absence of administrative fees alone makes this a popular choice.

Question 4] Which of the dispute cannot be referred for settlement to arbitration?**CS (Inter) – Dec 1994 (5 Marks), June 1999 (8 Marks)**

Ans.: All matters in dispute between parties relating to private rights or obligations which Civil Courts may take cognizance of Section 9 of CPC, 1908 may be referred to arbitration, unless a reference is forbidden by a statute or is opposed to public policy.

What disputes can be settled by Arbitration?

- ◆ Basically all disputes of Civil or Quasi Civil nature involving Civil Rights fall within the jurisdiction of Arbitration.
- ◆ Almost all disputes – commercial, civil, labour and family disputes in respect of which the parties are entitled to conclude a settlement – can be settled by ADA procedures.
- ◆ Disputes involving joint ventures, construction projects, partnership differences, intellectual property rights, personal injury, product liabilities, professional liability, real estate securities, contract interpretation and performance, insurance claim and Banking & non-Banking transaction disputes fall within the jurisdiction of Arbitration.
- ◆ It is expanding to the areas or construction health care, telecommunication, entertainment and technology based industries

Matters which cannot be referred to arbitration?

- ◆ In any case dispute involving criminal offences are fully beyond jurisdiction of arbitration.
- ◆ Even in case of civil rights following matter cannot be referred to arbitration:
 - Matrimonial matters and matters connected with conjugal rights.
 - Industrial Disputes and Revenue matters (Income Tax & other Tax matters).
 - Testamentary matters under Succession Act.
 - Motor Vehicle Accident cases.
 - Matters under Indian Trust Act, Trusteeship of Charitable Institutions, Public charity matters failing within the purview of Monopolies and Restrictive Trade Practices Act.
 - Determination guardianship or wards.
 - As per Section 24 of Indian Contract Act, 1872 matters relating to unlawful consideration are void hence these matters cannot be referred for arbitration.

Question 5] Raman & Raheem entered into an agreement to refer a dispute relating to geniuses of a will to arbitrator. In spite of this Raheem commenced proceeding relating to the dispute in the district Court of competent jurisdiction. Raman, therefore, submits an application for stay of legal proceedings under the Arbitration Act, will be succeed?

CS (Inter) – Dec 1997 (5 Marks), June 2008 (5 Marks)**CS (Executive) – June 2011 (5 Marks)**

Ans.: No, Raman will not succeed. Section 2(3) provides that certain disputes relating to testamentary matters like validity of a will cannot be referred to the arbitration.

Where some special and specific law is enacted for the purpose of determination of a matter, such matter cannot be referred to arbitration. The question to the geniuses of a will can only decided in accordance with law dealing with probate as given in the Indian Succession Act.

Hence, such a dispute cannot be referred to arbitration. In this view of the matter, the arbitration agreement, the Court cannot grant the remedy of stay of legal proceeding to Raman.

DEFINITIONS & APPLICABILITY

Question 6] Define 'arbitration agreement'. What are the essentials for a valid arbitration agreement?
CS (Inter) - Dec 2004 (5 Marks)

State the nature and utility of arbitration agreement. State the essentials of an arbitration agreement.
CS (Inter) - Dec 1996 (8 Marks)

What do you understand by arbitration agreement? What are the usual content of such agreement?
CS (Inter) - Dec 1999 (8 Marks)

Enumerate the salient features of an 'arbitration agreement' under the Arbitration and Conciliation Act, 1996.
CS (Inter) - June 2005 (6 Marks)

Ans.: "Arbitration agreement" means an agreement referred to in Section 7 [Section 2(1)(b)]. **Arbitration Agreement [Section 7]:** Arbitration agreement means an agreement by the parties submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of defined legal relationship whether contractual or not.

- ◆ The person who is appointed to determine differences and dispute is called the **Arbitrator** or **Arbitral Tribunal**,
- ◆ Proceeding before him is called **Arbitration Proceedings** and
- ◆ His decision is called an **Award**.

Essential Elements of an Arbitration Agreement:

(1) **Writing:** An arbitration agreement must be in writing.

An arbitration agreement is in writing if it is contained in

- A document signed by the parties
- An exchange of letters, telex, telegram or other means of telecommunication which provide a record of the agreement or
- An exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.

(2) **Valid Contract:** It must have all the essential element of a valid contract *and* the parties must be *ad idem*. (agree on same thing & in same sense)

(3) **Dispute:** It must be to refer a dispute present or future.

(4) **Form:** It may be in form of an **arbitration clause** in a contract or in the form of a **separate agreement**. Thus, arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The arbitration agreement can be by exchange of letters, documents, telex, telegram etc.

Question 6A] What is meant by 'arbitration agreement' under the Arbitration and Conciliation Act, 1996? Should the arbitration agreement be in writing and whether jurisdiction of Civil Court is barred?

CS (Executive) - Dec 2015 (5 Marks)

Ans.: "Arbitration agreement" means an agreement referred to in Section 7.

As per **Section 7**, arbitration agreement means an agreement by the parties submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of defined legal relationship whether contractual or not.

An arbitration agreement must be in writing.

Jurisdiction of Civil Court is not barred due to arbitration agreement. However, Section 8(1) provides that if a party approaches Court despite the arbitration agreement, the other party can raise objection to

Court along with certified copy of arbitration agreement. If Court is satisfied that dispute is subject to arbitration it must refuse to admit case and refer back for arbitration.

Further as per **Section 8(3)** an application has been made as above and that the issue is pending before the Judicial Authority, an arbitration may be commenced or continued and arbitral award is made.

Question 7] In spite of arbitration agreement, if one the party refers the case to Judicial Authority, can such Judicial Authority has power to refer back parties to arbitration?

Ans.: Power to refer parties to arbitration where there is an arbitration agreement [Section 8]: If a party approaches Court despite the arbitration agreement, the party can raise objection to Court along with certified copy of arbitration agreement. If Court is satisfied that dispute is subject to arbitration it must refuse to admit case and refer back for arbitration

Further as per **Section 8(3)** an application has been made as above and that the issue is pending before the Judicial Authority, an arbitration may be commenced or continued and arbitral award is made.

Question 8] Ajoy and Bijoy make an agreement in writing to refer a dispute between them to an arbitrator for determination. In spite of this agreement, Ajoy files a suit against Bijoy relating to that dispute in a Court. Advice Bijoy. CS (Inter) - June 1993 (5 Marks), June 2001 (6 Marks)

Ans.: Bijoy can invoke **Section 8**, envisaging power to refer parties to arbitration when there is an arbitration agreement.

If a party approaches Court despite the arbitration agreement, the party can raise objection to Court along with certified copy of arbitration agreement. If Court is satisfied that dispute is subject to arbitration it must refuse to admit case and refer back for arbitration

Further as per **Section 8(3)** an application has been made as above and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and arbitral award is made.

Therefore, Bijoy can object to the suit and plead for arbitration proceedings as per agreement.

Question 9] Discuss the essential ingredients of an arbitral award.

CS (Inter) - Dec 2005 (4 Marks), Dec 2015 (5 Marks)

What are the essentials of an arbitral award?

CS (Executive) - Dec 2008 (4 Marks)

Ans.: Arbitral Award [Section 2(1)(c)]: Arbitral award includes an interim award. The definition does not give much detail of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

- (1) **Written:** An arbitration agreement is required to be in writing. Similarly, a reference to arbitration an award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value and in writing. An oral decision is not an award under the law.
- (2) **Signing:** The award is to be signed by the members of the arbitral tribunal. However, the signature of majority of the members of the tribunal is sufficient if the reason for any omitted signature is stated.
- (3) **Recording the reasons:** The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
 - (a) Where the arbitration agreement expressly provides that no reasons are to be given, or
 - (b) Where the award has been made u/s 30 i.e. where the parties settled the dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms.
- (4) **Date:** The award should be dated i.e. the date of making of the award should be mentioned in the award.
- (5) **Place of arbitration:** Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral tribunal is under obligation to

state the place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.

- (6) **Compensation & interest:** The arbitral tribunal may include in the sum for which award is made interest up to the date of award and also a direction regarding future interest.
- (7) **Cost of the arbitration:** The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
- (8) **Delivery of arbitral award:** After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

Question 10] Explain: International Commercial Arbitration

CS (Executive) – Dec 2009 (4 Marks), June 2014 (5 Marks)

Ans.: As per **Section 2(f)**, International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:

- (i) an individual who is a national of, or habitually resident in, any country other than India or
- (ii) a body corporate which is incorporated in any country other than India or
- (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
- (iv) the Government of a foreign country.

Question 10A] How has the 'Court' been defined under the Arbitration and Conciliation Act, 1996?

CS (Executive) – Dec 2014 (5 Marks)

Ans.: **Court [Section 2(1)(e)]:** "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

Question 10B] Define 'legal representative' under the Arbitration and Conciliation Act, 1996.

CS (Executive) – Dec 2014 (3 Marks)

Ans.: **Legal Representative [Section 2(1)(g)]:** The definition of "legal representative" given under Section 2(1)(g) has been taken verbatim from the definition in Section 2(11) of the Code of Civil Procedure.

The following are the persons who are legal representatives:

- (a) A person who in law represents the estate of a deceased person.
- (b) A person who intermeddles with the estate of the deceased.
- (c) A person on whom the estate of a deceased person devolves on the death of the party acting in a representatives capacity.

The following persons are generally included in the list of legal representatives:

- (i) Executors and administrators properly appointed.
- (ii) Person who has taken on himself duties and responsibilities which belong to the executor or administrator though only in respect of a part of the estate.
- (iii) Heirs-at-law whether they take succession or by survivorship.
- (iv) Revisioners when the action has been brought by or against the widow representing her husband's estate.
- (v) Universal legatee.

The following are the illustrations of those who do not come within the meaning of legal representative, so far as the Act is concerned:

- (1) An assignee from a deceased zamindar or to whom the holding reverts on the death of a tenant.
- (2) A trespasser or a person who claims adversely the estate of the deceased.
- (3) A new trustee appointed or elected on the death of the deceased trustee.

APPOINTMENT OF ARBITRATORS

Question 11] What is the procedure for the appointment of arbitrators?

Ans.: A person who is appointed to determine difference and disputes between two or more parties by their mutual consent is called an arbitrator. The parties may appoint whomsoever they please to arbitrate on their dispute. However, his appointment is not complete till he has accepted the reference.

Number of Arbitrators [Section 10]: The parties are free to determine the number of arbitrators provided that such number **shall not be an even number**. Thus, the Arbitral Tribunal can consist of 1, 3, 5, 7 or any number of persons, provided that number of arbitrators must be an **odd number**.

If the **parties fail** to make the determination, the arbitral tribunal shall consist of a **sole arbitrator** (i.e. only one).

Appointment of Arbitrators [Section 11]:

- ◆ A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
- ◆ The parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
- ◆ If they are unable to agree in arbitration with three arbitrators each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
- ◆ But, if a party fails to appoint an arbitrator within 30 days or if two appointed arbitrators fail to agree on the third arbitrator within 30 days, the party can request Chief Justice to appoint arbitrator.
- ◆ The Chief Justice can authorize any person or institution to appoint an arbitrator e.g. India Council for Arbitration or Indian Society of Arbitrators etc.
- ◆ Decision on appointment of arbitrators by the Chief Justice or persons/institution designated by him, is final.
- ◆ Chief Justice or the persons/Institution designated by him would have due regard to qualifications of arbitrators agreed between the parties, and considerations likely to secure an independent and impartial arbitrator.
- ◆ 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.

Question 12] A and B enter to arbitration agreement under which a sole arbitrator is to be appointed by consent of both the parties. When B refuses to concur in the appointment of the arbitrator, what course is available to A?

CS (Inter) – Dec 1987 (5 Marks)

Ans.: As per **Section 11**, if a party fails to appoint an arbitrator within 30 days in case of arbitration with one arbitrator, or if two appointed arbitrators fail to agree on the third arbitrator within 30 days in case of arbitration with three arbitrator, the party can request Chief Justice or institution authorized by Chief Justice to appoint arbitrator.

The Chief Justice can authorize any person or institution to appoint an arbitrator e.g. Indian Council for Arbitration or Indian Society of Arbitrators.

Thus, A has to approach to Chief Justice of India or institutions authorized by Chief Justice.

Question 13] Anand and Bikram enter into an agreement to refer a dispute to arbitration. Thereafter, Bikram files a civil suit in a Court in respect of that dispute. Anand makes an application before the Court for stay for proceedings, Bikram challenges the validity of the agreement on the ground that arbitrator is not named in it. Will Bikram succeed? CS (Inter) – June 1994 (5 Marks)

Ans.: By the very definition of Arbitration Agreement it is clear that arbitrator need not be named in the agreement itself. The parties may appoint whomsoever they please to arbitrate on their dispute. If parties are agree on appointment of arbitrator then provisions of Section 11 has to be observed for appointment of arbitrator.

If a party approaches Court despite the arbitration agreement, the party can raise objection to Court along with certified copy of arbitration agreement. If Court is satisfied that dispute is subject to arbitration it must refuse to admit case and refer back for arbitration. Hence, Bikram will not succeed.

Anand can object to the suit and plead for arbitration proceedings as per agreement.

Question 14] On what grounds can the authority of an arbitrator be challenged? What is the challenge procedure?

Describe the grounds and procedure to challenge the appointment of an arbitral tribunal under the Arbitration and Conciliation Act, 1996. CS (Inter) – June 2004 (8 Marks)

Ans.: **Grounds for Challenge for appointment of Arbitrator [Section 12]:** When party approaches to any person for his possible appointment of Arbitrator, then such person is under a duty to disclose the circumstances which may likely to give rise to justifiable doubts as to his independence or impartiality. In other words person intended to be appointed as arbitrator must be independent and impartial.

Further an arbitrator, from the time of his appointment and throughout the arbitral proceedings shall, without delay, disclose to the parties in writing any circumstances likely to affect independence or impartiality.

An appointment of arbitrator may be challenged only if:

- Circumstances exist that give rise to **justifiable doubts** as to his **independence** or **impartiality**, or
- He does **not possess the qualification** agreed to by the parties.

Challenge Procedure [Section 13]:

- ◆ The parties are **free to agree** on a procedure for challenging an arbitrator.
- ◆ If parties are agreed upon a procedure and if challenge fails, then the arbitral tribunal shall continue the arbitral proceeding and make an arbitral award.
- ◆ Where an arbitral award is made, the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.
- ◆ Sometimes parties may fails to agree upon the challenge procedure. Then also party is entitled to challenge an arbitrator, **within 15 days after becoming aware of the constitution** of the arbitral tribunal.

Question 15] Ram and Shyam appointed Mohan as an arbitrator by their mutual consent. Thereafter, Ram makes a declaration that he revokes the authority of Mohan to act as an arbitrator. Can he legally to do so? CS (Inter) – June 1997 (5 Marks)

Ans.: Once an arbitrator has been appointed, he cannot be removed by any party, or even by both parties mutual consent.

As per **Section 12**, an appointment of arbitrator may be challenged only if:

- Circumstances exist that give rise to **justifiable doubts** as to his **independence** or **impartiality**, or
- He does **not possess the qualification** agreed to by the parties.
- The parties are **free to agree on a procedure** for challenging an arbitrator.

- If parties are agreed upon a procedure and if challenge fails, then the arbitral tribunal shall continue the arbitral proceeding and make an arbitral award.

Where an arbitral award is made, the party challenging the arbitrator may make an application for setting aside such an arbitral award only in accordance with Section 34.

Question 16] Write a short note on: Failure or impossibility to act as an arbitrator

Ans.: Failure or impossibility to act [Section 14]: The mandate of an arbitrator shall terminate, if he becomes *dejure* or *defacto* unable to perform his function, or fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate.

Further, if there is controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court.

However, withdrawal by arbitrator on his own or by agreement between the parties does not constitute acceptance of the grounds of challenge.

It is considered that the procedure for challenge to the appointment of an arbitrator need not be a matter of agreement by parties. The procedure in Section 13 should apply in all cases.

dejure = rightfully, legally; *defacto* = in fact

Question 17] Under the terms of an arbitration agreement, the Court appointed Anurag, chairman of the arbitral tribunal, as the arbitrator. During the pendency of the arbitration, Anurag was demoted and ceased to be the chairman of arbitral tribunal. The parties to the dispute objected to his continuance as arbitrator on the ground that he had now become disqualified. Is he entitled to continue as the arbitrator? Decide.

CS (Inter) - Dec 2004 (5 Marks)

Ans.: As per Section 14, the mandate of an arbitrator shall terminate, if he becomes *dejure* or *defacto* unable to perform his function, or fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate.

In given case even though Mr. Anurag has been removed from the post of chairman of the tribunal, he is still an arbitrator. His removal as such will not endanger his working as an arbitrator, hence he may continue to be arbitrator.

Question 18] Write a short note on: Substitution of Arbitrator

Ans.: Substitution of Arbitrator [Section 15]:

- (1) In addition to the circumstances referred to in Section 13 or 14, the mandate of an arbitrator shall terminate -
 - (a) where he withdraws from office for any reasons; or
 - (b) by or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed.
- (3) Where an arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) An order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator shall not be invalid because there has been a change in the composition of the arbitral tribunal.

Question 19] Write short note on: Jurisdiction of Arbitral Tribunal

CS (Inter) - June 2007 (4 Marks)

CS (Inter) - Dec 2001 (4 Marks), June 2007 (4 Marks)

Ans.: Jurisdiction of arbitral tribunals [Section 16]: The arbitral tribunal is empowered to rule its own jurisdiction including any objections in relation to existence and validity of the arbitration agreements and for that purpose:

- (1) An arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract and
- (2) A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

A plea that arbitral tribunal does not have jurisdiction can be raised before the submission of the statement of defence.

A party shall not be precluded from raising such a plea merely because he has appointment or participated in the appointment of an arbitrator.

A plea that the arbitral tribunal is exceeding the scope of its authority, could be raised by the party during the arbitral proceedings.

The arbitral tribunal shall decide on a plea referred as above and where the tribunal takes a decision rejecting the plea, it shall continue with the arbitral proceedings and make an arbitral award.

ipso jure = by the law itself; by operation of law

ARBITRAL PROCEEDINGS

Question 20] Describe the provisions relating to 'conduct of arbitral proceedings'.

Discuss the procedure to be followed for arbitral proceedings by an arbitral tribunal under the Arbitration and Conciliation Act, 1996. CS (Inter) - June 2003 (8 Marks), June 2008 (5 Marks)

Write a short note on: Appointment of expert by an arbitral tribunal

CS (Executive) - Dec 2010 (4 Marks)

Ans.: Provisions relating to conduct of arbitral proceedings are as follows:

- (1) **Equal treatment of parties [Section 18]:** The parties shall be treated equally and each party shall be given a full opportunity to present his case.
- (2) **Determination of rules of procedure [Section 19]:** The arbitral tribunal shall not be bound by the CPC 1908 or Indian Evidence Act, 1872. (That mean to say that they are not required to follow formalities & procedure which is followed by Court)
 - ◆ The parties are also free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
 - ◆ If parties fail to agree upon the procedure to be followed by the arbitral tribunal then the arbitral tribunal may conduct the proceedings in the manner it consider appropriate.
- (3) **Place of arbitration [Section 20]:** The parties are free to agree on the place of arbitration. Failing to any agreement, the place of arbitration may be determined by the arbitral tribunal having regard to the circumstances of the case and the convenience of the parties.
- (4) **Commencement of arbitral proceeding [Section 21]:** The arbitral proceeding in respect of a particular dispute commences on the date on which a request for dispute to be referred to arbitration is received by the respondent.
- (5) **Language [Section 22]:** The parties are free to agree upon the language to be used in the arbitral proceedings. Failing to any agreement, the arbitral tribunal shall determine the language to be used in the arbitral proceedings. The arbitral tribunal may order to translate any documentary evidence into language agreed upon by the parties or determined by the arbitral tribunals.

(6) Statement of claim & defence [Section 23]:

- ◆ The claimant shall state the facts supporting his claim and relief or remedy sought to arbitral tribunal within the period of time agreed upon by the parties or determined by arbitral tribunal.
- ◆ Respondent shall also state his defence within the period of time agreed upon by the parties or determined by the arbitral tribunal.
- ◆ Unless otherwise agreed by the parties, they are allowed to amend or supplement the claim or defence during the course of the arbitral proceedings.

(7) Hearing [Section 24]: The arbitral tribunal shall decide whether hold oral hearing or written proceeding at appropriate stage.

(8) Proceedings [Section 25]: If claimant fails to communicate his claim within time then arbitral tribunal shall terminate the proceeding. But if claimant shows a sufficient cause, proceedings cannot be terminated.

(9) Statement of defence: If the respondent fails to communicate his statement of defence within time limit, tribunal can continue the proceeding.

(10) Appearance of parties: If any party fails to appear at oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on evidence before it.

(11) Appointment of expert [Section 26]: The arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. The arbitral tribunal may require a party to give relevant information or to produce, or to provide access to, any relevant documents, goods or other property for inspection of expert.

If any party request, the expert may participate in oral hearings.

On request of any party, the expert shall make available all documents, goods or other property in his possession.

(12) Courts Assistance [Section 27]: The arbitral tribunal or any party may apply to the Court for assistance in taking evidence. The Court may ask the parties to that instead of giving evidence to it be directly given to arbitral tribunal.

Question 21] If there are more than one arbitrators are appointed, how decisions are made by arbitral tribunal?

Ans.: Decision making by panel of arbitrators [Section 29]: Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a **majority** of all its members.

However, if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

Question 22] Can arbitral tribunal encourage the parties for settlement of dispute through use of mediation, conciliation or other procedures?

Ans.: Settlement [Section 30]: An arbitral tribunal can encourage the parties for settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

If during arbitral proceedings the parties settle the dispute the arbitral tribunal shall terminate the proceedings and record the settlement in the form of an arbitral award on agreed terms.

An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award.

An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Question 23] What are essentials of arbitral award?

CS (Executive) - Dec 2008 (4 Marks)

Ans.: Form and contents of arbitral award [Section 31]:

- (1) **Writing:** An arbitral award shall be made in writing.
- (2) **Signing:** An arbitral award shall be signed by the members of the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the **majority** members shall be sufficient so long as the reason for any omitted signature is stated.
- (3) **Reasons:** The arbitral award shall state the reasons upon which it is based, unless-
 - (a) The parties have agreed that no reasons are to be given, or
 - (b) The award is an arbitral award on agreed terms u/s 30.
- (4) **Date & place of award:** The arbitral award shall state its **date** and the **place** of arbitration and the award shall be deemed to have been made at that place.
- (5) **Delivery of copy:** After the arbitral award is made, a signed copy shall be delivered to each party.
- (6) **Interim arbitral award:** At any time during the arbitral proceedings, arbitral tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award.
- (7) **Interest:** If an arbitral award is for the payment of money, the arbitral tribunal may include interest in its award at such rate as it deems reasonable. A sum directed to be paid by an arbitral award may carry interest up to **18% p.a.** from the date of the award to the date of payment.
- (8) **Costs of arbitration:** Unless otherwise agreed by the parties the costs of an arbitration shall be fixed by the arbitral tribunal.

Question 24] Under what circumstances do arbitral proceedings terminate?

Ans.: Termination of proceedings [Section 32]: Arbitration proceedings terminated in following cases:

- (1) When arbitral tribunal gives final award.
- (2) By an order of the arbitral tribunal. The arbitral tribunal may issue an order for the termination of the arbitral proceedings, where
 - Claimant withdraws his claim.
 - The parties agrees that the continuation of the proceeding has become unnecessary or impossible.

The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

CORRECTION & INTERPRETATION OF AWARD

Question 25] Discuss the provision relating to correction and interpretation of an award under the Arbitration and Conciliation Act, 1996. CS (Inter) - Dec 1998 (6 Marks), June 2001 (8 Marks)
Making of additional award by arbitral tribunal. Comment.

CS (Executive) - Dec 2012 (4 Marks)

Ans.: Correction and interpretation of award & additional award [Section 33]:

After issuing the arbitral award, if any party feels that there is mistake in award or they require the interpretation on any matter, they may within **30 days** from the receipt of arbitral award:

- Apply to arbitral tribunal to correct any **computation error**, any **clerical or typographical error** or any **other errors of similar nature** by giving to notice to other party.
- Apply to arbitral tribunal to give interpretation of specific point or part of the award.

If the arbitral tribunal think fit it shall correct the award or give the interpretation within 30 days from the receipt of request.

The arbitral tribunal may correct any above type of error within 30 days from the date of the arbitral award.

Additional Award: A party may also request the arbitral tribunal to make an additional award regarding the any claim presented in the proceeding but same is omitted from the arbitral award.

If the arbitral tribunal considers the above request and if it thinks fit, it may give additional award within 60 days from the receipt of request.

SETTING ASIDE AN AWARD

Question 26] Write a short note on: Setting aside an arbitral award

CS (Executive) – June 2010 (4 Marks), Dec 2013 (5 Marks)

What are the grounds for setting aside an arbitral award under the Arbitration and Conciliation Act, 1996?

CS (Inter) – Dec 2002 (8 Marks), Dec 2005 (4 Marks)

CS (Executive) – June 2016 (5 Marks)

Ans.: Application for setting aside arbitral award [Section 34]: When the party making the application furnishes proof to the Court regarding following circumstances, Court may set aside the award:

- (1) A party was under some incapacity.
- (2) Arbitration agreement is not valid under the law to which the parties have subjected it. (invalidity of Arbitration agreement)
- (3) Party making the application was not given proper notice of the application of an arbitrator or of the arbitral proceedings.
- (4) Award is not in accordance with the term of submission.
- (5) Arbitral tribunal was not properly constituted or the arbitral procedure was not in accordance with the agreement of the parties.
- (6) Subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.
- (7) Arbitral award is in conflict with the public policy of India.

An application for setting aside award should be made **within 3 months from the date of receipt of arbitral award**.

The period of 3 months could be **extended to a maximum of 30 days** by the Court if it is satisfied that the applicant was prevented by sufficient cause from making the application within the above period.

Question 27] Arbitrator refuses to adjourn the hearing in an arbitration matter before him to the respondent on the ground that he has to decide the dispute within four months. What will be the effect of such refusal?

CS (Inter) – Dec 1991 (5 Marks)

Ans.: Arbitrator cannot refuse to adjourn the hearing on the ground that he has to decide the dispute within four months. This against the principal of natural justice. An aggrieved party can apply to set aside an arbitral award as per Section 34.

Question 28] Madhav moves an application for setting aside the arbitral award on the ground that he was not given a proper notice of the arbitral proceedings and thereby not being able to present his case. He furnishes sufficient proof and pleads before the Court that he received the arbitral award just 15 days back. Decide with reasons:

(i) Whether Madhav will succeed in his prayer and

(ii) Whether the law of limitation will not be a bar in his case.

CS (Inter) – Dec 2006 (5 Marks)

CS (Executive) – Dec 2010 (5 Marks)

Ans.: Section 34 provides various grounds on which an arbitral award may be set aside. If party making the application was not given proper notice of the application of an arbitrator or of the arbitral proceedings, its valid ground for setting arbitral award and hence Madhav will succeed.

An application for setting aside award should be made **within 3 months from the date of receipt of arbitral award** by the party making application. Madhav has made application within time. Hence, the law of limitation will not be a bar in his case.

Question 29] Write a note on: Finality of arbitral award

CS (Inter) - Dec 2007 (4 Marks)

Ans.: Section 35 corresponds to the Article 35(1) of UNCITRAL (Model Law). It provides that subject to the provisions of Part I of the Act the award shall be final and binding on the parties and persons claiming under it.

In other words, an arbitral award is final and binding on the parties and the persons claiming under the same, subject to time limit prescribed under Sections 33 and 34 of the Act.

Question 30] A obtains an award against B in respect of an arbitration agreement entered into by A and B. B takes the plea that the award is not binding upon him because a condition to this effect was not incorporated in the arbitration agreement. Will B succeed?

CS (Inter) - June 1992 (8 Marks)

Ans.: As per Section 35 the award shall be final and binding on the parties and persons claiming under it. Hence, the plea of B that there is no specific stipulation in the arbitration agreement, that the award will be binding upon the parties (including B) is not tenable.

However, B can apply to set aside the award on the basis of various grounds mentioned in Section 34.

MISCELLANEOUS

Question 31] Can arbitral tribunal exercise lien on unpaid costs of the arbitration?

Ans.: Lien on arbitral award and deposits as to costs [Section 39]: The arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

An arbitral tribunal can refuse to deliver its award if parties fail to pay the fees and charges. In such case parties can apply to Court. The Court will ask the parties to deposit sum demanded by arbitral tribunal in Court. After inquiry Court may order to pay reasonable sum to the arbitral tribunal by way of costs and that the balance of the money, if any, shall be refunded to the applicant.

Question 32] After the completion of arbitration proceedings, the arbitrator gave a notice to the parties of the making and signing of award and of the amount of fees and charges in respect of the arbitration and award. The parties failed to pay the fees and charges and hence, the arbitrator refused to deliver award. A party, aggrieved by the conduct of the arbitrator, submitted an application to the Court to direct the arbitrator to deliver the award in the court. How the matter will be solved?

CS (Inter) - June 1998 (5 Marks)

Ans.: As per Section 39, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration. Cost of arbitration means reasonable cost relating fees and expenses of arbitrators and witnesses.

If parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such a case, any party can approach Court. The Court will ask to deposit from the parties and on such deposit, the Court will decide the cost of arbitration & fees payable to arbitrator and balance remaining in amount deposited will be refunded to the parties.

CONCILIATION

Question 32A] Explain briefly the terms 'conciliation' and 'mediation'.

CS (Executive) – Dec 2016 (5 Marks)

Ans.: Conciliation is the amicable settlement of dispute between the parties, with the help of a conciliator. In conciliation, there is 'win-win' situation, as both parties agree to discuss among themselves and arrive at a mutually agreed compromise.

Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

These processes can be successful only if the personality of the conciliator/mediator is such that he is able to induce the parties to come to a settlement. The Act gives a formal recognition to conciliation in India. Conciliation forces earlier and greater hold of the case. It can succeed only if the parties are willing to re-adjust. According to current thinking conciliation is not an alternative to arbitration or litigation, but rather complements arbitration or litigation.

Question 33] What do you understand by conciliation? When do conciliation proceedings begin? Can all disputes be submitted to conciliation?

Conciliation is informal process in which the conciliator, the third party, tries to bring the disputants to agreement. Comment.

CS (Executive) – June 2007 (4 Marks)

Ans.: If the dispute between parties is settled by means of mediation or in a friendly manner and through use of goodwill, it is known as conciliation. It should be noted that a settlement agreement reached by the parties as a result of conciliation proceedings shall have the same status and effect as an arbitral award.

The conciliation procedure can be applied to the dispute which arises out of legal relationship, whether contractual or not.

Conciliation procedure cannot be applied [Section 61]:

- ◆ Where any law for the time being in force provides the method and manner in which conciliation proceeding should be dealt. e. g. Industrial Disputes Act, 1947.
- ◆ By virtue of any law for the time being in force certain dispute may not be submitted to conciliation e.g. crime.

Commencement of conciliation proceedings [Section 62]:

- (1) The party initiating conciliation shall send to the other party a written invitation to conciliate, briefly identifying the subject of the dispute.
- (2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.
- (3) If the other party rejects the invitation there will be no conciliation proceedings.
- (4) If the party initiating conciliation does not receive a reply within 30 days from the date on which he sends the invitation, or within such other period of time as specified in the invitation he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

Question 34] Who is a conciliator? What can be the number of conciliators? Who appoints them?

What do you understand by conciliation? How are the conciliators appointed? Discuss their role in arriving at a settlement agreement.

CS (Inter) – Dec 2003 (8 Marks)

Ans.: Number of conciliators [Section 63]: There shall be 1 conciliator unless the parties agree that there shall be 2 or 3 conciliators.

Appointment of Conciliator [Section 64]: In conciliation proceedings with one conciliator, the parties may agree on name of sole conciliator. In conciliation with two conciliators, each party may appoint one conciliator. In conciliation proceeding with 3 conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall all as presiding conciliator.

The parties can also take the help of suitable institution or person in connection with the appointment of conciliators.

A party may request such an institution or person to recommend the names of suitable individuals to out as conciliators or

The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

Settlement Agreement [Section 73]:

- ◆ When it appears to the conciliator that there exit elements of settlement which may be acceptable to the parties, he shall formulate the term of possible settlement and submit them to the parties for their observation.
- ◆ If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement.
- ◆ When the parties sign the settlement, it shall be final and binding on the parties.
- ◆ The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

As per **Section 74**, the settlement agreement shall have the same status effect as if it is an arbitral award.

Question 35] State the Functions/Role of conciliator

Ans.: Role of Conciliator [Section 67]:

- (1) The conciliator shall assist the parties in an independent and impartial manner to reach an amicable settlement of their dispute.
- (2) The conciliator shall be guided by principles of objectivity, fairness and justice. He shall take into consideration the right and obligation of the parties the usage of the trade concerned and the circumstances surrounding the dispute.
- (3) The conciliator may conduct the conciliation proceeding in a such manner as he considers appropriate but after taking into consideration the request of the parties, if any.
- (4) The conciliator may, at any stage of the conciliation make proposals for a settlement of the dispute. Such proposal need not be in writing.

Functions of Conciliator:

Administrative Assistant [Section 68]: The conciliator may arrange administrative assistance by a suitable institution or person.

Communication between conciliator and parties [Section 69]:

- ◆ The conciliator may invite the parties to him.
- ◆ He may communicate with them orally or in writing.
- ◆ He can meet the parties together or separately.
- ◆ If parties are not already agreed regarding the place of meeting, conciliator can determine such place after consultation with the parties.

To disclosure of information: When conciliator receives any information from a party he shall disclose that information to other party, so that such party may have opportunity to present any explanation which he considers.

Question 36] When do conciliation proceedings terminate?

Ans.: Termination of conciliation proceedings [Section 76]: The conciliation proceedings shall be terminated:

- ◆ By the signing of the settlement agreement by the parties on the date of the agreement.
- ◆ By the written declaration of the conciliator, when he thinks that further effort at conciliation are no longer justified; on the date of declaration.
- ◆ By a written declaration of the parties addressed to the conciliator; on the date of declaration.
- ◆ By a written declaration of a party to the other party and conciliator; on the date of declaration.

Question 37] Distinguish between: Arbitration & Conciliation

CS (Executive) – Dec 2012 (4 Marks), Dec 2014 (5 Marks)

Ans.: Following are the main points of difference between arbitration & conciliation:

Points	Arbitration	Conciliation
Meaning	Arbitration is an agreement by the parties to submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of defined legal relationship whether contractual or not.	If the dispute between parties is settled by means of mediation or in a friendly manner and through use of goodwill, then it is known as conciliation.
Decision	In arbitration, the decision is known as arbitral award and is signed by the arbitral tribunal members	While under conciliation, it is known as settlement and is signed by the parties concerned.
Number	In arbitration, parties cannot appoint even number of arbitrators	In conciliation, the number of conciliators can be even.
Appointment	Arbitrators can be appointed even before the dispute arises.	A conciliator is appointed only after the dispute has arisen.
Evidence & examination of witnesses	An arbitrator has right to seek evidence or call witnesses.	A conciliator does not have such rights.

3

C H A P T E R

CONSUMER PROTECTION ACT, 1986

INTRODUCTION : *An analysis of marketing management has made it clear that consumer is a king pin in the market. The producer should produce goods keeping in mind the requirements of consumers and satisfy the consumer but it is observed that this obligation is neglected by some businessmen and they are involved in the unfair practices such as supply of substandard quality, adulteration etc. So there is need for consumer protection. Hence consumer protection means protecting the interest of consumer.*

Consumer protection is very wide. It includes rights, responsibilities and various remedies available to consumers. It is not only beneficial for consumer but it is equally important for businessmen also.

Consumer protection provides information to the ignorant customers regarding rights and remedies available to them. It spreads awareness so that consumer can know about the various redressal agencies where they can approach to protect their interests.

In developing countries like India, consumers are not organized. There are very few consumer organizations which are working to protect the interests of consumers. Consumer protection provides power and rights to these organizations as these organizations can file case on behalf of customers.

Although nowadays consumer is the king pin of market but then also there is lot of exploitation of consumers as businessmen use various unfair trade practices to cheat and exploit consumers. Consumer protection provides safeguard to consumers from such exploitation.

Businessmen cannot survive for a long time by ignoring the interest of consumer. They have to give due importance to consumer if they want to prosper in competitive market. Thus, Consumer Protection Act, 1986 can be described as common man's Civil Court. The Act is designated to make available cheap and quick remedy to a small consumer. In today's competitive world buyer could be easily misled and duped. He needs support and protection from unscrupulous sellers, thus Act has been incorporated to give quick, cheap and speedy justice of the complaints of buyers.

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. It came into force on 15th April, 1987.

APPLICABILITY & OBJECT

Question 1] Write a short note on: Basic rights of consumers as provided under the Consumer Protection Act, 1986

CS (Inter) – June 1994 (5 Marks), Dec 1995 (5 Marks)

CS (Inter) – June 1997 (8 Marks), Dec 2002 (3 Marks)

Ans.: Although businessman is aware of his social responsibilities even then we come across many cases of consumer exploitation. That is why government of India provided following rights to all the consumers under the Consumer Protection Act:

- (1) **Right to safety:** The consumers have the right to be protected against the marketing of goods and services which are hazardous to life and property. This right is important for safe and secure life. Sometimes the manufacturing defects in pressure cookers, gas cylinders and other electrical appliances may cause loss to life, health and property of customers. This right to safety protects the consumer from sale of such hazardous goods or services.
- (2) **Right to information:** The consumer has the right to get information about the quality, quantity, purity, standard and price of goods or service so as to protect himself against the abusive and unfair practices. The producer must supply all the relevant information at a suitable place.
- (3) **Right to choice:** Every consumer has the right to choose the goods or services of his or her likings. The right to choose means an assurance of availability, ability and access to a variety of products and services at competitive price. The producer or supplier or retailer should not force the customer to buy a particular brand only. Consumer should be free to choose the most suitable product from his point of view.
- (4) **Right to be heard or right to representation:** The consumer has the right to represent him or to be heard or right to advocate his interest. In case a consumer has been exploited or has any complaint against the product or service then he has the right to be heard and be assured that his interest would receive due consideration.
- (5) **Right to seek redressal:** This right assures justice to consumer against exploitation. The right to redressal includes compensation in the form of money or replacement of goods or repair of defect in the goods to the satisfaction of consumer.
- (6) **Right to consumer education:** Consumer education refers to educating the consumer constantly with regard to their rights. In other words, consumers must be aware of the rights they enjoy against the loss they suffer on account of goods and services purchased by them. Government has taken several measures to educate the consumers. For instance, Ministry of Civil Supplies publishes a quarterly magazine under the title "*Upbhokta Jagran*". Doordarshan telecasts a programme like the "*Sanrakshan Upbhokta Ka*" and apart from this, Consumer Day is observed on March 15 every year.

CONSUMER

Question 2] Explain the meaning of the term 'consumer' as defined in the Consumer Protection Act, 1986.

CS (Inter) - June 1994 (5 Marks), Dec 1995 (5 Marks)

CS (Executive) - June 2016 (5 Marks)

Ans.: Consumer [Section 2(d)]: Consumer means any person who:

- (i) Buys goods for a consideration and includes user of goods but does not include a person who obtains such goods for resale or for any commercial purpose *or*
- (ii) Hires or avails of services for a consideration and includes beneficiary of services

It is to be noted that consideration for goods or services may be paid or promised to be paid or partly paid and partly promised. Consumer also includes a person who takes goods or services under deferred payment system.

Explanation: Commercial purpose does not include use by a consumer of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

Question 3] Write a short note on: Commercial Purpose

CS (Executive) - Dec 2009 (3 Marks), Dec 2012 (3 Marks)

Ans.: As per the definition of 'Consumer' as defined under the Consumer Protection Act, 1986, if person purchases the goods for 'commercial purpose' then he is not 'Consumer' and no benefit under the Act will be available to him.

Commercial purpose does not include use by a consumer of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

The Supreme Court in *Laxmi Engineering Works v. P.S.G. Industrial Institute* held that the purpose for which a person has bought goods is a 'commercial purpose' is always a question of facts and to be decided in the facts and circumstances of each case. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self employment such purchaser of goods would yet be a consumer. The Supreme Court further observed 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.

Question 4] Whether passenger travelling by trains holding valid tickets and the subscribers of telephones are consumers? Explain with reasons.

CS (Inter) – Dec 1995 (5 Marks)

Ans.: It has been held that railway passengers travelling on payment of stipulated fare charged for tickets are 'Consumers' and facility of transportation provided by railway administration is a 'service' rendered for consideration as defined in Consumer Protection Act, 1986. [*GM South Eastern Railway vs Anand Sinha*, (1991) (1) CPJ 10]

Subscribers to telephones are also 'consumers'. It has been held that Telephone Departments fell within the provisions of the Consumer Protection Act, 1986 and subscribers, as consumer of telephone service, would entitled to seek relief whenever necessary. [*District Manager, Telephones, Patna vs. Lalit Kumar Bajjal*, (1992) 1 CPJ 189 (NCDRC)]

Question 5] X a small scale entrepreneur engaging 25 workers in his workshop, purchased a turning machine from Y which was found defective. X wants to lodge a complaint against Y with a consumer forum for compensation. Advise X.

CS (Inter) – June 1996 (5 Marks)

Ans.: As per the definition of 'Consumer' as defined under the Consumer Protection Act, 1986, if person purchases the goods for 'commercial purpose' then he is not 'Consumer' and no benefit under the Act will be available to him.

Commercial purpose does not include use by a consumer of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

Since, X had engaged 25 workers in his workshop to operate the machine purchased, his action will not be construed an activity for earning his livelihood but will be considered as commercial activity and thus he will not succeed in getting any compensation under the Consumer Protection Act, 1986.

Question 6] Discuss whether the legal heir of a deceased patient admitted in a government hospital rendering free services is a 'consumer' under the Consumer Protection Act, 1986.

CS (Inter) – Dec 1997 (5 Marks)

Ans.: As term 'Consumer' as defined in Consumer Protection Act, 1986 includes the person who hires or avails of any services for a consideration and includes any beneficiary of such services. It has been held by the Supreme Court that government hospital renders services free of charge and hence legal heir of a deceased patient admitted in a government hospital availing free services is not a 'Consumer'. [*Indian Medical Association vs. Shantha & Others* (1995) 19 CLA 258 SC]

Hence, the heir of deceased patient admitted in a government hospital cannot avail any benefit under the Consumer Protection Act, 1986.

Question 7] X brought from Beta Engineering works a machine called 'Brickman' which was used for clay preparation, brick moulding etc. The machine was found to be defective. Examine whether X can claim relief under the Consumer Protection Act, 1986. CS (Inter) - June 1998 (5 Marks)

Ans.: As per the definition of 'Consumer' as defined under the Consumer Protection Act, 1986, if person purchases the goods for 'commercial purpose' then he is not 'Consumer' and no benefit under the Act will be available to him.

Commercial purpose does not include use by a consumer of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

If X proves that machine purchased by him is for the purpose of earning his livelihood and was used for self employment then he will be 'Consumer' under the Act and will succeed in getting relief for the defect in the machine.

Question 8] Satarang Singh admitted his only infant son in a private nursing home. As result of strong dose of medicine administered by the nursing attendant, the child has become mentally retarded. Satarang Singh wants to make a complaint under the Consumer Protection Act, 1986. Will he succeed? CS (Inter) - Dec 1998 (5 Marks)

Ans.: It was held that even a member of a family gets the status of 'Consumer'. In an action by a member of the family for any deficiency in service, a hospital cannot take a stand that there is no privity of contract. In this case a minor was wrongly diagnosed and the Commission awarded compensation to both minor and parents separately.

Thus, Satarang Singh and his infant son both are consumers and they will succeed in their claim under the Consumer Protection Act, 1986.

Question 9] Mr. X booked for a motor car vehicle through one of the dealers. He was informed that the procedure for purchasing the car has been changed and he was called upon to make some further payment before delivery. On being aggrieved, Mr. X filed a complaint with the State Commission under the Consumer Protection Act, 1986. Will he succeed?

CS (Inter) - June 1995 (5 Marks), Dec 1998 (5 Marks)

Ans.: The facts of the case are similar to *M.N. Narasimha Reddy v. Managing Director, Maruti Udyog Ltd.*, where the appellant informed that the procedure for purchasing the car has been changed and he was called upon to make some further payment whereupon he filed complaint with State Commission.

The State Commission dismissed the complaint on the ground that the appellant was not a consumer as complaint does not relates to 'defect' in goods. On an appeal, the National Commission also dismissed the appeal and held that the complainant was not a consumer and the complaint was not maintainable in law. Therefore, Mr. X will not succeed in his complaint against the company.

Question 10] A car dealer issued an advertisement that a person could enter a contest by booking a particular branded car. On the specified dates, draws would be held and the persons who are successful in the draws would be entitled to two free tickets from Mumbai to New York and back. Hari who purchased the car and entered the contest was declared a winner of the draw. But the tickets were not delivered to him and therefore he filed a complaint under the Consumer Protection Act, 1986. Will he succeed? CS (Inter) - Dec 1999 (5 Marks)

Ans.: Hari will not succeed as he is not 'Consumer' because he had paid for the car which he had duly received and there was no complaint that it had any defect. Therefore, the opposite party was not liable so far as the contract was concerned and stated.

In *Byford vs S.S. Srivastava* (1993) 1 CPJ/55 (NCDRC), the National Commission held that -

Receiving two air tickets to New York was an additional attraction that was attached to the sale but, which depends upon lottery draw. It was not an intrinsic part of the contract deal for which the payment was made. Thus, so far the lottery winning is concerned it cannot be said that the complainant was 'Consumer' who had hired any service and hence he has not right to get the redressal under the Consumer Protection Act, 1986.

Question 11] Ajay purchased a tractor from Mahi Ltd. for tilling the land but he used it in idle time for transportation of agricultural produce on hire. Some defects were developed in the engine of the tractor. He complained to Mahi Ltd., but all in vain. Then he filed a suit in Consumer Disputes Redressal Forum for damages caused by the defects. Mahi Ltd. pleaded that Ajay is not a 'consumer' within the definition of section 2(1)(d) of the Consumer Protection Act, 1986, as he is using the tractor for commercial purposes. Whether Ajay will succeed in his case? Refer to relevant provisions of law in support of your answer with reference to case law, if any.

CS (Inter) - June 2001 (5 Marks)

CS (Executive) - June 2016 (5 Marks)

Ans.: As per the definition of 'Consumer' as defined under the Consumer Protection Act, 1986, if person purchases the goods for 'commercial purpose' then he is not 'Consumer' and no benefit under the Act will be available to him.

Commercial purpose does not include use by a consumer of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

In *Bhupendra Jang Bahadur Guna v. Regional Manager & Others*, it was 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. Thus, Ajay is 'Consumer' under the Consumer Protection Act, 1986 and he can file the claim if there is any defect in the tractor.

Question 12] Mahesh purchased a machine from Astute Ltd. to operate it himself for earning his livelihood. He took the assistance of a person to assistance of a person in operating machine. He filed a claim in the consumer forum against the company for deficiency in service. Astute Ltd. alleged that Mahesh did not operate the machine himself but had appointed a person exclusively to operate the machine. Will Mahesh Succeed?

CS (Inter) - June 2003 (5 Marks)

Ans.: As per the definition of 'Consumer' as defined under the Consumer Protection Act, 1986, if person purchases the goods for 'commercial purpose' then he is not 'Consumer' and no benefit under the Act will be available to him.

Commercial purpose does not include use by a consumer of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood, by means of self-employment.

The facts of the given case are based on the leading case *Laxmi Engineering Works v. PSG Industrial Institute*, (1995) II LPR 11 SC, where the Supreme Court held that if a person purchased a machine to operate himself for earning his livelihood, he would be consumer. But if a person purchases machine and appoint or engage another person exclusively to operate the machine, such person would not be consumer. Thus, Mahesh is 'Consumer' within the meaning of the Consumer Protection Act, 1986 and he will succeed in his claim.

Moreover, the complainant will succeed even if he engage somebody to operate the machine exclusively on the ground that the defect took place during the warranty period as that will be deficiency of service.

Question 13] A company named A Ltd. maintained a guest house for use of its CMD and other senior executives. It entered into a contract with X Ltd. for installation of central air-conditioner system. A complaint was lodged with X Ltd. that air-conditioning system did not function properly. But no action was taken by X Ltd. to repair the air-conditioning system. Then, the complainant company appointed a consultant to submit a report on the working of the air-conditioning system. The consultant pointed out number of defect such as defective fabrication, improper construction of the cooling tower and so on. A Ltd. now wants to make a complaint before the consumer forum. Will it succeed?

CS (Inter) – Dec 2001 (5 Marks)

CS (Executive) – June 2010 (5 Marks)

Ans.: In *J.K. Puri Engineers v. Mohan Breweries & Distilleries Ltd.*, (NCDRC), 1996, it was held that even where the goods are purchased for commercial purpose, if there is a warranty, as in this case, 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. The complainant is, therefore, a consumer. Further the complainant had drawn the attention of X Ltd. there was no reply from them for quite some time, there was thus gross deficiency in service. Thus, A Ltd. can file a complaint before the consumer forum and it will succeed.

Question 14] A person running a printing press purchased an offset printing machine from a supplier. When put to use, the offset printing machine was found defective due which he suffered serious loss in his business. The defect could not be rectified by supplier/manufacturer. The supplier also refused to provide a defect free replacement. He made a complaint to the consumer court claiming compensation.

CS (Inter) – June 2002 (5 Marks)

Ans.: As per the definition of 'Consumer' as defined under the Consumer Protection Act, 1986, if person purchases the goods for 'commercial purpose' then he is not 'Consumer' and no benefit under the Act will be available to him.

In *Abbey Chemical Pvt. Ltd. v. Kanti Bahi D Patel*, the National Commission held that no compensation could be awarded in respect of defects of a machine worth ₹ 10 lakhs, purchased for use in large scale manufacturing activity, because the purchase would be for a commercial purpose and the buyer in such case would not be a consumer under the Consumer Protection Act, 1986.

Thus, a person running printing press is not 'Consumer' and hence he will not succeed in his claim.

Question 15] An income taxpayer went to a Government Hospital for treatment where treatment is rendered free of charges. Being not satisfied with the treatment, he lodged a complaint with the Consumer Forum alleging deficiency in service and claiming compensation contending that the income tax paid by him has been appropriated in providing the 'so-called free service' by the hospital. Will he succeed?

CS (Inter) – Dec 2003 (5 Marks)

Ans.: As per the definition of 'Consumer' as given in Consumer Protection Act, 1986, consumer means any person who hires or avails of any services for a consideration.

The tax paid by the person availing the service at a Government hospital cannot be treated as a consideration or charge for the service rendered at the hospital. Hence, he cannot be treated as 'consumer' and will not succeed in his case.

Question 16] A tenant entered into a lease agreement of a flat for use as residential house. After occupying the flat, the tenant demanded of the landlord to effect some repairs and re-paint the building. The owner refused on the ground that there was no such clause in the lease agreement. The tenant filed a complaint in the Consumer Forum for 'deficiency in service'. Will he succeed?

CS (Inter) – June 2007 (5 Marks)

Ans.: It was held by the Supreme Court in *Laxmiben Laxmichand Shah vs. Sakerben Kanji Chandan* that the tenant entering into lease agreement with the landlord cannot be considered as consumer. 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.

Thus, tenant cannot be said to be consumer and he will not succeed.

Question 17] Under the 'salary saving scheme' of LIC of India, employees of a company have taken insurance policies and the premium due on each policy is collected by the company from the salaries of the employees and sent to LIC of India. LIC of India neither issued any separate receipts nor used to issue any premium notices to the employees. When the widow of a deceased employee made a claim to the LIC of India on the death of her husband, LIC of India repudiated the claim on the ground that four instalments of the premium have not been paid. The widow approached the Consumer Forum for redressal. Will she succeed?

CS (Inter) - Dec 2007 (5 Marks)

Ans.: Facts of the given case are similar to *Delhi Electric Supply Undertaking vs. Basanti Devi*. The LIC formulated a scheme called 'salary saving scheme' under which employees of an organization could buy an insurance policy. Premium due on each policy was collected by the employer from the salary of the employee and sent to LIC. The Corporation did not issue any separate receipt to employees nor did it issue any premium notice. When the widow of a deceased employee made a claim to LIC on the death of her husband, the LIC repudiated the claim on the ground that four instalments of the premium have not been paid.

Allowing the widows claim, 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 Supreme Court further held that the employer had implied authority to collect premium on behalf of the corporation. There was no gain saying the fact that if the employer had, after deducting the stipulated amount from the employee's salary, failed to remit the premium to the corporation, it was the fault of the agent of the corporation. In the circumstances, the LIC is liable to make payment under the policy.

GOODS & SERVICES

Question 18] Explain the term 'Goods' as per Consumer Protection Act, 1986

Whether shares of a company constitutes 'goods' under the Consumer Protection Act, 1986? Discuss in the light of case law?

CS (Inter) - Dec 1995 (5 Marks)

Ans.: Goods [Section 2 (i)]: Goods means goods as defined in the Sale of Goods Act, 1930.

As per Section 2 (7) of the 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* (1994) 3 CLJ 27, the Supreme Court held that an application for allotment of shares cannot constitute goods. It is after allotment, rights may arise as per the articles of association of the company. At the stage of application there is no purchase of goods for consideration and again the purchaser cannot be called the hirer of services for consideration.

Question 19] Explain the concept of 'service' as defined under Consumer Protection Act, 1986.

CS (Inter) - June 1999 (5 Marks)

Ans.: 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.

Question 20] X, a small scale industry having a turnover of only about ₹ 10 lakhs, seek nursing facilities from a bank by means of grant of adequate margin money. On failing to obtain this, it proceeds under the Consumer Protection Act, 1986. Will it succeed?

CS (Inter) – Dec 1994 (4 Marks)

Ans.: In *Special Machines vs. Punjab National Bank* (1991) CPJ 78, the National Commission held that failure to provide nursing and financing facilities to a small scale industry which consequently became sick cannot be said to constitute 'deficiency in service' as grant or withholding of further advances and insisting on margin money, banks may exercise their discretion and act in accordance with their best judgment. The proper forum to agitate such grievances is a Civil Court not a Consumer Forum. Based on the facts, it can be said that X will not succeed in his complaint against the bank before the Consumer Forum.

Question 21] A contract was entered between the landlord and the tenant for hiring of a flat on a monthly tenancy basis. Contrary to the contract, the landlord neglected and refused to provide the agreed amenities to the tenant and as consequences, the tenant and his family members suffered mental agony ill health etc. on being aggrieved, the tenant wants to file a complaint before the redressal agency under the Consumer Protection Act, 1986. Can landlord be held liable under the Act?

CS (Inter) – Dec 1999 (5 Marks)

Ans.: The arrangement between the tenant and the landlord was only one of the lease immovable property, which does not fall with the definition of 'Service' and hence not covered by the Consumer Protection Act, 1986. Further, tenant is not 'Consumer' within the meaning of Section 2(1)(d).

The facts of the given case are similar to *Smt. Laxmi Singhania vs Smt. Debi Lohia*, 1992 (1) CPJ 293, in which National Commission gave similar view and held that dispute between landlord and tenant does not come within purview of the Consumer Protection Act, 1986.

Thus, landlord cannot be held liable under Consumer Protection Act, 1986

Question 22] Whether a medical practitioner could be regarded as rendering service within the meaning of Section 2(1)(o) of the Consumer Protection Act, 1986?

CS (Inter) – Dec 2001 (5 Marks)

Ans.: Service rendered by a medical practitioner is 'Service' and such service would fall within the ambit of 'Service' as defined in Section 2(1)(o) of the Consumer Protection Act, 1986.

Thus, medical practitioner may be held liable for deficiency in service under the Consumer Protection Act, 1986.

Question 23] X, who was working as a truck driver had taken a general insurance policy to cover the risk of injuries for a period from 1.11.2014 to 30.10.2015. He renewed the policy for a further period of one year on 10.11.2015. On the same day, he met with an accident and suffered multiple injuries including fractures. X submitted the claim along with documents to the insurance company. The insurance company repudiated the claim on the ground that the premium for the renewed policy was received in the office at 2.30 pm on 10.11.2015, while the accident had taken place at 10 am on that day and hence there was no policy at the time of accident. Will X succeed if he files a complaint against the insurance company for his claim?

CS (Inter) – June 2000 (5 Marks)

Ans.: Service of insurance company is included as per the definition of 'Service'. In *New India Assurance Company Ltd. vs. Ram Dyal & Others*, the Supreme Court has held that when insurance policy is taken on particular day it is effective from the commencement of the day if in policy time of commencement is not stated.

Thus, when premium was paid on 10.11.2015 and on the policy only the date of the commencement of policy was mentioned and not the time, therefore, the policy gets renewed on the commencement of the day i.e. from the midnight of 9.11.2015. Hence, X will succeed if he files complaint against insurance company for his claim under the Consumer Protection Act, 1986.

DEFECT IN GOODS & DEFICIENCY IN SERVICE

Question 24] What amounts to 'defect in goods' under the Consumer Protection Act, 1986?

CS (Executive) – June 2011 (3 Marks), June 2015 (3 Marks)

Ans.: Defect [Section 2(1)(f)]: Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, 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.

It is clear from the above definition that non-fulfilment of any of the standards or requirements laid down under any law for the time being in force or as claimed by the trader in relation to any goods fall under the ambit of defect. Therefore, contravention of any of the provisions of following enactments treated as a defect under the Act:

- The Drugs & Cosmetics Act, 1950
- The Prevention of Food Adulteration Act, 1955
- The Indian Standards Institution (Certification Marks) Act, 1952

Contravention of the conditions or implied warranties under the Sale of Goods Act, 1930 in relation to any goods has also been treated as a defect under the Act.

Fault, imperfection or shortcoming in quality, quantity, potency, purity or standard in relation to goods is to be determined with reference to the warranties or guarantees expressly given by a trader.

Question 25] Explain the concept of 'deficiency' as defined under Consumer Protection Act, 1986.

CS (Inter) – June 1999 (4 Marks)

Write a short note on: Deficiency in service

CS (Executive) – June 2009 (3 Marks), June 2012 (3 Marks)

Ans.: 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.

Question 26] Sohan sent all the relevant documents in an envelope regarding consignment of goods to a buyer in the USA through Fast Service Couriers. The documents did not reach the buyer as a consequences of which buyer could not take the delivery of the goods. By the time the duplicate copies of the documents had been received by the buyer, the seasons of the goods over. He claimed that he had suffered loss of US\$ 50,000 as a result of the negligence of the courier. The State Commission ordered the payment to be made by the Fast Service Couriers, but National Commission in appeal reversed the order and ordered payment of US\$ 100 only as per the receipt issued by the Fast Service Couriers to the consignor for the dispatch of the letter. Advise Sohan.

CS (Inter) – Dec 1994 (4 Marks), Dec 2000 (5 Marks)

CS (Inter) – June 2003 (5 Marks)

Ans.: A delay in delivery of article or non deliver is deficiency in service by the organization engaged in courier service. However, courier can limit the damage payable by having terms of contract.

In *Air Pack Courier (India) Pvt. Ltd. vs S Suresh*, (1993) 1 CTJ 304, the National Commission held that if the document in courier were of great value then consignee should have insured the documents. Hence, National Commission did not grant any relief to the complainant.

Upholding the order of the National Commission, the Supreme Court held in view of the terms and conditions of contract between the parties, Courier Company was right in limiting the liability undertaken in the contract and in awarding compensation to the extent stated in the contract. Thus, if courier has limited its liability up to specific amount say ₹ 100 then courier is liable for damages up to ₹ 100 only and not for any other amount for loss of documents.

Question 27] Can postal department be held liable for non delivery of registered letter or late receipt by the addressees? CS (Inter) - June 2001 (5 Marks)

Ans.: As per Section 6 of the Post Office Act, 1896, Government does not incur any liability by reason of loss, mis-delivery or delay of, or damage to, any postal article in the course of transmission by post except to the extent liability expressly undertaken. Postal authority is liable only on account of fraudulent or wilful act of postal authority.

Question 28] Smartee posted a duly stamped cover, with complete address of the addressee and the address of sender. On the top of the cover the words "Application for admission to M.A./M. Sc./M.C.A." were printed in bold letters. The letters was mis-delivered back to the sender. Smartee seeks relief under the Consumer Protection Act, 1986 on account of deficiency in service by postal department. Will he succeed? CS (Inter) - Dec 1999 (4 Marks)

Ans.: In *Kober Rajendra Prasad vs. Superintendent of Post Offices Nellore*, 1991 (1) CRP 299, the State Commission held that mis-delivery back of packet to sender by the postal authority is a deficiency in service as there is gross negligence by postal department especially when complete address of sender as well as addressee was given on the packet and therefore post department is held liable.

Smartee can seek relief under the Consumer Protection Act, 1986 on account of deficiency in service by postal department.

Question 29] Jolly, who got admission in a collage, paid ₹ 20,000 towards tuition fee, hostel fee and other charges. Subsequently, he got admission in a Government Engineering College and therefore, demanded the refund of fees from the college. The college partly refunded the hostel fee and tuition fee and retained a major portion of the tuition fee. Jolly wants to file a complaint against the college for total refund fee. Will he succeed? CS (Inter) - June 2000 (5 Marks)

Ans.: In *Ramdeobaba Engineering College vs. Sushant Yubraj Rode & Another*, the National Commission held that non refund of admission fee is not deficiency in service. Admission fee is a consideration for admission and the service which the college was to render to the student in the matter of his pursuing studies in the college after admission. Hence, Jolly will not succeed in complaint against college under the Consumer Protection Act, 1986 as college has still to render the service and without any service there is no question of 'deficiency in service'.

Question 30] Avtar made a complaint to the Consumer Disputes Redressal Forum that the Regional Provident Fund Commissioner had not settled his provident fund dues within the period stipulated in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and for the 'deficiency in service'. He also claimed damages for non-settlement of the dues within the stipulated period. The Regional Provident Fund Commissioner in his reply contended that there was no hiring of service for consideration since he was performing a statutory function. Will Avtar succeed?

CS (Inter) - Dec 2000 (5 Marks), June 2007 (5 Marks)

Ans.: In *Regional PF Commissioner, Faridabad vs. Shiv Kumar Joshi*, RP No. 238, 1994, it was held that it was not correct that the Commissioner was exercising statutory power and was discharging statutory functions under the Provident Fund Act, he could not come within the ambit of the expression service. Administration charges were levied and recovered by the Commissioner for payment of services rendered by him and his staff. A duty is also cast for investment of moneys belonging to the employee's provident fund just as any

banker or financial institution under the control of the Central Government. The Commissioner is required to credit interest to each account. This was rendering of service for consideration as defined in the Act. Considering above, if Provident Fund Commissioner fails to settle his dues within the time prescribed it is deficiency in service and Provident Fund Commissioner will be liable.

Question 31] Bindu while travelling in a train down through the hole in the inter-connection passage way between two compartments and died. Bindu's dependant wants to lodge a complaint against the railway under the Consumer Protection Act, 1986. Advice.

CS (Inter) - Dec 2000 (5 Marks)

Ans.: It was held that a railway passenger travelling in a train on payment of consideration was a consumer within the meaning of the Consumer Protection Act, 1986.

In *Union of India v. Nathmal Hansaria*, the National Commission held that the death of the passenger could not be described as resulting from railway accident but an accidental death caused by the absence of safety devices in the vestibule passage way. Thus, there is deficiency in service and Railway is liable in given case.

Question 32] Rekha made a deposit of ₹ 20,000 with XYZ Ltd. for a period of 3 years. However, the company did not pay principal as well as interest on maturity. She filed a complaint before district forum. Will she succeed?

CS (Inter) - June 2001 (5 Marks)

Ans.: When a company invites deposits from the public, it is an offer by the company to interested persons for investment of their income with an assurance of refund with interest. Thus, in transaction of public deposit there is an inherent element of service for a consideration and therefore depositor is 'Consumer' under Consumer Protection Act, 1986. If company did not pay principal as well as interest on maturity it will be deficiency in service. Hence, Rekha will succeed if she files the complaint against XYZ Ltd.

Question 33] Mohan suffered in his nervous system because of administration of certain non-allopathic medicine by a doctor, a medical practitioner in allopathy system. Mohan filed a complaint demanding compensation for the consequences of the doctor's negligence. Will he succeed?

CS (Inter) - June 2002 (5 Marks)

Ans.: In *Poonam Verma vs. Ashwin Patel*, 1996 (4) SCALE 364, the Supreme Court observed that disputes regarding applicability of the Act to persons engaged in medical profession either as private practitioners or as Government doctors working in hospitals or Government dispensaries comes within the purview of the Consumer Protection Act, 1986. Allowing the appeal the Supreme Court held that the respondent who had practiced in allopathy without being qualified in that system was guilty of negligence *per se*. Thus, Mohan will succeed in claiming compensation from a doctor for negligence in medical service of doctor.

Question 34] Raman booked a ticket from Delhi to New York by Lufthansa Airlines. The airport authorities in New Delhi did not find any fault in his visa and other documents. However, at Frankfurt airport authorities instituted proceedings of verification because of which Raman missed his flight to New York. After necessary verification, Raman was able to reach New York by the next flight. The airline authorities tendered apology to Raman for the inconvenience caused to him and also paid as goodwill gesture a sum of ₹ 5,000. Raman intends to institute proceedings under the Consumer Protection Act, 1986 against the Lufthansa Airline for deficiency in service. Will he succeed?

CS (Inter) - Dec 2002 (5 Marks)

Ans.: In *Ravneet Singh Bagga vs. KLM Royal Dutch Fintimes*, the Supreme Court held that the respondent could not be held to be guilty of deficiency in service. The staff of the airline acts keeping in mind security and safety of passengers and the Aircraft. In the circumstances, the staff took some time to ascertain the truth and helped the appellant to reach New York the same day. Thus, if there is delay to airline passenger due to checking and verification it cannot be called as deficiency in service. Hence, Raman will not succeed in his claim against Lufthansa Airline for deficiency in service under the Consumer Protection Act, 1986.

Question 35] Raman purchased a car by taking a loan from a bank and gave post-dated cheques to the bank not only in respect of repayment of loan instalments but also towards premium of insurance policy for succeeding 3 years. On the expiry of the policy in the first year, the bank failed to get the policy renewed for the second year. In the meantime, the car met with an accident. Raman brought an action against the bank for 'deficiency in service' under the Consumer Protection Act, 1986. Will he succeed?

CS (Inter) – June 2003 (5 Marks)

CS (Executive) – Dec 2009 (5 Marks)

Ans.: In *Pradeep Kumar Jain vs. Citi Bank* the Supreme Court held that there is no deficiency in service because the obligation to renew the policy was on the appellant alone. But merely passing on two cheques to the bank for being paid to the insurance company the appellant would not absolve himself of his liability to renew the policy. The appellant also have certain duties to discharge in the matter of obtaining the policy and cannot merely pass the blame to someone else.

Question 36] Anju boarded an Express Train at a station in Tamil Nadu to go Delhi on some professional work. She was carrying with her suitcase in which there were some research material and cash of ₹ 10,000. She complained to the travel ticket examiner that stranger without reservation had entered into the compartment and despite protest from her and other co-passengers, the stranger occupied the berth and travel ticket examiner did not do anything to de-train stranger. When Anju work up to 2.00 pm the next day, to her surprise, she found that the suitcase was ransacked and important documents and cash were missing. She alleged that both travel ticket examiner and the guard were unwilling to receive her complaint and therefore she had registered and FIR with the police at Delhi. Whether the Railway is liable to pay damages to Anju?

CS (Inter) – June 2004 (5 Marks)

Ans.: 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 Consumer Protection Act, 1986.

Failure of the Railways to check unauthorized persons from entering and occupying first class compartments is 'deficiency in service'.

The facts of the case are similar to *General Manager, Southern Railway vs. Mrs. A. Shameem* (2002). In this case the National Commission held that if the reserved compartment was not protected from intruders, it was clearly a case of deficiency of service on the part of Railways. The TTE, who was present in the compartment when the train started and a complaint was made to him about presence of unauthorized passengers in the reserved compartment, ignored the pleas of passengers and did not offer any help to passengers in distress. This is nothing but the deficiency in service and negligence.

Thus, the Railway is liable to pay damages to Anju because the stranger occupied the berth and travel ticket examiner did not do anything which is deficiency in service on the part of railway.

Question 37] Rosy made a deposit of ₹ 5 lakh with a co-operative housing society for the purchase of a flat to be built by it at a given site on the commitment to deliver completed flat in 2 years time. On expiry of this period, the society offered her the option of money back without interest or booking of a flat of the same size on another plot situated at a distance of 2 km. The reason given for the fresh offer was some litigation on the title of the land which had hampered the progress of construction. She demanded money back with interest @ 12%. The society refused and Rosy approached the appropriate consumer forum for relief. Will she succeed?

CS (Inter) – Dec 2003 (5 Marks)

CS (Executive) – June 2011 (5 Marks)

Ans.: In *S.P. Dhavaskar vs. Housing Commissioner, Karnataka Housing Board*, it was held by the National Commission that a person who had deposited huge sums could not be asked to take back refund after 2

years without interest or to opt for alternative house at increased price which might be beyond his financial capacity. Before taking up construction job they should have taken adequate care as to title of land.

The Housing Board had been grossly negligent in rendering service. Therefore, Rosy will succeed in her claim.

Question 38] Babul entered into a contract with a share broker for the sale of shares. The share broker, after having sold the shares, issued him a cheque but the cheque was dishonoured. Despite repeated reminders, the share broker did not pay him the money. He took up the matter with the Consumers Forum for redressal. Will he be regarded as a 'Consumer' and will he succeed?

CS (Inter) - Dec 2004 (5 Marks)

Ans.: Babul is 'Consumer' and share broker service is covered under the Consumer Protection Act, 1986. As per the facts of the case, the complainant had been cheated. Since, the broker had committed deficiency in service. He was responsible for damages. Therefore Babul will succeed in his complaint against broker as held in *Indiravandan Chokey vs. Hitesh Dineshchandara Mali*, (1994) CPJ 304.

Question 39] Prudent Investments Ltd. was celebrating silver jubilee of its operations and in this connection sent invitations by post to 250 top businessmen for a special dinner at a 5-Star Hotel. Due to delay in delivery and/or non-delivery of invitation cards by the postal authorities, only 100 invitees attended the dinner. Advise the company whether it can make a complaint for compensation to the Consumer Disputes Redressal Forum against the postal authorities for deficiency in service.

CS (Inter) - Dec 2005 (5 Marks)

Ans.: As per Section 6 of Post Office Act, 1896, Government does not incur any liability by reason of loss, mis-delivery or delay of, or damage to, any postal article in the course of transmission by post except to the extent liability expressly undertaken. Postal authority is liable only on account of fraudulent or wilful act of postal authority.

In *Presidency Post Master & Another v. Dr. v. Shankar Rao*, it was held by the National Commission that if the Act provides additional means of obtaining remedy by a consumer but if the remedy is barred under any other Act, then the various forums constituted under the Act cannot grant the remedy prayed for. Further, services rendered by the Post Office are merely statutory and there is no contractual liability in running the postal service. The Central Government merely performs a governmental function which does not amount to a commercial transaction and therefore, the liability for misleading or late delivery can be fastened on the Postal Department only on the basis of express provisions of the Post Office Act, 1896.

Question 40] Kajol purchased 2,000 units from a leading mutual fund in 1999 on monthly income scheme. On maturity, the mutual fund sent account payee cheque dated 1st September, 2005 in favour of Kajol at her address lodged with the mutual fund through registered post. The registered post letter was not returned undelivered and the mutual fund believed that the letter containing the cheque was duly delivered to Kajol. On 19th November, 2005, Kajol asked for payment of the maturity amount and was informed that the cheque was delivered and en-cashed through a co-operative bank. Kajol files a complaint against the mutual fund for deficiency in service and seeks relief. Will she succeed?

CS (Inter) - June 2006 (5 Marks)

Ans.: Non-refunding the amount due on maturity by mutual fund is clearly deficiency in service as per the Consumer Protection Act, 1986. Kajol, who files a complaint against the mutual fund will be able to succeed & will be awarded compensation. There is a deficiency in service on the part of the mutual fund to make the payment due to Kajol. Thus, Kajol will be able to get compensation under the Consumer Protection Act, 1986.

Question 41] Chhote Lal, a customer of a bank, while waiting to deposit cash of ₹ 45,000 at the bank counter was robbed of his bag containing cash by a person who confronted him with a revolver. The bank security guard did not catch the person even when he was alerted by Chhote Lal. Chhote Lal filed a complaint with the District Forum against the bank for deficiency in service and sought relief. Will he succeed?

CS (Inter) – Dec 2006 (5 Marks)

Ans.: Facts of the given problem are similar to *D. S. Sachar vs. Punjab and Sind Bank*, 2005 CTJ NCDRC, it was held by the National Commission that ensuring safety of the money to be deposited or withdrawn inside the bank premises is impliedly part of service which the bank renders to its customers.

Bank was deficient in service in view of the facts that bank's gunman or any other employee made no attempt whatsoever to approach the snatcher of the money. Hence, bank was directed to pay the amount of ₹ 45,000 to the petitioner with interest and cost.

In view of above case law, Chotalal will succeed in claiming compensation against bank for deficiency in service under the Consumer Protection Act, 1986.

Question 42] A newly wedded couple Anand and his wife Anjali had gone to Kathmandu for their honeymoon. They could not return in time to attend the reception as the airline authorities failed to inform them about cancellation of their return flight. They lodged a complaint with the Consumer Forum for grant of compensation. However, the airlines authorities pleaded that the mistake was on the part of their agent whom the airlines authorities had informed about the cancellation of the flight. Will they succeed in getting compensation? Give reasons in support of your answer.

CS (Inter) – Dec 2006 (5 Marks)

Ans.: It was held by the National Commission in *Indian Airline, Delhi vs. S. N. Seth*, Appeal No. 495 (1997) that the travel agents are the agents of airlines and airline is liable for the negligent acts of its agents as per Indian Contract Act, 1872.

The Indian Contract Act, 1872 applies to all litigants before the commission under the Consumer Protection Act, 1986. By issuing air ticket on behalf of the Indian Airline a contract has been entered into between customer and Indian Airline. In such circumstances principle is certainly bound by the terms of the contract. Thus, complainants can succeed in their claim for compensation under the Consumer Protection Act, 1986 against Airline Authorities for deficiency in service. As the agent acted negligently, Airline Authorities are liable as principal for the loss to third party.

Question 43] Girish, while taking a loan from a bank, gave FDR of his family friend Neena as a guarantee against the loan received. The bank adjusted the said FDR amount when Girish defaulted the loan repayment. Neena claimed return of money from the bank contending that she is a third party and it was 'deficiency in service' on the bank's part. Will Neena succeed?

CS (Inter) – Dec 2007 (5 Marks)

Ans.: The facts given in problem are similar to *Mrs. Anumati vs. Punjab National Bank*, in which National Commission held that there shall be no deficiency in service where bank takes conscious decision to adjust the fixed deposit of the joint holders against the loan taken by third party when FDR has been mortgaged as guarantee for loan.

The FDR of Neena was guaranteed against the loan taken by the Girish from the bank. Thus Neena will not succeed if she claimed return of money from the bank contending that she is a third party.

Question 44] Rajesh made a complaint before the Consumer Disputes Redressal Forum for seeking compensation against the State Electricity Board contending that due to fluctuations and fall in electricity voltage in his small scale industrial unit, he suffered production loss. Will he succeed?

CS (Inter) – June 2008 (5 Marks)

Ans.: The National Commission in *Kerela State Electricity Board vs. Raveendran* considered a complaint regarding fall in electricity voltage damaging the machine in a plastic factory and affecting production and held that it is 'deficiency in service'. The National Commission awarded compensation to the complainant. Thus, Rajesh will succeed if he makes complaint against SEB before the Consumer Disputes Redressal Forum for seeking compensation under the Consumer Protection Act, 1986.

Question 45] After the date of booking for purchase of a car, Rakshit was asked to pay differential amount of increase in the Central Excise Duty at the time of delivery of the car. Rakshit refused to pay the amount and moved the Consumer Disputes Redressal Forum. Will he succeed?

CS (Inter) - June 2008 (5 Marks)

Ans.: In the above case, Rakshit was asked to pay differential amount of increase in the Central Excise Duty at the time of delivery of the car after the date of booking for purchase of car manufacturer's decision to increase the price due to increase in central excise duty is not justified. Thus, Rakshit will succeed in the above case.

Question 46] Sangeetha filed a complaint against a bank where her ornaments kept in the bank's locker were found missing and sought compensation through the Consumers Disputes Redressal Forum against the deficiency in service by the bank. The bank submitted a certificate recorded by the custodian of the bank on the day Sangeetha had operated the locker which stated that all lockers operated during the day had been checked and found properly locked. Will Sangeetha succeed in her claim?

CS (Executive) - Dec 2008 (5 Marks)

Ans.: In *Punjab National Bank vs. K.B. Shetty*, First Appeal No. 7 (1991), ornaments kept in the bank's 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. The National Commission upholding the decision of the State Commission, held the bank guilty of negligence which amounts to deficiency in service and therefore, liable to make good the loss.

Thus, Sangeetha will succeed in her claim against the bank for deficiency in service for the lost ornaments from the locker of the bank under the Consumer Protection Act, 1986.

Question 47] A school owned a swimming pool and offered swimming facilities to the public on payment of fees. The school conducted summer swimming training camps to train children in swimming and for this purpose had engaged a trainer/coach.

Mohan had enrolled his son for learning how to swim. One day while swimming, the child died due to drowning. The school authorities maintained that the trainer/coach was fully qualified for the job and challenged the complainant's claim for compensation in the consumer disputes redressal forum. Should the school authorities be held liable to pay compensation for 'deficiency in service'? Who is entitled to receive compensation? Give reasons.

CS (Executive) - Dec 2012 (5 Marks)

Ans.: In the case of *Sashikant Krishnaji Dole vs. Shitshan Prasarak Mandali* [F.A. No. 134 of 1993 (NCDRC)], 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. 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. Dismissing the appeal the National Commission observed that the State Commission had given cogent reasons for holding the school and the coach responsible for death of the deceased. Thus, Mohan will succeed in claiming compensation from the school and the coach under the Consumer Protection Act, 1986.

Question 47A] Prakash, aged 37 years, was travelling from Mumbai to Delhi by air. When he 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. When Prakash was stepping down from the aircraft, the ladder was suddenly removed as a result of which he fell down sustaining bodily injuries causing 10% disablement. As against the claim of ₹ 10 lakh filed by Prakash towards compensation, the airlines was willing to pay ₹ 40,000 which according to it was the maximum statutory liability of the airlines under the Carriage by Air Act, 1972. However, the State Commission awarded ₹ 4 lakh towards compensation and an additional ₹ 1 lakh for mental agony and distress plus costs. Is the order passed by the State Commission justified? If so, give reasons and refer to the decided case law.

CS (Executive) – Dec 2010 (5 Marks)

Ans.: In *Station Manager, Indian Airlines v. Dr. Jiteswar Ahir* [First Appeal No. 270 of 1994 decided on 28-2-1996 (NCDRC)] 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. According to the complainant he 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 which was reported to be about 10%. As against the complainant's claim of ₹ 10 lakhs the airlines was willing to pay ₹ 40,000 as compensation which according to them was the maximum statutory liability of the Corporation under the Carriage by Air Act, 1972. The State Commission, after examining witnesses and the medical boards report held that there was dangerous deficiency in service and having regard to the expert opinion and other medical reports, it ordered payment of compensation of ₹ 4 lakhs and ₹ 1 lakh for mental agony and distress plus costs. In appeal by the Corporation, the National Commission, upholding the State Commissions order, held that in terms of regulations relied upon by the appellant Corporation, if it was proved that the accident caused to the complainant had resulted in a permanent disablement, incapacitating him from engaging in or being occupied with his usual duties or his business or occupation.

Question 47B] Ramesh, an industrial employee contributing to ESI Fund was treated in an ESI hospital. Due to negligent diagnosis at the hospital, his condition deteriorated and he had to be shifted to a private hospital. He filed a complaint before the Consumer Disputes Redressal Forum seeking compensation from the ESI hospital. His complaint was dismissed on the ground that medical service rendered by the ESI hospital was gratuitous in nature. The State Commission and the National Commission upheld the decision of the District Forum. Ramesh intends to prefer an appeal before the Supreme Court. Will he succeed? Give reasons.

CS (Executive) – June 2013 (5 Marks)

Ans.: The Supreme Court in *Kishore Lal v. Chairman, Employees State Insurance Corporation* held that appellant is a consumer within the ambit of Section 2(1)(d) of the Consumer Protection Act, 1986 and the medical service rendered in the ESI hospital/dispensary by the respondent Corporation falls within the ambit of Section 2(1)(o) of the Consumer Protection Act and, therefore, the consumer forum has jurisdiction to adjudicate upon the case of the appellant. The jurisdiction of the consumer forum is not ousted by virtue of Section 75 of the Employees' State Insurance Act, 1948.

Thus, Ramesh will succeed in his appeal.

Question 47C] Mohan was suffering from a serious ailment. He was admitted to a well-known private hospital in Gurgaon. He was subjected to various tests. Even after diagnosis and subsequent treatment, his condition deteriorated. The doctor advised surgery during which Mohan collapsed and died. Sushma, his wife, preferred a claim for compensation of ₹ 50 lakh under the Consumer Protection Act, 1986 for 'deficiency in service'. The hospital authorities contended that medical profession was being unnecessarily hounded. Is the contention tenable? Refer to relevant case law laying down the guidelines for medical profession.

CS (Executive) – June 2014 (5 Marks)

Ans.: In *Kusum Sharma & Others v. Batra Hospital & Medical Research Centre & Others* 2010 CTJ 242 SC, the Supreme Court held that hospital could be charged as guilty if it is shown that hospital was negligence in its duties. However, the medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

In given case, the Mohan was given reasonable and standard treatment by the hospital. Even, after this he was expired, then hospital and doctors cannot be held liable as there is no deficiency in service.

Question 47D] Ms. Neelam, daughter of Ashok, was travelling by train. She 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.

Ashok claimed compensation from the Railways for deficiency in service. The Railways contended that the redressal agencies under the Consumer Protection Act, 1986 had no jurisdiction to consider a complaint of this nature. They also contended that all the coaches of the train had been thoroughly checked at the starting point of the train and no defect was reported.

Will Ashok succeed in getting compensation? Give reasons and refer to decided case law, if any.
CS (Executive) – June 2015 (5 Marks)

Ans.: It was held that a railway passenger travelling in a train on payment of consideration was a consumer within the meaning of the Consumer Protection Act, 1986.

In *Union of India v. Nathmal Hansaria*, the National Commission held that the death of the passenger could not be described as resulting from railway accident but an accidental death caused by the absence of safety devices in the vestibule passage way. Thus, there is deficiency in service and Railway is liable in given case.

Question 47E] Pawan booked an air ticket for New York with Skyhigh Airlines. At New Delhi airport, authorities found visa in order; but at Amsterdam, when his visa was checked it was found that the visa bears the photocopy of photograph. Thus, Pawan missed his flight to New York. However, the airlines helped him to reach New York on the same day. After reaching New York, Skyhigh airlines tendered an apology to Pawan for the inconvenience caused to him and paid as a goodwill gesture, a sum of ₹ 2,500. Pawan filed a complaint with National Commission under the Consumer Protection Act, 1986. Will Pawan succeed? Give reasons with reference to case law, if any.

CS (Executive) – Dec 2015 (5 Marks)

Ans.: In *Ravneet Singh Bagga v. KLM Royal Dutch Fintimes*, the Supreme Court held that the respondent could not be held to be guilty of deficiency in service. The staff of the airline acts keeping in mind security and safety of passengers and the Aircraft. In the circumstances, the staff took some time to ascertain the truth and helped the appellant to reach New York the same day. Thus, if there is delay to airline passenger due to checking and verification it cannot be called as deficiency in service. Hence, Pawan will not succeed in his claim against Skyhigh Airline for deficiency in service under the Consumer Protection Act, 1986.

Question 47F] Sohan has a truck which was driven by a driver, Shyam, but Shyam did not have valid licence for driving the truck. The truck was insured with an insurance company. On the way, all of a sudden the truck started burning. Sohan filed a claim with the insurance company. The insurance company repudiated the claim on the ground that driver of the said truck did not have valid driving licence. The truck owner pleaded that the claim is not related to 'driving' of the truck but the insurance company did not change its earlier decision. Sohan filed a complaint with the District Consumers' Disputes Redressal Forum. Will Sohan succeed? Discuss with reference to decided case, if any.

CS (Executive) – Dec 2016 (5 Marks)

OTHER DEFINITIONS**Question 48] Define the term: Complainant**CS (Inter) - Dec 1997 (5 Marks)
CS (Executive) - Dec 2010 (3 Marks)**Ans.: Complainant [Section 2(1)(b)]:** Complainant means -

- (i) A consumer
- (ii) Any voluntary consumer association registered under the Companies Act, 2013
- (iii) The Central or State Government which makes a complaint
- (iv) One or more consumers, where there are numerous consumers having the same interest

Question 49] Explain the term 'Complaint' as per the Consumer Protection Act, 1986.**Ans.: Complaint [Section 2(1)(c)]:** Complaint means any allegation in writing to obtain relief by a complainant that:

- (i) An UTP or RTP has been adopted by trader or service provider
- (ii) The goods suffer from one or more defects
- (iii) The services suffer from deficiency
- (iv) Charging excess price than
 - Fixed under any law
 - Displayed on the goods or package
 - Displayed on the price list
 - Agreed between the parties.
- (v) Hazardous goods are being offered for sale to the public
 - in contravention of safety standards
 - which will affect life and safety of the public
- (vi) Hazardous Services are being offered to the public.

Question 50] Explain the term 'Consumer Dispute' as per the Consumer Protection Act, 1986.

CS (Inter) - June 1998 (2 Marks)

Ans.: 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 allegations contained in the complaint.**Question 51] What do you understand by 'restrictive trade practices'?**

CS (Executive) - Dec 2016 (5 Marks)

Ans.: Restrictive Trade Practice [Section 2(1)(nn)]: Restrictive trade practice means a trade practice which manipulate price or conditions of delivery or flow of supplies relating to goods or services in a manner to impose unjustified costs or restrictions on the consumers and shall include:

- (a) A trade practice to raise price by making delay in supply of goods or rendering of service
- (b) Any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods or services. (*i.e. tie in sale*)

CONSUMER PROTECTION COUNCIL**Question 52] Write a note on: Redressal Agencies under the Consumer Protection Act, 1986 and their Jurisdiction**

Ans.: Three tier consumer grievances machinery under the Consumer Protection Act, 1986 are as follows:

- (1) **District Forum:** District forum consists of a president and two other members. The president can be a retired or working judge of District Court. They are appointed by State Government. The complaints for goods or services worth ₹ 20 lakhs or less can be filed in this agency. The agency sends the goods for testing in laboratory if required and gives decisions on the basis of facts and laboratory report. If the aggrieved party is not satisfied by the decision of the district forum, they can file an appeal to State Commission within 30 days by depositing ₹ 25,000 or 50% of penalty amount whichever is less. On sufficient cause, the State Commission may entertain an appeal after the expiry of 30 days.
- (2) **State Commission:** It consists of a president and two other members. The president must be a retired or working judge of High Court. They all are appointed by State Government. The complaints for the goods worth more than ₹ 20 lakhs and less than ₹ 1 Crore can be filed in State Commission. On receiving complaint the State Commission contacts the party against whom the complaint is filed and sends the goods for testing in laboratory if required. In case the aggrieved party is not satisfied with the judgment then they can file an appeal in National Commission within 30 days by depositing ₹ 35,000 or 50% of penalty amount whichever is less. On sufficient cause, the National Commission may entertain an appeal after the expiry of 30 days.
- (3) **National Commission:** The National Commission consists of a president and four members one of whom shall be a woman. They are appointed by Central Government. The complaint can be filed in National Commission if the value of goods exceeds ₹ 1 Crore. On receiving the complaint the National Commission informs the party against whom complaint is filed and sends the goods for testing if required and gives judgment. If aggrieved party is not satisfied with the judgment then they can file a complaint in Supreme Court within 30 days. On sufficient cause, the Supreme Court may entertain an appeal after the expiry of 30 days.

Question 53] Write a short note on: Pecuniary and territorial jurisdiction of the District Forum
CS (Executive) - Dec 2012 (5 Marks)

Ans.: Jurisdiction of the District Forum [Section 11]: The District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed does not exceed ₹ 20 lakhs.

A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction:

- (a) The opposite party actually and voluntarily resides or carries on business or has a branch office or personally works for gain.
- (b) If there are more than one opposite party then suit shall be instituted in jurisdiction of that District Forum where any of the opposite party actually and voluntarily resides, or carries on business, or personally works for gain. However, in such case the leave of the District Forum has to be taken or the opposite party who do not reside, or carry on business, or personally work for gain, acquiesce in such institution.
- (c) The cause of action arises.

Question 54] Avinash booked his goods with Superfast Freight Carriers at Delhi for being Carried to Firozabad. The goods receipt note mention that all disputes would be subject to jurisdiction of the Mumbai Court. Avinash lodged a complaint for certain deficiency in service against the transporter in the District Forum at Delhi. Superfast Freight Carriers contested that District Forum at Delhi had no jurisdiction to entertain complaint as the head office of the transporter was at Mumbai and the jurisdiction has been clearly stated in the goods receipt note. Is the contention of the transporter tenable?

CS (Inter) - June 2000 (5 Marks)

Ans.: The facts of the given case are similar to the decision given in *Paras Mal vs. Roshan Freight Carriers*, wherein it was held by the National Commission that the parties cannot confer jurisdiction on a District

Forum/Court which has no jurisdiction to try the suit and consequently, the agreement between the parties conferring exclusive jurisdiction on such District Forum/Court is of no use. The National Commission held that in present case goods are booked from Delhi to Firozabad and thus the District Forum at Mumbai where the Head Office situated had no jurisdiction to try suit. Consequently, the condition in the goods receipt note that all disputes were subject to jurisdiction of the Mumbai Court or District Forum is of no use.

MISCELLANEOUS PROVISIONS

Question 55] Who can file a complaint under the Consumer Protection Act, 1986?

Ans.: Manner in which complaint shall be made [Section 12]: A complaint in relation to any goods or service may be filed with a District Forum by -

- (a) Consumer himself
- (b) Recognized consumer association
- (c) One or more consumers, where there are numerous consumers
- (d) Central or State Government.

Question 56] Explain the nature and scope of remedies available under the Consumer Protection Act, 1986.

CS (Inter) - Dec 2007 (3 Marks)

CS (Executive) - Dec 2014 (5 Marks)

Ans.: Finding of the District Forum [Section 14]: Where the goods suffer any defect or there is deficiency in service, the District Forum, State or National Commission may pass the following orders:

- (a) To remove the defects
- (b) To replace the goods
- (c) To return the price or the charges paid by the complainant
- (d) To pay compensation amount to the consumer for any loss or injury
- (e) To remove the defects in goods or deficiencies in the services
- (f) To discontinue the unfair trade practice or the restrictive trade practice
- (g) Not to offer the hazardous goods for sale
- (h) To withdraw the hazardous goods from being offered for sale
- (i) To cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature
- (j) To pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently. It is to be noted that the minimum amount of sum so payable shall not be less than 5% of the value of such defective goods sold or service provided to such consumers. Further, the amount so obtained shall be credited in favour of prescribed person and utilized in prescribed manner.
- (k) To issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party
- (l) To provide for adequate costs to parties.

Question 57] What is the limitation period for filing of a complaint before the District Forum, State Commission and National Commission?

CS (Inter) - Dec 1997 (5 Marks)

Ans.: Limitation Period [Section 24A]: A Complaint has to be filed with the District Forum, State or National Commission **within 2 years** from the date of cause of action. If sufficient cause is shown the complaint may be admitted after 2 years. A delayed complaint is entertained only when District Forum, State or National Commission records its reasons for condoning such delay.

MISCELLANEOUS CASES

Question 58] One of the parties to a contract which contained an arbitration clause, made a complaint before the Consumer Forum. The respondent pleaded that the Forum has no authority to decide the dispute. In view of the arbitration clause, will the complainant succeed?

CS (Inter) – Dec 2001 (5 Marks)
CS (Executive) – Dec 2011 (5 Marks)

Ans.: Act not in derogation of any other Law [Section 3]: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

If an agreement contains arbitration clause, the dispute must be referred to arbitration, as per Section 8 of the **Arbitration & Conciliation Act, 1996**. However in *Skypack Courier Ltd. vs. Tata Chemical Ltd.*, it has been held that if there is arbitration agreement, a consumer forum can entertain consumer complaint, as remedy provided under the Act is in addition to provision of any law for the time being in force.

Question 59] Raja took a life insurance policy with accident benefits and premium was payable half-yearly. When the fourth premium fell due, Balwinder, the agent of LIC, met with him and collected a bearer cheque towards premium payable in respect of the policy. The cheque was encashed immediately, but was not deposited with LIC for three months. Meanwhile, Raja met with an accident and died. Will the wife of the deceased succeed in her claim against the LIC?

CS (Inter) – June 2002 (5 Marks), June 2008 (5 Marks)
CS (Executive) – June 2009 (5 Marks), Dec 2010 (5 Marks)
CS (Executive) – June 2012 (5 Marks)

Ans.: In *Harshad J. Shah vs. Life Insurance Corporation of India*, 1997 (3) SCALE 423 SC, the Supreme Court held that the agent had no express authority to receive the premium on behalf of the Corporation. Nor could it be said that he had an implied authority to collect the premium, as regulations expressly prohibited the agents from collecting premiums. Therefore, no case had been set up by the complainant before the State Commission that the Corporation by its conduct had induced the policyholders, including the insured, to believe that the agents were authorized to receive premiums on behalf of the Corporation nor was there any material on record that lent support to this contention. In the facts of this case there was no room to invoke the doctrine of apparent authority underlying Section 237 of the Indian Contract Act, 1872. Hence, wife of Raja will not succeed in her claim against the LIC.

Question 60] In February, 1999, Dhirendra opened an account under the national savings scheme in the General Post Office in Nagpur. In March, 2000, he opened a similar account in another Post Office in Pune. On his retirement from service, he got both the accounts transferred to a branch of the Post Office in Bhopal. When he sought to close the accounts by withdrawing the amount together with interest, the Post Office pointed out that under the National Savings Scheme Rules, he could have opened only one account and thus would not be entitled to receive any interest on the second account opened in Pune. Dhirendra wants to file a complaint with the Consumer Disputes Redressal Forum. Will he succeed? Decide giving reasons and citing case law, if any.

CS (Inter) – June 2005 (5 Marks)

Ans.: In *Department of Posts & Telegraphs v. Dr. R.C. Saxena*, the State Commission had taken the view that neither the application form which was required to be filled in by the depositor while opening the account or even the passbook issued to the depositor after opening the account under the National Savings Scheme contain any information that the depositor could not open more than one account under the scheme and that the rule was made more for administrative convenience of the department and did not have any connection with the substantive provisions of the scheme. Therefore, the opening of the second account was only irregularity and not a contravention of the **Post Office Savings Bank General Rules, 1981**. The State Commission accordingly directed the department to pay interest on the amount of deposit due at the time of closure of the account.

Dismissing the Departments appeal the National Commission held that the opening of the second account by the respondent was an irregularity not amounting to contravention of the rules. The respondent was entitled to interest on the deposit.

Question 61] An insurance company did not settle the insurance claim amounting to ₹ 2 lakh on the plea that Shambhu, the assured, had not disclosed material facts about his illnesses, i.e., high blood pressure and history of diabetes, at the time of submitting the proposal. Shambhu denies the allegations and pleads that he had not concealed anything. The insurer contended that the onus of proof lies on the assured to prove beyond doubt that he had not misrepresented about the material facts. Will the contention of the insurance company be given credence by the Consumer Disputes Redressal Forum? Give reasons in support of your answer and refer to relevant case law, if any.

CS (Inter) - June 2005 (5 Marks), Dec 2005 (5 Marks)

Ans.: In *LIC of India vs. Smt. Sheela Pandey*, the National Commission has held that the repudiation of the claim was wrong and unjustified as the insurance company has failed to prove that assured had suppressed material facts, which he was duty bound to disclose. **Section 45** of the **Insurance Act, 1938** places the burden of proof on the insurer to establish the above circumstances and unless the insurer is able to do so, there is no question of the policy being avoided simply on the ground of misstatement of facts.

The *onus probandi*, in all such cases, rest heavily on the party alleging the fraud. The insurer cannot avoid consequences of the insurance contract by simply showing inaccuracy or falsity of the statement made in proposal for insurance or in report of medical officer. Thus, the insurance company had to settle the claim of the assured.

Question 62] A CT scan machine is installed in Daya Ram Charitable Trust and Diagnostic Centre. 80% of the patients are required to pay charges for the services rendered by the trust whereas 20% patients are provided free services. On a complaint against the trust for deficiency in service, it contended that the trust did not engage in profit-making activity on a large scale. Will it succeed?

CS (Inter) - June 2006 (5 Marks)

Ans.: In *Kalpavriksha Charitable Trust v. Toshnival Brothers (P) Ltd.* (1999) (6) Scale 534, it was held that in a diagnostic Centre where 80% of the patients are required to pay for the services availed and only 20% of the patients were given free services, the CT scan machine was used for commercial purpose. Hence, complaint can lie against Daya Ram Charitable Trust and Diagnostic Centre for deficiency in service.

Question 63] Distinguish between: Contract of service and contract for service

CS (Executive) - June 2010 (5 Marks), June 2012 (5 Marks)

Ans.: Following are the main points of distinction between contract of service and contract for service:

Points	Contract of service	Contract for service
Meaning	A contract of service is an agreement whereby a person agrees to employ another as an employee and the employee agrees to serve his employer as an employee.	A contract for service is an agreement whereby a person is engaged as an independent contractor for carrying out an assignment or project.
Relationship	There exists master and servant relationship in contract of service.	In contract for service there is no master and servant relationship.
Example	X Ltd. employs Mr. Ram, a Company Secretary. This is contract of service.	X Ltd. appoints Mr. Ram as a Secretarial Auditor. This is contract for service.
Nature of work	In contract of service the employee is bound to work under the supervision and directions given by the employer.	In contract for service, a person execute his work as per his own skill and experience.

4

C H A P T E R

INTELLECTUAL PROPERTY RIGHTS

INTRODUCTION : *Intellectual property rights include patents, copyright, industrial design rights, trademarks and in some jurisdictions trade secrets.*

As the term intellectual property relates to the creations of human mind and human intellect, this property is called intellectual property. Creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. In this chapter general discussion on Intellectual property rights is covered and separate chapters have made for each intellectual property right.

Question 1] What is meant by intellectual property? Mention various kinds of intellectual property and the laws governing intellectual property rights in India?

Ans.: As the term intellectual property relates to the creations of human mind and human intellect, this property is called Intellectual property. Creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them.

Types of intellectual properties:

- ◆ Copyright and related rights
- ◆ Trademarks, Service marks, Certification marks, Collective marks
- ◆ Geographical indications
- ◆ Industrial designs
- ◆ Patents
- ◆ Layout-designs (topographies) of integrated circuits
- ◆ Undisclosed information, including trade secret.

Laws governing intellectual property rights in India:

- The Copyright Act, 1957
- The Patent Act, 1970
- The Trade Marks Act, 1999
- The Geographical Indications of Goods (Registration & Protection) Act, 1999
- The Design Act, 2000

Question 2] Write a short note on: Concept of Copyright

Ans.: Copyright is right of artist, author, producer of films etc. who have created a work by use of their artistic skills. The concept of idea was originally concerned with the field of literature and arts. In view

of technological advancements in recent times, copyright protection has been expanded considerably. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts and cable programmes. Computer programs have also been brought within the purview of copyright law.

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Copyrights are governed by the Copyright Act, 1957.

Salient features of copyright and the Copyright Act, 1957 are as follows:

- ◆ Copyright protection gives exclusive rights to the owners to reproduce the work so that they cannot be derived from financial benefits arising from such rights.
- ◆ Protection of copyright is available for 60 years.
- ◆ A quasi-judicial body 'Copyright Board' is constituted by the Central Government to settle the dispute and grant compulsory licence of copyrights.
- ◆ Copyrights can be assigned.
- ◆ Owner of copyright can grant licence as per provisions of the Act.
- ◆ The Copyright Act, 1957 also makes special provisions for 'broadcast reproduction right' & 'performers rights'.
- ◆ Copyright protection is also available foreign works if foreign countries also grant similar protection to work made in India.
- ◆ Registration of copyright is not obligatory it is optional. Non-registration does not deprive the owner of his right to bring both a civil & criminal action against an offence of infringement.
- ◆ The list of acts which do not constitute infringement of copyright has been provided u/s 52.
- ◆ Where copyright in any work has been infringed, the owner of the copyright shall be entitled to remedies like injunction, damages, accounts etc.
- ◆ Any person who knowingly infringes or abets the infringement of the copyright or any other right shall be punishable as per Section 63.
- ◆ Police officers are empowered to seize all the copies of work and all plates used for making infringement if police officer is satisfied that infringement of copyright has been committed or is likely to be committed.

Question 3] Write a short note on: Concept of patent

Ans.: A patent is an exclusive right granted for an invention. In other words, a patent is an exclusive right to a product or a process that generally provides a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application. Patents are governed by the Patent Act, 1970.

Salient features of patents and the Patent Act, 1970 are as follows:

- ◆ Section 3 gives list of invention for which no patent is available.
- ◆ An application for a patent for an invention may be made by true and first inventor of the invention, assignee or legal representative.
- ◆ Every application for a patent to be made for *one invention only*.
- ◆ International application filed under the Patent Cooperation Treaty (PCT) shall be deemed to be an application under Patent Act, 1970.
- ◆ When application for patent is filed then it shall not be ordinarily be open to the public for prescribed period.

- ◆ Application for grant of patent shall be deemed to have been abandoned if applicant fails to comply with the requirements within 12 month.
- ◆ Where an application for a patent has been published but a patent has not been granted, any person can oppose against the grant of patent on the following grounds mentioned in Section 25.
- ◆ An application for a patent, and any specification filed are kept secret up to 18 months from the date of application.
- ◆ The term of every patent shall be 20 years from the date of filing application for patent.
- ◆ Application for restoration of lapsed patent can be made within 18 months from the date of lapse.
- ◆ A patentee can surrender his patent at any time by giving notice to the Controller.
- ◆ Compulsory licence can be granted on application to any person on any grounds mentioned in Section 84 of the Patent Act, 1970.
- ◆ Patents can be granted to persons outside India, on the basis of international arrangement. Such grant is available only if there is a convention, treaty or arrangement with foreign country for grant of patents on reciprocal basis i.e. if that other country also grants patents to Indian applicants.

Question 4] Write a short note on: Concept of trademark

Ans.: A trademark is a recognizable sign, design or expression which identifies products or services of a particular source from those of others. A trademark may be located on a package, a label, a voucher or on the product itself. Trademark symbolizes the business reputation. Trade mark is valuable property of any business. Some of the well known trademarks are Coca Cola, Pepsi, Tata etc. It is intangible property.

Salient features of trademarks and the Trademark Act, 1999 are as follows:

- ◆ Registration of a trademark is optional.
- ◆ The registration of a trademark shall give to the registered proprietor of the trademark the exclusive right to the use of the trademark in relation to the goods or service in respect of which the trademark is registered and to obtain relief in respect of infringement of the trademark.
- ◆ The Trademark Act, 1999 makes special provision for Collective Marks & Certification Trademarks.
- ◆ Person claiming to be the proprietor of a trademark used or proposed to be used can apply to the Registrar in Form No. TM-1 with a fee of ₹ 2,500.
- ◆ After deciding on opposition and hearing parties, Registrar can register trademark. Date of application shall be deemed to be date of registration. He will issue registration certificate in Form O-2.
- ◆ The registration of trademark shall be valid for 10 years. It can be renewed from time to time.
- ◆ No person shall be entitled to institute any proceeding or can recover damages for infringement of an unregistered trade mark. However, such unregistered trademark owner can take passing off action.
- ◆ Owner of trademark can assign or licence the right in trademark.
- ◆ If a trademark is not used for continuous period of 5 years, it can be removed from the register, on receipt of application from aggrieved person.
- ◆ The registered proprietor can grant permission to a person as 'registered user' to use the trademark.

Question 5] Write a short note on: The World Intellectual Property Organization (WIPO)

Ans.: The World Intellectual Property Organization (WIPO) is one of the 17 specialized agencies of the United Nations. WIPO was created in 1967 "to encourage creative activity, to promote the protection of intellectual property throughout the world." WIPO currently has 188 member states, administers 26 international treaties, and is headquartered in Geneva, Switzerland.

As part of the United Nations system of specialized agencies, WIPO serves as a forum for its Member States to establish and harmonize rules and practices for the protection of intellectual property rights. WIPO also services global registration systems for trademarks, industrial designs and appellations of origin, and a global filing system for patents.

WIPO has established *WIPOnet*, a global information network. The project seeks to link over 300 intellectual property offices in all WIPO Member States. In addition to providing a means of secure communication among all connected parties, *WIPOnet* is the foundation for WIPO's intellectual property services.

Question 6] Distinguish between: Intellectual Property & Industrial Property

CS (Inter) - June 2007 (5 Marks)

CS (Executive) - June 2010 (5 Marks)

What is meant by 'Industrial Property' under the Intellectual Property Rights (IPRs)?

CS (Executive) - June 2015 (3 Marks)

Ans.: Legal scholars often make a distinction between intellectual and industrial property. Intellectual property covers copyright and related rights, whereas industrial property means patents, trademarks, trade secrets and so on. Traditionally this distinction was made because industrial property rights were mostly used by industry, whereas intellectual property right was "only" for artists, writers and other creative people.

Today the distinction between the two has almost disappeared. Most people use "intellectual property" as a catch-all term, including patents and other items that traditionally were considered "industrial property."

Question 7] State the basic principle of GATS.

CS (Executive) - June 2014 (5 Marks)

Ans.: General Agreement on Trade in Services (GATS) is the first ever set of multilateral, legally enforceable rules covering international trade in services. It was negotiated in the Uruguay Round of World Trade Organization.

The GATS' contribution to world services trade rests on two main pillars:

- (a) Ensuring increased transparency and predictability of relevant rules and regulations, and
- (b) Promoting progressive liberalization through successive rounds of negotiations.

Basic principles of GATS are as follows:

- All services are covered by GATS
- Most-favoured-nation treatment applies to all services
- National treatment applies in the areas where commitments are made
- Transparency in regulations, inquiry points
- Regulations have to be objective and reasonable
- International payments - normally unrestricted
- Individual countries commitments - negotiated and bound
- Progressive liberalization - through further negotiations.

5

CHAPTER

COPYRIGHT ACT, 1957

INTRODUCTION : Copyright is right of artist, author, and producer of films etc. who have created a work by use of their artistic skills. The idea of copyright was originally concerned with the field of literature and arts. In view of technological advancements in recent times, copyright protection has been expanded considerably. Today, copyright law has extended protection not only to literary, dramatic, musical and artistic works but also sound recordings, films, broadcasts and cable programmes. Computer programmes have also been brought within the purview of copyright law.

Copyright ensures certain minimum safeguards of the rights of authors over their creations, thereby protecting and rewarding creativity. Creativity being the keystone of progress, no civilized society can afford to ignore the basic requirement of encouraging the same. The protection provided by copyright to the efforts of writers, artists, designers, dramatists, musicians, architects and producers of sound recordings, cinematograph films and computer software, creates an atmosphere conducive to creativity, which induces them to create more and motivates others to create.

The Copyright Act, 1957 extends to whole of India.

MEANING & DEFINITION

Question 1] Explain the following terms as defined in Copyright Act, 1957:

1. Artistic Work

CS (Executive) - Dec 2014 (3 Marks)

2. Author

CS (Executive) - Dec 2016 (3 Marks)

3. Cinematograph Film

4. Dramatic Work

5. Literary Work

6. Musical Work

7. Sound Recording

8. Visual recording

9. Work

Ans.:

1. **Artistic Work [Section 2(c)]:** Artistic work means -

- (i) A painting a sculpture a drawing (including a diagram map, chart or plan) an engraving or a photograph whether or not any such work possesses artistic quality
- (ii) An architectural work of art
- (iii) Any other work of artistic craftsmanship.