CHAPTER -1
CONSTITUTION OF INDIA

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

The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules. Fundamental rights are envisaged in Part III of the Constitution. Directive Principles of State Policy in part IV of the constitution contains certain Directives which are the guidelines for the future Government to lead the Country. Constitution lays down that the executive power of the Union shall be vested in the President and the executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. The Supreme Court, which is the highest Court in the Country is an institution created by the Constitution.

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

JUSTICE, social, economic and political;

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

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

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

The word “Socialist”, added by the 42nd Amendment, aims to secure to its people “justice—social, economic and political”.The expression “Democratic Republic” signifies that our government is of the people, by the people and for the people.

Nature/ Features of Constitution of India

Indian constitution is basically federal in nature along with some unitary features.The majority of the Supreme Court judges in ***KesavanandaBharati v. State of Kerala, AIR 1973 SC 1461***, were of the view that the federal features form the basic structure of the Indian Constitution. Here, we should firstly check-out the federal features of our constitution as follows:-

(1) Dual Government: In federal constitution there is provision for two sets of Government one at the centre and one for each different state. In Indian there is central / national government as well as state government for each and every state.

(2) Distribution of Powers: Like all federal constitution, Indian constitution also provides in VIIth Scheme, a plan for distribution of legislative power between Central Government and State Government i.e. (a) Union list (b) State List (c) Concurrent list and (d) Residuary power.

(3) **Supremacy of the Constitution:** Indian constitution is the supreme law and both central and state governments derive their authority from the constitution only.
(4) **Independence of Judiciary:** Indian constitution provides for freedom of judiciary system i.e. SC or subordinate courts, which can declare any action of government / legislature ultra-vires (void).
(5) **Written Constitution:** Whether original or amended.
(6) **Amendment in Constitution is Possible only through rigid procedure.**

All these features make the constitution of India as federal constitution. However, Indian constitution also poses some unitary features as:

(1) **Suspension of State Legislative Rights:** No doubt SG can make laws for matters specified in "State List" but in case of National int. (U/A 249) and proclamation of emergency (U/A 250), the CG will make laws for SG.
(2) **Single Citizenship:** Unlike USA, there is single citizenship in India.
(3) **Single Supreme Court:** there is no provision in Indian constitution for two SC one for federal and one for states.
(4) **President Rule:** Art. 356, provides for suspension of state government and compelling the state for "Presidency Rule".
(5) **Increase or Decrease in the Boundaries of Status:** Article 3 constitution provides for unilateral action by parliament for increasing or decreasing the limits of state.

In conclusion it can be commented that Indian constitution is federal with some unitary features.

Definition of State

With a few exceptions, all the fundamental rights are available against the State. Under Article 12, unless the context otherwise requires, "the State" includes –
(a) the Government and Parliament of India;
(b) the Government and the Legislature of each of the States; and
(c) all local or other authorities:
(i) within the territory of India; or
(ii) under the control of the Government of India.

The expression 'local authorities' refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards. The Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the authority should engage in performing government functions **(Electricity Board, Rajasthan v. Mohanlal, AIR 1967 SC 1957).** The Calcutta High Court has held that the electricity authorities being State within the meaning of Article 12, their action can be judicially reviewed by this Court under Article 226 of the Constitution of India. It has also been held that a university is an authority **(University of Madras v. ShantaBai, AIR 1954 Mad. 67).**

Test for Instrumentality or Agency of the State

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

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

An important decision on the definition of State in Article 12 is **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.** A seven Judge Bench of the Supreme Court by a majority of 5:2 held that**CSIR** is an instrumentality of "the State" falling within the scope of Article 12.

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

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

The word **'law'** according to the definition given in Article 13 itself includes –
"... any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

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

Doctrine of Severability

One thing to be noted in Article 13 is that, it is not the entire law which is affected by the provisions in Part III, but on the other hand, the law becomes invalid only to the extent

to which it is inconsistent with the Fundamental Rights. So only that part of the law will be declared invalid which is inconsistent, and the rest of the law will stand.
However, on this point a clarification has been made by the Courts that invalid part of the law shall be severed and declared invalid if really it is severable, i.e., if after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid. This is known as the rule of severability.
It is clear that this doctrine applies only to pre constitutional laws as according to Article 13(2), State cannot even make any law which is contrary to the provisions of this Part.

Doctrine of Eclipse

The another noteworthy thing in Article 13 is that, though an existing law inconsistent with a fundamental right becomes in-operative from the date of the commencement of the Constitution, yet it is not dead altogether. A law made before the commencement of the Constitution remains eclipsed or dormant to the extent it comes under the shadow of the fundamental rights, i.e. is inconsistent with it, but the eclipsed or dormant parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the Constitution. This is known as the *doctrine of eclipse*.

Waiver

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

Single Person Law

A law may be constitutional, even though it relates to a single individual, if that single individual is treated as a class by himself on some peculiar circumstances. The case is ***CharanjitLalChowdhary*v. *Union of India*, AIR 1951 SC 41,** in this case, the petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The company
through its directors had been managing and running a textile mill of the same name. Later, on account of mismanagement,a situation had arisen that brought about the closing down of the mill, thus affecting the production of an essential commodity, apart from causing serious unemployment amongst certain section of the community.
For a valid classification there has to be a rational nexus between the classification made by the law and the object sought to be achieved. For example a provision for district-wise distribution of seats in State Medical colleges on the basis of population of a district to the population of the State was held to be void **(*P. Rajandran* v. *State of Mysore,* AIR 1968 SC 1012).**

Part III – Fundamental Rights (Articles 14-33):

Fundamental Rights (FRs) are those rights which are secured to individuals for the attainment of full moral and spiritual stature. These right if denied, the individuals would not be able to achieve their **maximum potentials and objects.**

A. Right to Equality (Art. 14 to 18)

ARTICLE 14	ARTICLE 15	ARTICLE 16	ARTICLE 17	ARTICLE 18
Equality before the law and equal protection	Prohibition of discrimination on grounds of religion etc.	Equality of opportunity in matters of public employment	Abolition of untouchability	Abolition of titles

Article 14 Equity before Law

The state shall not deny to any person equality before law or the equal protection of the laws within the territory of India. The article uses two expressions as:

(a) Equality before Law: It means there is not any special privilege in favour of any individuals and equal subjection of all classes to the ordinary law. In other words, no man, whether PM or a farmer, is above law.

(b) Equal Protection of the Laws: This is positive concept and implies equality of treatment in equal circumstances. In other words, among equals the laws should be treated equal and equally administrated. This law doesn't apply to unequal.

Legislative Classification:

Equality before the law doesn't prohibit classification but prohibits discrimination. Here classification means reasonable classification which may be based upon.

(a) Business, geographical or territorial differences;
(b) Difference in time;
(c) Nature of persons; and
(d) Object of the law.

When a classification will be valid?

A permissible classification must satisfy two conditions**(Twin Test)** namely,

1. It must be founded on an intelligible differentia which distinguish persons or things that are grouped together from other left out of the group, and
2. The differentiation must have a relation to the objects sought to be achieved by the statute in question.

Note: A single person will also be a class in himself **(CharanjitLal vs. Union of India)**

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

(i) Article 14 forbids class legislation, but does not forbid classification.

(ii) Permissible classification must satisfy two conditions, namely,

(a) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group

(b) the differentia must have a relation to the object sought to be achieved by the statute in question.

(iii) The classification may be founded on different basis, namely geographical, or according to objects or occupations or the like.

(iv) In permissible classification, mathematical nicety and perfect equality are not required. Similarly, non identity of treatment is enough.

(v) Even a single individual may be treated a class by himself on account of some special circumstances or reasons applicable to him and not applicable to others; a law may be constitutional even though it relates to a single individual who is in a class by himself.

(vi) Article 14 condemns discrimination not only by substantive law but by a law of procedure.

(vii) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

☞ In the recent past, Article 14 has acquired new dimensions. In **Maneka Gandhi v. Union of India, AIR 1978 SC 597,** the Supreme Court held that Article 14 strikes at arbitrariness in State action and ensures a fairness and equality of treatment.

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

Article 15 Prohibition of Discrimination on ground only of religion, race, caste, sex or place of birth:

Basis of Discrimination:

(1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.15 (1)

(2) No citizen shall on grounds of religion, race, caste, sex, and place of birth or any of them, be subject to any disability, liability restriction or condition with regards:

(i) Access to shops, public restaurant,hotels,place of public entertainment.

(ii) The use of wells, tanks, bathing ghats, roads and places of public resort, which is maintained wholly or partly out of state funds. 15 (2)

Exception to Article 15 [15(3) and 15(4)]:

1. **15(3):** The state can make special provisions for women and children.
2. **15(4):** Special provision for the advancement of
   - **(a)** Socially and educationally backward classes of citizen
   - **(b)** Schedule caste; and
   - **(c)** Schedule Tribes.

Article 16 Equality in Opportunity in matters of Public Employment:

Art. 16(1) guarantees equal opportunity in matter relating to employment or appointment of office under the State.

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

Exception: 16 (3-5)

(i) Resident of particular state / union territory may be condition for appointment in that state or union territory. The condition is subject to a law in regard to class or classes of employment made by the Parliament

(ii) Reservation for backward class of citizen not adequately represented in that services.

(iii) Religious or denominational institution

Article 17 Abolition of Untouchability

Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

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

Article 18 Abolition of Titles

The article is really a prohibition which prohibits such titles which classifies people and show specialty. The article can read as:

(i) No title, not being a military or academic distinction, shall be conferred by the State.

(ii) No citizen of India shall accept any title from any foreign State.

(iii) No person, who is not a citizen of India shall, while he holds any office or trust under the State, accept without the consent of the President, any title from any foreign State.

(iv) No person, holding any office of profit or trust under State shall without the consent of the President, accept any present, emolument or office of any kind from or under a foreign State.

Right Relating to Freedom (Art. 19, 20, 21 and 22):

B. Right to Freedom (Art. 19 to 22)

Art. 19(1)		Art. 20	Art. 21	Art. 22
19(1) (a)	Freedom of speech and expression	Protection in respect of conviction for	Protection of life and personal liberty	Protection against arrest and detention

		offence		
19(1) (b)	Assemble peaceably and without arms	→ Protection ex-post fact laws → Protection against double jeopardy → Protection against self-incrimination	**ARTICLE 21A RIGHT TO EDUCATION:-** Introduced by constitution 86th Amendment, Act, 2002. According to this, the state shall provide free and compulsory education to all children of the age of 6-14 years.	
19(1) (c)	Forms associations or unions			
19(1) (d)	Move, freely, throughout the territory of India.			
19(1) (e)	Reside and settle in any part of the territory of India			
19(1) (g)	Practice and professions, or to carry on any occupation trade or business.			

Article 19: Guarantee Six Rights of Freedom

Article 19(1)(a): Right to Freedom of Speech and Expression: This right includes any mode of expression of one's ideas and includes right to make a good or bad speech and even the right of not to speak.

Reasonable Restriction 19(2):
The freedom of speech & expression is not absolute but conditional. These conditions are called as reasonable restriction, which are as:

- Sovereignty and integrity of India
- Security of the state
- Friendly relations with foreign state.

- Public order
- Decency or morality
- Contempt of court
- Defamation or
- Incitement to an offence;

☞ The Supreme Court in **Cricket Association of Bengal v. Ministry of Information & Broadcasting (Govt. of India), AIR 1995 SC1236,** has held that this freedom includes the right to communicate through any media - print, electronic and audio visual.

☞ The Supreme Court in **Union of India v. Naveen Jindal, (2004) 2 SCC 476,** has held that right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1)(a) of the Constitution being an expression and manifestation of his allegiance and feelings and sentiments of pride for the nation.

Article 19(1)(b): Right to assemble peacefully and without arms : Article 19(1)(b) guarantees to all citizens of India the right of assemble which include the right to hold meeting and to take out processions.

Article 19(1) (c): Freedom to form Association: This right includes freedom to hold meeting and to take out processions without arms. This right allows to have an association of people, having similar views.

☞ In **Tikaramji v. Uttar Pradesh, AIR 1956 SC 676,** the Supreme Court observedthat assuming the right to form an association "implies a right not to form an association, it does not follow thatthe negative right must also be regarded as a fundamental right". However Andhra Pradesh High Court held that this right necessarily implies a right not to be a member of an association.

☞ Hence, the rules whichmade it compulsory for all teachers of elementary schools to become members of an association were held to be void as being violation of Article 19(1)(c) **(Sitharamachary v. Sr. Dy. Inspector of Schools, AIR 1958 A.P. 78).**

Article 19(1)(d): Freedom of Movement: Every citizen has

Right to move freely throughout the territory of India is another right guaranteed under Article 19(1)(d). This right, however, does not extend to travel abroad, and like other rights stated above, it is also subject to the reasonable restrictions which the State may impose: (i) in the interests of the general public, or
(ii) for the protection of the interests of any scheduled tribe.

Article 19 (1)(e) Freedom of residence

Article 19(1)(e) guarantees to a citizen the right to reside and settle in any part of the territory of India. This right overlaps the right guaranteed by clause (d). This freedom is said to be intended to remove internal barriers within the territory of India to enable

every citizen to travel freely and settle down in any part of a State or Union territory. This freedom is also subject to reasonable restrictions in the interests of general public or for the protection of the interests of any Scheduled Tribe . That apart, citizens can be subjected to reasonable restrictions

Article 19(1)(g): Freedom to trade and occupations: The constitution guarantees to every citizen to right to practice and profession, or to carry on any occupation, trade or business.

Exceptions:

(i) In the interest of the general public; and

(ii) Subject to any law laying down.

(a) Professional or technical qualification necessary for practicing any profession or carrying on any occupation trade or business; or

(b) Restrictions by the state government for exclusive dealing in goods / providing services.

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

Article 20(1) Protection against ex-post fact laws (A – 20(1))

Article 20(1) of the constitution of India provides certain safe guard to the person accused of crimes. These are:

(a) Conviction only when the act was offence, when the act happened.

(b) No person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at time of commission of the offence. However, this profession is available only for criminal legislation and not civil legislation.

- ***Protection against double jeopardy:*** According to Article 20(2), no person shall be **prosecuted and punished** for the same offence more than once. Itis, however, to be noted that the conjunction "and" is used between the words prosecuted and punished, andtherefore, if a person has been let off after prosecution without being punished, he can be prosecuted again.

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

  1. that he must be accused of an offence;

2. that there must be a compulsion to be a witness; and
3. such compulsion should result in his giving evidence against himself.

Article 21: Protection of Life and Personal Liberty
"No person shall be deprived of his personal liability except according to procedure established by law".

But personal liberty includes
Right to sleep: **(Kharak Singh vs. State of UP)**
Right to travel foreign: **(Satwant Singh Sawhney)**

Article 21A: Right to Education
This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, the State shallprovide free and compulsory education to all children of the age of six to fourteen years in such manner as theState may, by law, determine.

Article 22: Protection against Arrest and Detention:
Article 22 of the constitution provides following safe guards against arbitrary arrest.
(i) Information about ground for arrest
(ii) Right to consult and to be defended by a legal practitioner of his choice.
(iii) Present before magistrate within 24 hours of arrest;
(iv) No detention beyond the period of 24 hours without the authority of a magistrate.

However, these safe guards are not available to:
(a) An alien enemy; or
(b) Person who is arrested and detained under any law providing for preventive detention."

ARTICLE 22 (Amended by 44th Amendment Act, 1978):

(a) such a person cannot be detained for a longer period than three months unless:
(i) An Advisory Board constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention.
(ii) Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board

(b) The authority ordering the detention of a person under the preventive detention law shall:
(i) communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and
(ii) afford him the earliest opportunity of making the representation against the order. It may, however, be noted that while the grounds for making the order are to be supplied, the authority making such order is not bound to disclose those facts which it considers to be against the public interest.

Preventive Detention: Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it.

C. Right against Exploitation (Act 23, 24):

Art. 23	Art. 24
Prohibition of traffic in human beings and forced labour	Prohibition of employment of children

Article 23 Prohibition of traffic inhuman beings and forced labour: Traffic means "to deal in men and women like goods" such as to sell or let or otherwise dispose of them. It also includes "Slavery".

Article 24 Prohibition of employment of children in factories:
No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

D. Right to freedom of Religion (Art. 25-28):

Article 25: Freedom of conscience and free profession, practice and propagation of religion:

- **(i)** Freedom of conscience i.e. moral sense of right and wrong; and
- **(ii)** The right freely to profess practice and propagate religion.

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

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

Article 26: Freedom to manage religious affairs:
Act, 26 guarantees to every religious denomination or any section there of the right:

- **(a)** To establish and maintain institution for religious and charitable.
- **(b)** To manage its own affairs in matter of religion;
- **(c)** To own and acquire moveable and immovable property and
- **(d)** To administer such property;

Article 27: Freedom from payment of tax for the promotion of any particular religion:
No person can be compelled to pay any taxes, the proceeds of which are specially appropriate in payment of expenses for the promotion / maintenance of religious institution.

Article 28: Freedom as to attendance at religious instructions or religious worship in educational institution
Article 28 Gives freedom to a person to participate in such religious institutions

E. Cultural and Education Right (Act. 29, 30):

Art. 29	Art. 30
Protection of interests of minorities	Right of minorities to establish and administer educational institutions.

Article 29: Protection of Interest of Minorities:

(a) Any section of citizens residing in the territory of India or any part there of having distinct language, script or culture of its own shall have the right to conserve the same.

(b) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, sex, language or any of them.

Article 30: Right to Minorities to Establish and Administer Educational Institutions
All minorities, whether based on religion or language shall have the right to establish and administer educational institutions of their choice (Art. 30(1)).

Right to constitutional Remedies (Articles 32-35):

Article 32 Remedies for Enforcement of fundamental Right:
A person whose fundamental right is violated appropriate procedure. The SC will issue directions or orders or writs etc.

Article 35: Only parliament can make laws restricting the fundamental rights and not the state legislature.

WRITS AND ITS KINDS

The term "writ" means "legal document in writing"

Types of Writ

1. Habeas Corpus: Literal meaning "have the body" it is issued by the court against detaining authority for producing the person before the court. The disobedience to this writ is treated as contempt of court.

2. Mandamus: The literal meaning of "mandamus" is command. It is issued to direct any corporation, inferior court, or Government requiring him or it to do a particular thing specified therein which is his / her or its duty and further in the nature of public duty.
Simply, this writ is issued when a public authority specially against judicial and quasi-judicial bodies are declining to exercise their authority.

3. Certiorari: The literal meaning of "writ of certiorari" is to be more fully informed of". This writ is an order issued by the SC or a HC to inferior Court or body (exercising judicial or equal judicial function) to have the "decisions or "acts" of such inferior Court or body brought before the SC/HC to investigate its legality.
It is found that decision is bad, it is quashed or declared invalid and, therefore it is to binding the person against whom it is made.

Conditions for Issue of Certiorari:
Without or in excess of jurisdiction or
In contravention of the rules of natural justice, or
Commits a prima facie error on the report / decision.

4. Quo warranto: The literal meaning of quo warrants is "what is your authority" this writ is issued to judicially control executive action in the matter of appointments to Public officer under statutory provisions. This writ prevents a person from continuing in "Public office" who has wrongfully suppressed the office. The writ calls upon the holder of a public holding the offence in question.
If on investigation, it is found that he is liable for committing the offence, the court may restrain him from acting in the office and also declare the office to be vacant.

5. Prohibition
A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.While *mandamus* commands activity, prohibition commands inactivity, it is available only against judicial or quasi judicial authorities and is not available against a public officer who is not vested with judicial functions.

ORDINANCE MAKING POWER (Article 53 lays down that Executive Power of the Union shall be vested in President)
Ordinance Making Power of the President: When parliament is not in session, and the circumstances require immediate action, **Article 123** provides for promulgation of an ordinance. The ordinance shall have the same effect as an act of parliaments.

Conditions for exercise of Ordinance:
1. The houses of parliament are not in session. If one house is sitting, there is no bar to issuance of ordinance.
2. The president must be satisfied that
   (a) Circumstances exist necessitating action and
   (b) It is necessary to take immediate action.
3. **Duration of Ordinance: Six weeks** after assembly of both the houses. If houses assemble on different date, six weeks will be counted from later date.
4. When duration of ordinance come to end even **before six weeks**:
   (a) By passing of resolutions by both houses disapproving of the ordinance;
   (b) Withdrawal by the president.

5. Ordinance only on the subject matter for which parliament can legislate i.e. List I & List III.
6. No delegation of ordinance making power – by president.

ARTICLE 213: ORDINANCE MAKING POWER OF GOVERNOR(Executive Power of State vest in Governor)

When both the houses of the legislature of a state are not in session and the Governor is satisfied that circumstances requires immediate action, he may promulgate such ordinance as the circumstances appears to him to require.

Circumstances requiring instructions of president:

In following cases, the Governor can't make ordinance without instructions from presidents.

(i) Bill contains some provision which requires previous sanctions of the president:
(ii) The Governor deems it necessary to reserve a bill containing the provision for the consideration of president;
(iii) An act of the state legislature containing the same provisions, which requires the assent of the president. Rest is same as in the case of president

Article 245: Parliament of making Laws in State List:

1. **In the National Interest:** When RajyaSabha declares by 2/3 majority of member present and voting that it is in the "National Interest" that parliament can legislate for the state list. However validity of such resolution is only one year and cab be extended by a fresh resolution for any number of years.
   The laws passed by parliament under the provision cease to have effect automatically after six months of the expiry of the resolution period.

2. **During a proclamation of emergency (Art. 250):** The parliament can legislate in relation to the subject enumerated in the state list, during proclamation of emergency .Article provides that proclamation shall be declared when the president is satisfied that a grave emergency exist – whereby the security of India or any part of the territory thereof is threatened whether by war, or external aggression or armed rebellion etc.

3. **On the request of two or more states (Art. 252):** If two or more states are desirous that on any particular matter in the state list, there should be a single Act. Which would apply in whose states they can invoke the aid of parliament to make such an act for them? Any act, so passed by parliament, may be amended or repelled by an act of parliament only.

4. **In case of an emergency (article 356**) : If the constitutional machinery in the state is not able to perform its function or comes to a stand still then emergency is declared.

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

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

INTERPRETATION OF THE LEGISLATIVE LISTS

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

a. **Plenary Powers:** The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on the power, then it is to be given the widest scope that its words are capable of, without, rendering another item nugatory.
Thus, a legislature to which a power is granted over a particular subject may make law on any aspect or on all aspects of it; it can make a retrospective law or a prospective law and it can also make law on all matters ancillary to that matter.

b. **Harmonious Construction:** Different entries in the different lists are to be interpreted in such a way that a conflict between them is avoided and each of them is given effect. It must be accepted that the Constitution does not want to create conflict and make any entry nugatory. Therefore, when there appears a conflict between two entries in the two different lists the two entries should be so interpreted, that each of them is given effect and, for that purpose the scope and meaning of one may be restricted so as to give meaning to the other also.

c. **Pith and Substance Rule:** The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. Therefore, where such overlapping occurs,the question must be asked, what is, “pith and substance” of the enactment in question and in which lists true nature and character is to be found. For this purpose the enactment as a whole with its object and effect must be considered.

d. **Colourable Legislation:** It is, in a way, a rule of interpretation almost opposite to the one discussed above. The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a colour of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such legislation is called colourable piece of legislation and is invalid. The motive of the legislature is, however, irrelevant for the application of this doctrine. Therefore, if a legislature is authorised to do a particular thing directly or indirectly, then it is totally irrelevant as to with what motives – good or bad – it did .

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

FUNDAMENTAL DUTIES

Article51A imposing the fundamental duties on every citizen of India was inserted by the Constitution Forty second Amendment) Act, 1976

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

These Fundamental Duties are:

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

Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their implementation. Fundamental duties can't be enforced by writs (*Surya Narain*v. *Union of India,* AIR 1982 Raj 1).

Directive Principles of State Policy (DPS):

Part IV, Containing article 36 to 51 deals with duties of a state which are also used as "guideline" for the state.

DP vs. Fundamental Right

1. **Nature:** DPS are like instrument of instruction for the state government to do certain thing and to achieve certain objectives. On the other hand, fundamental Rights imposes certain restriction on SG.
2. **Enforceable by any court:** DPS are not enforceable, but FRs are enforceable U/A 32 & 226.

Void: A competent court can declare a law as void if it violate FRs

DIRECTIVE PRICIPLES

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

(a) State to secure a social order for the promotion of welfare of the people:
(1) The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social,

economic and political should inform all the institutions of the national life (Art. 38).

(2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities, and opportunities, not only amongst individuals but also among groups of people residing in different areas or engaged in different vocations. (introduced by Constitution 44th Amendment Act).

(b) Certain principles of policy to be followed by the State. The State, particularly, must direct its policy towards securing:

(i) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(ii) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common goods;
(iii) that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;
(iv) equal pay for equal work for both men and women;
(v) that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter avocation unsuited to their age or strength;
(vi) that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISTRIBUTION OF SUBJECT MATTER OF LEGISLATION

To understand the whole scheme, the Constitution draws three long lists of all the conceivable legislative subjects. These lists are contained in the VIIth Schedule to the Constitution. List I is named as the **Union List**. List II as the **State List** and III as the **Concurrent List**. Each list contains a number of entries in which the subjects of legislation have been separately and distinctly mentioned. The number of entries in the respective lists is 97, 66 and 47.

Thus, those subjects which are of national interest or importance, or which need national control and uniformity of policy throughout the country have been included in the Union List; the subjects which are of local or regional interest and on which local control is more expedient, have been assigned to the State List and those subjects which ordinarily are of local interest yet need uniformity on national level or at least with respect to some parts of the country, i.e., with respect, to more than one State have been allotted to the Concurrent List. To illustrate, defence of India, naval, military and air forces; atomic energy, foreign affairs, war and peace, railways, posts and telegraphs, currency, coinage and legal tender; foreign loans; Reserve Bank of India; trade and commerce with foreign countries; import and export across customs frontiers; inter-State trade and commerce, banking; industrial disputes concerning Union employees; coordination and determination of Standards in institutions for higher education are some of the subjects in the **Union List**.

Public Order; police; prisons; local Government; public health and sanitation; trade and commerce within the State; markets and fairs; betting and gambling etc., are some of the subjects included in the **State List**. And coming to the Concurrent List, Criminal law; marriage and divorce; transfer of property; contracts; economic and social planning; commercial and industrial insurance; monopolies; social security and social insurance; legal, medical and other professions; price control, electricity; acquisition and requisition of property are some of the illustrative matters included in the Concurrent List.

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

(i) The entries relating to tax have been separated from other subjects and thus if a subject is included in any particular List it does not mean the power to impose tax with respect to that also follows.

(ii) Subject-matter of tax is enumerated only in the Union List and the State List. There is no tax subject included in the Concurrent List.

(iii) In each List there is an entry of "fees" with respect to any matter included in that List excluding court fee. This entry is the last in all the Lists except List I where it is last but one.

(iv) There is an entry each in Lists I and II relating to "offences against laws with respect to any of the matters" included in the respective List while criminal law is a general subject in the Concurrent List.

Classification of Subordinate Legislation

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

2. Judicial Legislation: Under various statues, the High Courts are authorised to frame rules for regulating the procedure to be followedin courts. Such rules have been framed by the High Courts under the Guardians of Wards Act, Insolvency Act,Succession Act and Companies Act, etc.

3. Municipal Legislation: Municipal authorities are entrusted with limited and sub-ordinate powers of establishing special laws applicableto the whole or any part of the area under their administration known as bye-laws.

4. Autonomous Legislation: Under this head fall the regulations which autonomous bodies such as Universities make in respect of matterswhich concern themselves.

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

How a Bill becomes an Act in Parliament

A Bill is the draft of a legislative proposal. It has to pass through various stages before it becomes an Act of Parliament. There are three stages through which a bill has to pass in one House of Parliament. The procedure is similar for the Legislative Assemblies of States.

First Reading

The legislative process begins with the introduction of a Bill in either House of Parliament, i.e. the Lok Sabha or the Rajya Sabha.. It is necessary for a member-in-charge of the Bill to ask for the leave of the House to introduce the Bill. If leave is granted by the House, the Bill is introduced. This stage is known as the First Reading of the Bill. If the motion for leave to introduce a Bill is opposed, the Speaker may, in his discretion, allow a brief explanatory statement to be made by the member who opposes the motion and the member-in-charge who moved the motion.

Reference of Bill to a Standing Committee

After a Bill has been introduced, the Presiding Officer of the concerned House (Speaker of the Lok Sabha or the Chairman of the Rajya Sabha or anyone acting on their behalf) can refer the Bill to the concerned Standing Committee for examination and to prepare a report thereon. If a Bill is referred to a Standing Committee, the Committee shall consider the general principles and clauses of the Bill referred to them and make a report thereon. The Committee can also seek expert opinion or the public opinion of those interested in the measure. After the Bill has thus been considered, the Committee submits its report to the House. The report of the Committee, being of persuasive value, shall be treated as considered advice.

Second Reading

The Second Reading consists of consideration of the Bill which occurs in two stages.

First stage

The first stage consists of general discussion on the Bill as a whole when the principle underlying the Bill is discussed on any of the following motions.:

That the Bill be taken into consideration

That the bill be referred to a Select Committee

That it be circulated for the purpose of eliciting opinion thereon.

Second Stage

The second stage of the Second Reading consists of clause-by-clause consideration of the Bill as introduced or as reported by Select/Joint Committee. Discussion takes place on each clause of the Bill and amendments to clauses can be moved at this stage.

Third Reading

At this stage the debate is confined to arguments either in support or rejection of the Bill without referring to the details thereof further than that are absolutely necessary. Only formal, verbal or consequential amendments are allowed to be moved at this stage. In passing an ordinary Bill, a simple majority of members present and voting is necessary. But in the case of a Bill to amend the Constitution, a majority of the total membership of the House and a majority of not less than two-thirds of the members present and voting is required in each House of Parliament. If the number of votes in favour and against the bill are tied, then the Presiding officer of the concerned House can cast his/her vote, referred to as a Casting Vote Right

Bill in the other House

After the Bill is passed by one House, it is sent to the other House for concurrence with a message to that effect, and there also it goes through the stages described above, except the introduction stage If a Bill passed by one House is amended by the other House, it is sent back to the originating House for approval. If the originating House does not agree with the amendments, it shall be that the two houses have disagreed.. If it fails to return the Bill within the fixed time, the Bill is deemed to be passed by both the houses and is sent for the approval of the President.

Protection of life and personal liberty (Article 21)

Article 21 confers on every person the fundamental right to life and personal liberty. It says that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The right to life includes those things which make life meaningful. For example, the right of a couple to adopt a son is a constitutional right guaranteed under Article 21 of the Constitution The right to life enshrined in Article 21 guarantees right to live with human dignity. Right to live in freedom from noise pollution is a fundamental right protected by Article 21 and noise pollution beyond permissible limits is an inroad into that right.The majority in the case of A.K. Gopalan v. State of Madras, AIR 1950 SC 27, gave a narrow meaning to the

expression 'personal liberty' within the subject matter of Articles 20 to 22 by confining it to the liberty of the person (that is, of the body of a person). It was discussed by the majority Judges in the A.K. Gopalan's case and came to the conclusion that "that view was not the last word on the subject". The restricted interpretation of the expression 'personal liberty' preferred by the majority judgement in A.K. Gopalan's case namely, that the expression 'personal liberty' means only liberty relating to or concerning the person or body of the individual, has not been accepted by the Supreme Court in subsequent cases.

That the expression 'personal liberty' is not limited to bodily restraint or to confinement to prison, only is well illustrated in Kharak Singh v. State of U.P, AIR 1963 SC 1295. In that case the question raised was of the validity of the police regulations authorising the police to conduct what are called as domiciliary visits against bad characters and to have surveillance over them. The court held that such visits were an invasion, on the part of the police, of the sanctity of a man's home and an intrusion into his personal security and his right to sleep, and therefore violative of the personal liberty of the individual, unless authorised by a valid law.

In Satwant Singh Sawhney it was held that right to travel is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel, except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, the denial of a passport amounts to deprivation of personal liberty. In the absence of any procedure prescribed by the law of land sustaining the refusal of a passport to a person, it's refusal amounts to an unauthorised deprivation of personal liberty guaranteed by Article 21. This decision was accepted by the Parliament and the infirmity was set right by the enactment of the Passports Act, 1967. It was stated in Maneka Gandhi v. Union of India, AIR 1978 S.C. 597, that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad, and no person can be deprived of this right except according to procedure prescribed by law.

Procedure established by law: The expression 'procedure established by law' means procedure laid down by statute or procedure prescribed by the law of the State. Accordingly, first, there must be a law justifying interference with the person's life or personal liberty, and secondly, the law should be a valid law, and thirdly, the procedure laid down by the law should have been strictly followed. In Maneka Gandhi's case, it was held that the procedure must be fair, just and reasonable. It must not be arbitrary fanciful or oppressive.

CHAPTER-2
INTERPRETATION OF STATUTES

Statutes or laws (popularly used in India) mean the "written will of the legislature" while the world interpretation or construction means to "find out the basic / original intention of draft man / legislature".

In simple words, Interpretation of statutes enables us to find out the real intention of the draft man, and give a logical / rational meaning to the words used in law.

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

GENERAL PRINCIPLES OF INTERPRETATION

(A) Primary Rule

(1) Rule of literal Construction:(Golden Rule of interpretation): As per this rule, the words of a statute are first understood in their natural ordinary or popular sense. This rule simply advocates for plain & grammatical meaning to words and phrases used in a statue.

Some of the other basic principles of literal construction are:
(i) Every word in law should be given meaning as no word is unnecessarily used.
(ii)One should not presume any omissions and if a aword is not there in the Statute, it shall not be given any meaning.

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

When this Rule is not applicable?
(a) When the plain / popular meaning leads to absurdity and inconsistency;
(b) Scientific & technical language must be given their specific meaning.

(2) The Mischief Rule or Heydon's Rule of Interpretation: When the words of statute, capable of giving two or more constructions, the court must adopt that meaning which "shall suppress the mischief and advance the remedy".In a classical case i.e. Heydon's case it was held that "for the sure and true interpretation of all statutes following four point shall be considered."

(a) What was the common law before the making of the act?

(b) What was the mischief defect for which the common law didn't provide?

(c) What remedy the parliament had resolved and appointed to cure the disease; and

(d) The true reason of the remedy i.e. (to suppress the Mischief).

The **Supreme Court in Sodra Devi's case** has expressed the view that the rule in Heydon's case in applicable only when the words in question are ambiguous and are reasonably capable of more than one meaning.

(3) Rule of Reasonable Restrictions:*(Ut Res Magis Valeat Quam Pareat):* This rule is applicable when literal or dictionary meaning of a word leads / results in hardship, injustice, absurdity etc. then the court must give a sensible meaning to give effect to the intention of the legislature. It also applies when the narrower interpretation fails to achieve the purpose then broader interpretation is adopted.

According to this rule, the words of a statute must be construed ut res magis valeat quam pareat, so as to give a sensible meaning to them. A provision of law cannot be so interpreted as to divorce it entirely from common sense; every word or expression used in an Act should receive a natural and fair meaning.

It is the duty of a Court in constructing a statute to give effect to the intention of the legislature. If, therefore, giving of literal meaning to a word used by the draftsman particularly in penal statute would defeat the object of the legislature, which is to suppress a mischief, the Court can depart from the dictionary meaning which will advance the remedy and suppress the mischief.

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

(4) Rule of Harmonious Construction: A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the Courts to avoid "a head on clash" between two sections of the same Act and, "whenever it is possible to do so, to construct provisions which

appear to conflict so that they harmonise"

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

(5) Rule of Ejusdem Generic: The literal meaning of "Ejusdem generic" is of the same kind of species" when particular words pertaining to a class, category are followed by general words the general words are construed as particular words. **E.g.:** Lion, Tiger, Wolf like animals are dangerous, here "like animals" is a general word and not include Cow, Buffalo etc.

Royal Hatcheries Pvt. Ltd. vs. Buffalo etc: Where a statute uses the words "such as oxen, bulls, goat, cows etc."Here the general words "such as"will not include wild animals like lion and tiger

The Ejusdem generis rule is that, where there are general words following particular and specific words, the general words following particular and specific words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose.

To apply the rule the following conditions must exist:

(1) The statute contains an enumeration by specific words,
(2) The members of the enumeration constitute a class,
(3) The class is not exhausted by the enumeration,
(4) A general term follows the enumeration,
(5) There is a distinct genus which comprises more than one species
(6) There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires. (See Thakura Singh v. Revenue Minister, AIR 1965 J & K 102)

(B) Secondary Rule of Interpretation:

(6) Expressio unis Est Exclusio Alterius: Express mention of one thing implies the exclusion of another. In other words, mention of one or more thing of a particular class may be regarded as silently excluding all other members of the class.

E.g.: If statutes refers to 'lands' house and coal-mines; other mines except coalmines are excludes and "other mines" can't be made to fall within the general term 'lands".

Caution: While using these rules take care for "accidental exclusion." Often the exclusion of a thing is the result of inadvertence or accident. It may be that where the draftsmen did not intend to exclude a particular thing but due to inadvertence didn't include. It in the statute; the application of this rule would imply that the statute excludes that particular thing, and thus, would give unwarranted results. So use this rule as a valuable servant and not as a master.

(7) Noscitur A Sociis: The meaning of a word is derived from its associate words, i.e. the meaning of a word is to be judged by the company it keeps. The words in a statue construed with reference to the words found in immediate connection with them.It two more which are capable of analogous (Similar or parallel) meaning are grouped together, they should stand be understood in cognate sense, i.e. they take their colour from each other and are given a similar or related meaning**E.g.:** In construing the words cosmetics, perfumery and toilet goods; the word 'perfumery' can only refer to such articles of perfumery, as are used cosmetics and toilet goods. Thus, it can't cover "car perfumes."

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

(i) when the context excluded that principle.

(ii) if sufficient reason can be assigned, it is proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act.

(iii) where it would cause injustice or absurdity.

(iv) where different circumstances are being dealt with.

(v) where the words are used in a different context

(8) Contemporanea Exposition EST optima: The maxim means that a contemporaneous exposition is the best and strongest in law. Where the words used in a statute have undergone alteration in meaning in course of time, the words will be construed to bear the same meaning as they had when the statute was passed on the principle expressed in the maxim. In simple words, old statutes should be interpreted as they would have been at the date when they were passed and prior usage and interpretation by those who have an interest or duty in enforcing the Act, and the legal profession of the time, are presumptive evidence of their meaning when the meaning is doubtful. But if the statute appears to be capable of only interpretation, the fact that a wrong meaning had been attached to it for many years, will be immaterial and the correct meaning will be given by the Courts except when title to property may be affected or when every day transactions have been entered into on such wrong interpretation.

Q. What are presumptions in interpretation of statute?

Ans. Presumptions / Assumptions are necessary for interpretation of "Law" to avoid contrary meaning and ambiguity. Some of these presumptions are:

(a) Words in statute are used precisely and not loosely;

(b) Rights once given (vested right) are not taken away without express words, or necessary compensation;

(c) "Mensrea" (Guilty mind) is necessary for a criminal offense etc.

(d) "State" is not affected by a statute unless it is expressly mentioned as being so affected.

(e) Statute is not intended to be consistent with the principles of international law.

(f) Statute is constitutionally void; (legislature does not make any alteration in existing law)

(g) There is presumption that statute is prospective i.e. there is presumption against retrospective legislation.

(h) Legislature confers power necessary to carry out duties imposed by it.

(i) The law compels no man to do that which is futile or fruitless;
(j) Doctrine of nature justice is to be followed.

AID (HELP) OF INTERPRETATION

(A) Internal Aid: These are given in the Act itself

(a) Tile: The long title sets out in general terms, the purpose of the Act and it often precedes the preamble.It may be referred for ascertaining the general scope of the statuethrowing light on its construction. However title can't override that clear meaning of the statue.

(b) Preamble: It is just like key to open the meaning of a statute by its makers. It states the reason for creation of the act and the evil which it wants to suppress.

Use of Preamble

Useful if words are ambiguous: If the wording of a statue is ambiguous, the preamble can and ought to be referred to ascertain the object and scope of the Act, in order to arrive at the proper construction.

(c) Heading and title of a Chapter: The heading prefixed do sections or sets of sections are regarded as preambles to those sections e.g.: constitution of India, Part (III) talks about fundamental rights (Art. 14-32). These heading can be used in consulting the provisions of the act, but only in cases where the enacting words are ambiguous.

(d) Marginal Notes: These notes are printed at the left hand margin of section in an enactment. It summaries the effect of a section.


The courts generally don't give much weightage to these notes. But Supreme Court in **"Golaknath vs. State of Punjab"** given it more weight and held as a part of constitution.


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

(e) Interpretation clause: This clause contains "definitions" of certain words and expression used elsewhere in the body of a statute. It solves two purposes at the same time.

- Gives meaning of words, Phrases or expression used in the Act;
- Avoids frequent repetition in describing the subject matter.

(f) Proviso: A clause which is an exception to the main provision is known as "proviso". It is used to remove a "special case / condition" from general (main) clause and a separate provisions made for the special case.

(g) Illustrations: It makes clear intention of words of a statute.

(h) Explanations: (Clarification) when the "words" of stature is not defined in interpretation clause", these may be explanation after the end of the section.

Use of Explanation: To remove any ambiguity in the main section

(B) External Aids: It means those aids, which are outside the statute, and can be referred only when the language of the act is not clear and the intrinsic aid has failed to help. These aids are:

(a) Parliamentary History: It includes the whole process through which a Bill becomes an act. The court while interpretation can use the "Report of Committee" on whose report statute is based. Again the speeches and opinions of the legislature (parliamentary debates) con also be used to find out what mischief was intended to be suppressed by law.

(b) Reference to Other Statutes: A statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in ***Pari Materia***, i.e. statutes dealing with the same subject matter forming part of the same system.

(c) Dictionaries: When a word or expression is not defied in the statute itself, the court may have recourse (use) to dictionaries to find out the meaning of the word or expression as understood in common parlance.

(d) Use of Foreign Decisions: Foreign decision may be used for construing our acts provided:

- Such foreign country also follows the same system of jurisprudence as ours; and
- Foreign decisions have been given on same laws as ours.

Also note that foreign decision must be picked only for from "English" decisions because most of the Indian Acts are based on English Acts and India and England have Similarities regarding common law and jurisprudence.

NOTE:

STRICT CONSTRUCTION	LIBRAL CONSTRUCTION
1. When words in statues are interpreted by latter and no regard is given beyond the spirit of the statute. **2.** In strict interpretation the court follows "literal rule;" **3.** An example of strict construction includes taxing statues.	**1.** When construction is made beyond the words of statue mainly with intention to advance the purpose or object in the statutes. **2.** In this 'mischief or harmonious construction is flowed". **3.** ESI, PF,, wages act are read according to liberal construction.

CHAPTER-3 LAW RELATING TO TORTS

INTRODUCTION

The word 'tort' is a French equivalent of English word 'wrong'. The word tort is derived from Latin language from the word *Tortum.* Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.
Broadly speaking, public wrongs are the violations of 'public law and hence amount to be offences against the
State, while private wrongs are the breaches of private law, i.e., wrongs against individuals.

Section 2(m) of the Limitation Act, 1963, states: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

GENERAL CONDITIONS OF LIABILITY FOR A TORT

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

(i) *Wrongful act:* The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. In other words, it should prejudicially affect any of the above mentioned interests, and protected by law.

(ii) *Legal damages:* it is not every damage that is a damage in the eye of the law. It must be a damage which the law recognizes as such. In other words, there should be legal injury or invasion of the legal right.

As was stated in ***Ashby* v. *White*, (1703) 2 Ld. Raym. 938** legal damage is neither identical with actual damage nor is it necessarily pecuniary.

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts.
Thus, if I own a shop and you open a shop in the neighbourhood, as a result of which I lose some customers and my profits fall off, I cannot sue you for the lose in profits, because you are exercising your legal right.

Injuria Sine Damno

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort.

The leading example is the case of ***Ashby v White*** referred to above where a person was wrongfully not allowed to vote and even though it has not caused him any damage, since his legal right to vote was denied, he was entitled to compensation.

(iii) *Legal remedy:* The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages, although some other remedies, e.g., injunction, may be obtained in addition to damages or specific restitution may be claimed in an action for the detention of a chattel. Self-help is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land.

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

Mens Rea

How far a guilty mind of persons is required for liability for tort?
The General principle lies in the maxim "*actus non facit reum nisi mens sit rea"* i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence.

KINDS OF TORTIOUS LIABILITY
The following types of tortuous liability may be noted:

(A) STRICT OR ABSOLUTE LIABILITY
In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence on the defendant's part. In other words, the defendant is held liable without fault. These cases fall under the following categories:

Rule in Rylands v. Fletcher

Ryland employed independent contractors to build a reservoir, playing no active role in its construction. When the contractors discovered a series of old coal shafts improperly filled with debris, they chose to continue work rather than properly blocking them up. The result was that on 11 December 1860, shortly after being filled for the first time, Ryland' reservoir burst and flooded a neighbouring mine, run by Fletcher, causing damage.
Fletcher brought a claim under negligence against Ryland

House of Lords, laying down the rule of strict liability in "*Rylands v Fletcher*" observed that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape"

The rule in *Rylands* v. *Flethcer* (1868) L.R. 3 H.L. 330 is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants. It was held in that case that: "If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it does not escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage."

Exceptions to the Rule of Strict Liability

The following exceptions to the rule of strict liability have been introduced in course of time, some of them being inherent in the judgment itself in *Ryland* v. *Fletcher:*

(i) Damage due to Natural Use of the Land

(ii) Consent of the plaintiff

(iii) Act of Third Party: If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable.

(iv) *Statutory Authority:* Thus, in *Green* v. *Chelzea Water Works Co.* (1894) 70 L.T. 547 the defendant company had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any fault on its part as a consequence of which plaintiff's premises were flooded with water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

(v) Act of God: If an escape is caused, through natural causes and without human intervention circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, there is then said to exist the defence of Act of God.

(vi) Escape due to plaintiff's own Default: Damage by escape due to the plaintiff's own default was considered to be good defence in *Rylands* v. *Fletcher* itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused.

Rule Of Absolute Liability

On the night of Dec. 2nd-3rd, 1984, the most tragic industrial disaster in history occurred in the city of Bhopal, Madhya Pradesh. Union Carbide Corporation (UCC), an American Corporation, with subsidiaries operating throughout the World had a chemical plant in Bhopal under the name Union Carbide India Ltd., (UCIL). The chemical plant manufactured pesticides called Seven and Temik. Methyl Isocyanate (MIC), a highly toxic gas is an ingredient in the production of both Seven and Temik. On the night of tragedy, MIC leaked from the plant in substantial quantities and the prevailing winds blew the deadly gas into the overpopulated hutments adjacent to the plants and into the most densely occupied parts of the city. The massive escape of lethal MIC gas from the Bhopal Plant into the atmosphere rained death and destruction upon the innocent and

helpless people and caused widespread pollution to the environs in the worst industrial disaster mankind had ever known.

the Supreme Court of India came out with a over all settlement of claims and awarded U.S. $470 million to the Government of India on behalf of all Bhopal victims full and final settlement of all the past, present and future claims arising from the disaster.

Departure from Rylands v. Fletcher

In M.C. Mehta v. Union of India, AIR 1987 SC 1086, the Supreme Court sought to make a departure from the accepted legal position in Rylands v. Fletcher stating that "an enterprise which is engaged in a hazardous or inherently dangerous activity that poses a potential threat to the health and safety of persons and owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone. The principle of absolute liability is operative without any exceptions. It does not admit of the defences of reasonable and due care, unlike strict liability. Thus, when an enterprise is engaged in hazardous activity and harm result, it is absolutely liable, effectively tightening up the law.

(B) VICARIOUS LIABILITY

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

(a) Principal and Agent [Specific authority]

Qui facit per aliumfacit per se – he who acts through another is acting himself, so that the act of the agent is the act of the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same.

(b) Partners

For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable therefore to the same extent as the guilty partner. The liability of the partners is joint and several.

(c) Master and Servant [Authority by relation]

A master is liable for the tort committed by his servant while acting in the course of his employment.

A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim *Respondent Superior* (Let the principal be liable) or on the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself).

(d) Employer and Independent Contractor

It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors.

(e) Where Employer is Liable for the acts of Independent Contractor
The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:
(i) When employer authorizes him to commit a tort.
(ii) In torts of strict liability
(iii) Negligence of independent contractor

(g) Liability for the acts of Servants
An employer is liable whenever his servant commits a tort *in the course of his employment.* An act is deemed to be done in the course of employment if it is either:

(i) a wrongful act authorized by the employer, or
(ii) a wrongful and unauthorized mode of doing some act authorized by the employer.

In ***Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board (1942)*** A.C. 509, the director of a petrol lorry, while transferring petrol from the lorry to an underground tank at a garage, struck a match in order to light a cigarette and then threw it, still alight on the floor. An explosion and a fire ensued. The House of Lords held his employers liable for the damage caused, for he did the act in the course of carrying out his task of delivering petrol; it was an unauthorized way of doing what he was employed to do.

(C) VICARIOUS LIABILITY OF THE STATE
Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India.
When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. If it is a sovereign function, it could claim immunity from the tortuous liability, otherwise not. A sovereign function denotes the activity of the State which can be done only by the State like defence, police, etc. The State is not liable vicariously for any breach by its employees. A non-sovereign function covers generally the activities of commercial nature or those which can be carried out by a private individual like transport, hospitals etc. in which the State is equally liable similar to a private person.

TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

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

(a) Battery
Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery.

Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without any lawful justification is battery.

(b) Assault

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed.

To point a loaded gun at the plaintiff, or to shake fist under his nose, or to curse him in a threatening manner, or to aim a blow at him which is intercepted, or to surround him with a display of force is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it, is an assault.

(c) Bodily Harm

A wilful act (or statement) of defendant, calculated to cause physical harm to the plaintiff and in fact causing physical harm to him, is a tort.

(d) False Imprisonment

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body.

(e) Malicious Prosecution

Malicious prosecution consists in instigating judicial proceedings (usually criminal) against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property.

(f) Nervous Shock

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard.

Causing of nervous shock itself is not enough to make it an actionable tort, some injury or illness must take place as a result of the emotional disturbance, fear or sorrow.

(g) Defamation

Defamation is an attack on the reputation of a person. It means that something is said or done by a person which affects the reputation of another.

Defamation may be classified into two heads: Libel and Slander. ***Libel*** is a representation made in some permanent form, e.g. written words, pictures, caricatures, cinema films, effigy, statue and recorded words. In a cinema films both the photographic part of it and the speech which is synchronized with it amount to tort.

Slander is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures.

Generally, the punishment for libel is more severe than for slander. Defamation is tort as well as a crime in India.

REMEDIES IN TORTS

Judicial Remedies

Three types of judicial remedies are available to the plaintiff in an action for tort namely: (i) Damages or
Compensation, (ii) Injunction, and (iii) Specific Restitution of Property.

Extra Judicial Remedies
In certain cases it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:
(a) Self Defence
It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

(b) Prevention of Trespass
An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them but the force should be reasonable for the purpose.

(c) Re-entry on Land
A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

(d) Re-caption of Goods
It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by the use of a reasonable force from one who has wrongly taken it or wrongfully detained it.

(e) Abatement of Nuisance
The occupier of land may lawfully abate (i.e. terminate by his own act), any nuisance injuriously affecting it.
Thus, he may cut overhanging branches as spreading roots from his neighbour's trees, but (i) upon giving notice; (ii) by choosing the least mischievous method; (iii) avoiding unnecessary damage.

(f) Distress Damage Feasant
An occupier may lawfully seize any cattle or any chattel which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage. The right is known as that of distress damage feasant-to distrain things which are doing damage. It is a legal seizure and detention of cattle or chattel till compensation is paid for the damage.

CHAPTER- 4 LIMITATION ACT, 1963

The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications. The Act prescribes the period of limitation in Articles in Schedule to the Act. The Act extends to whole of India except the State of Jammu and Kashmir.

LAW OF LIMITATION BARS ONLY THE REMEDY

The Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process.***(Bombay Dying& Mfg. Co. Ltd. v. State of Bombay)*** .

Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal.

BAR OF LIMITATION/TIME BARRED [Section 3]

Section 3 of the Act provides that every suit, appeal or application must be instituted, preferred or made within the period of limitation prescribed in **schedule II** of the Limitation Act.

EXTENSION OF TIME IN CERTAIN CASES / DOCTRINE OF SUFFICIENT CAUSE / CONDONATION OF DELAY [Section 5]

Section 5 allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay. This is known as **doctrine of "sufficient cause" for delay**.

Section 5 provides that any appeal or any application may be admitted after the prescribed period if the appellant or the applicant **satisfies** the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Thus, the Court may admit an application or appeal even after the expiry of the specified period of limitation if it is satisfied with the applicant or the appellant, as the case may be as to sufficient cause for not making it within time.

- In **Ramlal v. Rewa Coal Fields Ltd., AIR 1962 SC 361,** the Supreme Court held that once the period of limitation expires then the appellant has to explainthe delay made thereafter for day by day and if he is unable to explain the delay even for a single day, it wouldbe deemed that the party did not have sufficient cause for delay.

The term **'Sufficient Cause'** has not been defined in the Limitation Act. It depends on the circumstances of each case. However, it must be a cause which is beyond the control of the party.

EXCEPTION: The Section is **not applicable-**

(a) to applications made under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 and

(b) to suits

It applies only to appeals or applications as specified therein. The **reason for non-aplicability** of the Section to suits is that, the period of limitation allowed in most of the

suits extends from 3 to 12 years whereas in appeals and application it does not exceed 6 months.

COMPUTATION OF PERIOD OF LIMITATION FOR PERSONS UNDER LEGAL DISABILITY

Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. Section 7 supplements Section 6. Section 8 controls these sections, which serves as an exception to Sections 6 and 7. **Section 6, 7, 8 doesn't apply on appeals.**

SECTION-6

In case of persons suffering from some **legal disability**, the period of limitation **runs** from the **date of cessation of disability**.

Where the prescribed period of limitation expires before the cessation of disability, for instance, before the attainment of majority, the minor will be entitled to a fresh period of limitation from the attainment of his majority.

In case of person with several disabilities, the period of limitation will starts from the date of cessation of all disabilities.

SECTION-7

Section 7 is only an application of the principle in Section 6 to a **joint-right** inherited by a group of persons wherein some or all of whom are under the disability.

The disability of all except one does not prevent the running of time, if the discharge can be given without the concurrence of the other. Otherwise the time will run only when the disability is removed.

SECTION-8

Section 8 imposes a limitation on concession provided under Sections 6 and 7 to a person under disability up to a maximum of **three years** after the cessation of disability.

CONTINUOUS RUNNING OF TIME [Section 9]

According to Section 9 of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it.

The applicability of this Section is limited to suits and applications only and does not apply to appeals.

For the applicability of Section 9 it is essential that the cause of action or the right to move the application must continue to exist and subsisting on the date on which a particular application is made. If a right itself had been taken away by some subsequent event, no question of bar of limitation will arise.

EXCLUSION OF CERTAIN DAYS OR TIME IN LEGAL PROCEEDINGS/ COMPUTATION OF PERIOD OF LIMITATION [Section 12]

Sections 12 to 24 deals with computation of period of limitation and Section 12 prescribes the time which shall be excluded in computing the time of limitation in legal proceedings.

1. **Computation of period of limitation for a suit, appeal or application:**
   In case of any suit, appeal or application, the period of limitation is to be computed exclusive of the day on which the time begins to run.

2. **Computation of period of limitation for an appeal or an application for leave to appeal or for revision or review of a judgement :**
   (i) The day on which the judgement complained of was pronounced.
   (ii) The time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

3. **Computation of Limitation period for an application to set aside an award:**
   The time required for obtaining a copy of the award shall be excluded.

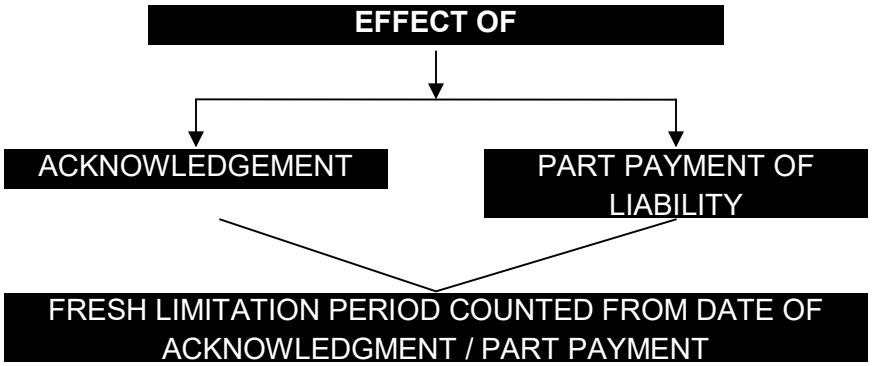
The term "time requisite for obtaining a copy" means the time which is reasonably required for obtaining such a copy, On the explanation to Section 12, the Supreme Court in the case of *Udayan China Bhai* v. *R.C. Bali,* AIR , held that by reading Section 12 with explanation it is not possible to accept the submission that in computing the time requisite for obtaining copy of a decree by an application made after preparation of the decree, the time that elapsed between the pronouncement of the judgement and the signing of the decree should be excluded.

Exclusion of time bona fide taken in a court without jurisdiction. (Section 14)
The relief to a person is given by Section 14 of the Act when the period of limitation is over, because another civil proceedings relating to the matter in issue had been initiated in a court which is unable to entertain it, by lack of jurisdiction or by any other like cause. The following conditions must co-exist for the applicability of this Section:
(a) that the plaintiff or the applicant was prosecuting another civil proceedings against the defendant with due diligence;
(b) that the previous suit or application related to the same matter in issue;
(c) that the plaintiff or the applicant prosecuted in good-faith in that court; and
(d) that the court was unable to entertain a suit or application on account of defect of jurisdiction or other like cause.

EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION [Section 18]
Section 18 of the Act deals with the effect of acknowledgement of liability in respect of property or right on the period of limitation. A fresh period of limitation shall be computed from the time when the acknowledgement was signed or made.

The following requirements should be present for a valid acknowledgement as per Section 18:
(a) There must be an admission or acknowledgement;
(b) Such acknowledgement must be in respect of any property or right;
(c) It must be made before the expiry of period of limitation;
(d) It must be in writing and signed by the party against whom such property or right is claimed.

EFFECT OF PAYMENT (OR PART PAYMENT) OF DEBT OR OF INTEREST ON THE PERIOD OF LIMITATIONSECTION 19
As per Section 19 of the Act where payment on account of a debt or of interest is made **before the expiration** of the prescribed limitation period by the person liable to pay the debt or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.



CLASSIFICATION OF PERIOD OF LIMITATION

Depending upon the duration, period of limitation for different purposes may be classified as follows:

1. **PERIOD OF 30 YEARS**

   The maximum period of limitation prescribed by the Limitation Act is 30 years and it is provided **only for three kinds of suits:-**

   (i) Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
   (ii) Suits by mortgagee for foreclosure;
   (iii) Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

2. **PERIOD OF 12 YEARS**

   A period of 12 years is prescribed as a limitation period for various kinds of suits relating to immovable property, trusts and endowments.

3. **PERIOD OF 3 YEARS**

   A period of three years has been prescribed for suits relating to accounts, contracts, and declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

4. **PERIOD VARYING BETWEEN 1 TO 3 YEARS**

   The period from 1 to 3 years has been prescribed for suits relating to torts and other miscellaneous matters and suits for which no period of limitation is provided in the schedule to the Act.

5. **PERIOD IN DAYS VARYING BETWEEN 90 TO 10 DAYS**

   The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons. For appeals against a sentence of death passed by a Court of Session or High Court, the limitation period is 30 days and for appeals against any sentence other than death the period of 60 days for appeal to High Court and 30 days for appeal to any other court.

LIMITATION AND WRITS UNDER CONSTITUTION

The Legislature may, without violating the fundamental rights, enact statutes prescribing limitation within which actions may be brought or varying or changing the existing rules of limitation either by shortening or extending time provided a reasonable time is allowed for enforcement of the existing right of action which would become barred under the amended
Statute.

The State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India under Article 32 of the Constitution. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13(2) of the Constitution. It is against the State action that Fundamental Rights are claimed. The Limitation Act does not in terms apply to a proceeding under Article 32 or Article 226 of the Constitution. But the Courts act on the analogy of the statute of limitation and refuse relief if the delay is more than the statutory
period of limitation . Where the remedy in a writ petition corresponds to a remedy in an ordinary suit and latter remedy is subject to bar of a statute of limitation, the Court in its writ jurisdiction adopts in the statute its own rule of procedure and in absence of special circumstances imposes the same limitation in the writ jurisdiction.

CHAPTER -5 CODE OF CIVIL PROCEDURE, 1908

SHORT TITLE, COMMENCEMENT AND EXTENT [SECTION 1]

Short Title: This act may be acted as the Code of Civil Procedure, 1908.
Commencement: It shall come into force on the first day of January, 1909.
Extent: It extends to the whole of India except in the states of Jammu and Kashmir.

SCHEME OF THE CODE

The Civil Procedure Code consists of two parts:

A. First part contains 158 Sections.
B. Second part contains 51 Orders which in turn contains several rules.

IMPORTANT DEFINITIONS [SECTION 2]

1) **Decree [Section 2(2)]**: As per sec2(2), Decree as defined under the code means
   → The formal expression of an adjudication which so far as regards the court expressing it;
   → Conclusively determines the rights of the parties
   → With regards to all or any of the matters in controversy
   → And may be either be preliminary or final

But Decree does not include –

a) Any adjudication from which an appeal lies as an appeal from an order, or
b) Any order of dismissal for default.

2) **Decree Holder [Section 2(3)]**"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made. [Section 2(3)] Thus, a person who is not a party to the suit but in whose favour an order capable of execution is passed is a decree-holder.

3) **Judgment [Section 2(9)]:** As per [sec2(9)] Judgment means a statement given by a Judge on grounds of a Decree or order. What is ordinarily called as an order is in fact a judgment. Also an order deciding a primary issue is a Judgment.

4) **Judgement Debtor [Section 2(10)]**"Judgement-debtor" means any person against whom a decree has been passed or an order capable of execution has been made. The definition does not include legal representative of a deceased judgement-debtor.

5) **Order [Section 2(14)]:** As per [sec2(14)] of the code, order means the formal expression of an decision of a civil court which is not a decree.

6) **Cause of Action:** "Cause of action" means every fact that it would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Under Order 2, Rule 2, of the Civil Procedure Code it means all the essential facts constituting the rights and its infringement.

PLACE OF SUING/FILING OF SUIT (TERRITORIAL LIMIT)

- **Every suit** shall be instituted in the **Court of the lowest grade** to try it. **(Section 15)**

- Suits relating to **immovable property** shall be instituted in the Court within the local limits of whose jurisdiction the **property is situated (Section 16)**

- Where **immovable property** is **situated** within the jurisdiction of **different Courts**, the suit may be instituted in **any Court** within the local limits of whose jurisdiction the property is **situated.(Section 17)**

- Where jurisdiction of Courts where immovable property is situated, are **uncertain**, then **any of the said Courts** may proceed to entertain the suit. **(Section 18)**

- Suit for compensation for **wrong done** to the person or to **movable property**, may be instituted in any of the Courts within whose jurisdiction the **defendant resides, or carries on business, or personally works for gain**or **where wrong was commited. (Section 19)**

- **Other suits** (where Sections 15, 16, 18 and 19 doesn't apply) may be instituted in any of the Courts within whose jurisdiction the **defendant resides,** or **cause of action has arisen**. **(Section 20)**

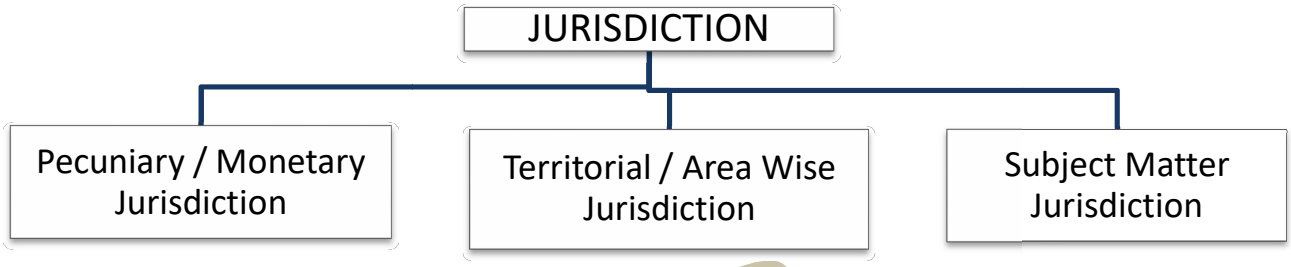
- In the case of a **body corporate or company** suit may be instituted in any of the Courts **within whose jurisdiction;-**
  (a) its principal office is situated, or
  (b) Cause of action has arisen, ***provided*** it has a subordinate office (branch office) at such place. **(Section 20)**Where there might be two or more competent courts which could entertain a suit and if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute. Such an agreement would be valid

STRUCTURE OF CIVIL COURTS/SUBORDINATION OF COURTS [Section 3]

Section 3 of the Civil Procedure code lays down that for the purpose of this code, the district court is subordinate to the High Court and Every Civil Court of a Grade inferior to that of a District and every court of small causes is subordinate to High Court.

Jurisdiction of Courts:
Jurisdiction means the authority by which a court has to decide matters that are brought before it for Jurisdiction. The limit of this authority is imposed by a charter or statute or commission. If no limit is imposed the authority is said to be unlimited.

Jurisdiction of Civil Courts in India:



☞ **Pecuniary Jurisdiction** of the Court divides the court on a vertical basis.At present the Pecuniary Jurisdiction of the Delhi courts is as follows:-

- ❖ Suits amounting to Rs 2 crores lie before Distt. Court.
- ❖ Suits over and above Rs 2 crores lie before High Court.

☞ **Territorial Jurisdiction** divides the court on a Horizontal basis.

- **District Courts:** For example in Delhi there are six District courts, viz. 1) Patiala House, 2) Tis Hazari and, 3) Karkardooma, 4) Rohini, 5) Dwarka and 6) SaketAll these courts have nearly same powers, being on same horizontal line, these courts are divided into territory wise i.e;
  - → South Delhi, West Delhi and New Delhi cases – Patiala House.
  - → North Delhi cases – Tis Hazari.
  - → East Delhi cases – Karkardooma.
  - → North West cases – Rohini.
  - → South West cases – Dwarka
  - → Pending cases of South District – Saket
- **High Courts:** Similarly High Courts of two different states, say Delhi and Punjab, may have similar powers in their respective states but are divided on the basis of area.
  - → Cases pertaining to Delhi – DELHI HIGH COURT
  - → Cases pertaining to Punjab – PUNJAB HIGH COURT

Jurisdiction of CIVIL COURT under CPC: Section 9 of CPC; deals with the Jurisdiction of Civil Court in India. It says that the court shall have Jurisdiction to try suits of a Civil Nature excepting suits of which their cognizance is either expressly or impliedly barred.

Conditions: A Civil Court has Jurisdiction to try a suit if two conditions are fulfilled:

i) The suit must be of civil nature.
ii) The cognizance of such a suit should not have been expressly or impliedly barred.

→ **The following suits are considered as the suits of Civil nature:**

1) Suits relating to rights to property.
2) Suits relating to rights of worship.
3) Suits relating to taking out o religious processions.
4) Suits relating to rights to share in offerings.
5) Suits for damages of civil wrongs.
6) Suits for specific performance of contracts or for damages for Breach of Contracts.
7) Suits for Specific Reliefs.
8) Suits for dissolution of Marriages.
9) Suits for rent.
10) Suits for rights of franchise.
11) Any other right as may be specified.

→ **Suits which are not the suits of Civil nature:**

1) Suits involving principally caste questions.
2) Suits involving purely religious rites as ceremonies..
3) Suits against expulsion from caste etc.

Stay of Suits (Doctrine of Res Sub Judice): [section 10]

As per the doctrine of Res-Sub Judice "No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a Previously Instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit is pending in the same or any other court in India having Jurisdiction to grant the Relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having Jurisdiction, or before the Supreme Court.

Objective:

i) to prevent courts of concurrent Jurisdiction.
ii) to avoid conflict of decision.

Essential Conditions for Stay of Suits:

1. There must be two suits instituted at different time.
2. The matter in issue in the later suit should be directly and substantially in issue in the earlier suit.
3. Such suit should be between the same parties.
4. Such earlier suit is still pending either in the same court or in any other competent court but not before a foreign court.

A suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same color combination etc. as that of plaintiff company. A subsequent suit was instituted in different Court by the defendant company against the plaintiff company with same allegation. The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different Courts might result in conflicting decisions as issue involved in two suits was totally identical**(M/s. Wings Pharmaceuticals (P) Ltd. and another v. M/s. Swan Pharmaceuticals and others, AIR 1999 Pat. 96).**

RES JUDICATA: [section 11]

Section 11 of the CPC, 1908 deals with the doctrine of Res-Judicata that is, **bar or restraint on repetition of litigation of the same issues.** It is a presumed principle accepted and provided in law that there must be a limit or end to litigation on the same issues.

For the applicability of the principle of Res Judicata embodied section 11, the following requirements are necessary

1. The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit.
2. The former suit has been decided.
3. The said issue has been heard and finally decided.
4. Such former suit and the latter are between the same parties or litigation under the same title or person claiming under parties above.

✍ In short, this principle applies where an issue which has been raised in a subsequent suit was directly and substantially in issue in a former suit between the same parties and was heard and decided finally. Findings incidentally recorded do not operate as res judicata **(Madhvi Amma Bhawani Amma v. Kunjikutty P.M. Pillai, AIR 2000 SC 2301).**

RES SUB JUDICE	RES JUDICATA
The rule of res sub judice relates to a matter which is pending judicial enquiry	res Judicata relates to a matter adjudicated upon or a matter on which judgement has been pronounced.
Res sub judice bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit	rule of res judicata bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title

SET-OFF, EQUITABLE AND COUNTER CLAIM

Set-Off or Legal Set-Off: The doctrine of set-off allows the defendant to put his own claim against the plaintiff before the court under certain circumstances. Technically, a set-off can be defined as a discharge of reciprocal obligations to the extent of the smaller obligations.

Example: 'A' files a suit against 'B' claiming Rs.5,000/-. 'B' may take a defence that 'A' owes Rs.3,000/- to 'B' as well. Thus 'B' is basically asking to set off Rs.3,000/- of A's claim and pay only Rs.2,000/-

Essential Conditions for Set-Off:

1. The suit must be of Recovery of money. Example: 'A' sues 'B' for Rs.20,000/-. 'B' cannot set off the claim, for damages for breach of contract for specific performance.

2. The sum of money must be ascertained.
3. The sum claimed must be legally recoverable. Example: Winnings in a wager cannot be claimed in a set-off.
4. The sum claimed must be recoverable by all the defendants against the plaintiff if there is more than one.
5. The sum claimed must be recoverable from all the plaintiffs by the defendant if there is more than one plaintiff.
6. In the defendant's claim for set-off, both the party must fill in the same character as they fill in the plaintiff's suit.

Equitable Set-Off: The provisions of rule 6 given above are for Legal set-off. However, these provisions are not exhaustive. This means that a set-off is still possible in certain situations even when some of the above conditions are not satisfied.
For example: In a transaction whereby goods are exchange for services as well as payment, the defendant may be allowed to claim a set-off for an uncertain amount for damaged goods. In such a case driving the plaintiff to file another suit would be unfair. A set-off in such situation is called an Equitable Set-off.
However, there is still one condition that must be satisfied for Equitable set-off – "The set claim must originate from the same transaction."

Distinction between "Legal Set-Off" and "Equitable Set-Off":

"Legal Set-Off"

- Sum must be ascertained.
- Claim need not originate from the same transaction.
- Legal Set-Off can be claimed as a right by the defendant and the court is bound to adjudicate upon the claim.
- Court fees must be paid on Set-Off amount.
- The amount must not be time barred.

Equitable set-Off"

- Sum need not be ascertained.
- Claim must originate from the same transaction.
- Equitable Set-Off cannot be claimed as a right but by court's discretion.
- No court fee is required.

Counter Claim: A defendant in a suit may, in addition to his right of pleading and set-off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not.
Provided that such counter claim shall not exceed the Pecuniary Jurisdiction of the court [Rule 6A].
Such counter claim shall have the same effect across suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.

Rule 6B: Counter Claim to be stated:

Where any defendant seeks to rely upon any ground as supporting a right of counter claim, shall in his written statement state specifically that he does so by way of counter claim

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

Temporary Injunctions

Injunction is a Judicial proceeding where by a party is ordered by the court to:

i. Do an act; or
ii. Refrain from doing a particular act or thing.

According to section 39 of the CPC 1908, Temporary Injunction means an order passed by the court to restrain someone from doing something that would result in Alienation of property, or its destruction or when the plaintiff is in danger of being dispossessed at the together a Temporary or Interlocutory Injunction continues until the suit is completely disposed of or until further orders of the court re granted. It can be granted at any stage of suit and regulated by CPC.

Interlocutory Orders

Interlocutory Orders are passed by a court during the pendency of a suit, they do not determine the substantive right of the parties in respect of subject matters, nor they terminate the suit, but they relate to protection of the subject matter of the suit.

In some cases they are also passed in the case of execution of proceedings after the Judgment has also obtained.

REFERENCE, REVIEW AND REVISION

REFERENCE

It is an assistance and opinion which taken by the lower court from the Higher Court in regards of any matter which involves any substantive question relating to law. The power of reference is vested to the court. Reference in general sense is always made to High Court. Reference is made when the decision of the suits is pending and the inferior court needs assistance of the High Court. [section113]

REVIEW

Section 114 of the CPC provides for the review of the case i.e.; the reconsideration of the decision given by the court. The application for review can be filed where no appeal could be preferred against order of the court and also in cases where the person concerned does not want to prefer such an appeal, though such an appeal is maintainable. It may be noted that application of review has to be filled before the same court which has given the decision.

REVISION

Section 115 deals with revision. Petition of revision can be made before the High Court when the Subordinate Court:

→ Exercise a jurisdiction not vested in it by law;
→ Fails to exercise jurisdiction vested in it by law; or
→ To acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court may make such order as it thinks fit.

APPEALS

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or by rules having the force of statute.

KINDS OF APPEALS

1. **APPEALS FROM ORIGINAL DECREES**
   Appeals from original decrees may be preferred in the Court superior to the Court passing the decree. Where the decree has been passed with the consent of parties, no appeal lies. The appeal from original decree lies on a question of law as well as on question of fact.

2. **SECOND APPEAL**
   As per Section 100 of the Civil Procedure Code, an appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a substantial question of law.

   As a general rule the second appeal is on questions of law alone (Section 100). **The Privy Council in Durga Choudharain v. Jawaher Singh, (1891) 18 Cal. 23 P.C.,** observed that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

3. **APPEAL FROM ORDERS**
   Appeal from orders would lie only on grounds of defect or irregularity in law. Otherwise in general, Appeal against orders are not allowed.

4. **APPEALS TO THE SUPREME COURT**
   Appeals to the Supreme Court would lie from any judgement, decree or final orders passed by a High Court in exercise of original jurisdiction.

IMPORTANT STAGES IN PROCEEDINGS OF A SUIT

- When the suit has been duly instituted, the Court issues an order **(known as summons)** to the defendant to appear and answer the claim and to file the written statement of his defence if any within a period of 30 days from the date of service of summons. No summons are to be issued when the defendant has appeared at the presentation of plaint and admitted the plaintiffs claim.

- If the defendant fails to file the written statement within the prescribed period of 30 days, he is allowed to file the same on such other days as specified by the Court for reasons to be recorded in writing but not later than ninety days from the date of service of summons

- The defendant may appear in person or by a duly instructed pleader or by a pleader accompanied by some person to be able to answer all material questions relating to the suit.

- Every summons must be signed by the judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint.

- If the requirement of personal appearance of the defendant or plaintiff is felt by the Court, then it has to make an order for such appearance.

- Where no date is fixed for the appearance of the defendant, the Court has no power to dismiss the suit in default. The summons must also state that the defendant is to produce all documents in his possession or power upon which he intends to rely in support of his case.

- The ordinary mode of service of summons i.e. direct service is by delivery or tendering a copy of it signed by the judge or competent officer of the Court to the person summoned either personally or to his agent or any adult male or female member of his family, against signature obtained in acknowledgement of the services.

DELIVERY OF SUMMONS BY COURT

Rule 9 substituted by the Code of Civil Procedure (Amendment) Act, 2002 provides that –

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer, who may be an officer of a Court other than that in which the suit is instituted, to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court.

(3) When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant.

(4) Where defendant resides in another province, a summons may be sent for service in another state to such court and in such manner as may be prescribed by rules in force in that State.

The above provisions shall apply to summons to witnesses.

- In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the office in which he is employed.
- In the case of a suit being instituted against a corporation, the summons may be served (a) on the secretary or on any director, or other principal officer ofthe corporation or (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business.
- Where persons are to be sued as partners in the name of their firm, the summons shall be served either (a) upon one or more of the partners or (b) at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business. Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

DEFENCE

The defendant has to file a written statement of his defence within a period of thirty days from the date of service of summons. If he fails to file the written statement within the stipulated time period he is allowed to file the same on such other day as may be specified by the Court for reasons to be recorded in writing. The time period for filing the written statement should not exceed 90 days.

Appearance of Parties and Consequence of Non-Appearance

If both the parties do not appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed. If the defendant is absent in spite of service of summons and the plaintiff appears, the Court may proceed*ex-parte* (from the side of one party only).

In case the defendant is not served with summons, the Court shall order a second summon to be issued. If the summons is served on the defendant without sufficient time to appear, the Court may postpone the hearing to a further date. If the summon was not served on the defendant in sufficient time due to the plaintiff's default, the Court shall order the plaintiff to pay costs of adjournment.

If the plaintiff is absent and the defendant is present at the hearing of the suit, the Court shall make an order for the dismissal of the suit, unless the defendant admits the claim of the plaintiff or a part thereof in which case the Court shall pass a decree in favour of the plaintiff in accordance with the admission of the defendant and shall dismiss the suit to the extent of the remainder.

A defendant has four remedies available if an *ex-parte* decree is passed against him :

i) He may file an appeal against the *ex-parte* decree under Section 96 of the C.P.C.
ii) He may file an application for review of the judgement.
iii) He may apply for setting aside the *ex-parte* decree.

iv) A suit can also be filed to set aside an *ex-parte* decree obtained by fraud but no suit shall lie for non-service of summons.

Discovery and Interrogatories and Production of Documents

"Discovery" means finding out material facts and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points at issue or to avoid proving admitted facts. Discovery may be of two kinds —
(a) by interrogatories (b) by documents.

The objects of discovery are to:
a) ascertain the nature of the case of the adversary or material facts for the adversary's case.
b) obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.
c) narrow the points at issue.
d) avoid expense and effort in proving admitted facts.

A party may refuse to produce the document for inspection on the following grounds:
i) where it discloses a party's evidence
ii) when it enjoys a legal professional privilege
iii) when it is injurious to public interest
iv) denial of possession of document.

If a party denies by an affidavit the possession of any document, the party claiming discovery cannot cross examine upon it, nor adduce evidence to contradict it, because in all questions of discovery the oath of the party making the discovery is conclusive (*Kedarnath*v. *Vishwanath,* (1924) 46 All. 417).

Admission by Parties

"Admission" means that one party accepts the case of the other party in whole or in part to be true. Admission may be either in pleadings or by answers to interrogatories, by agreement of the parties or admission by notice.

Issues

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law.
Issues are to be framed on material proportions of fact or law which are to be gathered from the following—
i) Allegations made in the plaint and written statement,
ii) Allegations made by the parties or persons present on their behalf or their pleaders on oath,
iii) Allegations in answer to interrogatories,
iv) Contents of documents produced by the parties,
v) Statements made by parties or their representatives when examined,
vi) From examination of a witness or any documents ordered to be produced.

Hearing of the Suit – The plaintiff has the right to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on

some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him and in such a case the defendant has a right to begin.

SUMMARY PROCEDURE(Order 37)

Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. (Order 37)

The rules for summary procedure are applicable to the following Courts: (1) High Courts, City Civil Courts and Small Courts;
(2) Other Courts: In such Courts the High Courts may restrict the operation of order 37 by issuing a notification in the Official Gazette.

The debt or liquidated demand in money payable by the defendant should arise on a written contract or on an enactment or on a guarantee.

Institution of summary suits

Such suit may be instituted by presenting a plaint containing the following essentials:

1) a specific averment to the effect that the suit is filed under this order

(2) that no relief which does not fall within the ambit of this rule has been claimed

(3) the inscription immediately below the number of the suit in the title of the suit that the suit is being established under Order 37 of the CPC.

The **defendant is not entitled to defend** the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such term as the Court or the Judge may think fit.

However, such leave shall not be granted where:-

(a) the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a **substantial defence** or that the **defences** are **frivolous** and
(b) the part of the **amount** claimed by the plaintiff and admitted by the defendant to be due from him is **not deposited** by him in the Court.

A procedure by way of summary suit applies to suits upon **bill of exchange, hundies or promissory notes,** or where the plaintiff desires to proceed under the provisions of Order 37.

CHAPTER -6 INDIAN PENAL CODE 1860

INTRODUCTION
The Indian Penal Code (IPC) is a colonial legislation which was retained as the main penal law of the country even after India became independent in 1947. The Indian Penal Code was passed in the year 1860 but it came into force on 1st January 1862, and it applies to the whole of India except the state of Jammu and Kashmir.

The Indian Penal Code, 1860 is a substantive law of crimes. It defines acts which constitute an offence and lays down punishment for the same. It lays down certain principles of criminal law. The procedural law through which the IPC is implemented is the Criminal Procedure Code, 1973. IPC consists of 23 chaptersand more than 511 sections.

JURISDICTION OF COURTS
Under the Indian Penal Code, 1860 criminal courts in India exercise jurisdiction either because a crime is committed by any person (national, or foreigner) within the Indian territory or because a crime though committed outside India, the person committing the crime is liable to be tried for it under any Indian law. The former is known as intra-territorial jurisdiction and the latter as known as extra-territorial jurisdiction.

Intra-territorial jurisdiction: Where a crime under any provision of IPC is committed within the territory of India the IPC applies and the courts can try and punish irrespective of the fact that the person who had committed the crime is an Indian national or foreigner. This is called 'intra-territorial jurisdiction' because the submission to the jurisdiction of the court is by virtue of the crime being committed within the Indian territory. Section 2 ofthe Code deals with intra-territorial jurisdiction of the courts. The section declares the jurisdictional scope ofoperation of the IPC to offences committed within India.

Exemptions
Article 361(2) of the constitution protects criminal proceedings against the President or Governor of a state in any court, during the time they hold office.

In accordance with well recognised principles of International Law, foreign sovereigns are exempt from criminal proceedings

This immunity is also enjoyed by the ambassadors and diplomats of foreign countries who have official status in India.

Extra –territorial jurisdiction:-Section 3 and section 4 of the IPC provide for extra-territorial jurisdiction. Where a crime is committed outside the territory of India by an Indian national, such a person may be tried and punished by the India courts. According to section 3 if anyone commits any offence beyond India which is punishable in our country under any Indian law, he is liable to be convicted and punished in the same manner as if the crime was committed in India. Section 4 expands on section 3, while at the same time clarifying that the provisions of the Code shall apply to first, in case of Indians, for any offence committed outside and beyond India; and second, in case of any person in any place without and beyond India for targeting computer resource located in India. Section 4 also talks about the applicability of IPC to any offence committed by any person on any ship or aircraft registered in India wherever it may be.

INGREDIENTS OF CRIME
The basic function of criminal law is to punish the offender and to deter the incidence of crime in the society.

A criminal act must contain the following elements:

1. **Human Being**– The first requirement for commission of crime is that the act must be committed by a human being. The human being must be under legal obligation to act in particular manner and be physically and mentally fit for conviction in case he has not acted in accordance with the legal obligation. Only a human being under legal obligation and capable of being punished can be the proper subject of criminal law.

2. **Mens rea**: The basic principle of criminal liability is embodied in the legal maxim 'actus non Facitreum, nisi mens sit rea'. It means 'the act alone does not amount to guilt; the act must be accompanied by a guilty mind'. The intention and the act must both concur to constitute the crime.
Mens rea is defined as the mental element necessary to constitute criminal liability. It is the attitude of mind which accompanies and directs the conduct which results in the 'actusreus'.

Forms of Mens Rea.
(i) Intention:-Intention is defined as 'the purpose or design with which an act is done'. Intention indicates the position of mind, condition of someone at particular time of commission of offence and also will of the accused to see effects of his unlawful conduct. Criminal intention does not mean only the specific intention but it includes the generic intention as well. For example: A poisons the food which B was supposed to eat with the intention of killing B. C eats that food instead of B and is killed. A is liable for killing C although A never intended it.

(ii) Negligence:-Negligence is the second form of mens rea. Negligence is not taking care, where thereis a duty to take care. Negligence or carelessness indicates a state of mind where there is absenceof a desire to cause a particular consequence.

(iii) Recklessness:-Recklessness occurs when the actor does not desire the consequence, but foresees the possibility and consciously takes the risk. It is a total disregard for the consequences of one's own actions. Recklessness is a form of mens rea.

There are many exceptional cases where mens rea is not required in criminal law. Some of them are as follows:
a. Where a statute imposes liability, the presence of absence of a guilty mind is irrelevant. The classical view of that 'no mens rea, no crime' has long been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishment even where the offences have been defined to exclude mens rea. Many laws passed in the interest of public safety and social welfare imposes absolute liability. This is so in matters concerning public health, food, drugs, etc. There is absolute liability (mens rea is not essential) in the licensing of shops, hotels, restaurants and chemists establishments. The same is true of cases under the Motor Vehicles Act and the Arms Act, etc
b. Where it is difficult to prove mens rea and penalties are petty fines. In such petty cases, speedy disposal of cases is necessary and the proving of mens rea is not easy. An accused may be fined even without any proof of mens rea.
c. In the interest of public safety, strict liability is imposed and whether a person causes public nuisance with a guilty mind or without guilty mind, he is punished.
d. If a person violates a law even without the knowledge of the existence of the law, it can still be said that he has committed an act which is prohibited by law. In such cases, the fact that he was not aware of the law and hence did not intend to violate it is no defense and he would be liable as if he was aware of the law. This follows from the maxim 'ignorance of the law is no excuse'.

3. Actus Reus (act or omission): The third essential element of crime is Actus Reus. A human being and an evil intent are not enough to constitute a crime for one cannot know the intentions of a man.

Actus Reus means unlawful commission must be done in carrying out a plan with the guilty intention. Actus Reus is defined as a result of voluntary human conduct which law prohibits. It is the doing of some act by the person to be held liable. An 'act' is a willed movement of body.
A man may be held fully liable even when he has taken no part in the actual commission of the crime. For example, if a number of people conspire to murder a person and only one of them actually shoots the person, every conspirator would be held liable for it. A person will also be held fully responsible if he has made use of an innocent agent to commit a crime.
Corporate Body and Mens Rea
With the proliferation in juristic persons and a growth in their activities which increasingly touch upon the daily lives of ordinary people, criminal law has evolved to bring such persons within its ambit. For example, according to section 11 of the IPC, the word 'person' includes any Company or Association, or body of persons, whether incorporated or not. Thus companies are covered under the provisions of the IPC.

In State of Maharastrav. M/s Syndicate Transport, AIR 1964 Bom 195, it was held that the question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individual must depend on the nature of offence disclosed by the allegations in the complaint or in the charge sheet, the relative position of the officer or agent vis-à-vis the corporate body and other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act.

STAGES OF CRIME

The commission of a crime consists of some significant stages. If a person commits a crime voluntarily, itinvolves four important stages, viz.

1. Criminal Intention
Criminal intention is the first stage in the commission of offence. Intention is the conscious exercise of mental faculties of a person to do an act for the purpose of accomplishing or satisfying a purpose.
Law does not as a rule punish individuals for their evil thoughts or criminal intentions. The criminal court does not punish a man for mere guilty intention because it is very difficult for the prosecution to prove the guilty intention of a man.Intention means doing any act with one's will, desire, voluntariness, malafides and for some purpose.
For example, if a man drives in a rash and recklessmanner resulting in an accident causing death of a person, the reckless driver cannot pleadinnocence by stating that he never intended to cause the death of the person. It may be true in thestrict sense of term. But a reckless driver should know that reckless driving is likely to result in harmand can even cause death of the persons on the road, So, by virtue of definition of the word voluntarily' in the Code, a reckless driver who causes death of a person can be presumed ordeemed to have intended to cause the death of the person.

2. Preparation
Preparation means to arrange necessary measures for commission of intended criminal act. Preparation itself is not punishable as it is difficult to prove that necessary preparations were made for commission of the offence. But in certain exceptional cases mere preparation is also punishable.
Under the IPC, mere preparation to commit offences is punishable as they are considered to be grave offences. Some of them are as follows:
(i) Preparation to wage war against the Government (section 122).
(ii) Preparation for counterfeiting of coins or Government Stamps (sections 233 to 235, 255 and 257).

3. Attempt
Attempt, which is the third stage in the commission of a crime, is punishable. Attempt has been called as a preliminary crime. IPC does not give any definition of 'attempt' butsimply provides

for punishment for attempting to commit an offence. Attempt means the direct movement towards commission of a crime after necessary preparations have been made. When aperson wants to commit a crime, he firstly forms an intention, then makes some preparation andfinally does something for achieving the object; if he succeeds in his object he is guilty of completedoffence otherwise only for making an attempt. It should be noted that whether an act amounts to an attempt to commit a particular offence is a question of fact depending on the nature of crime and steps necessary to take in order to commit it. The act constituting attempt must be proximate to the intended result.

4. Commission of Crime or Accomplishment:- The last stage in the commission of crime is its accomplishment. If the accused succeeds in his attempt, the result is the commission of crime and he will be guilty of the offence. If his attempt is unsuccessful, he will be guilty for an attempt only. If the offence is complete, the offender will be tried and punished under the specific provisions of the IPC.

Presumption of Innocence and Burden of Proof
There is a presumption of innocence in favour of any person accused of committing any crime. It means thatin the eyes of the law, the accused person is innocent till it is proven otherwise by the prosecution. So strongis this presumption that in order to rebut it, the prosecution must prove it 'beyond reasonable doubts' that thecrime was committed by the accused.

PUNISHEMENTS UBDER INDIAN PENAL CODE

Punishments:-The punishments to which offenders are liable under the provisions of IPC are –

1. Death:-A death sentence is the harshest of punishments provided in the IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. The Supreme Court has ruled that death sentence ought to be imposed only in the 'rarest of rate cases'.
2. Life Imprisonment:-Imprisonment for life meant rigorous imprisonment, that is, till the last breath of the convict.
3. Imprisonment:-Imprisonment which is of two descriptions namely –
(i) Rigorous Imprisonment, that is hard labour;
(ii) Simple Imprisonment

4. Forfeiture of property:-Forfeiture is the divestiture of specific property without compensation in consequence of some default or act forbidden by law. The Courts may order for forfeiture of property of the accused in certain occasions. The courts are empowered to forfeit property of the guilty under section 126 and section 127 of the IPC.

5. Fine:-Fine is forfeiture of money by way of penalty. It should be imposed individually and not collectively. When court sentences an accused for a punishment, which includes a fine amount, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence.

Criminal conspiracy is covered under section 120A and 120-B of the IPC.

Definition of criminal conspiracy (Section 120A)
When two or more persons agree to do, or cause to be done,**—**
(1) an illegal act, or
(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement inpursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merelyincidental to that object.
The ingredients of the offence of criminal conspiracy as laid down by the Supreme Court are:
1. an agreement between two or more persons;
2. the agreement must relate to doing or causing to be done either
(i) an illegal act;
(ii) an act which is not illegal in itself but is done by illegal means.

In NCT of Delhi v. Navjot Sandhu, (Parliament attack case) the accused hadnever contacted the deceased terrorist on place but had helped one of the conspirators to flee to a saferplace after incident was not held guilty as conspirator.

Punishment of criminal conspiracy(Section 120B)
(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment forlife or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is madein this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abettedsuch offence.
(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceedingsix months, or with fine or with both.
The punishment for conspiracy is the same as if the conspirator had abetted the offence. The punishment forcriminal conspiracy is more severe if the agreement is one to commit a serious offence and less severeotherwise.

Criminal Misappropriation of Property
Section 403 and 404 of the Indian Penal Code, 1860 deal with Criminal Misappropriation of Property.

Dishonest misappropriation of property(Section 403)
Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
Dishonestly is an essential ingredient of the offence and the Code provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that'dishonestly'. Misappropriation means the intentional, illegal use of the property or funds of another person for one's own use or other unauthorized purpose.
There are two things necessary before an offence under section 403 can be established. Firstly, that the property must be misappropriated or converted to the use of the accused, and, secondly, that he must misappropriate or convert it dishonestly.

Illustrations
(a) A takes property belonging to Z out of Z's possession, in good faith believing at the time when he takes it,that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being, joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

In Mohammad Ali v. State, 2006 CrLJ 1368 (MP), fifteen bundles of electric wire were seized from the appellant but none including electricity department claimed that wires were stolen property. Evidence on records showed that impugned electric wire was purchased by the applicant from scrap seller. Merely applicant not having any receipt for purchase of impugned wire cannot be said to be guilty of offence punishable under Section 403 of the Code. Order of framing charge was, therefore, quashed by the Supreme Court and the accused was not held guilty under section 403 of the Indian Penal Code, 1860.

In U. Dhar v. State of Jharkhand, (2003) 2 SCC 219, there were two contracts- one between the principal and contractor and another between contractor and sub-contractor. On completion of work sub-contract or demanded money for completion of work and on non-payment filed a criminal complaint alleging that contractor having received the payment from principal had misappropriated the money. The magistrate took cognizance of the case and High Court refused to quash the order of magistrate. On appeal to the Supreme Court, it was held that matter was of civil nature and criminal complaint was not maintainable and was liable to be quashed. The Supreme Court also observed that money paid by the principal to the contractor was not money belonging to the complainant, sub-contractor, hence there was no question of misappropriation.

Dishonest misappropriation of property possessed by deceased person at the time of hisdeath (Section 404)
Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's death, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's death was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration
Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Criminal breach of trust (Section 405)
Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property inviolation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers anyother person so to do, commits “criminal breach of trust”.

The essential ingredients of the offence of criminal breach of trust are as under;
1. The accused must be entrusted with the property or with dominion over it,
2. The person so entrusted must use that property, or;
3. The accused must dishonestly use or dispose of that property or wilfully suffer any other person to
do so in violation,
(i) of any direction of law prescribing the mode in which such trust is to be discharged, or;
(ii) of any legal contract made touching the discharge of such trust.

Explanation 1.—A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not who deducts the employee’s contribution from the wages payable to the employee for the credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in

violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948, shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of said contribution in violation of a direction of law as aforesaid.

Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.
(b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

The Supreme Court of India in has held that the first ingredient of criminal breach of trust is entrustment and where it is missing, the same would not constitute a criminal breach of trust. Breach of trust may be held to be a civil wrong but when mens-rea is involved it gives rise to criminal liability also. The expression 'direction of law' in the context of Section 405 would include not only legislations pure and simple but also directions, instruments and circulars issued by authority entitled therefore.

In a landmark judgment of Pratibha Rani v. Suraj Kumar, AIR 1985 SC 628, the appellant alleged that her stridhan property was entrusted to her in–laws which they dishonestly misappropriated for their own use. She made out a clear, specific and unambiguous case against in–laws. The accused were held guilty of this offence and she was held entitled to prove her case and no court wouldbe justified in quashing her complaint.

Punishment for criminal breach of trust.(Section 406)
Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Criminal breach of trust by carrier (Section 407)
Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by clerk or servant (Section 408)
Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by public servant, or by banker, merchant or agent (Section 409)
Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity ofa public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished **with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable tofine**.

The acts of criminal breach of trust done by strangers is treated less harshly than acts of criminal breach of trust on part of the persons who enjoy special trust and also in a position to be privy to a lot of information or authority or on account of the status enjoyed by them, say as in the case of a public servant. In respect of public servants a much more stringent punishment of life imprisonment or imprisonment up to 10 years with fine is provided. This is because of special status and the trust which a public servant enjoys in the eyes of the public as a representative of the government or government owned enterprises.
The persons having a fiduciary relationship between them have a greater responsibility for honesty as they have more control over the property entrusted to them due to their special relationship. Under this section the punishment is severe and the persons of fiduciary relationship have been classified as public servants, bankers, factors, brokers, attorneys and agents.

In Bagga Singh v. State of Punjab, the appellant was a taxation clerk in the Municipal Committee, Sangrur.He had collected arrears of tax from tax-payers but the sum was not deposited in the funds of the committee after collection but was deposited after about 5 months. He pleaded that money was deposited with the cashier Madan Lal, a co-accused, who had defaulted on the same but the cashier proved that he had not received any such sum and was acquitted by lower court. The mere fact that the co-accused cashier was acquitted was not sufficient to acquit accused in the absence of any proof that he had discharged the trust expected of him. As such the accused was liable under section 409 of Indian Penal Code, 1860.

In Bachchu Singh v. State of Haryana, AIR 1999 SC 2285, the appellant was working as 'Gram Sachiv' foreight gram panchayats. He collected a sum of Rs. 648 from thirty villagers towards the house tax and executed receipts for the same. As he was a public servant, and in that capacity he had collected money as house tax but did not remit the same, he was charged under Section 409 of Indian Penal Code, 1860. It was held that the appellant dishonestly misappropriated or converted the said amount for his own use and his conviction under section 409 of Indian Penal Code, 1860 was upheld by the Supreme Court.

Cheating
Sections 415 to 420 of Indian Penal Code, 1860 deal with the offence of cheating. In most of the offences relating to property the accused merely get possession of thing in question, but in case of cheating he obtains possession as well as the property in it.

Section 415 provides that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Cheating – Main Ingredients
The main ingredients of cheating are as under:
1. Deception of any person.
2. a. Fraudulently or dishonestly inducing that person
(i) to deliver any property to any person; or
(ii) to consent that any person shall retain any property; or
(b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if
he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.
(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.
(c) A, by exhibiting to Z a false sample of an article intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.
The Supreme Court in M.N. Ojha and others v. Alok Kumar Srivastav and anr, (2009) 9 SCC 682, has held that where the intention on the part of the accused is to retain wrongfully the excise duty which the State is empowered under law to recover from another person who has removed non-duty paid tobacco from one bonded warehouse to another, they are held guilty of cheating.

Cheating by personation
As per section 416 a person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is aperson other than he or such other person really is.

Illustrations
(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.
(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Punishment for cheating
Section 417 provides that whoever cheats shall be punished with imprisonment of either description for aterm which may extend to one year, or with fine, or with both.

Punishment for cheating by personation
Section 419 states that whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating and dishonestly inducing delivery of property
As per section 420 whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
Simple cheating is punishable under section 417 of the IPC. Section 420 comes into operation when there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving.
In Kuriachan Chacko v. State of Kerala, the money circulation scheme was allegedly mathematical impossibility and promoters knew fully well that scheme was unworkable and false representations were being made to induce persons to part with their money. The Supreme Court held that it could be assumed and presumed that the accused had committed offence of cheating under section 420 ofthe IPC.

In Mohd. Ibrahim and others v. State of Bihar and another, the accused was alleged to have executed false sale deeds and a complaint was filed by real owner of property. The accused had a bona fide belief that the property belonged to him and purchaser also believed that suit property belongs to the accused. It was held that accused was not guilty of cheating as ingredients of cheating were not present.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors (Section 421)

Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes tobe transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

An offence under this section has following essential ingredients:

(i) That the accused removed, concealed or delivered the property or that he transferred, it caused it tobe transferred to someone;

(ii) That such a transfer was without adequate consideration;

(iii) That the accused thereby intended to prevent or knew that he was thereby likely to prevent the distribution of that property according to law among his creditors or creditors of another person;

(iv) That he acted dishonestly and fraudulently.

Dishonestly or fraudulently preventing debt being available for creditors (Section 422)

Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This section, like the preceding section 421, is intended to prevent the defrauding of creditors by masking property.

Dishonest or fraudulent execution of deed of transfer containing false statement of consideration (Section 423)

Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge on property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This section deals with fraudulent and fictitious conveyances and transfers.

The essential ingredient of an offence under section 423 is that the sale deed or a deed subjecting an immovable property to a charge must contain a false statement relating to the consideration or relating to the person for whose use or benefit it isintended to operate.

Though dishonest execution of a benami deed is covered under this section, the section stands superseded by The Prohibition of Benami Properties Transactions Act, 1988 because the latter covers a wider filed, encompassing the field covered by this section.

Forgery

Forgery is defined under section 463 of the Indian Penal Code, 1860 and the punishment for it is prescribedunder section 465.

Forgery (Section 463)

Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Punishment for forgery (Section 465)

Whoever commits forgery shall be punished with imprisonment of either description for a term which mayextend to two years, or with fine, or with both.

The Supreme Court in Ramchandranv. State, AIR 2010 SC 1922, has held that to constitute an offence of forgery document must be made with dishonest or fraudulent intention. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

In Balbir Kaur v. State of Punjab,the allegation against the accused wasthat she furnished a certificate to get employment as ETT teacher which was found to be bogus and forgedin as much as school was not recognized for period given in certificate. However the certificate did notanywhere say that school was recognized. It was held that merely indicating teaching experience of theaccused, per-se, cannot be said to indicate wrong facts. So the direction which was issued for prosecution is liable to be quashed.

DEFAMATION

Section 499 provides that whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases herein after excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Illustrations

(a) A says— “Z is an honest man; he never stole B's watch”; intending to cause it to be believed that Z didsteal B's watch. This is defamation, unless it fall within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch.This is defamation, unless it fall within one of the exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Kinds of Defamation

The wrong of defamation is of two kinds- libel and slander.
In libel, the defamatory statement is made in some permanent and visible form, such as writing, printing or pictures.

In slander it is made in spoken words or in some other transitory form, whether visible or audible, such asgestures or inarticulate but significant sounds.

Exceptions

Truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that theimputation should be made or published.

Public conduct of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Publication of reports of proceedings of courts.—It is not defamation to publish substantially true report of the proceedings of a Court of justice, or of the result of any such proceedings. Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil orcriminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.
Imputation made in good faith by person for protection of his or other's interests.—
It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Punishment for defamation
According to section 500 whoever defames another shall be punished with simple imprisonment for a termwhich may extend to two years, or with fine, or with both.

GENERAL EXCEPTIONS
The Indian Penal Code, 1860 also provides for general exceptions for a person accused of committing anyoffence under the Code to plead in his defense.
1. **Act of a child under seven years of age** :-If any child who is below seven years of age commits any offence, he is not guilty because it is the presumption of law that that a child below 7 years of age is incapable to having a criminal intention (mens rea) necessary to commit a crime.

2 **Act of a child above seven and under twelve of immature understanding** :- If any minor child is in between seven and twelve years of age and not attained the maturity of what is wrong and contrary to law at the time of commission of offence in not liable to be convicted and punished.

3. **Act of a person of unsound mind** :- Nothing done by any person of unsound mind is an offence if at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

4. **Act of a person incapable of judgment by reason of intoxication caused against his will**: Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

5. **Act not intended and not known to be likely to cause death or grievous hurt, done by consent**: When anyone commits any act without any intention to cause death or grievous hurt and which is not within the knowledge of that person to likely to cause death or grievous hurt to any person who is more than eighteen years of age and has consented to take the risk of that harm, the person doing the act has committed no offence.

This section is based on the principle of 'volenti-non-fit injuria' which means he who consents suffers no injury. The policy behind this section is that everyone is the best judge of his own interestand no one consents to that which he considers injurious to his own interest.

6. **Act not intended to cause death, done by consent in good faith for person's benefit** :- Nothing, which is not intented to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.
Section 88 extends the operation of consent to all acts except that of causing death intentionally provided that the act is done in good faith for the benefit of the consenting party.
For example: - A, a surgeon, knowing that a particular operation is likely to cause the death of Z who suffers under the painful complaint but not intending to cause Z's death and intending in good faith Z's benefit, performs that operation on Z with Z's consent. A has committed no offence.

7. Communication made in good faith:- No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person. For example: A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

8. **Act causing slight harm: -** Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

CHAPTER -7 CODE OF CRIMINAL PROCEDURE, 1973

INTRODUCTION

The Code of Criminal Procedure, 1973 is an Act to consolidate and amend the law relating to Criminal Procedure. It is an act for supplementing the IPC 1860 by rule of procedure with a view to preventing offence and bringing offender to justice.
The Code of Criminal Procedure, 1898 (Cr. P.C.) was repealed by the Code of 1973 enacted by Parliament on 25th January, 1974 and made effective from 1.4.1974 so as to consolidate and amend the law relating to Criminal Procedure.

DEFINITIONS

A. Offence [Section 2(n)]

It means any act or omission made punishable by any law for the time being in force and including any act in respect of which a complaint may be made under section 20 of the cattle trespass act, 1871.
In simple, offence means any act legislature classes as punishable however,
mens– rea i.e. a **bad intention or guilt** is an essential in very offence.

B. Bailable and Non-Bailable Offence [Section 2(a)]

Bailable offence means any offence – which is show as bailable in the first schedule of the code or which is made bailable by any other law for the time being in force

- Non-bailable offence means any other offence;

Difference between Bailable & Non-Bailable Offence:

1) Bailable Offence is less serious in comparison to non-bailable offence.

2) In Bailable Offence bail is granted as matter of course, the bail may be granted either by the police officer in charge of the accused person or by the court. but in case of non-bailable offence bail is not granted as a matter of course but it doesn't mean that's bail will not be granted under any circumstance.

3) The police officer or court has discretion to grant bail in case of Non-BailableOffence, except where there appear reasonable grounds for believing that accused person is guilty of an offence punishable with death or imprisonment for life .

Exception: But in case of a person under the age of 16 years or any woman, any sick person may be released on bail even if the offence be punishable with imprisonment for life or with death.

C. Cognizable and non-cognizable Offence [Section 2(c) 2(i)]

Cognizable offence 2(c): It means an offence for which a police office may arrest without warrant. These offences are specified in first schedule or under any other law for the time being in force.These are more serious in nature and are heavily punishable – murder dacoity, theft etc.

Non-cognizable offence Section 2(i): NCO means an offence where in police can't arrest the person without warrant and without an order from magistrate. It is not serious in nature i.e. small hurt, nuisance etc.

Difference between Cognizable Offence& Non-Cognizable Offence:

1) Cognizable Offence means an offence wherein police can arrest the person without warrant and without an order from magistrate.
2) Non-Cognizable Offence means an offence where in police can't arrest the person without warrant or an order from magistrate.
3) Cognizable Offence are more beware and serious in nature.
4) Non-Cognizable Offence is less serious in nature compare to Cognizable Offence.
5) In case of Cognizable Offence anticipatory bail is available. In case of non-cognizable offence anticipatory bail is not available.
6) Cognizable Offence is generally non-bailable offence.
7) If the offender has committed ten offences and if even a single case is-cognizable and other offence are cognizable then proceedings will be carried out as if cognizable offense is committed..

D. Difference between F.I.R. and Complaint

F.I.R. (Section 154): Every information relating to the commission of a cognizable offence may be given orally or in writing to an officer in charge of a police.

Complaint Section 2(d): It means any allegation orally or in writing to a magistrate that some person whether known or unknown has committed an offence. It doesn't include a police report.

✍ There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprit be suitably dealt with is a complaint. **(Mohd. Yousuf v. AfaqJahan, AIR 2006 SC 705).**

Now the difference can be summed-up as follows:

1) FIR is made to the police officer, but complaint is made to the magistrate.
2) FIR relates to a Cognizable Offence on the face of it. But complaint relate to both cognizable and non-cognizable offences.
3) Court can't take cognizance of the offence on the basis of FIR. But court can take cognizance of the offence on the basis of complaint.
4) FIR is made by any person even by police officer but complaint is made by any person except police officer.

Judicial Proceeding[Section 2(i)]

It includes any proceeding in the course of which evidence is or may be legally taken on oath. The term judicial proceeding includes inquiry and trial but not investigation.

Pleader[Section 2(q)]

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practice in such Court and includes any other person appointed with the premission of the Court to act in such proceeding. It is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

Public Prosecutor [Section 2(u)]

A "public prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor. Public prosecutor, though an executive officer is, in a larger sense, also an officer of the Court and he is bound to assist the Court with his fair views and fair exercise of his functions.

Summons and Warrant Cases

"Summons case" means a case relating to an offence and not being a warrant case. [Section 2(w)] A "Warrant case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. [Section 2(x)]

Those cases which are punishable with imprisonment for two years or less are summons cases, the rest are all warrant cases. Thus, the division is based on punishment which can be awarded. The procedure for the trial of summons cases is provided by Chapter XX and for warrant cases by Chapter XIX.

INVESTIGATION, INQUIRY AND TRIAL

Investigation 2(h)

Investigation includes all the proceedings under the code for the collection of evidence conducted by a police officer or any person (other than a magistrate) who is authorized by a magistrate in this behalf. It precedes inquiry.

Inquiry 2(g)

It means every inquiry (other than a trial conducted under the code) by a magistrate or court section 159 empowers a magistrate on receipt of a police report under section 57 to hold a preliminary inquiry in order to ascertain whether an offence has been committed and if so whether any person shall be put under trial. If precede trial.

Trial: It is judicial proceeding which is carried on to find out whether the person charged with offence is guilty or not

BAIL AND ANTICIPATORY BAIL

BAIL

It means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

Q. In what cases bail can be taken (Section 436)?

When any person (except a person accused of a Non- bailable charged offence)Is arrested or detained without warrant by an officer in charge of police station, or appears

or brought before a court or at any stage of proceeding before such court. Such person shall be released on a bail subject to execution of a bond with or without sureties.

When bail may be taken in case of non-bailable offence (Section 437):
When any person accuse of or suspected of the commission of any non bailable offence is arrested or detained without warrant by an officer in charge of a public station or appears or brought before a court other than the HC Or Court of Session, he may be release on bail

Exceptions: But such person shall not be released, If the person is guilty of an offence punishable with death or imprisonment for life or is a habitual offender

Anticipatory Bail (Section 438): Anticipatory bail is an advance bail which can be available in case of cognizable offence .Anticipatory Bail application is made either to Court of Session or High Court. When any person has reason to believe that he may be arrested on for having committed a non bailable offence he has not yet been arrested he may apply for anticipatory bail.

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Mens rea

Mens rea means a guilty mind. The fundamental principle of penal liability is embodied in the maxim *actus nonfacit ream nisi mens sit rea*. The act itself does not constitute guilt unless done with a guilty intent. Thus, unlessan act is done with a guilty intention, it will not be criminally punishable. The general rule to be stated is "theremust be a mind at fault before there can be a crime". *Mens rea* is a subjective matter. Thus *mens rea* is an essential ingredient in every criminal offence.The motive is not an intention. Intention involves foresight or knowledge of the probable or likely consequencesof an injury. In short, *mens rea* is the state of mind which accompanies and directs the conduct resulting in the *actus reus*.

SUMMON AND WARRANT

SUMMONS [Section 61]
A summon is issued either for appearance or for producing a document or thing which may be issued to an accused person or witness. Every summons issued by the Court shall be in writing, in duplicate, signed by the Presiding Officer of such Court or by such officer as is authorised by the High Court and shall bear the seal of the Court.

Service of Summons [Section 62]: The summons shall be served by a police officer or by an officer of the Court or other public servant.

WARRANT OF ARREST [Section 70]
Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. The form of warrant of arrest is Form No. 2 of the Second Schedule. The requisites of a warrant are as follows:
1. It must be in writing.

2. It must bear the name and designation of the person who is to execute it;
3. It must give full name and description of the person to be arrested;
4. It must state the offence charged;
5. It must be signed by the presiding officer; and
6. It must be sealed.

Such warrant is only for protection of a person before the concerned Court and not before the police officer. Under Section 76 the police officer or other person executing the warrant of arrest shall (subject to the provisions of Section 71 as to security) bring the person arrested before the Court without unnecessary delay provided that such delay shall not in any case exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Search Warrant

According to Section 93, a search warrant can be issued only in the following cases:
(1) where the Court has reason to believe that a person summoned to produce any document or other thing will not produce it;
(2) where such document or thing is not known to the Court to be in the possession of any person; or
(3) where a general inspection or search is necessary. However, a search warrant may be general or restricted in its scope as to any place or part thereof.
But such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority, by a magistrate other than a District Magistrate or Chief Judicial Magistrate

ARREST OF PERSONS

Section 41 enumerates different categories of cases in which a police officer may arrest a person without an order from a Magistrate and without a warrant. These include:

(a) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking; or
(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who being a released convict, commits a breach of any rule, relating to notification of residence or change of or absence from residence; or
(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other causes for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Arrest on refusal to give name and residence [Section 42]

If any person who is accused of committing a non-cognizable offence does not give his name, residence or gives a name and residence which the police officer feels to be false, he may be taken into custody. However, such person cannot be detained beyond 24 hours.

Arrest by a private person (Section 43): A Private Person may arrest or cause to be arrested any person who in his presence omits a non bailable and cognizable offence or is a proclaimed offender.

Arrest by magistrate (Section 44) : Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody.

Arrest how made [Section 46]

Section 46 sets out the manner in which an arrest is to be made. The Section authorises a police officer or other person making an arrest to actually touch or confine the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance. The Section does not give a right to cause the death of a person who is not accused of an offence punishable with death sentence or life imprisonment.
The word “arrest” when used in its ordinary and natural sense means the apprehension or restrain or the deprivation of one’s personal liberty to go where he pleases. The word “arrest” consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.
Ordinarily, a police officer is not at liberty to go outside India and to arrest an offender without a warrant, but if he can arrest an offender without warrant who escapes into any place in India, he can be pursued and arrested by him without warrant.
Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay and subject to the provisions relating to bail, Article 22(2) of the Constitution of India also provides for producing the arrested person before the Magistrate within 24 hours who can under Section 167 order his detention for a term not exceeding 15 days.

Summon case 2(w): As per this section “summon case means a case relating to an offence and not being a warrant case.

Distinguish between Summon and Warrant Case:

(1) Cases which are punishable with imprisonment for two years are summon case and the rest are all warrant case.
(2) Trials of summon case are done under chapter xx which in case of warrant case it is done under xix of code.

CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:

(1) High Courts;
(2) Courts of Session;
(3) Judicial Magistrates of the first class, and, in any metropolitan area; Metropolitan Magistrates;
(4) Judicial Magistrates of the second class; and
(5) Executive Magistrates;

Besides this, the Courts may also be constituted under any other law. The Supreme Court is also vested with some criminal powers. Article 134 confers *appellate* jurisdiction on the Supreme Court in regard to criminal matters from a High Court in certain cases.

POWER OF COURT TO PASS SENTENCES

a) Sentences which High Courts and Sessions Judges may pass

According to Section 28, a High Court may pass any sentence authorised by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court. An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

b) Sentences which Magistrates may pass

Section 29 lays down the quantum of sentence which different categories of Magistrates are empowered to impose. The powers of individual categories of Magistrates to pass the sentence are as under:

(i) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.
(ii) A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of a fine not exceeding ten thousand rupees, or of both.
(iii) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding five thousand rupees, or of both.
(iv) A Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, and the powers of the Court of a Magistrate of the First class.

c) Sentence of imprisonment in default of fine

Where a fine is imposed on an accused and it is not paid, the law provides that he can be imprisoned for a term in addition to a substantive imprisonment awarded to him, if any. Section 30 defines the limits of Magistrate's powers to award imprisonment in default of payment of fine.

SUMMARY TRIALS

Summary trial means the "speedy disposal" of cases. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years.

Power to try summarily (Section 260):
A summary trial is followed for the speed disposal of the suit for minor offences. Any chief judicial magistrate, metropolitan magistrate of the first class specially empowered in this behalf by the HC may if the think fit, try in a summary way all or any of the following offences; summary cases (i.e. offences punishable with imprisonment up to two years).

(1) Theft, under IPC where the value of the stolen property doesn't exceed Rs.2000/-
(2) Receiving or retaining stolen property under section 411 of the IPC where the value of the stolen property doesn't exceed Rs.2000/-
(3) Assisting in the concealment or disposal of stolen property under section 414 of the IPC where the value of the stolen property doesn't exceed Rs.2000/-

Procedure for Summary Trails (Section 262): In summary trail the procedure specified in this code for the trail of summary case shall be followed expect as hereinafter mentioned. Further no sentence of the imprisonment for a term exceeding 3 months shall be passed in the case of summary trails

Record in Summary Trails (section 263):
The magistrate shall enter in the prescribed form the following particulars in every case tried summarily:

- The serial number of the case,
- The date of the commission of the offence,
- The date of record of complaint,
- The name of the parentage and reside of the accused,
- The offence complained of and the offence proved and the value of the property in respect of which the offence has been committed,
- The plea of the accused and his examination if any,
- The findings,
- The sentence / final order & the date on which proceeding terminated.

Judgment in Summary Trails (Section 264):
Must contain substance of the evidence and a judgment containing a brief statement of the reasons for the finding. The concerned Magistrate shall sign such record and judgment.

Limitation for taking cognizance of certain offences:

As per section 468(1) of the code, no court shall take cognizance of an offence of the category specified in sub-section (2) of the said section after the expiry of the period of limitation.

1. **The period of limitation shall be:**
   Six months: If the offence is punishable with fine only,
   One year: If the offence is punishable with imprisonment for a term not exceeding one year
   Three year: If the offence is punishable with imprisonment for a term exceeding one year but not exceeding 3 year

Power to officer

1. **Police officer's power to investigate cognizable case.**
   a) In case of a cognizable offence the p.o. may conduct investigation without the order of a magistrate. Investigations include all proceedings under the code for the collection of evidence by the magistrate in this behalf. (Section 156).

   b) Attendance of any person or oral examination by the p.o. who appears to be acquainted with the fact and circumstance of the case. (Section 160, 161 witnesses.)

2. **Search by police officer (Section 165):** If the police officer has reason to believe that anything necessary for the purpose of an investigation may be found in any place within the limits of the police station (jurisdiction), he may search any thing or place.

Condition for Search: Police Officer must reach in writing the ground of his belief and specifying the thing for which search is to be made.

Duties of Police Officer:
When any person is arrested or detained in custody and it appears that's the investigation can't completed within the period of 24 hours and there are ground for believing that the accusations or information is well founded, the officer in charge of police station shall promptly. Transmit to the nearest judicial ministered a copy of the entree in the dairy relating. To the case and shall forward the accused to such magistrate at the same time.
The magistrate may than authorizes the detention of the accused in custody for a term not exceeding of fifteen (15) days.
On completion of investigation the competent police officer under the code shall forward a police report to a magistrate empowered to take cognizance of the offence.

Power of the Magistrate

1. **Cognizance of an offence by magistrate: (Section 190):** Any magistrate of the first class and of second class specially empowered may take cognizance of an offence.
   a. Upon receiving a complaint of facts which constitute such offence
   b. Upon a police report of such facts;
   c. Information received from any person other than a police officer;
   d. His own knowledge that such offence has been committed.
2. **Forward of application of the accused (Section 191):** when a magistrate takes cognizance of an offence from a person other than police officer or upon his own knowledge, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another magistrateIf the accused object to further proceedings before the magistrate taking cognizance, the case shall be transferred to such other magistrate as may specified by the CJM in this behalf.
3. **Handover of cases to magistrate (Section 193):** The session court doesn't take cognizance of any offence, as a court of original jurisdiction unless a competent magistrate has committed the case to it.

Complaints to magistrate (production):

A magistrate taking cognizance of an offence on complaint shall examine upon oath the complaint and the witness present (if any). The substance of such examination shall be reduced to writing and shall be signed by the complaint and the witnesses, and also by the magistrate.

However when the complaint is made in writing, the magistrate need not examine complaint and the witnesses:

(a) If a public servant acting or purporting to act in discharge of his official duties or a court has made the complaint. Or

(b) If the magistrate makes over the case for inquiry or trial to another magistrate u/s 193.

When magistrate is not competent to take cognizance of the case (Section 201):

The magistrate shall:

(a) If the complaint is in writing, return it for presentation to the proper court.

(b) If the complaint is not in writing (i.e. oral) direct complaint to the proper court.

Dismiss or issue of summons or warrant:

The magistrate, after inquire into the case either himself or investigation made by a police officer or evidence of witness on oath either dismiss the complaint or issue summon for attendance of the accused if the case appears to be a summons case (Section 202, 203, 204).

The Charge [Allegation]:

- **Control of Charge (Section 211/212):** Every charge under this code shall state the offence with which the accused is charged specifying the law and the name of the offence particulars of time and place of the alleged offence.
- **Separate Charge for Distinct Offence (Section 218):** For every distinct offence of which any person is accused there shall be a separate charge and ever such charge shall be tried separately.
- **Trial for more than one offence (Section 220):** If more than the same person in series of commits offence acts so connected together as to from the same transactions, such offence.

Person once convicted or acquitted not to be tried for same offence (Section 300):

A person who has once been tried by a court of competent jurisdiction for an offence and is convicted or acquitted such offence shall while conviction or acquitted remains in force not be liable to be tried again for the same offence.

Example:A is tried upon a charge of theft as a servant, and acquitted. He cannot after words, while the acquitted remains in force be charged with theft as servant, or enter upon the same facts with theft simply or with criminal breach.

The Judgment:

- **Judgment (Section 353):** The judgment in every trial in any criminal court of original jurisdiction shall be pronounced by the presiding officer by delivering or reading out the whole of the judgment or the operations part of the judgment in open court.

- **Language and Contents of judgment (Section 354):**Every judgment referred in Section 353:
  (a) Shall be written in the language of the court
  (b) Shall contain points for determination, the decision thereon and the reasons for the decision.
  (c) Shall specify the offence of which and the section of the IPC or other law under which the accused is convicted and the punishment to which he is sentenced.
  (d) If it be judgment of acquitted and direct that he be set at liberty.

Compounding of offences (Section 320 of CrPc)

If both the parties agree that there has been compromise, then the Court has to dispose of the case in terms of that compromise and the petitioner is to be acquitted. If, on the other hand, parties differ, then the Court has to call upon them to lead evidence and then record a finding on such **evidence**.

The offences that may lawfully be compounded are those that are mentioned in Section 320 of the Code of Criminal Procedure. The offences other than those mentioned cannot be compounded. The offences punishable laws other than the Penal Code are not compoundable.

A case may be compounded at any time before sentence is pronounced even whilst the Magistrate is writing the judgment.

The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution and Section 320 provides that if the offence be compoundable, composition shall have the effect of an acquittal.

The object of Section 320 of the Code is to promote friendliness between the parties so that peace between them is restored.

Compounding without the permission of the Court:

Uttering words, etc. with deliberate intent to wound the religious feelings of person

Causing hurt

Wrongfully restraining confining any person

Criminal trespass

House-trespass

Adultery

Compounding with the permission of the Court

Voluntarily causing grievous hurt

Wrongfully confining a person for three days or more

Assault or criminal force to woman with intent to outrage her modesty

Theft where the value of property stolen does not exceed two thousand rupees

When any offender is compoundable under Section 320 of the Code, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed or, as the case may be, before which the appeal is to be heard.

The composition of an offence under Section 320 of the Code shall have the effect of an acquittal of the accused with whom the offence has been compounded.

No offence shall be compounded except as provided by Section 320 of the Code

CHAPTER- 8 THE EVIDENCE ACT, 1872

The "Law of Evidence" may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as "Law of Evidence".
The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence. The Act extends to the whole of India except the State of Jammu and Kashmir and applies to all judicial proceedings in or before any Court, including Court-martial (other than the Court-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act) but not to affidavits presented to any Court or officer, or to proceedings before an arbitrator.

The Act does not define the term "**judicial proceedings**" but it is defined under Section **2(i)** of the Criminal Procedure Code as "a proceeding in the course of which evidence is or may be legally taken on oath".

An **affidavit** is a declaration sworn or affirmed before a person competent to administer an oath. Thus, an affidavit per se does not become evidence in the suits but it can become evidence only by consent of the party or if specifically authorised by any provision of the law. They can be used as evidence only under Order XIX of the Civil Procedure Code. Evidence:

The term evidence is defined under Section 3 of the Evidence Act as follows :

Evidence means and includes:
(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
(2) all documents (including electronic records) produced for the inspection of the Court; such documents are called documentary evidence.

The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts. be adduced in order to prove a certain fact (principal fact) which is in issue.

While proceeding a suit, the court is overflowed by facts i.e. facts in issue. Now the court is required to distinguish between the relevant and irrelevant facts. For this the court uses "law of Evidence" and then pronounces the judgment and declares the right or liabilities of parties as regards those facts.

The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the Law of Evidence.

Fact (Sec 3): Fact means and includes:

Anything, state of things,or relation of things capable of being perceived by the senses.

Any mental condition of which any person is conscious

Example of physical fact: Anything which can be seen / heard or saw something is a fact.
Example of perceived fact: Opinion or good faith etc.

Fact in issue (Sec 3): "Fact in issue" means and includes any fact from which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liabilities or disability.

- Asserted
- Denied

In any unit or proceeding
E.g.: A is accused of the murder of B at his trail; the following facts may be in issue

- A caused B's death;
- A intended to cause B's death.

A had received grace & sudden provocation from B; A, at the time of doing the act which caused B's death, was by reason of unsoundness of the Indian incapable of knowing its nature.

Relevant Fact (Sec 3): One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Indian Evidence Act (Section 6-55) relating to relevance of facts.
Example: the question is, whether a robbed B. The facts that after B was robbed, C said in A's presence – the police are coming to look for the man who robbed B" and that immediately afterwards A ran ways are relevant facts.

"Res Gestae" (Section 6): The literal meaning of "Res Gestae' is surrounding or accompanying facts or circumstances which are inseparable from the facts in issue and such facts or circumstances are necessary to explain the nature of the main fact at issue.
Res Gestae is considered to be a relevant fact and is a rule of admission of evidence "facts which, through, no in issue, are so concerned with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different time and places".

Example: A is accused of the murder of B by beating him whatever was said or done by A or B or by standers at the beating, or so shortly as to form part of the transaction, is a relevant fact.

Motive, Preparation & Conduct (section-8) deals with motive, preparation & conduct and its relevancy i.e. can be accepted by the court as evidence.

Motive: Motive is that when induces or move a person to act in a certain way, it may be malice, revenge, monetary advantage or simply an emotion. There can't be any action without a motive.

Points about Motive:

1. Motive by itself can't give rise to an inference of quilt. It can be considered along with other circumstances.
2. It may difficult to discover motive. It often happens that only the culprit himself knows that moaned to him a certain course of action. But failure to find the under lying motive of a crime doesn't mean that it doesn't exist.

Preparation: It means arranging the means or measured necessary for the commission of a crime. When the question is as to whether a person did a particular act, the fact what he made preparation to do it, would certainly be relevant for the purpose of showing that he did it.
For Example: A is tried for the murder of B, A procured poison. The fact that, before the death of B, A procured poison similar to that which was administered to B is relevant subsequent to the crime.

- Example of previous conduct-preparation and previous attempt are instances of previous conduct.
- Example of subsequent conducts- concealment, disguises flight etc.

ADMISSION/CONFESSION

Admission (Section 17): An admission is statement (oral or documentary or contained in e-from persons, and under the circumstances, set in section 18-23)

The following person may make admission-
(a) a party himself,
(b) by the agent
(c) by a person having joint property of pecuniary interest in the subject matter.

Confession (Section 24-30): The act doesn't define the term confession, but it is kind of admission thus all confessions are admission but not vice-versa. In other words, admissions are agent up of which confession are a species. A confession is generally used for admission of criminal offence.

Ques. Which confessions are irrelevant?

Ans. Section 24-26 deal with confessions, which are irrelevant:

1. **A confession made by an accused person is irrelevant in a criminal case if it is caused by:**
   (a) Inducement
   (b)Threat or
   (c) Promises (Section 24).

2. **A confession made to a police officer is inadmissible in evidence, as such confession is treated as untrustworthy (section 25)**

3. **Section 26 is extension of section 25. It provides that confession by any person whilst in custody of a police officer shall not be admissible unless it is made in the immediate presence of a magistrate.**

Exception:

1. However, section 27 is an exception and provides that if the confession made to a police office leads to the discovery of facts, things, documents etc. that part of the information in the confession is admissible. The trust of the confession becomes guaranteed by the discovery of facts in consequence of the information given.

2. Confession made after removal of impression caused by inducement, threat or promise relevant: under section 28.

3. The confession of a co-accused may be taken into consideration by the court in a case whose more persons than one are being jointly tried for the same offence (Section 30).

OPINION [Section 45-51]

Opinion of third person when relevant: As a general matter of evidence, all oral evidence must be direct, thus any opinion of a witness (third party) will be irrelevant subject to following exception:

1. Opinion of Experts (Section 45): Experts opinions are relevant in relation to
- **(a)** Foreign law
- **(b)** Science
- **(c)** Law
- **(d)** Identity of hand writing
- **(e)** Finger impression etc.

Example: Whether A's death was caused by person?
The opinion of expert as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

2. Fact which support or are inconsistent with the opinion of expert are also made relevant (Section 46).
3. Opinion of any person who is acquired with the hand writing of a person is relevant when the question is whether or not be purported document was written by that person (Section 47).
4. Opinion of certifying authority – in case of digital signature of any person.
5. Opinion of person who would be likely to know of the existence of any general custom or right are relevant when the existence of any general custom or right is in question (48).
6. Opinion of person having "special means of knowledge" as to any usages, words & terms used in a "particular district" – when these words are in question.

7. When relationship of one person to another is in question, opinion of any person who belongs of the family of those persons or otherwise in relevant – if he has special means of knowledge in the subject.

Ques. What are the facts which need not be proved or for whom evidence need not be given?
Ans. Any fact, the party wishes to be believed by the court, must be proved. However there are two exceptions:
1. Facts judicially noticeable need not be proved (Section 56); as is the "fact" already known by the court due to its nature, seriousness or clarity.
(a) The facts i.e. judicial notice are given in section 59 as:
(b) All laws or rules in force in the territory of India.
(c) Acts of parliament
(d) Names title, functions and signature of the Gazette officers.

2. Facts admitted by the opposite side (Section 58): Where an allegation of fact is made by one party and it is either admitted or not denied by the other, there is no need of evidence to be given of that particular "fact".

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

The Act divides the subject of proof into two parts:
(i) proof of facts other than the contents of documents;
(ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or *electronic records* may be proved by oral evidence (Section59) which must in all cases be "direct" (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes.
Thus, the two broad rules regarding oral evidence are:
(i) all facts except the contents of documents may be proved by oral evidence;
(ii) oral evidence must in all cases be "direct".

But, if a witness is unable to speak he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. **(Section 119)**

Direct evidence
In Section 60 of the Evidence Act, expression "oral evidence" has an altogether different meaning. It is used in the sense of "original evidence" as distinguished from "hearsay" evidence and it is not used in contradiction to "circumstantial" or "presumptive evidence".

Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on. In defining the direct evidence in Section 60, the Act impliedly enacts what is called the rule against hearsay.

Documentary Evidence

A *"document"* means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence.

Primary Evidence

"*Primary evidence*" means the document itself produced for the inspection of the Court (Section 62). The rule that the best evidence must be given of which the nature of the case permits has often been regarded as expressing the great fundamental principles upon which the law of evidence depends. The general rule requiring primary evidence of producing documents is commonly said to be based on the best evidence principle and to be supported by the so called presumption that if inferior evidence is produced where better might be given, the latter would tell against the withholder.

Secondary Evidence

Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy. Section 63 defines the kind of secondary evidence permitted by the Act. According to Section 63, "secondary evidence" means and includes:

(1) certified copies given under the provisions hereafter contained;
(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
(3) copies made from or compared with the original;
(4) counterparts of documents as against the parties who did not execute them;
(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.
(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

Special Provisions as to Evidence Relating to Electronic Record

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B.
Under Section 65B(1) any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. The

conditions in respect of a computer output related above, have been stipulated under Section 65B(2) of the Evidence Act.

PRESUMPTIONS

The Act recognises some rules as to presumptions. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. There are three categories of presumptions:

(i) presumptions of law, which is a rule of law that a particular inference shall be drawn by a court from particular circumstances.

(ii) presumptions of fact, it is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.

(iii) mixed presumptions, they consider mainly certain inferences between the presumptions of law and presumptions of fact.

ESTOPPEL

The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing (Section 115).

Principle of Estoppel

Estoppel is based on the maxim 'allegans contratia non estaudiendus' i.e. a person alleging contrary facts should not be heard. The principle of estoppel covers one kind of facts. It says that man cannot approbate and reprobate, or that a man cannot blow hot and cold, or that a man shall not say one thing at one time and later on say a different thing.

The doctrine of estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it **(Sorat Chunder v. GopalChunder).**

> It was laid down by the Privy Council in **MohoriBibee v. DharmodasGhosh, (1930) 30 Cal. 530 PC,** that the rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it.

EXCLUSION OF EVIDENCE

Exclusion of Oral Evidence by Documentary Evidence

Section 91 only written instrument (document) can be given as evidence:
This section is based upon "Beset evidence rule" and excluded the oral evidence of certain matter which is required by law to be reduced to the form of a document.

Exclusion of Evidence of Oral Agreement (Section 92)

When the terms and conditions of a transaction are reduced to writing either by agreement of parties of as required by law, no oral evidence is admissible to modified a document so as to-contradict, very add or subtract from its terms.
Example: A agrees absolutely in writing to pay B Rs.1,000/- on 1st, March 2005. The fact that, at the same time an oral agreement was made the money should not be paid till 31st March can't be proved'.

Exclusion of evidence to explain or amend ambiguous documents (section 93):
When the language used in a document is; on its face, ambiguous or defective, evidence may not be given of facts which show it is meaning of supply its defeats.
Example: A agrees in writing to sell a horse to B, for "Rs.10,000 or Rs.15,000 evidence can't be given to show which price was given.

Exclusion of Evidence against Application of Document to Existing Facts (Section 91)
When language used in a document is plain in itself, and when it applied accurately to existing facts, evidence, may not be given to show that it was not meant to apply to such facts.A sells to B by deed, "my estate at Rampur containing 100 bighas" A has an estate at Rampur containing 100 Bigha. Evidence may not be given of the fact that the estate means to be sold was one situated at a different place and of a different size.

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Q.'Hearsay evidence is no evidence at all' Explain.
Ans. Hearsay evidence may be defined as that which witness doesn't say of his own knowledge out says that another has said or signified to him. Hearsay evidence is that which a witness states not on the basis of what he himself saw or heard or what has some under immediate observation of his bodily sense but on what he has learnt through the medium of a third person

Exception to General Rule of Hearsay Evidence
1. **Section 32:** As per this section, only statement (whatever verbal or written) made by person who are dear or can't be found or have become incapable of giving evidence or whose attendance can't be procured without an amount of unreasonable expense or under delay are relevant.
2. **Section 33:** Evidence given by a witness in a judicial proceeding is relevant in a subsequent judicial proceeding of the witness is dead or can't found or has become incapable of giving evidence or is kept out of the way by other party if his presence can't be obtained without unreasonable delay or expense provided the witness has cross examined in previous proceeding and the question issue substantially the same.

Q.What are facts, which can't be given as evidence?
Ans. There are some facts of which evidence can't be given; though they are relevant these facts are:
1. **Privilege of Judges &Magistrates (Section 121):** No judge or magistrate shall be compelled to answer any question as to his own conduct in court as such judge or magistrate.

Exception:

(i) Special order of the superior court; or
(ii) Judge/magistrate may be examined as to other matter, which occurred in his presence.

Example: A on his trial before the Court of Session, says that a deposition was improperly taken by B, the magistrate. B can't be compelled to answer question as to this, except upon the special order of a superior court.

2. **Communication between husband and wife (section 122):** communication between husband & wife is privileged and its disclosure can't be enforced.

3. **Evidence as to affairs of state (Section 123):** No one shall be permitted to give any evidence from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of department concerned, who shall give or withhold such permission as he thinks fit.

4. **Professional Communications (Section 126):**
   No barristers, attorney, pleader or vakil shall at any time be permitted without his client's consent to disclose any commission made to him in the course and for the purpose of his employment. Again the said section 136, also apply to interpreters and the clerks or servants or barristers, pleaders, attorney and vakils .
   Example: A client says to B on attorney, "I have committed murder and I wish you to defend me "this commission can't be produced in court.

CHAPTER -9 LAW RELATING TO ARBITRATION & CONCILIATION

ARBITRATION AND CONCILIATION ACT, 1996

INTRODUCTION

Arbitration is used as an alternative means of resolving disputes instead of litigation through Courts of Law. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration on 21 June, 1985. The General Assembly in December, 1985 recommended that all give due consideration to the Model Law. The Arbitration and Conciliation, 1996 governs the arbitration laws in India. The Act contains 4 Parts and 3 Schedules which came into the force on 22 August, 1996.

Alternate Dispute Resolution (ADR)

"Alternative" dispute resolution is usually considered to be alternative to litigation and is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

ADR is a term used to describe several different methods of resolving legal disputes without going to court. The rising cost of litigation is making traditional lawsuits impractical for many individuals and businesses. At the same time, civil courts face backlogged dockets, resulting in delays of a year or more for private parties to have their cases heard by a jury. New types of proceedings have been developed in response, and they are proving beneficial.

ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. The salient features of each type are as follows:

- In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution.

- In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does not impose a resolution on the parties
- In collaborative law, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system.
- In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration.

ADR has been increasingly used internationally, both alongside and integrated formally into legal systems, in order to capitalize on the typical advantages of ADR over litigation:

- Suitability for multi-party disputes
- Flexibility of procedure - the process is determined and controlled by the parties to the dispute
- Lower costs
- Less complexity
- Parties choice of neutral third party (and therefore expertise in area of dispute) to direct negotiations/adjudicate
- Likelihood and speed of settlements
- Practical solutions tailored to parties' interests and needs
- Durability of agreements
- Confidentiality
- The preservation of relationships and the preservation of reputations

Privacy, neutrality of the proceedings and of the decision and possibilities of customizing the procedures are some more attractive features. The Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration.

Arbitration [Section 2(1)(a)]

Arbitration is a well-established and widely used means to end disputes. It is one of several kinds of Alternative Dispute Resolution, which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final, and courts rarely reexamine it.

As per **Section 2(1)(a)** of the Arbitration and Conciliation Act, 1996, "Arbitration" means any arbitration, whether or not administered by an arbitrator appointed specially for the settlement of a particular dispute or by some permanent arbitral institution.

Arbitration is one of the methods of settling civil disputes between two or more persons by reference of the dispute to an independent and impartial third person, called arbitrator, instead of litigating the matter in the usual way through Courts. It saves time

and expenses. It also avoids unnecessary technicalities and at the same time ensures "substantial justice within limits of the law".

Arbitrator

The term "Arbitrator" is not defined in the Arbitration and Conciliation Act, 1996 but the person who is appointed to determine differences and disputes between two or more parties by their mutual consent is called **Arbitrator** or Arbitral Tribunal (which may consist of a sole arbitrator or panel of arbitrators), the proceedings before whom are called **arbitration proceedings**, and his decision is called an **award**.

It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference.

ARBITRATION AGREEMENT [Section 7]

Definition of Arbitration Agreement

In terms of **Section 7** of the Act,"Arbitration Agreement" means an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined legal relationship, whether contractual or not.

Essentials of Arbitration Agreement

The following are the essentials of Arbitration Agreement:

1. It must be in writing i.e. a document signed by parties; an exchange of letters or other means of telecommunication which record the agreement; an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by another; [signatures of the parties to the agreement are not necessary but it must be shown that they agreed to the settlement of disputes by arbitration

2. It must have all essential elements of a valid contract and the parties must be *ad idem* i.e. have same understanding

3. It must refer to a dispute, present or future, between the parties to arbitration.

4. It may be in the form of an arbitration clause in a contract or in the form of separate agreement [if a contract containing the arbitration clause comes to an end on account of fraud, misrepresentation etc, the arbitration clause still continues to be binding.

In **Bihar State Mineral Development Corporation v. Encon Builders Pvt. Ltd., Supreme Court** has observed that the following four essential elements of an arbitration agreement:

1. There must be a present or future difference in connection with some contemplated affair.
2. There must be the intention of the parties to settle such difference by a private tribunal.
3. The parties must agree in writing to be bound by the decision of the tribunal.

4. The parties must be *ad idem i.e. must have mutual understanding*.

An arbitration agreement, is required to be in writing which means that a legally binding and valid agreement between the parties purporting to submit to arbitration any existing any future disputes arising out of or in connection with the main contract.

POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION [Section 8]

A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, shall refer the parties to arbitration, if a party so applies.

In order that the judicial authority may refer the parties to arbitration, the following conditions must be fulfilled:

(1) There should be a valid and a subsisting arbitration agreement capable of being enforced, [**F.W.D & Co. v. Hiralal, AIR 1976 Cal. 126**]. The agreement must be in writing and must have been made before the commencement of the legal proceedings [**Ramjidas v. House, ILR Cal. 199**]
(2) The subject matter in question in the legal proceedings must be within the scope of the arbitration agreement i.e. subject matter of reference to the arbitration must be the same as the subject matter of the legal proceedings [**KuntaMalla Reddy v. Soma Srinivas, AIR 1978 AP 289]**
(3) The application must be made by a party to the arbitration agreement or by some person claiming under him.
(4) The applicant must make the application at the earliest stage of the proceedings, i.e. before submitting his first statement on the substance of the dispute.
(5) The application must be accompanied by the original arbitration agreement or a duly certified copy thereof.

The Supreme Court in **Hindustan Petroleum Corporation Ltd. v. M/s Pink City Midway Petroleum, AIR 2003, SC 2881,** has held that the jurisdiction of Civil Court is barred after an application under Section 8 of the Act is made for arbitration.

The Rajasthan High Court in **Mahesh Kumar v. Rajasthan State Road Corporation, AIR 2006, RJ 56,** held that mere existence of arbitration clause in agreement does not bar jurisdiction of Civil Court automatically. The objection of a party to the jurisdiction of the arbitrator must be raised not later than the submission of its first statement of defence on the substance of the dispute.

MATTERS WHICH MAY AND WHICH CAN NOT BE REFERRED TO ARBITRATION [SECTION 9 OF CIVIL PROCEDURE CODE. 1908]

All matters in dispute between parties relating to private rights or obligations, which Civil Courts may take cognizance of, may be referred to arbitration. However, a matter shall not be referred to arbitration if it is forbidden by a Statute or is opposed to public policy.

Matters which may be referred to Arbitration

Following are some of the matters which may be referred to Arbitration:

(1) Determination of damages in case of breach of contract.

(2) Question of validity of marriage [
(3) Matters of personal rights or private rights of perties.
(4) Time barred claims
(5) Disputes regarding compliment and dignity

Matters which cannot be referred to Arbitration

Following are the matters which cannot be referred to Arbitration:
(1) Matters relating to divorce or restitution of conjugal rights
(2) Testamentary matters like the validity of a will
(3) Insolvency matters
(4) Matters relating to public charities and charitable trusts.
(5) Matters relating to guardianship of a minor
(6) Lunacy proceedings.
(7) Matters of criminal nature
(8) Execution proceedings

ARBITRAL TRIBUNAL

INTRODUCTION

An **arbitral tribunal** (or **arbitration tribunal**) is a panel of one or more adjudicators which is convened and sits to resolve a dispute by way of arbitration. The tribunal may consist of a **sole arbitrator**, or there may be two or more **arbitrators**, which might include either achairman or an umpire. The parties to a dispute are usually free to agree the number and composition of the arbitral tribunal.

The person who is appointed to determine differences and disputes is called the Arbitrator or Arbitral Tribunal (which may consist of a sole arbitrator or panel of arbitrators), the proceedings before whom are called arbitration proceedings, and his decision is called an award.

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. If the parties fail to make the determination, the arbitral tribunal shall consist of a sole arbitrator.The words in the provision “the parties are free to determine the number of arbitrators” indicate that if they desire to exercise their option in favor of even number of arbitrators and agree to not to challenge the consequent award, the award rendered would be a valid and binding. The provision only gives a ground to either of the party in the event of appointment of even number of parties to object to such composition of the arbitral tribunal.

Appointment of Arbitrators [Sec. 11]

Section 11 of the Act deals with the appointment of the arbitrators. According to this section parties can agree to any procedure for appointment of arbitrators.

A person of any nationality may be appointed as an arbitrator, unless otherwise agreed by the parties.

When the parties have agreed that the number of arbitrators to be appointed shall be three, but do not agree on a procedure for their appointment, then each party shall

appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the Presiding Arbitrator.

Section 11 further provides that where a party fails to appoint an arbitrator within 30 days from the date of the receipt of a request to do so from the other party or where the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, then a party may request the Chief Justice of High Court ofthe State concerned or any person or institution designated by the Chief Justice, to take necessary measures. The decision on the matter entrusted to the Chief Justice or any person or institution designated by the Chief Justiceshallbe final.

It may be noted that in an international commercial arbitration, the power to appoint an arbitrator or arbitrators is vested with the Chief Justice of India or a person or institution designated by the Chief Justice of India. An international commercial arbitration is an arbitration relating to disputes considered commercial in nature, where atleast one of the parties belongs to a foreign country.

The duties and powers of the arbitral tribunal include the following:

- To give ruling on the existence or validity of the arbitration agreement or on its own jurisdiction.
- To order interim measures of protection.
- To determine the admissibility and the weight of evidence lead before the forum.
- To decide the dispute on merits as per the substantive law of the parties and according to the terms of contract and usage of trade.
- To encourage voluntary dispute settlement through Alternative Dispute Resolution (ADR) mechanisms including conciliation
- To deliver reasoned arbitral award.
- To determine the cost of arbitration and its apportionment among the parties.
- To render accounts of deposits to the parties and return unspent balance.

Challenge of Appointment of Arbitrator

Section 12 of the Act provides that the appointment of arbitrator may be challenged on any of the following grounds:

(1) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or
(2) He does not possess the qualification agreed to by the parties.

It may be noted that a party may challenge an arbitrator appointed by him only on those grounds which came to his knowledge after the appointment has been made.

Procedure [Sec. 13]:

The parties are free to agree on a procedure for challenging an arbitrator.

When a person is tipped for possible appointment as an arbitrator or afterwards throughout the arbitral proceedings since his appointment as arbitrator, he must promptly disclose in writing anything likely to raise justifiable doubts as to his independence or impartiality.

Any party can challenge an arbitrator within 15 days of his either becoming aware of the constitution of the arbitral tribunal or of anything exciting suspicion of bias against the arbitrator or knowledge that the arbitrator is without requisite qualifications.

If the other party agrees to the challenge, then the arbitrator stands removed from his office. The arbitrator may also resign in face of such challenge.

However, otherwise if the challenge is not successful, the arbitral tribunal shall continue with arbitration and make award. The aggrieved party can make an application to the court for setting aside the award re agitating the said points of challenge to the arbitrator amongst other grounds.

Even without any allegations of bias or complaints regarding want of independence or lack of requisite qualifications, the arbitrator can be removed with the agreement of both parties if he is otherwise unable to perform his functions or delays with arbitration.

Failure or Impossibility to Act [Sec. 14]

As per Section 14, when a mandate given to an arbitrator shall be terminated. "Mandate" means an authorization to act given to an arbitrator.

The mandate of an arbitrator shall terminate if:
(a) He becomes de jure (by right) or de facto (in fact) unable to perform his functions or for other reasons fails to act without undue delay; and
(b) He withdraws from his office or the parties agree to the termination of his mandate.

The mandate of an arbitrator shall also be terminated in the following cases:
(a) Where he withdraws from office for any reason; or
(b) By virtue of an agreement between the parties.

Further, if there is a controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court under Section 14(2).

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

In **Construction India Ltd. v. Secretary, Works Department, Government of Orissa**, it was held that demotion of a government employee from his government position does not lead to termination of that person as an arbitrator. Section l4 provides the circumstances of termination of arbitrator and demotion from a government position is not covered under Section 14.

Substitution of Arbitrator [Sec. 15]

Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
Unless otherwise agreed bythe parties:
(a) Where an arbitrator is replaced, any hearings previously held may be repeated at the discretion of the Arbitral Tribunal;
(b) An order or ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

Jurisdiction of Arbitral Tribunal [Sec. 16]

The arbitral tribunal may rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of an arbitration agreement. For this purpose:

(a) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) A decision by the arbitral tribunal that the certain provisions ofa contract is null and void shall not automatically invalidate the arbitration clause.

It may be noted that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. However, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

ARBITRAL PROCEEDING:

1. Equal treatment of parties (Sec. 18). The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

2. Determination of rules of procedure (Sec. 19). The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.
   - Failing any agreement, the arbitral tribunal may conduct the proceedings in the manner it considers appropriate.
   - This power of the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

3. Place of arbitration (Sec. 20)
   - The parties are free to agree on the place of arbitration.
   - Failing any agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case.

4. Commencement of arbitral proceedings (Sec. 21)
   - The arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

5. Language (Sec. 22) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

Arbitration Procedure

Sections 23 to 27 of the Arbitration and Conciliation Act, 1996 stipulate the procedure to be followed in arbitral/arbitration proceedings lays down the procedure involves the following steps:

1. **Statements of claim and defence:** The claimant has to submit his claim, consisting of facts supporting the claim, points at issue and the relief or remedy sought - within the period agreed by the parties, or determined by the arbitral tribunal. Likewise, the respondent has to state the defence in respect of the claims of the claimant.

2. **Hearing and written proceedings:** It is open to parties to agree for holding oral hearings for presentation of evidence and for oral arguments, or, alternatively, for conducting proceedings on the basis of documents such as affidavits. In the absence of any such agreement, a decision in this regard may be taken by the arbitral tribunal.

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

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

5. **Court assistance in taking evidence:** The arbitral tribunal as well as any party, with the approval of the arbitral tribunal, can apply to the court for assistance in taking evidence. On such application being made, the court may order that the evidence be provided directly to the arbitral tribunal. The persons who failed to attend as required or refused to give evidence will be treated guilty of Contempt of Arbitral Tribunal at par with persons who were guilty of like offences in suits before the court.

6. **Decision:** The decision of the Tribunal is generally by a majority of all its members.

Settlement [Sec. 30]

In spite of an arbitration agreement, the arbitral tribunal may encourage the settlement of disputes by using mediation, conciliation or other proceedings, with the agreement of the parties.

If the parties reach to a settlement, the arbitral award will be given by the arbitral tribunal. The arbitral award, on agreed terms, will have the same status and effect as any other arbitral award on the merits of the dispute.

Sole Arbitrator

In the absence of any agreed procedure for appointment of the arbitrator, if the parties fail to agree on the name of the sole arbitrator within 30 days of being requested by the other party, any of the parties can apply to the Chief Justice of the concerned High Court or his designate, if any, for making the appointment.

Where even under an agreed appointment procedure any party or parties or authorized institution or person fail to act as stipulated therein, or to reach an agreement expected of them under that procedure, any party can apply to the Chief Justice of the concerned High Court or his designate, if any, for making the appointment.

AWARD

Meaning of Award

An arbitral award is a written document containing its date and place of arbitration preferably with the signature of all members of the arbitral tribunal. However, the signatures of the majority of members will suffice if the reason for any omitted signature is given. The award must be a reasoned award unless the parties agree to dispense with such reasoning or the same is a consent award on agreed terms. A signed copy of the award shall be given to each party. Before the final award the arbitral tribunal may make an interim award.

Essentials of a Valid Award

The requirements for a valid award have a number of different sources: the parties' own agreement; the common law; and the*Arbitration Act* 1996.

- The award must be in writing.
- The award must contain reasons.This is one of the most important requirements of a valid award and the one which causes the most difficulty in practice. The requirements to give reasons, and the way in which the reasons should be set out.
- The award must be certain and unambiguous. The arbitrator must make it clear exactly how the dispute has been decided. If this is not made clear, the award may be challenged.
- The award must be complete. If the award fails to determine all the disputes submitted for the decision of the arbitrator, it may be vulnerable to a challenge based on serious irregularity.
- The award must not deal with matters that have not been referred to the arbitrator. If the award purports to determine matters beyond those submitted, the award will be bad for excess of jurisdiction, and liable to be set aside.
- The award should state the seat of the arbitration.
- The award should be signed by the arbitrator.
- The award should state the date on which it is made.
- The award needs to be enforceable. The award should be framed in such a way as to ensure that it can be enforced either by action on the award or by summary process.This requirement will rarely be of relevance in rent review, since the usual outcome of the award will be to determine the open market rental value, rather than to specify a rent that the tenant is to pay.

Form and contents of Arbitral Award

Following are the important provisions pertaining to form and contents of arbitral award as per Section 31 of the Act:

(1) Arbitral award must be in writing.
(2) It must state the reasons unless otherwise agreed by the parties or the award is on agreed terms under Section 30.
(3) It must be dated and signed by the arbitrators.
(4) It must state the place of arbitration.
(5) A signed copy of the arbitral award must be delivered to each of the parties to the reference.

It is good practice to develop a template for use in setting out the award, to ensure that all the salient elements are covered in a logical, clear and complete way. Most well written awards follow a set pattern containing a number of different ingredients, as follows:

- heading;

- title;
- recitals;
- background;
- the review provisions;
- issues;
- reasons;
- decision; and
- closing formalities.

Correction and Interpretation of Award [Sec. 33(1)]

All tribunals make mistakes from time to time. Unless the parties have agreed otherwise, s.57 of the Act allows the arbitrator, on their own initiative or on the application of a party to correct such mistakes within 30 days from the receipt of arbitral award:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

It may be noted that the arbitral tribunal may correct any error of the type referred to in clause (a) above, on its own initiative, within 30 days from the date of the arbitral award.

Additional Award [Sec. 33(4)]

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

Enforcement of award

Section 36 of the Act provides that if the time for making an application to set aside the award has expired or the application has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as it were a decree of the Court.

Setting aside of an Arbitral Award [Sec. 34]

The parties can approach the Court for setting aside the Award.
Section 34 provides that an arbitral award may be challenged before the Competent Court and can be set aside on the following grounds:

(1) A party to arbitration suffered from want of competency.
(2) The arbitration agreement is illegal and void.
(3) The concerned party (i.e., party applying for setting aside the award) was not given proper notice of appointment of an arbitrator.
(4) The arbitral tribunal was not properly constituted or the procedure adopted not in accordance with the agreement.
(5) The arbitral tribunal acted without jurisdiction.
(6) Award dealing with a dispute not contemplated by or not falling within the terms of submission to arbitration.

(7) The subject matter of dispute is not capable of settlement by arbitration under the law.
(8) Award is in conflict with the public policy.

An application for setting aside an arbitral tribunal may be made within 3 months from the date on which the party making the application had received the award. If a request had been made under Section 33 for the correction or interpretation of the award, application for setting aside of award may be made within 3 months from the date on which that request had been disposed of by the arbitral tribunal. However, if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the prescribed period of 3 months, it may entertain the application within a further period of 30 days, but not thereafter.

Interim measures by the court (section 9)

An arbitrator doesn't have any power to grant injunction however a party to arbitral agreement may, before or during arbitral proceedings or at any time after the making or the arbitral award but before it is enforce in accordance with section 36, apply to a court:

(i) For the appointment of a guardian for a minor or person of unsound mind for the purpose of arbitral proceedings or

(ii) For an interim measure of protection in respect of any of the following matters:
- **(a)** Prevention, interim custody or sale of any goods which are the subject matter of the arbitration agreement.
- **(b)** Securing the amount in dispute in the arbitration;
- **(c)** Interim injunction or the appointment of a receiver etc.
- **(d)** Any other matter – the court deems fit.

In *Ashok Chawla*v.*Rakesh Gupta,* (1996) 2 Arb.L-J. 255, it has been held that in the absence of any prayer for substantive relief, the prayer for issuing any directions by way of interim measures cannot be entertained.

APPEALS [SECTION 37]

Section 37 of the Act provides that anappeal against the order of Arbitral Tribunal granting or refusing to grant any interim measures shall lie to a Competent Court.

Further, appeal shall also lie to the Competent Courts only against the following orders of the Court:
- ❖ Order granting or refusing to grant any interim measures;
- ❖ Order setting aside or refusing to set aside an arbitral award.

No second appeal shall lie from an order passed in appeal under this Section. However, the right to appeal to the Supreme Court is not affected.

CONCILIATION

INTRODUCTION

Conciliation is one of the non-binding procedures where an impartial third party, known as the conciliator, assists the parties to a dispute in reaching a mutually agreed settlement of the dispute. As per the Halsbury Laws of England, conciliation is a process of persuading parties to each an agreement. Because of its non-judicial character, conciliation is considered to be fundamentally different from that of litigation. Generally Judges and Arbitrators decide the case in the form of a judgment or an award which is binding on the parties while in the procedure of the conciliation, the conciliator who is often a government official gives its report in the form of recommendations which is made public.

Meaning of Conciliation

Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to agreement and settling of disputes without litigation. Conciliation is an informal process in which the conciliator (the third party) tries to bring the disputants to an agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. The Arbitration and Conciliation Act, 1996 gives a formal recognition to conciliation in India.

Application and Scope

Section 61 of the Arbitration and Conciliation Act of 1996 provides for the Application and Scope of Conciliation. Section 61 points out that the process of conciliation extends, in the first place, to disputes, whether contractual or not. But the disputes must arise out of the legal relationship. It means that the dispute must be such as to give one party the right to sue and to the other party the liability to be sued. The process of conciliation extends, in the second place, to all proceedings relating to it. But Part III of the Act does not apply to such disputes as cannot be submitted to conciliation by the virtue of any law for the time being in force.

Number and qualification of conciliators-Section 63 fixes the number of conciliators. There shall be one conciliator. But the parties may by their agreement provide for two or three conciliators. Where the number of conciliator is more than one they should as general rule act jointly.

Appointment of Conciliator

Section 64 of the Arbitration and Conciliation Act, 1996 provides that the conciliator is appointed in the following manner:

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

Principles of Procedure

1) **Independence and impartiality [Section 67(1)]-**The conciliator should be independent and impartial. He should assist the parties in an independent and impartial manner while he is attempting to reach an amicable settlement of their dispute.

2) **Fairness and justice [Section 67(2)]-**The conciliator should be guided by the principles of fairness and justice. He should take into consideration, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices between the parties.

3) **Confidentiality [Section 70]-**The conciliator and the parties are duly bound to keep confidential all matters relating to conciliation proceedings. Similarly when a party gives a information to the conciliator on the condition that it be kept confidential, the conciliator should not disclose that information to the other party.

4) **Disclosure of the information [Section 70]-**When the conciliator receives a information about any fact relating to the dispute from a party, he should disclose the substance of that information to the other party. The purpose of this provision is to enable the other party to present an explanation which he might consider appropriate.

5) **Co-operation of the parties with Conciliator [S. 71]-**The parties should in good faith cooperate with the conciliator. They should submit the written materials, provide evidence and attend meetings when the conciliator requests them for this purpose.

Role of Conciliator

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

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

Procedure of conciliation

1) **Commencement of the conciliation proceedings [Section 62]-**The conciliation proceeding are initiated by one party sending a written invitation to the other party to conciliate. The invitation should identify the subject of the dispute. Conciliation proceedings are commenced when the other party accepts the invitation to conciliate in writing. If the other party rejects the invitation, there will be no conciliation proceedings. If the party inviting conciliation does not receive a reply within thirty days of the date he sends the invitation or within such period of time as is specified in the invitation, he may elect to treat this as rejection of the invitation to conciliate. If he so elects he should inform the other party in writing accordingly.

2) **Submission of Statement to Conciliator [Section 65] –** The conciliator may request each party to submit to him a brief written statement. The statement should describe the general nature of the dispute and the points at issue. Each party should send a copy of such statement to the other party. The conciliator may require each party to submit to him a further written statement of his position and the facts and grounds in its support. It may be supplemented by appropriate documents and evidence. The party should send the copy of such statements, documents and evidence to the other party. At any stage of the conciliation proceedings, the conciliator may request a party to submit to him any additional information which he may deem appropriate.

3) **Conduct of Conciliation Proceedings [Section 69(1), 67(3)]-**The conciliator may invite the parties to meet him. He may communicate with the parties orally or in writing. He may meet or communicate with the parties together or separately. In the conduct of the conciliation proceedings, the conciliator has some freedom. He may conduct them in such manner as he may consider appropriate. But he should take in account the circumstances of the case, the express wishes of the parties, a party's request to be heard orally and the need of speedy settlement of the dispute.

4) **Administrative assistance [S. 68]-**Section 68 facilitates administrative assistance for the conduct of conciliation proceedings. Accordingly, the parties and the conciliator may seek administrative assistance by a suitable institution or the person with the consent of the parties.

Difference between Arbitration and Conciliation

- Arbitration is more of formal nature and conciliation is of informal nature.
- 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.
- In arbitration, parties cannot appoint even number of arbitrators; while in conciliation, the number of Conciliators can be even.
- Arbitrators can be appointed even before the dispute arises; while a conciliator is appointed only after the dispute has arisen.

Settlement Agreement

As per Section 73 -

1) When it appears to the conciliator that there exists elements of a settlement which may be acceptable to he parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations.

2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement.
3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.
4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

Status and effect of settlement agreement

The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed term son the substance of the dispute rendered by an arbitral tribunal under Section 30.

A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence.

Number of conciliators

1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.
2) Where there is more than one conciliator, they ought, as a general rule, to act jointly. (Section 63)

Termination of Conciliation Proceedings

The conciliation proceedings shall be terminated:

(a) by the signing of the settlement agreement by the parties on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration. (Section 76)

Resort to arbitral or judicial proceedings

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights. (Section 77)

Admissibility of evidence in other proceedings

The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

b) admissions made by the other party in the course of the conciliation proceedings;
c) proposals made by the conciliator;
d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MEDIATION

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

EXAMINATION QUESTIONS

Q. 1. What are the essentials of an arbitral award?

Q. 2. Write short notes on the following:
- ❖ Alternate dispute resolution;
- ❖ Jurisdiction of arbitral tribunals; and
- ❖ Finality of arbitral award

Q. 3. Discuss briefly the circumstances under which the court may modify or correct an arbitration award.

Q. 4. What are the kinds of disputes which cannot be referred to arbitration?

Q. 5. What do you understand by an arbitration agreement? What are the usual contents of such an agreement?

Q. 6. What are the grounds for setting aside of an arbitral award under the Arbitration and Conciliation Act, 1996?

Q. 7. Describe the provisions regarding setting aside an award under the Arbitration and Conciliation Act, 1996. What is the time limit for making an application for setting aside the award made under the said Act?

Q. 8. In which court and on what grounds may an award be challenged under the Arbitration and Conciliation Act, 1996?

Q. 9. Discuss the procedure to be followed for arbitral proceedings by an arbitral tribunal under the Arbitration and Conciliation Act, 1996. .

Q. 10. What do you understand by 'conciliation`? How are the conciliators appointed? Discuss their role in arriving at a settlement agreement.

Q. 11. 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 the dispute in a court. Advise Bijoy.

Q. 12. Vivek 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 thus he could not present his case. He furnishes sufficient proof and pleads before the court that he received the arbitral award just 15 days back. What is the appropriate remedy to be provided by the court in this case?

Q. 13. 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 chainnan of arbitrator 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.

Q. 14. 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.

SPECIMEN ANSWER OF SITUATION BASED QUESTION

Question: Mizaz and Siraj entered into an agreement to refer a dispute relating to genuineness of a will to an arbitral tribunal. Inspite of this, Siraj commenced proceedings relating to this 'dispute in the district court of competent' jurisdiction. Mizaz submits an application for stay of legal proceedings under the Arbitration and Conciliation Act, 1996. Will he succeed?Explain.

Answer

The issue under consideration is related to **'Power of Judicial Authority to refer dispute to Arbitration'** as provided under **Section 8** of the Arbitration and Conciliation Act, 1996.

Section 8 provides that where there is an arbitration agreement between two parties to refer dispute to the arbitration method, but if one of the parties has referred the dispute to the court, then the court shall refer the dispute, on the application made by the other party, to the arbitration, subject to the satisfaction of certain conditions. One of the conditions laid down under Section 8, for referring the dispute to arbitration, is that the matter under dispute is capable of being determined through arbitration method.

In the given situation, Mizaz and Siraj entered into an agreement to refer a dispute relating to genuineness of a will to an arbitral tribunal. Inspite of this, Siraj commenced proceedings relating to this 'dispute in the district court of competent' jurisdiction. Miraz

wants the legal proceedings before the court to be stayed and to refer the dispute to arbitration. Here, the court shall not grant the stay and **will not refer the dispute to arbitration because matter under dispute is 'Genuineness of a Will? and this is not capable of being determined through arbitration method.** As per CPC, 1908, 'Genuineness of a Will' can be determined only by the Courts.

CHAPTER – 10 LAW RELATING TO STAMPS

INTRODUCTION

The Indian Stamp Act, 1899 is a fiscal legislation dealing with tax on transactions. The tax is levied on in the shape of stamps recording the transactions. It is the law relating to stamps which consolidates and amends the law relating to stamp duty.

In order to protect the revenue of states, the Indian Stamps Act, 1899 was enacted. The Act came into force on 1.7.1899. The Act is divided into **8 chapters** and **one schedule**. The Act extends to the **whole of India except the State of Jammu and Kashmir**.

Indian Stamp Act 1899 is the parent Act, which was enacted by the Legislature as a fiscal statute.

The constitution of India Contains 3 lists i.e. Union list (entry 91), State list (entry 63) and Concurrent List regarding power to regulate stamp duties.

(a) Union List

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.

(b) The State Legislature

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.

(c) Amendments, entry 44

The amendments to the Central Act effected by the States are in the shape of amendment of sections of the Central Act, adding new sections, adding separate schedules, modifying in schedules, etc.

Stamp duty is a source of income to the government. This has been done by prescribing a stamp duty which is payable on every document/ instrument. In our country, documents are often executed without proper legal advice and lawyers have to face a difficult situation when they find that the document to be put in the court is not properly stamped. When the documents are properly stamped they can be admitted in a court as an evidence.

Stamp duty is TAX which is levied on DOCUMENTS.

IMPORTANT DEFINITIONS

Bill of Exchange [Section 2(2)]

Bill of exchange means a bill of exchange as defined by the Negotiable Instruments Act, 1881, and includes also a hundi, and any other document entitling or purporting to entitle any other person of, or to draw upon any other person for, any sum of money.

Bill of Lading [Section 2(4)]

Bill of lading includes a through bill lading, but does not include a mate's receipt. When goods are delivered on board a ship, the receipt given by the person in charge of the ship is called the mate's receipt. The shipper returns this receipts to the master of the ship before the ship leaves and gets bill of lading for the goods.

Bond [Section 2(5)]

Bond includes the following:

- Any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- Any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- Any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.

Conveyance [Section 2(10)]

Conveyance includes a conveyance on sale and every instrument by which property, whether moveable or immovable, is transferred inter vivos[1] and which is not otherwise specifically provided for by Schedule.

1. takes effect between two living persons and governed by the Indian T.P. Act.

Instrument [Section 2(14)]

In terms of **Section 2(14)** of Indian Stamp Act, 1899, the term instrument includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. It is a writing which generally imports a document of a formal legal kind. It may also be defined as a document which gives formal expression to a legal act, for the purpose of creating, securing, modifying bills, bonds, conveyances, leases, mortgages, promissory notes, wills, etc.

Definition of Instrument is an inclusive definition, an instrument may include Bills of Exchange, Promissory Notes, Share Transfer Deed, Instrument of Proxy, Letter of Credit, and Insurance Policies, etc. are examples of such instruments but does not include ordinary letters or memoranda or accounts.

Following instances may be noted

- ❖ 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.

- Photocopy of an agreement is not an instrument as defined under Section 2(14) of the Act. In general, levy of stamp duty is a State subject. However in certain cases, Parliament has exclusive powers to fix the rates of duty.

Promissory Notes[Section 2(22)]

It means a promissory note as defined by the Negotiable Instruments Act, 1881. It also includes a note promising the payment of any sum of money out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen.

Requisites of a promissory note as per the Negotiable Instruments Act, 1881 are the following

- the document must contain an unconditional undertaking to pay;
- the undertaking must be to pay money only;
- the money to be paid must be certain;
- it must be payable to or to the order of a certain person or to bearer;
- the document must be signed by the maker.

INSTRUMENTS CHARGEABLE WITH STAMP DUTY [SECTION 3]

Section 3 is the charging section with the rate as specified in Schedule I, on an instrument. The liability of an instrument to stamp duty is determined by the Act in force at the time the instrument is executed.

The following instruments shall be chargeable with duty of the amount indicated in Schedule I

(a) Instruments mentioned in Schedule I which, not having been previously executed in India, whether it relates to property situated or to any matter or thing to be done in or out of India, is chargeable to stamp duty.
(b) Bills of Exchange and Promissory Notes are chargeable to stamp duty. However, the bills of exchange which are payable on demand are not subject to stamp duty.
(c) Instrument executed out of India are chargeable to duty if they relate to some property situated in India or to some matter or thing done or to be done in India.

However no duty is chargeable in respect of the following instruments

(a) Instruments executed by or on behalf of or in favor of, the Government.
(b) Instruments for the sale, transfer or other disposition of any ship or vessel.
(c) Bills of Exchange and Promissory Notes executed outside India and acted upon outside India.
(d) Any instrument executed by, or, on behalf of, or in favor of, the Developer or Unit or in connection with the carrying out of purposes of the special Economic Zone (SEZ).

In **Swadeshi Cotton Mills, AIR 1932 All 291**, it was held that if after entering into a contract of sale the parties refrained from getting an actual deed of conveyance executed has evaded the payment of higher stamp duty.

Further, in **Commissioner of Inland Revenue v. G. Angus, (1889) 23 QBD 579**, Esher M.R. stated that “goodwill can be sold and conveyed to purchasers without any ‘conveyance’ being executed and that if you treat the document as only an agreement with regard to the goodwill, there will never be any conveyance executed and the property would have been transferred to the purchaser without the Crown getting any ad valorem duty upon the transfer.

Substance and Description

Courts have invariably upheld the principle of substance of the transaction, over the form, in the matter of deciding the nature of instrument. The substance of the transaction in the document may not necessarily embody to the description given in the head thereof. Further description and substance plays an important role in determining stamp amount.

SECTION 4
EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY WHEN SINGLE TRANSACTION OF SALE, MORTGAGE OR SETTLEMENT EFFECTED BY SEVERAL INSTRUMENTS)

Under Section 4, it is provided that, where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction:

1. The principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the sale, mortgage or settlement.
2. And for the other instruments called subsidiary instruments, they shall be chargeable with a duty of Re. 1 instead of the duty prescribed for it in that Schedule.

It may be noted that parties may determine for themselves which of the instruments will be employed shall be deemed to be principal instrument. However, the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instrument employed.

Illustrations where Section 4 is applicable:

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

II. A executed a conveyance of immovable property. On the same deed his nephew (undivided in status) endorsed his consent to the sale, as such consent was considered to be necessary. It was held that the conveyance was the principal instrument. The consent was chargeable with only one rupee.

III. 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 B also. It was held that the two documents had to be construed as part of the same act; the first was liable to duty as a conveyance while the second was liable to a duty of Rupee 1 only (Dadobav. Krishna, ILR 7 Bom. 34).

Illustrations where Section 4 is not applicable/ New Stamp is necessary

I. A lease is executed and got registered. A second document is executed material altering the terms of the first document. The second document has to be stamped as a lease. Section 4 does not apply.

II. A purchaser of land executes a mortgage of the land in favor of the vendor for a portion of the purchase money. The mortgage is liable to full duty as a separate instrument. Section 4 does not apply.

INSTRUMENTS RELATING T0 SEVERAL DISTINCT MATTERS [SECTION 5]

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

Where several distinct matters and transactions are embodied in a single instrument, the instrument is called the multifarious instrument.

Meaning of Distinct Matters

This section deals with multifarious instruments. The expression "distinct matters" connotes distinct transactions. The term distinct matters mean the matters of different kinds.

Following matters are considered to be distinct matters:

(1) 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. **[ChimnoyeeBasu v. Sankare Prasad Singh]**

(2) Agreement for service and a lease.

(3) A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable under Section 5, where they have no common interest.

(4) Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities, section 5 applies. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.

Following matters are not considered to be distinct matters

(1) An agreement to refer any dispute whatever arising out of a contract (e.g Arbitration Clause)

(2) Covenants (terms and conditions) in a mortgage of land that the mortgagor will pay the taxes of the land.

(3) Documents purporting to be mere acknowledgement of other transaction.

(4) A provision in a deed of transfer of shares in a company that the transferee will hold the shares subject to the rules and regulations of the company.

(5) An agreement containing two covenants making certain properties chargeable in the first instance and creating charge over other certain properties if the first mentioned properties are found insufficient does not fallwithinSection5(TekRamv.MaqbulShah,)

(6) A lease to joint tenants requires only one stamp.

(7) A conveyance by several persons jointly relating to their separate interest in certain shares in an incorporated company requires only one stamp.

PrincipalandAncillary

What is the leading object? Which is principal and which is ancillary? TRUE TEST
If an instrument taken with reference to its primary object is exempted then stamp duty cannot be charged merely because matter ancillary to it is included and that matter is chargeable to stamp duty. A very common example of this is if an agreement for sale of goods is exempt, which also contains an arbitration clause which is chargeable. The latter clause is incidental to the former agreement and is exempt.
Where a document contains a transfer of mortgage and an agreement to make a loan, the mortgage and the loan are distinct matters and separately chargeable.
Thus, the test usually adopted is the test of — **LEADING OBJECT**. If there is only one leading object, Section 5 will not apply. But if there are several distinct contracts, each is taxable/Stamp.

SECTION 6
INSTRUMENTS COMING WITHIN SEVERAL DESCRIPTIONS IN SCHEDULE 1

In such case when an instrument falls within the provisions of two or more Articles in Schedule I, and the instrument does not contain distinct matters, it is to be charged with the highest of the duties, when the duties chargeable are different.

The provisions of section 6 are subject to the provisions of Section 5 i.e., if the instrument is containing the distinct matters, then Section 6 shall not apply because in such situations Section 5 applies. However, nothing in this Act shall render chargeable, with duty exceeding one rupee, in counterpart or duplicate, of any instrument chargeable with duty, in respect of which proper duty has been paid.

Section 6 applies only where the instrument contains only one matter, but falls within two or more items in the Schedule. Section 6 covers cases where the instrument does not cover distinct matters but is ambiguous in regard to the various entries given in Schedule-I to the Act.

For example, a document fell within the definition of both a bond and a promissory note. It was held that the highest of the duties payable on the promissory note and the bond shall be paid. **[State Bank of Hyderabad v. Ranganath]**

A debtor execute a lease in favor of his creditor providing that the creditor could appropriate the rent payable by him in respect of the lease towards the repayment of the loan advances by him. Hence instrument was partly lease and partly a mortgage.

BONDS, DEBENTURES, ETC. ISSUED UNDER THE LOCAL AUTHORITIES LOAN ACT

Section 8 provides that any local authority raising a loan under the provisions of the Local Authorities Loans Act, 1879 or of any other law for the time being in force by the issue of bonds, debentures or other securities, shall, in respect of such loans, be chargeable with a duty of one percent on the total amount of the bonds, debentures or other securities issued by it. Such bonds, debentures or other securities need not be

stamped and shall not be chargeable with any further duty on renewal, consolidation, sub-division or otherwise.

SECURITIES DEALT IN DEPOSITORY NOT LIABLE TO STAMP DUTY

As per Section 8A of the Act:—

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

(b) the transfer of—

- ❖ registered ownership of securities from a person to a depository or from a depository to a beneficial owner;
- ❖ beneficial ownership of securities, dealt with by a depository;
- ❖ beneficial ownership of units, such units being units of a Mutual Fund including units of the Unit Trust of India established under sub-section (1) of Section 3 of the Unit Trust of India Act, 1963, dealt with by a depository, shall not be liable to duty under this Act or any other law for the time being in force.

MODE OF PAYMENT OF STAMP DUTY OR MODE OF STAMPING/ METHOD OF STAMPING

Section 10 provides that all duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamps according to the provisions contained in the Act, or when no such provision is applicable thereto, as the State Government concerned may by rule, direct. The rules may, among other matters, regulate:

- ❖ 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 modes of payment of stamp duty:

ADHESIVE STAMPS IMPRESSED STAMPS

Adhesive Stamps

Section 11: Use of Adhesive Stamps

Section 11 deals with the use of adhesive stamps. This section provides that the following instruments **may** be stamped with adhesive stamp, namely –

(a) Instruments chargeable with the duty not exceeding 10 paise, except bills of exchange payable otherwise than on demand.

(b) The bills of exchange and promissory notes drawn or made out of India.
(c) Instruments relating to entry as an advocate, vakil or attorney on the rolls of a High Court.
(d) Notarial Acts and
(e) Instruments relating to transfer of shares of a company or other body corporate.

The use of the words **may** be stamped really connotes **shall** be stamped. The rules framed under the Act as well as under the relevant state laws invariably provide that the adhesive stamps shall carry special words to indicate the use to which the stamps can be put.

Section 12: Cancellation of Adhesive Stamp

Section 12 of the Act provides that the adhesive stamps shall be cancelled either at the time when the Stamp is affixed, if the instrument has already been executed OR at the time of executing. The object of cancellation is to prevent the same stamps from being used again.

The person required to cancel an adhesive stamp may cancel it in any of the following manner:
❖ By writing on or across the stamp his name or initials of his firm along with the date.
❖ In any other effectual manner.

The following have been held to be effectual manner of cancellation of adhesive stamps:
(a) Drawing a solitary line (single line) across the stamp.
(b) Drawing of diagonal lines across the stamp with ends extending on to the paper of the document.

It may be noted that any instrument bearing an adhesive stamp, which has not been cancelled, shall be deemed to be unstamped. If a person fails to cancel the stamp, he becomes liable to penalty in accordance with Section 63.

In **Hafiz Allah Baksh v. Dost Mohammed**, it was held that if it is possible to use a stamp a second time, inspite of a line being drawn across it, there is no effectual cancellation. Again, the question whether an 'adhesive stamp has been cancelled in an effectual manner has to be determined with reference to the facts and circumstances of each case.

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 **[Re. Tata Iron Steel Company]**

In **Melaram v. BrijLal,** it was held that a very effective method of cancellation is the drawing of **diagonal lines** right across the stamps with ends **extending** on to the **paper** of the document.

A **cross** marked by an illiterate person indicating his acknowledgement, was held to be an effective cancellation of the stamp in **KolaiSai v. BalaiHajam.**

Putting a date across the stamp by a third party on a date subsequent to the date on which the bill had been drawn, was held to be not proper cancellation. **[Daya Ram v. ChanduLal]**

Section 13: Impressed Stamp

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

The expression "face of the instrument" is not to be interpreted as meaning that the document must commence on the side on which the stamp is impressed or that both sides of the paper or parchment may not be written upon.

The engrossed and impressed stamp should not be written over. Under Section 14, no second instrument chargeable with duty shall be written upon piece of stamp paper upon which an instrument chargeable with duty has already been written.

It may be noted that an instrument should be written only on that side on which the stamp is embossed. If the instrument begins and ends on the reverse side, it is not duly stamped.

Where a single sheet of paper is insufficient, the Indian Stamp Act provides for the following:

(1) Where two or more stamp papers are used, a portion of such instrument shall be written on each sheet so used.
(2) Where one stamp paper is insufficient in space, plain paper may be added but the substantial part of the instrument must appear on the stamp paper.

Denoting Duty

Section 16 applies where the duty with which an instrument is chargeable or its exemption from duty depends upon the duty payable on another instrument called the principal or original Instrument. This is so for example in the case of a subsidiary instrument under section 4.

For e.g. If the duty payable on an instrument X depends upon the duty payable on another instrument Y an application is to be made in writing to the collector along with instrument X and Y, that duty paid on instrument Y should denoted on instrument X by Endorsement. This is called denoting of duty.

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

TIMING OF STAMPING

Instruments executed in India must be stamped before or at the time of execution.

- Section 17 of the Act provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. The scope of Section 17 is restricted to only instruments executed in India. If the executant of a document has already completed the execution of the document and

in the eye of law the document, could be said to have been executed, a subsequent stamping, (however close in time) could not render the document as one stamped at the time of execution.
Thus, where a promissory note is executed by A and B and a stamp is afterwards affixed and cancelled by A by again signing it, the stamping has taken place subsequent to the execution and hence, the provisions of Section 17 are not complied with.

- **Instruments executed outside India** can be stamped within three months after it is first received in India (Section 18). Section 18 relates to foreign instruments (other than bills and notes), received in India; Foreign bills and notes received in India have been dealt with, in Section 19. In case of bills of exchange or promissory notes made out of India, it should be stamped by first holder in India deals with the instrument i.e., presents the same for acceptance or payment, or endorses transfers or otherwise negotiates the same in India. Where an instrument is brought to the Collector after the expiry of three months, the Collector may, instead of declining to stamp it, validate it under Sections 41 and 42 if he is satisfied that the omission to stamp in time was due to a reasonable cause.

  As far as bills of exchange and promissory notes are concerned, Section 19 makes an elaborate Provision. Any bill of exchange payable otherwise than on demand or promissory note drawn or mad out of India must be stamped and the stamp cancelled, before the first holder in India deals with the instrument, i.e., presents the same for acceptance or payment, or endorses transfers or otherwise negotiates the same in India.

  The object of Section 18 is to facilitate the stamping of the documents within a period of three months when Section 17 relating to instruments executed in India cannot be complied with. Section 18 is intended to mitigate the inconvenience and hardship that will entail if the instrument concerned is required to be stamped before or at a the time of execution as laid down in Section 17.

VALUATION OF DUTY [SECTIONS 20 TO 28]

Value if amount is expressed in foreign currency (Section 20)

According to Section 20, where an instrument is chargeable with ad-valorem duty (i.e., on the basis of value of property) in respect of any money expressed in any foreign currency, such duty shall be calculated on the value of such money in the Indian currency according to the current rate of exchange on the day of the date of the instrument.

The Central Government may, from time to time, prescribe a rate of exchange for the conversion of any foreign currency into the Indian currency for the purpose of calculating stamp duty. In such a case, the exchange rates so prescribed by the Central Govt. shall be deemed to be the current rate.

Valuation of Stock and any marketable or other securities [Section 21]

Section 21 provides that in the case of an instrument is chargeable with ad-valorem duty in respect of any share or of any marketable security, then such duty shall be calculated on the value of such shares or securities according to the average price or the value thereof on the day of the date of the instrument. Where the shares are quoted

on the stock exchange, it is easy to ascertain the price of the shares or stock.

However, where the shares or stocks are not quoted on any stock exchange, the valuation has to be based upon the average of the latest private transactions, which can generally be ascertained from the principal officer of the concerned company or corporation. If, there have been no dealings at all, then unless some other reliable evidence of market value is forthcoming the value is to be taken at par.

Effect of statement of rate of exchange or average price [Section 22]

Section 22 provides that when an instrument contains a statement of current rate of exchange or average price, as the case may be, and is stamped in accordance with such statement, it shall be presumed that the instrument is duly stamped until and unless the contrary is proved.

Instruments reserving interest [Section 23]

Section 23 provides that where stamp duty is leviable on the sum actually due at the date of the execution of the instrument under consideration and any additional amount that may occur in future in the form of interest is not to be taken into account.

However, when the interest is capitalized, then the aforesaid rule shall not apply. For instance, a promissory note for Rs.10,000 is drawn with the recital of interest at the rate of 18 percent per annum, payable by the promissor; stamp is leviable on the basis that the instrument is for Rs. 10,000 only.

Valuation of instrument connected with pledge of marketable securities [Sec. 23A]

Section 23 A provides that , where an instrument is given on the occasions of deposit of any marketable security by Way of security of money advanced or to be advanced by Way of loans, it will be chargeable to duty as per the rates applicable to “agreement or memorandum of agreement’ is appearing in Schedule I of Indian Stamp Act. Release of the instrument will also be chargeable to same stamp duty.

Valuation in case of transfer in consideration of debt [Section 24]

According to Section 24, where any property is transferred to any person in satisfaction of any debt due to such person, such debt shall be treated as consideration for valuation of ad-Valorem duty.

What Section 24 means is that where property is sold subject to the payment by the purchaser, discharging a debt charged on the property, then the purchaser is really paying a consideration which includes the amount of that debt also **[Somayya Organics Ltd. v. Board of Revenue].**

Explanation to Section 24 provides that in the case of sale of property subject to mortgage or other encumbrances, any unpaid mortgage money or money charged together with the interest, if any, due on the same shall be deemed to be part of the consideration for the sale. However, where property subject to a mortgage is transferred to the mortgagee he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

Illustrations:

(i) A owes B Rs. 1,000/-. A sells a property to B, the consideration being Rs. 500/- and the release of the previous debt of Rs. 1,000/-. Stamp duty is payable on Rs. I,500/-
(ii) A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1,000/- and unpaid interest Rs. 200/-. Stamp duty is payable on 1,700.
(iii) A mortgages a house of the value of Rs. 10,000/- to B for Rs. 5,000/-. B afterwards buys the house from A. Stamp duty is payable on Rs. 10,000/- less the amount of stamp duty already paid for the mortgage.

Valuation in case of annuity [Section 25]

Section 25 deals with the manner of computation of duty in case of annuities. Some agreements provide for payment of annuity i.e., periodic payments and not lump sum payments. In such cases, valuation is done in the following manner:
(a) If the period of annuity is definite, total amount of annuity to be paid during the period will be considered.
(b) If annuity is payable for an indefinite period of time or perpetually, total amount payable within 20 years from the date of first payment will be considered for valuation.
(c) If payment of annuity is subject to life of a person, the valuation will be done on the basis of annuity payable for 12 years from the date of first payment.

Duty where value of subject matter is indeterminable [Section 26]

When value of subject matter of any instrument chargeable with add-valorem duty and cannot be ascertained, stamp duty should be paid on estimated valuation. However, in such a case the maximum amount that can be claimed will be only the value on which the stamp duty has actually been paid and nothing more.

However, under the combined operation of Sections 26 and 35, a lessee under the mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the stamp originally affixed to the lease. [AIR 1924 PC 221; AIR 1930 Cal. 526].

Facts affecting duty to be set forth in the instrument [Section 27]

Section 27 lays down that the consideration, if any, and all other facts and circumstances which can have a bearing on the amount of stamp duty shall be fully or truly stated in the instrument. This section aims at protecting the revenue of the Govt. by requiring the parties to make a true and full disclosure of all facts having any bearing on the duty payable.

But the omission does not render the document inadmissible or liable to be impounded and taxed in the manner provided in Section 35. However, it is punishable Under Section 64, i.e. omission to set-forth fully and truly the value of the property, with intent to defraud the Government.

Directions as to duty in case of certain conveyances [Section 28] (apportionment)

Section28prescribescertainrulesforapportionment oftheconsideration, in casesofcertainconveyancesarisingoutofaproperty beingcontractedtobesold andthereafterconveyedinparts etc.

Where any property has been contracted to be sold for one consideration for the whole and is thereafter to be conveyed in parts to the purchaser, it becomes necessary to

apportion the stamp duty payable on different instruments. The basis of apportionment is the consideration paid in respect of each separate conveyance.

E.g. A agreed to sell to B a block of houses consisting of 3 houses, H1, H2, H3 for Rs. 2,50,000/-. B agreed to sell house H1 to C for Rs. 1,00,000/- and house2 to D for 90,000 and decided to retain the house H3for his personal residence.

The conveyance were executed by A to C and D. These Conveyance would be chargeable ad valorem on a consideration of 1, 00,000 and Rs. 90,000 respectively. The conveyance of house H3 to B would be chargeable on Rs. 60,000/- i.e. (250000-190000)

A contract to sell house to B. B contracts to sell the same house to C. One Document of conveyance is executed by A to C. The duty payable will be on the consideration paid by C. The object of this section is to provide relief from the payment of double stamp duty.

WHO SHOULD PAY THE STAMP DUTY [SECTION 29]

The section is not exhaustive and makes no reference to several instruments. There are several other instruments not mentioned in Section 29, for which there is no express provision as to who should bear the stamp expenses. The primary duty of stamping lies in all cases on the person executing the instrument as Section 17 directs that the instruments chargeable with duty shall be stamped at or before executing an instrument without the same being duly stamped.

Section 29 deals with the persons responsible for the payment of duty. Under this section, in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

Following persons, unless the parties have agreed otherwise, are liable to pay the stamp duty

- in the case of a policy of insurance other than fire insurance by the person effecting the insurance;
- in the case of a policy of fire-insurance – by the person issuing the policy;
- in the case of a conveyance including a reconveyance of mortgaged property by the grantee;
- in the case of a lease or agreement to lease by the lessee or intended lessee;
- in the case of a counterpart of a lease – by the lessor;
- in the case of an instrument of exchange – by the parties in equal shares;
- in the case of partition deed, parties to partition have to pay stamp duty in proportion to their respective shares in the property.

Receipts

Under **Section 30** of the Act any person receiving any money exceeding twenty rupees in amount or any bill of exchange, cheque or promissory note for an amount exceeding five hundred rupees or receiving in satisfaction of a debt any movable property exceeding five hundred rupees in value, shall on demand by the person paying or delivering such money, bill, cheque, note, or property, give a duly stamped receipt for the same.

CONSEQUENCES IF INSTRUMENT NOT DULY STAMPED [SECS. 33 TO 48]

Meaning of duly stamped

Duly stamped means that the instrument bears an adhesive or impressed stamp, not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India. [Sec. 2 (11)]

In case of adhesive stamp, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way so that it cannot be used for other instrument and the stamp appears at the face of instrument. If stamp is not cancelled, the instrument is treated as unstamped. Similarly, if the stamp duty paid is not adequate, the instrument is treated as not duly stamped.

Instruments not duly stamped, inadmissible in evidence etc, [Sections 35 & 36]

Section 35 of the Act provides that if an instrument is not duly stamped, it is not a void instrument.

It stipulates that no instrument chargeable with duty shall be –

- admitted in evidence for any purpose whatsoever by any person authorized by law or by the consent of the parties ; or
- shall be acted upon: or
- registered; or
- authenticated by any such person as aforesaid or by any public officer.

Unless such instrument is duly stamped

Following are the exceptions to Section 35:

(1) A document can be accepted as evidence in criminal court.
(2) An instrument not duly stamped can be accepted as evidence on payment of penalty of 10 times of the difference on duty.
(3) A receipt which is not duly stamped can be accepted as evidence on payment of penalty of Rupee 1
(4) If contract is effected by more than one letters, the contract will be admissible as an evidence if any one of the letters bears the proper stamps.
(5) Non-admissibility of evidence is not applicable on instruments executed by or on behalf of the Govt.
(6) A document certified by collector as properly stamped cannot be disallowed as evidence.

Section 36 provides that the admissibility of instrument cannot be challenged on the ground that it is not duly stamped, once it has been admitted in evidence.

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Section 36 is mandatory **[Guni Ram V. Kodar].**

If notwithstanding any objection, the trial Court admits the document, the matter ends there and the

Court cannot subsequently order the deficiency to be made and levy penalty (BhupathiNathv. Basanta Kumar, AIR 1936 Cal. 556; AIR 1933 Lah. 240).

ADMISSION OF IMPROPERLY STAMPED INSTRUMENTS

Under **Section 37**, opportunity is given to a party, of getting a mistake rectified when a stamp of proper amount, but of improper description has been used. Under this section, the State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, the instrument may, on payment of the duty with which the stamp is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

COLLECTOR'S POWER TO STAMP

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

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

Instruments unduly stamped by accident [Section 41]

Section 41 deals with cases where a person, of his own motion bring it to the Collector's notice that the instrument is not duly stamped. It provides that the deficiency in duty or even the total failure of duty may be made good by payment of the proper duty to the Collector within one year; provided that the collector is satisfied that such a lapse is due to accident, mistake or urgent necessity.

If the Collector is not so satisfied he shall impound the instrument and levy deficit duty and penalty.

Prosecution for Offences against Stamp Law

Section 43 deals with prosecutions for offences against the Stamp Law. This section provides that a levy of a penalty or payment thereof in respect of an unstamped or insufficiently stamped document does not necessarily exempt a person from liability for prosecution for such offence. However, the proviso to the section clarifies that no such prosecution shall be instituted in the case of any instrument in respect of which a penalty has been paid, unless it appears to the Collector that the offence was committed with **the intention of evading the payment/Duty**. On receipt of copy of the instrument impounded under Section 38, the Collector can initiate criminal proceedings if he sees same reasons.

Refund of Stamp Duty or Penalty by Revenue Authorities

Section 45 empowers the Chief Controlling Revenue Authority to order refund of excess stamp duty or penalty paid. The object of granting such further power to the Chief Controlling Revenue Authority is evidently to set right mistakes or other omissions by the Collector to order refund in deserving cases. The Section provides that where any penalty is paid under Section 35 or section 40, the Chief Controlling Revenue Authority

may, upon application in writing made within one year from the date of payment, order, refund such penalty wholly or in part. Where in the opinion of the Chief Controlling Revenue Authority, stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess.

Circumstances under which refund of stamp duty or penalty may be made by revenue authorities

- Spoiled stamps
- Misused stamps
- Stamps used in excess of the value required
- Stamps not required for use

The stamps purchased and not used for intended purpose are entitled for refund after after deduction of certain charges, if lodged for refund within 6 months from the date of purchase.

E Stamping

E stamping is a computer based application and a secured way of paying Non-Judicial stamp duty to the Government.

Benefits to The Client/Customer By E-Stamping

1) e-Stamp Certificate can be generated within minutes
2) e-Stamp Certificate generated is tamper proof
3) Authenticity of the e-Stamp certificate can be checked through the inquiry module.
4) e-Stamp Certificate generated has a Unique Identification Number (UIN).
5) Specific denomination is not required

Features of e-Stamping

1.) Easy accessibility and faster processing
2.) Security
3.) Cost savings
4.) User friendly

EXAMINATION QUESTIONS

Q. 1. State the modes of cancellation of adhesive stamps.
Q. 2. What are the instruments chargeable with stamp duty under the Indian Stamp Act, 1899?
Q. 3. Discuss the provisions relating to valuation of instruments for levy of duty under the Indian Stamp Act, 1899.
Q. 4. Explain the term 'distinct matters' relating to instruments liable for payment of duty under the Indian Stamp Act, 1899.
Q. 5. Define the term 'instrument' under the Indian Stamp Act, l899. Are the following 'instruments' under the Indian Stamp Act, 1899:

(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?

(ii) An unsigned draft document?

Q. 6. Which party is responsible for payment of duty on different kinds of instruments under the Indian Stamp Act, 1899?

Q. 7. 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.

Q. 8. Discuss the evidentiary value of an instrument not duly stamped under Stamp Act, 1899.

Q. 9. Within what period different kinds of instruments chargeable with stamp duty but executed out of India may be stamped?

Q. 10. Explain the methods of stamping under the Indian Stamp Act, 1899.

Q. 11. Explain 'Denoting duty'.

Q. 12. Amal entered into an agreement for sale of his house with Bimal on 2"d July, 2001. In the recital of the agreement, it was mentioned that the delivery of possession of the house had already been given on 2"d July, 2000. Discuss the validity of the agreement for the purpose of levying stamp duty on the agreement of sale in pursuance of above delivery of possession and subsequently the agreement.

Q. 13. 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.

Q. 14. 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.

Q. 15. Rajesh mortgages a building of the value of Rs. 70,000 to Suresh for Rs. 50,000. Rajesh, subsequently, sells the building to Suresh. An unpaid amount of Rs. 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.

Q. 16. Arjun executed a power of attorney both in his personal capacity and in the capacity as an executor, trustee, manager and liquidator in favour of Bheem. Decide the liability of duty payable on the instrument.

Q. 17. 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.

SPECIMEN ANSWER OF SITUATION BASED QUESTION

Question

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.

Answer

The issue under consideration is related to 'Stamp Duty payable in respect of a Single transaction effected by Several Instruments' as provided under Section 4 of Indian Stamp Act, 1899.

Section 4 provides that where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the sale, mortgage or settlement. As regards the other instruments called subsidiary instruments, they shall be chargeable with a duty of Re. I instead of the duty prescribed fwr it in that Schedule.

It may be noted that parties may determine for themselves Which of the instruments will be employed shall be deemed to be principal instrument, However, the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instrument employed.

Applying Section 4 on the situation given in the question, it can be concluded that gift deed executed by Ram is the principal instrument and it shall be chargeable to duty as prescribed in Schedule I and the deed executed by Shyam is the subsidiary instrument and hence chargeable to Re.1 stamp duty.

CHAPTER -11 LAW RELATING TO REGISTRATION OF DOCUMENTS

INTRODUCTION

Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document.

The Registration Act, 1908 is used for proper recording and registration of documents /instruments, which give them more authenticity. The Registration Act, 1908 is the law relating to registration of documents.

The Act came into force on: **01.01.1909.**

The Act contains provisions and procedures applicable to registration of documents in India.

OBJECTIVE

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

The Act deals with cases where transactions between individuals are reduced to writing and provide for compulsory or optional registration, as the case may be, of such written instruments. It does not deal with transaction not reduced to writing.

Therefore the objectives can be listed as follows:
1. The conservation of evidence,
2. Assurance of title, publicity of documents and prevention of fraud and forgery.
3. Registration ensures and safeguards the interest of an intending purchaser.

DOCUMENTS TO BE REGISTERED

Registrable Documents can be classified into two classes:

1. Those whose registration is compulsory; (Section 17)
2. Those whose registration is optional. (Section 18)

DOCUMENTS FOR WHICH REGISTRATION IS COMPULSORY AND OPTIONAL [SEC 17 & 18]

Documents for which Registration is Compulsory [Sec. 17]

Section 17 provides that the following documents require compulsory registration:

(1) Instruments of gift of immovable property: A person who gifts is DONOR and who receives gift is DONEE. Gift can be given by the donor at anytime during his lifetime till the time he possess the capacity to gift.

If donee dies before the acceptance of gift, such gift shall be treated void. However, if donor dies before registration, the document may be presented at anytime by his legal representative/heir or any other agent authorized on this behalf (**NAND KISHORE V. SURAJ PRASAD**)

It was held by the Privy Council in **KalyanaSundram v. Karuppa, AIR 1927 PC 42**, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. And if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. Neither death nor the express revocation by the donor, is a ground for refusing registration, provided other conditions are complied with.

Delay in registration of a gift does not postpone its operation. Section 123 of Transfer of Property Act, 1882 merely requires that donor should have signed the deed of gift. Hence a gift deed can be registered even if the donor does not agree to its registration

(2) Other Non-Testamentary Instruments (other than instruments of gift of immovable property): which purport or operate to create, declare, assign, limit or extinguish, any right, title or interest of the value of Rs.100/- and upwards, to or in immovable property. A document which is plainly intended to be operative immediately and to be final and irrevocable is non- testamentary instrument.

(3) Acknowledgement of Receipt/Payment: Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of creation, declaration, assignment, limitation or extinction, of any right, title or interest of the value of Rs.100/- and above, to or in immovable property.

This clause requires an acknowledgement in the form of a receipt to be registered, but not an acknowledgement of the fact that a transaction has taken place. To be registrable under this clause a receipt must satisfy the following two conditions:

- ❖ it must be the receipt of a consideration; and
- ❖ it must on the face of it be an acknowledgement of payment or some consideration on account of the creation, declaration, assignment, limitation or extinction of an interest of the value of 100 or upwards in immovable property.

The receipt must be such as to be linked with the creation etc. of a right

E.g. B sells his land to B for Rs 20000. A might gives a receipt in stating that "Received from B the sum of Rs. 20000 being the price of my land which I have sold to B and which I have no further Interest"

(4) Decree/Order/Award of the Court: Non- testamentary instruments transferring or assigning any decree of a court or any award of an arbitrator when such decree or award declares, assigns, limits or extinguishes, of any right, title or interest of the value of Rs.100/- and above in immovable property.

(5) Lease of Immoveable Property: Lease Deeds of following leases of immovable property:
(a) Lease from year to year basis;
(b) Lease for the term exceeding I year; and
(c) Lease which reserves a yearly rent.

(6) A document, other than a will, through which one person authorizes another person to adopt his son.

Documents for which Registration is Optional [Section 18]

Section 18 provides that in respect of the following documents, registration is optional:

(1) Non-testamentary instruments which create, declare, assign, limit or extinguish, any right, title or interest of the value less than Rs.100/- in immovable property.
(2) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of creation, declaration, assignment, limitation or extinction, of any right, title or interest of the value less than Rs.100/- in immovable property.
(3) Non- testamentary instruments transferring or assigning any decree of a court or any award of an arbitrator when such decree or award creates, declares, assigns, limits or extinguishes, of any right, title or interest of the value less than Rs.100/- in immovable property.
(4) Lease of immovable property for any term not exceeding one year
(5) Instruments which create, declare, assign, limit or extinguish, any right, title or interest in movable property
(6) Wills
(7) Other documents not required to be registered as per sec 17(2) .For instance Composition deed any decree or order of the court, grant of immovable property by the Gov., etc.

SECTION 19

If any document is duly presented for registration but not in the language, which isn't commonly used in the district and understood by the Registering Officer, he can demand for the true translation thereof, else shall refuse the registration.

TIME LIMIT FOR PRESENTATION OF DOCUMENT FOR REGISTRATION

Documents executed in India [Sections 23, 24 & 25]

Section 23of Registration Act, 1908 provides that the document other than will must be presented before the Registrar for registration within four months of its execution. Section 23, proviso prescribes a period of four months for presenting a copy of a decree or order. It is counted from the date of the decree.

Section 24provides that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within 4 months from the date of each execution.

Section 25further provides that the Registrar has got the power to condone the delay in presenting the document for registration up to a period of four months, provided that the applicant satisfies the Registrar that he has been prevented by sufficient cause or reasons beyond his control in presenting the documents for registration within the prescribed period of four months.

A document other than a will must be presented within four months of its execution. In cases of urgent necessity, etc. the period is eight months, but higher fee has to be paid (Sections 23-26).
The maximum fine can be 10 times the amount of the proper registration fee.

Documents executed outside India [Section 26]

As per Section 26 Where the registering officer is satisfied that the document was executed outside India and it has been presented for registration within four months after its arrival in India, he may accept such document for registration on payment of proper registration fee. A document executed outside India is not valid unless it is registered in India (**Nainsukhdas v. Gowardhandas, AIR 1948 Nag. 110**).

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Time limit for presentation of Will [Section 27]

A will may be presented at any time for the purpose of registration as provided in Sections 40-46. Registration of a will is optional under section 18(e).

Unstamped Document:

If the document is not sufficiently stamped its presentation is still good presentation though penalty under the Stamp Act can be levied **(Mahaliramv. UpendraNath, AIR 1960 Pat 470).**

Re-Registration (Section 23A)

Sometimes, a document requiring registration may be accepted for registration by Registrar from a person not duly empowered to present the same and may be registered, In such a case, any person claiming under such document may present such document, in accordance with the provisions of the Registration Act, for registration in the office of the Registrar of the district in which the document was originally registered. He can, however, do so within four months from his first becoming aware that registration of such document is invalid.

When such a document is presented for re-registration, the Registrar shall register the same as if it has not been previously registered. The document, if duly re-registered in accordance with the provisions of Section 23A, shall be deemed to have been duly registered for all purposes from the date of its original registration. The provision of section applies notwithstanding anything to contrary contained in this act.

Section 23A provides for the re-registration of certain documents. The section is mainly intended to deal with situations where the original presentation was by a person not duly authorised..

PLACE OF REGISTRATION OF DOCUMENTS

Documents pertaining to IMMOVABLE PROPERTY [Section 28]

Section 28 of the Registration Act provides that the document relating to immovable property shall be presented for registration in the office of Sub-Registrar within whose sub-district the whole or some portion of the relevant property is situated.

Registration of documents elsewhere has been held to be void [**HarendraLal Roy Chowdhuri v. HariDasi Debi, (1914) ILR 41 Cal. 972, 988 (PC)**].

Documents pertaining to OTHER PROPERTY [Section 29]

Section 29 of the Registration Act provides that documents pertaining to any property, other than immovable property, may be presented for registration in the office of Sub-Registrar in Whose sub-district the document was executed or in the office of any other Sub-Registrar under State Govt. at which all persons executing and claiming under the document desired the same to be registered.

PRESENTING THE DOCUMENTS FOR REGISTRATION [SECTION 32]

Every document to be registered under the Registration Act, whether such registration is compulsory or optional, shall be presented before the Registrar by any of the following persons:

(a) some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or
(b) the representative or assign of such person, or
(c) the agent of such person aforesaid, duly authorised by power-of-attorney executed and authenticated in the manner hereinafter mentioned.

It is immaterial whether the registration is compulsory or optional; but, if it is presented for registration by a person other than a party not mentioned in Section 32, such presentation is wholly inoperative and the registration of such a document is void. **[Kishore Chandra Singh v. Ganesh Prashad Singh]**

For the purpose of Section 32, a special power of attorney is required as provided under Section 33. A general power of attorney will not do.

EFFECT OF REGISTRATION/ NON-REGISTRATION OF DOCUMENTS

Time from which Registration documents operates [Sections 47]

A registered document operates from the time from which it was intended to operate and not from the date of registration.

As between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one. **[K.J. Nathan v. S.V. MaruthiRai].**

In effect Section 47 means that a document operates from the date of execution. (as between the parties)

Registered Document Relating to Property when to take effect against Oral Agreement (Section 48)/ Unregistered Documents (Section 50)

. Section 48 refers to the priority of the registered agreements over oral agreements and Section 50 refers to the priority of registered agreements over non-registered agreements.

A non-testamentary registered document, relating to property, takes effect against any oral agreement relating to such property. However, when the oral agreement is accompanied by delivery of possession(and the same constitutes valid transfer under the law in force applicable), then the oral agreement will prevail over the registered document.

Certain registered documents relating to land which will take the effect against unregistered documents:

Section 50 provides as under:

(1) Every document of the kinds mentioned in clause (a), (b), (c) and (d) of Section 17, Sub-section (1) and clauses (a) and (b) of Section 18, shall if duly registered, take effect as regards the property, comprised therein, against every unregistered document relating to the same property, .

Effect of Non-Registration of Documents [Section 49]

A document which is compulsorily registrable but is not registered, fails to take effect and is void as regards immovable property. It cannot affect any immovable property comprised therein. Further it cannot confer any power to adopt.

Section 49 is mandatory, and a document which is required to be registered cannot be received in evidence as affecting immovable property. An unregistered document which comes within Section 17 cannot be used in any legal proceeding to bring out indirectly the effect which it would have if registered.

An unregistered document cannot be received as evidence of any transaction effecting such property or conferring such power. However such a document may be received as evidence of:

(1) A contract in a suit for specific performance; or
(2) Part performance of a contract as per section 53A of Transfer of Property Act.

CERTIFICATE OF REGISTRATION:

The certificate of registration in respect of a document is prima facie an evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law. (Section 60)

REFUSAL BY REGISTRAR TO REGISTER DOCUMENTS [SECTIONS 71-75]

Reasons for refusal to register the document to be recorded [Section 71]

Every Sub-Registrar refusing to register the document, except on the ground that the property to which the document relates is not situated within its sub-district, shall make an order of refusal and shall record the reasons for such order.

It may be noted that under-valuation of stamp duty is not a valid ground for refusing the registration of a document. In such a case, the sub-registrar can guide the person to affix proper stamps before he can register the documents presented. If the sub-registrar is doubtful as to the proper value of stamps affixed, he can refer the case to the Collector of Stamps to be adjudicated.

Appeal to Registrar from orders of Sub-Registrar refusing registration on ground other than denial of execution of document [Section 72]

According to Section 72(1), an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of denial of execution.

If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in Sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration. [Section 72(2)]

Application to Registrar when Sub-Registrar refused to register the Documents on the ground of Denial of Execution [Section 73. 74 & 75]

Where the Sub-Registrar has refused to register a document on the ground of denial of execution, then any person claiming under such document may, within 30 days after the making of the order of refusal, apply (application not the Appeal) to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered.

Where such an appeal is made to the Registrar, then he shall enquire to find out whether the document has been really executed or not. If the Registrar finds that the document has been executed, he shall order (sec 75) the document to be registered. If the document is duly presented for registration within 30 days after the making of such order, the Sub-Registrar shall register the same.
Such registration shall take effect as if the document has been registered when it was first duly presented for registration.

If a person denies execution, the Sub-Registrar must refuse registration leaving the parties to appeal under Section 73 (**ChhoteyLal v. Collector of Moradabad, AIR 1922 PC 279**). Ultimate remedy is a suit under Section 77 (**KaPlinisMysthong v. Ring Pyrbot, AIR 1965 A.N. 42**).

Institution of Suit In Case of Order of Refusal by Registrar [Section 77]

Where the Registrar refuses to order the document to be registered any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the **Civil Court**, (within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered) a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.

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MULTIPLE CHOICE QUESTIONS

Q. 1. Choose the most appropriate answer from the given options in respect of the following:

(a)As per the Registration Act, 1908, a testator may deposit with any Registrar his will in a sealed cover superscribed with the name of the testator:
(i) Personally
(ii)Through an agent
(iii) Through any person
(iv) Either (i) or (ii).

Q. 2. Re-write the following sentences after filling-up the blank space with appropriate word(s) so as to convey the correct meaning:
(i) All documents, other than a will, shall be accepted for registration if presented to the proper officer within months from the date of its execution.
(ii)Any document which is intended to be operative immediately is called a document.
(iii) A & B executed a single document on 8 February, and 12 July respectively. The document shall be presented for registration before &
(iv)Every document requiring registration shall be presented for registration in the office of a within whose sub-district the whole or some portion of the property to which such document relates is situate.
(v) Attestation is valid and complete when witnesses sign the instrument.

Q. 3. Answer 'True' or 'False' to the Following:
(a)A Sale-deed executed by X in respect of his properties situated in Ranchi, Patna and Hazaribagh can be registered at Ranchi, Patna and Hazaribagh.
(b)The testator or after his death, any person claiming as executor or otherwise under the Will may present it to any Registrar and Sub-Registrar for registration.

(c)An unregistered document under section 17 of the Registration Act, 1908 can be used in any legal proceeding to bring out indirectly the effect which it would have if registered.

EXAMINATION QUESTIONS

Q. 1. State the documents of which registration is optional.
Q. 2. State the provisions relating to presentation of documents for registration under the Registration Act, 1908.
Q. 3. What are the provisions relating to 'place of registration' in regard to the documents of land' and other transactions under section 28 of the Registration Act, 1908?
Q. 4. Explain the provisions regarding re-registration of certain documents under section 23A of the Registration Act, 1908.
Q. 5. Mention who can present documents for registration under the Registration Act. 1908. If a document is presented for registration by a person other than a person executing or claiming under the same, what is the effect of such registration?
Q. 6. Enumerate the effects of non-registration of documents required to be registered.
Q. 7. Section 18 of the Registration Act, 1908 makes the registration of some documents optional. Enumerate six documents where the registration is optional.
Q. 8. Can the registering officer accept a document executed out of India?
Q. 9. What is 'non-testamentary document"? Name any two non-testamentary documents. Are all non-testamentary documents required to be registered?
Q. 10. Gopal has filed a document regarding purchase of a piece of land for registration in his name. The Sub-Registrar has refused to register the document without stating any reason for such refusal. Explain the powers of the Registrar to refuse registration and the steps that Gopal has to take in the circumstances.
Q. 11. What is 'non-testamentary document'? Name any two non-testamentary documents. Are all non-testamentary documents required to be registered?
Q. 12. Is the registration of a will optional under the Registration Act, 19087 Explain the manner in which it may be presented for registration.
Q. 13. There are two registered documents executed by same persons in respect of the same property to the two different persons at two different times. One document was executed on 1st October, 1999 whereas the other document was executed on 20th October. 1999. However, the document executed on 1st October, 1999 was registered subsequent to the registration of the other document. State which document gets priority over the other under the provisions of the Registration Act, 1908.
Q. 14. A document executed on 2“d January, 2000 was presented for registration under the Registration Act, 1908 on 31” August, 2000. The registering authorities refused to accept the document for registration on the ground that it was time - barred Decide.
Q. 15. Tom has donated a piece of immovable property to his major son Wise. Before the instrument could be registered, Tom died. By virtue of the will in favour of Mrs. Tom, she desires to revoke the gift to Wise, as the instrument is still not registered under the Registration Act, 1908? Will Wise succeed in retaining the gift received from Tom?
Q. 16. Rohit executes a sale deed of a house in favour of Prem. The house is situated at NOIDA, but the transferor and transferee want the sale deed to be registered at Lucknow, which is the capital of the State. Can they do so?

Q. 17. Amrit executed a gift deed in his life time in favour of Bhanu. The gift deed was not registered during the life time of Amrit. Bhanu, after death of Amrit, presented the gift deed before the Registrar for its registration. Rakshit, brother of Amrit raised an objection for the registration of gift deed on the ground of fake signatures of Amrit. But the witnesses to the gift deed contended that the signatures were made before them by the donor at the time of execution of gift deed. Whether the gift deed will be treated valid for registration under the Registration Act, 1908?

Q. 18. A document was executed by several persons at different times. The person in whose favour such execution was made, presented the document for re-registration after expiry of three months. Whether such documents can be registered and if yes, within what period?

Q. 19. By an agreement, Anamika transferred to Bipasha a decree of a court by which she was entitled to possess 500 bighas of land. Is it necessary to register such a transfer under the Registration Act, 1908?

Q. 20. Bijoy executed a contract for purchasing a piece of land in Delhi from Ajoy. Just after the execution of contract, Bijoy proceeded to England and he is not expected to retum to India before six months. Chirag, a good friend of Ajoy who has general power of attorney to act on behalf of Bijoy, gets the said sale deed registered. Is this registration valid?

Q. 21. Ankur has made a gift of a house to Bhaskar. Ankur has signed on the gift deed and handed over the possession of the house to Bhaskar. Ankur did not want gift deed to be registered. After sometime, Ankur dies. There was a long delay in the registration of the gift deed. Whether the period of delay may be condoned by the Registrar for the registration of gift deed even after the death of the donor under the Registration Act, 1908.

Q. 22. Ajit sells a house to Baljit by a written document in 1997 and delivers possession thereof to Baljit. But the document is not registered. After one year, Ajit sues Baljit to take back possession of the house on the ground that because of non-registration, the document has no validity. Will Ajit succeed?

SPECIMEN ANSWER OF SITUATION BASED QUESTION

Question

Rohit executes a sale deed of a house in favour of Prem. The house is situated at Noida, but the transferor and transferee want the sale deed to be registered at Lucknow, which is the capital of the State. Can they do so?

Answer

The issue under consideration is related to **'Place of presenting the document for Registration'** as provided under Sections 28 and 29 of Registration Act, 1908.

Section 28 provides that the document relating to immovable property shall be presented for registration in the office of Sub-Registrar within whose sub-district the whole or some portion of the relevant property is situated.

Section 29 provides that documents pertaining to any property, other man immovable property, may be presented for registration in the office of Sub- Registrar in whose sub-district the document was executed or in the office of any other Sub-Registrar under State Govt. at which all persons executing and claiming under the document desired the same to be registered.

In the given question, sale deed of a house (immovable property) is required to be registered and hence it will be governed by the provisions of Section 28. As per Section 28, **sale deed can be presented for registration only at Noida Registration Office and not at Lucknow.**

CHAPTER -12 RIGHT TO INFORMATION

The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings." Right to information is not a mere statutory right created by the Right to Information Act. It is essentially a fundamental right guaranteed by the Constitution of India under Right to Know in article 19 (1) (a).

INTRODUCTION

The right to information bill was passed by the Lok Sabha on May 11, 2005 and by Rajya Sabha on May 12, 2005 and received the assent of president on June 15, 2005. Right to information is a necessary ingredient participatory Democracy. The Govt. enacted RTI Act 2005, which came in force on Oct 12, 2005.

OBJECT

The RTI Act 2005 confers on all right to information. The act provides for setting out all the practical regime of right to information for citizens to secure access to information held by **pubic authorities** to promote transparency and accountability in the working of every public authority.

IMPORTANT DEFINITION

1. **Public Authority [Sec. 2(h)]**
   "Public Authority": means any authority as body or institution of self-government established or constituted-
   - ❖ By or under the constitution.
   - ❖ By any other law made by parliament.
   - ❖ By any other law made by state Legislature
   - ❖ By notification issued or order made by the appropriate government.

2. **Record [Sec. 2(l)]**
   Record Includes:
   (a) Any, document manuscript and file;
   (b) Any microfilm, microfiche and facsimile copy of a document;
   (c) Any reproduction of image or images embodied in such microfilm (whether enlarged or not); and
   (d) Any other material produced by a computer or any other devices.

3. **Information [Sec 2(f)]**
   Information means material in any form, including records, documents, memos, e-mails, opinions,advices, press releases, reports, papers, samples, models date materials held in any electronic form.

4. **Right to information [Sec. 2(j)]**
   Right to information means the right to information accessible under this act which is held by as under the contract of any authority and includes the right to public.
   (a) Taking notes, extracts, and certified copies of documents or records;
   (b) Inspection of work, documents, records

(c) Taking certified samples of material
(d) Obtaining information in the form of diskettes, floppies, tapes video cassettes or in any other electronic mode or through printouts where such information is stated in a computer or in any other device.

5. **Third party [Section 2(n)]**"Third party" means a person other than the citizen making a request for information and includes a public authority.

SALIENT FEATURES OF THE ACT

1. The RTI Act extends to the whole of India except Jammu and Kashmir.
2. It provides a very definite day for its commencement i.e. 120 days from enactment.
3. It shall apply to public authorities.
4. All citizens shall have the right to information, subject to provisions of the act.
5. The public information officers / Assistant PIO will be responsible to deal with the requests for information and also to assist person seeking information.
6. Fee will be payable by the applicant depending on the nature of information sought
7. Certain categories of information have been exempted from disclosure under Sec. 8 and 9 of the Act.
8. Intelligence and security agencies specified in schedule II to the Act have been exempted.

OBLIGATIONS OF THE PUBLIC AUTHORITY [Section 4(1)]

Every public authority under the act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possessions as prescribed under the Act. **[Sec. 4(1)(a)]**

As per **Sec. 4(1)(b)**, every public authority has to publish within 120 days of the enactment of the act:

(a) The particulars of its organizations, functions and duties,
(b) The powers and duties of it officers and employees.
(c) The norms set by it for the discharge of its functions.
(d) A directory of its officers and employees.
(e) The names, designations and other particulars of the PIO.
(f) Such other information as may be prescribed; and thereafter update the publications every year.

DESIGNATION OF PUBLIC INFORMATION OFFICERS [Section 5]

Every public authority has to-

- Designate in all administrative units or offices – Central or state PIO to provide information to a person who have made request for the information.
- Designate at each sub-divisional and sub-district level- Central Assistant or State Assistant PIO. To receive the applications for information and appeals for forwarding the same to central or state PIO.
- No reason to be given by the person making request for information except those that may be necessary for contacting him.

REQUESTS FOR OBTAINING INFORMATION [Section 6 & 7]

The act specifies the manners in which requests maybe made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority that may hold the information.

- Applications are to be submitted in writing or electrically with prescribed fee to PIO.

- Information to be provided within 30 days
- 48 hours where life or liberty is involved.
- 35 days where request is given to Asst. PIO
- Time taken for calculation and intimation of fees excluded from the time frame.
- No action on application for 30 days is a deemed refusal.
- If the interest of the third party is involved then time limit will be 40 days (Max. period + time given to the party to make representation).
- No fee for delayed response.

DUTIES OF PUBLIC INFORMATION OFFICER [Section 5, 7, 10 & 11]

1. PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduces the same in writing. If jurisdiction of other authority is involved then transfer within 5 days the request to other authority and inform the applicant.
2. PIO may seek the assistance of any other officers for the proper discharge of his or her duties.
3. on receipt of a request, it shall as expeditiously as possible , as 30 days of the receipt of the request provide the information on payment of such fees as may be prescribed or reject the request for any of the reasons specified as Sec. 8 & 9
4. Where life an liberty is involved the information shall be provided within 48 hours
5. If information sought has been supplied by the third party and is treated as confidential by third party the PIO shall give a written notice to the third party within 5 days from the receipts of the request.
6. The third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice.

EXEMPTION FROM DISCLOSURE [Section 8]

Certain category of information have been exempted from disclosure under the Act these are:-

- Where disclosure prejudicially affects the sovereignty and integrity of India.
- Disclosure leads to incitement of an offense.
- Information which has been expressly forbidden by any count or tribunal
- Information received in confidence from a foreign government.
- Information the disclosure of which endangers life or physical safety of any person.
- Cabinet papers including records of deliberations of the council of ministers secretaries and other officers.
- Information that would impede the process of investigation or apprehension of prosecution of offenders.

REJECTION OF REQUEST [Section 9]

The PIO has been empowered to reject a request for information whereas infringement of a copyright subsisting in a person would be involved.

PARTIAL DISCLOSURE ALLOWED (SECTION 10)

If the request for access to information is rejected on the ground that it is in relation to the information which is exempt from disclosure then access may be provided to that part of the record which does not contain any information which is exempt.

INFORMATION COMMISSION

Central Information Commission (CIC)

The central information commission is to be constituted by the Central Government through a gazette notification. It shall consists of the Chief information commissioner and central information commissioners not exceeding 10. These shall be appointed by the president of India on the recommendation of a committee consists of PM who is the chairman of the committee, member of opposition in the LokSabha and a union cabinet ministers to be nominated by the prime minister.

Qualifications

(1) Shall be a person of eminence in public life with wide knowledge and experience in law, Science etc
(2) Shall not be a Member of Parliament or member of the legislature of any state or union territory.
(3) Shall not hold any other office or place of profit or connected with any political party or carrying on any business or pursuing any profession.
(4) Shall have its headquarters in Delhi
(5) Exercise its powers without being subjected to directions by any other authority

Appointment [Sec. 13]

(1) CIC shall be appointed for a term of 5 years from the date on which he enters upon his office on till he attains the age of 65 years whichever is earlier.
(2) CIC is not eligible for Re-appointment.
(3) Salary will be the same as of the Chief Election Commissioner.

State Information Commission (SIC)

The state information commission will be constituted by the state government through a Gazette notification. The SIC consists of one State Chief Information Commissioner (SCIC) and has more than 10 state information Commissioners. These shall be appointed by the Governor on the Recommendation of a committee consisting of the chief ministers who is the chairman of the committee. Other members include the leader of the opposition of the legislative Assembly and one cabinet ministers nominated by chief ministers.

Qualifications [Section 15 & 16]

The qualification for appointment as SIC. / SCIC shall be the same as that for Central Commissioners.The commission will exercise its powers without being subjected to any other authority. The headquarters of the state information commission shall be at such place as the state govt. may specify. Other officers may be established in other parts of the state within the approval of the state government.

POWER OF INFORMATION COMMISSION [Section 18]

The Central Information Commission/State Information Commission has a duty to receive complaints from any person:

i. who has not been able to submit an information request because a PIO has not been appointed;
ii. who has been refused information that was requested;
iii. who has received no response to his/her information request within the specified time limits;
iv. who thinks the fees charged are unreasonable;
v. who thinks information given is incomplete or false or misleading; and

vi. any other matter relating to obtaining information under this law.

APPELLATE AUTHORITIES [Section 19]

Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.

First Appeal: First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision. However , the Appellate Authority may entertain the appeal even after the expiry of aforesaid 30 days , if he is satisfied that the Appellant has been prevented by sufficient cause from filing the appeal within the prescribed period of 30 days.
First appeal shall be disposed off within 30 days from the date of receipt of or within such extended period a total of forty five days from the date of filing thereof , for reasons to be recorded in writing.

Second Appeal: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority.

Third Party appeal against PIO's decision must be filed within 30 days before first Appellate Authority; and within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.

PENALTIES [Section 20]

Section 20 of the Act imposes stringent penalty on a Public Information Officer (PIO) for failing to provide information. Every PIO will be liable for fine of Rs. 250 per day, up to a maximum of Rs.25,000/-, for -
(i) not accepting an application;
(ii) delaying information release without reasonable cause;
(iii) malafidely denying information;
(iv) knowingly giving incomplete, incorrect, misleading information;
(v) destroying information that has been requested; and
(vi) obstructing furnishing of information in any manner.
The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty.
They can also recommend disciplinary action for violation of the law against the PIO for persistently failing to provide information without any reasonable cause within the specified period.

JURISDICTION OF COURTS [Section 23]

As per Section 23, lower Courts are barred from entertaining suits or applications against any order made under this Act.

ROLE OF CENTRAL/STATE GOVERNMENTS

Section 26 contemplates the Role of Central/State Governments. It authorizes the Central/State Governments to:
(i) Develop and organize educational programmes for the public especially disadvantaged communities on RTI.
(ii) Encourage public authorities to participate in the development and organization of such programmes.

(iii) Promote timely and effective dissemination of accurate information by the public authorities.
(iv) Train officers and develop training materials.
(v) Compile and disseminate a User Guide for the public in the respective official language.
(vi) Publish names, designation, postal addresses and contact details of PIOs and other information such as notices regarding fees to be paid, remedies available in law if request is rejected etc.

☞ **Vide office memorandum dated 29th June 2015,** Ministry of Personnel, Public Grievances and Pensions has drawn attention to the duly accepted recommendations of committee, which was constituted to recommend, measure to further strengthen implementation of section 4 of the RTI Act. The committee inter-alia made the following recommendations which have been duly accepted by competent authority:-

1) In order to reduce the number of RTI application relating to service matters, the information relating to recruitment, promotion and transfers should be brought to public domain promptly.

2) The retention and maintainance of specific documents for specified duration should be clearly spelt by each public authority in respect of its documents.

3) Access to information should be made user-friendly for which appropriate IT infrastructure should be suitably designed. All details of public authority may be uploaded on website.

4) Training module of employees should incorporate matter relating to the virtues of transparency and open government and RTI law.

All the public authorities are requested to follow the above recommendations.

☞ **Vide office memorandum dated 06th October, 2015** Ministry of Personnel, Public Grievances and Pensions has provided format for giving information to the applicants under RTI Act- issue of guidelines regarding.

It has been observed that different public authorities provide information to RTI applicants in different formats. Though there cannot be a standard format for providing information, the reply should however essentially contain the following information:

(i) RTI application number, date and date of its receipt in the public authority.

(ii) The name, designation, official telephone number and email ID of the CPIO.

(iii) In case the information requested for is denied, detailed reasons for denial quoting the relevant sections of the RTI Act should be clearly mentioned.

(iv) In case the information pertains to other public authority and the application is transferred under section 6(3) of the RTI Act, details of the public authority to whom the application is transferred should be given.

(v) In the concluding para of the reply, it should be clearly mentioned that the First Appeal, if any, against the reply of the PIO may be made to the First Appellate Authority within 30 days of receipt of reply of PIO.

(vi) The name, designation, address, official telephone number and e-mail ID of the First Appellate Authority should also be clearly mentioned.

CHAPTER -13 INFORMATION TECHNOLOGY ACT, 2000

Preamble

An Act to provide legal recognition for transactions carried out by means of electronic date interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternative to paper-based methods of communication and storage of information to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the India Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto;

WHEREAS the General Assembly of the United Nations by resolution A/RES/ 51/162, date 30th January 1997 has adopted the Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law;

AND WHREAS the said resolution recommends, inter alia, that all States give favorable consideration to the said Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper based methods of communication and storage of information;

AND WHEREAS it is considered necessary to give effect to the said resolution and to promote efficient delivery of Government services by means of reliable electronic records;

BE it enacted by Parliament in the Fifty-first Year of the Republic of India as follows:

Comment: In view of the progressive use of computer networking and internet it was imperative that India have some regulatory law in regard to the present modes of information exchange which impinge not only upon the economic but also social values.

Definitions. –

- In this Act, unless the context otherwise requires,-
  - "access", with its grammatical variation and cognate expressions, means gaining entry into, instructing or communicating with the logical, arithmetical or memory function resources of a computer, computer system or computer network;

- "addressee" means a person who is intended by the originator to receive the electronic record but does not include any intermediary;

- "adjudicating officer" means an adjudicating officer appointed under sub-section (1) of section

46;

"affixing digital signature", with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature;

"appropriate Government " means as respects any matter- enumerated in List II of the Seventh Schedule to the Constitution;

relating to any State law enacted under List III of the Seventh Schedule to the Constitution,

the State Government and in any other case, the Central Government;

"asymmetric crypto system" means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature;"Certifying Authority" means a person who has been granted a license to issue a Digital Signature Certificate under section 24;

"certification practice statement" issued by a Certifying Authority to specify the practices that the Certifying Authority employs in issuing Digital Signature Certificates;

"**computer**" means electronic, magnetic, optical or other high-speed date processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or relates to the computer in a computer system or computer network;

"**computer network**" means the inter-connection of one or more computers through-

3. the use of satellite, microwave, terrestrial lime or other communication media; and

4. terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained;

"computer resources" means computer, computer system, computer network, data, computer database or software;

"**computer system**" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions;

"Controller" means the Controller of Certifying Authorities appointed under sub-section (1) of section 17'

"Cyber Appellate Tribunal" means the cyber Regulations Appellate Tribunal established under sub-section (1) of section 48;

"**data**" means a representation of information, knowledge, facts, concepts or instruction which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

"digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3;

"Digital Signature Certificate " means a Digital Signature Certificate issued under sub-section (4) of section 35;

"electronic from", with reference to information. Means, any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

"Electronic Gazette" means Official Gazette published in the electronic form;

"electronic record" means date, record or date generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

"function", in relation to a computer, includes logic, control, arithmetical process, deletion, storage and retrieval and retrieval and communication or telecommunication from or within a computer;

"information' includes data, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche;

"intermediary" with respect to any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;

"key pair", in an asymmetric crypto system, means a private key and its mathematically related public key., which are so related that the public key can verify a digital signature created by the private key;

"law" includes any Act of Parliament or of a State Legislature, Ordinances promulgated by the President under article 240, Bills enacted as President's Act under sub-clause (a) of clause (1) of article 375 of the Constitution and includes rules, regulations, bye-laws and order issued or made thereunder;

"license" means a license granted to a Certifying Authority under section 24;

(za) "originator" means a license granted to a Certifying Authority under section 24;

(zb) "prescribed" means prescribed by rules made under the Act;

(zc) "private key" means the key of a key pair used to create a digital signature;

(zd) "public key" means the key of a key pair used to verify a digital signature and listed in the Digital Signature Certificate;

(ze) "secure system" means computer hardware, software and procedure that-

(a) are reasonably secure from unauthorized access and misuses;

(b) provide a reasonable level of reliability and correct operation;

(c) are reasonably suited to performing the intended functions; and

(d) adhere to generally accepted security procedures;

(zf) "security procedure" means the security procedure prescribed under section 16 by the Central Government;

(zg) "subscriber" means a person in whose name the Digital Signature Certificate is issued;

(zh) "verify", in relation to a digital signature, electronic record or public key, with its grammatical variations and cognate expressions, means to determine whether-

(a) the initial electronic record was affixed with the digital signature by the sue of private key corresponding to the public key of the subscriber;

(b) the initial electronic record is retained intact or has been altered since such electronic record was so affixed with the digital signature.

(2) Any reference in this Act to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

3. Authentication of electronic records. –Subject to the provisions of this section, any subscriber may authenticate an electronic record by affixing his digital signature.

(1) The authentication of the electronic record shall be effected by the use of asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.

Explanation.- For the purposes of this sub-section, "hash function" means an algorithm mapping or translation of one sequence of bits into another, generally smaller, set known as "hash result" such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally infeasible-

(a) to derive or reconstruct the original electronic record from the hash result produced by the algorithm;

(b) that two electronic records can produce the same hash result using algorithm.

(3) Any person by the use of a public key of the subscriber can verify the electronic record.

(4) The private key and the public key are unique to the subscriber and constitute a functioning key pair.

4. Legal recognition of electronic records –

Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.

5. Legal recognition of digital signatures. –

Where any lay provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

Explanation.- For the purposes of this section, "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, means affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly.

6. Use of electronic records and digital signatures in Government and its agencies. –

(1) Where any law provides for-

(a) the filing of any form, application or any other document with any office authority, body for agency owned or controlled by the appropriate Government in a particular manner;

(b) the issue or grant of any license, permit. Sanction or approval by whatever name called in a particular manner;

(c) the receipt or payment of money in a particular manner, the, notwithstanding anything contained in any other law for the time being in force, such requirement shall be deemed to have
been satisfied if such filing, issue, grant, receipt or payment, as the case be, is effected by means of such electronic form as may be prescribed by the appropriate Government.

(2) The appropriate Government may, for the purposes of sub-section (1), by rules, prescribe-

(a) the manner and format in which such electronic records shall be filed, created or issued;

(b) the manner or method of payment of any fee or charges for filing, creation or issue any electronic record clause (a).

7. Retention of electronic records.-

(1) Where any law provides that documents, records or information shall be retained for any specific period, the, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if-

(a) the manner and format therein remains accessible so as to be usable for a subsequent reference;

(b) the electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;

(c) the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record:

8. Publication of rule, regulation, etc., in Electronic Gazette.-

Where any law provides that any rule, regulation, order, bye-law, notification or any6 other matte shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette:

Provided that where any rule, regulation, order, by-law, notification or any other matter is published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form.

9. Section 6, 7 and 8 not to confer right to insist document should be accepted in electronic form.-

Nothing contained in section 6, 7 and 8 shall be confer a right upon any person to insist that any Ministry or Department of the Central Government or the State Government or any authority or body established by or under any law or controlled or funded by the Central or State Government should accept, issue, create, retain and preserve any document in the form of electronic records or effect any monetary transaction in the electronic form.

10. Power to make rules by Central Government in respect of digital signature.-

The Central Government may, for the purposes of this Act, by rules, prescribe-

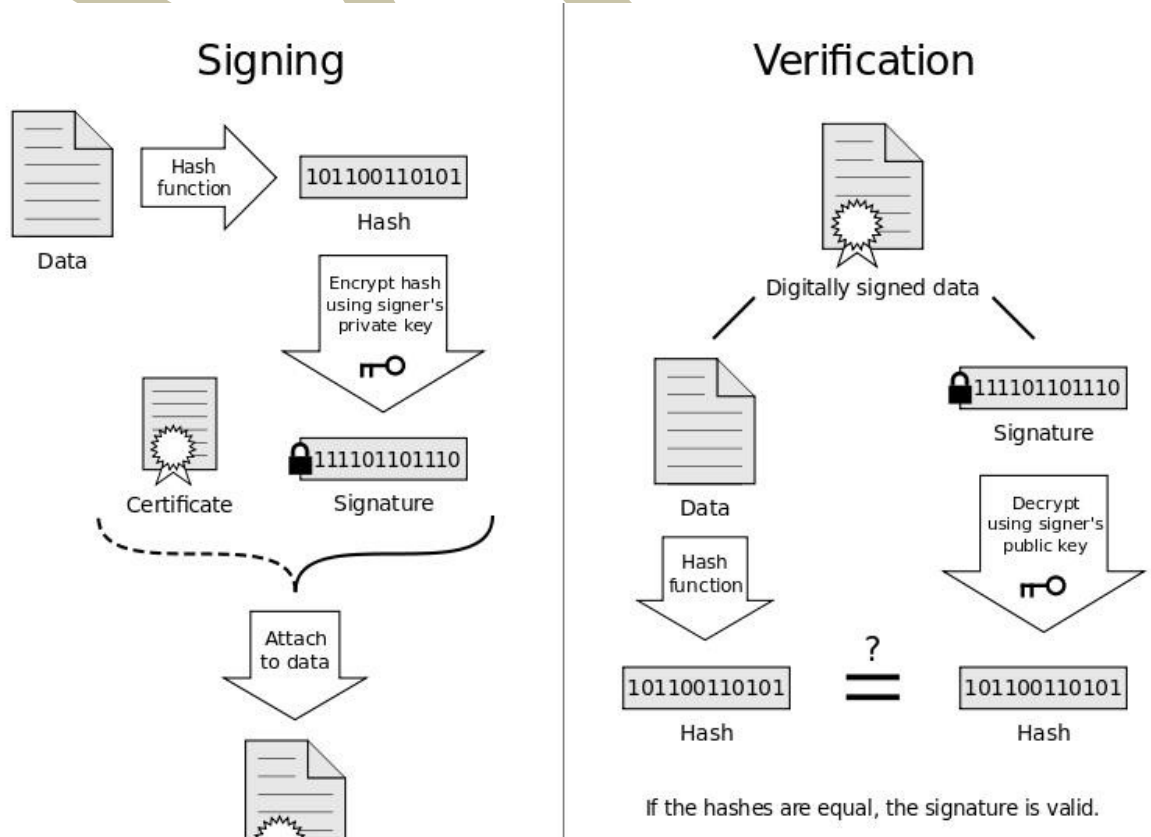
(a) the type of digital signature;

(b) the manner and format in which the digital signature shall be affixed;

(d) the manner or procedure which facilitates identification of the person affixing the digital signature;control processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments; and

(e) any other matter which is necessary to give legal effect to digital signatures

Digital Signature



A diagram showing how a digital signature is applied and then verified

A digital signature is a mathematical scheme for demonstrating the authenticity of a digital message or document. A valid digital signature gives a recipient reason to believe that the message was created by a known sender, such that the sender cannot deny having sent the message (authentication and non-repudiation) and that the message was not altered in transit (integrity). Digital signatures are commonly used for software distribution, financial transactions, and in other cases where it is important to detect forgery or tampering.

Essential steps of the digital signature process

- STEP 1 The signatory is the authorized holder a unique cryptographic key pair;
- STEP 2 The signatory prepares a data message (for example, in the form of an electronic mail message) on a computer;

- STEP 3 The signatory prepares a “message digest”, using a secure hash algorithm. Digital signature creation uses a hash result derived from and unique to the signed message;
- STEP 4 The signatory encrypts the message digest with the private key. The private key is applied to the message digest text using a mathematical algorithm. The digital signature consists of the encrypted message digest,
- STEP 5 The signatory typically attaches or appends its digital signature to the message;
- STEP 6 The signatory sends the digital signature and the (unencrypted or encrypted) message to the relying party electronically;
  STEP 7 The relying party uses the signatory’s public key to verify the signatory’s digital signature. Verification using the signatory’s public key provides a level of technical assurance that the message came exclusively from the signatory;
- STEP 8 The relying party also creates a “message digest” of the message, using the same secure hash algorithm;
- STEP 9 The relying party compares the two message digests. If they are the same, then the relying party knows that the message has not been altered after it was signed. Even if one bit in the message has been altered after the message has been digitally signed, the message digest created by the relying party will be different from the message digest created by the signatory;
- STEP 10 Where the certification process is resorted to, the relying party obtains a certificate from the certification service provider (including through the signatory or otherwise), which confirms the digital signature on the signatory’s message. The certificate contains the public key and name of the signatory (and possibly additional information), digitally signed by the certification service provider.

Secure Electronic Records and Secure Digital

Signatures 14. Secure electronic record.

Where any security procedure has been applied to an electronic record at a specific point of time. then such record shall be deemed to be a secure electronic record from such point of time to the time of verification.

15. Secure digital signature.

If, by application of a security procedure agreed to by the parties concerned, it can be verified that a digital signature, at the time it was affixed, was-

1. unique to the subscriber affixing it.
2. capable of identifying such subscriber.
3. created in a manner or using a means under the exclusive control of the subscriber and is linked to the electronic record to which it relates in such a manner that if the electronic record was altered the digital signature would be invalidated.

then such digital signature shall be deemed to be a secure digital signature.

16. Security procedure.

The Central Government shall for the purposes of this Act prescribe the security procedure having regard to commercial circumstances prevailing at the time when the procedure was used, including-

1. the nature of the transaction.
2. the level of sophistication of the parties with reference to their technological capacity.
3. the volume of similar transactions engaged in by other parties.
4. the availability of alternatives offered to but rejected by any party.
5. the cost of alternative procedures, and
6. the procedures in general use for similar types of transactions or communications.

Regulation of Certifying Authorities

17. Appointment of Controller and other officers. The Central Government may, by notification in the Official Gazette, appoint a Controller of Certifying Authorities for the purposes of this Act and may also by the same or subsequent notification appoint such number of Deputy Controllers and Assistant Controllers as it deems fit.

1. The Controller shall discharge his functions under this Act subject to the general control and directions of the Central Government.
2. The Deputy Controllers and Assistant Controllers shall perform the functions assigned to them by the Controller under the general superintendence and control of the Controller.
3. The qualifications, experience and terms and conditions of service of Controller, Deputy Controllers and Assistant Controllers shall be such as may be prescribed by the Central Government.
4. The Head Office and Branch Office of the office of the Controller shall be at such places as the Central Government may specify, and these may be established at such places as the Central Government may think fit.
5. There shall be a seal of the Office of the Controller.

18. Functions of Controller.

The Controller may perform all or any of the following functions, namely: -

(6) exercising supervision over the activities of the Certifying Authorities.

(7) certifying public keys of the Certifying Authorities.

(8) laying down the standards to be maintained by the Certifying Authorities

(9) specifying the qualifications and experience which employees of the Certifying Authorities should possess.

(10) specifying the conditions subject to which the Certifying Authorities shall conduct their business.

(11) specifying the contents of written, printed or visual materials and advertisements that may be distributed or used in respect of a Digital Signature Certificate and the public key.

(12) specifying the form and content of a Digital Signature Certificate and the key.

(13) specifying the form and manner in which accounts shall be maintained by the Certifying Authorities.

(14) specifying the terms and conditions subject to which auditors may be appointed and the remuneration to be paid to them.

(15) facilitating the establishment of any electronic system by a Certifying Authority either solely or jointly with other Certifying Authorities and regulation of such systems.

(16) specifying the manner in which the Certifying Authorities shall conduct their dealings with the subscribers.

(17) resolving any conflict of interests between the Certifying Authorities and the subscribers.

(18) laying down the duties of the Certifying Authorities.

(19) maintaining a data base containing the disclosure record of every Certifying Authority containing such particulars as may be specified by regulations, which shall be accessible to public.

Digital Signature Certificates

35. Certifying Authority to issue Digital Signature Certificate.

1. Any person may make an application to the Certifying Authority for the issue of a Digital Signature Certificate in such form as may be prescribed by the Central Government

2. Every such application shall be accompanied by such fee not exceeding twenty-five thousand rupees as may be prescribed by the Central Government, to be paid to the Certifying Authority: Provided that while prescribing fees under sub-section (2) different fees may be prescribed for different classes of applicants'.

3. Every such application shall be accompanied by a certification practice statement or where there is no such statement, a statement containing such particulars, as may be specified by regulations.

4. On receipt of an application under sub-section (1), the Certifying Authority may, after consideration of the certification practice statement or the other statement under sub-section (3) and after making such enquiries as it may deem fit, grant the Digital Signature Certificate or for reasons to be recorded in writing, reject the application:

Provided that no Digital Signature Certificate shall be granted unless the Certifying Authority is satisfied that -

1. the applicant holds the private key corresponding to the public key to be listed in the Digital Signature Certificate.

2. the applicant holds a private key, which is capable of creating a digital signature.

3. the public key to be listed in the certificate can be used to verify a digital signature affixed by the private key held by the applicant:

   Provided further that no application shall be rejected unless the applicant has been given a reasonable opportunity of showing cause against the proposed rejection.

(8) Representations upon issuance of Digital Signature Certificate.

A Certifying Authority while issuing a Digital Signature Certificate shall certify that--

1. it has complied with the provisions of this Act and the rules and regulations made thereunder.

2. it has published the Digital Signature Certificate or otherwise made it available to such person relying on it and the subscriber has accepted it.

3. the subscriber holds the private key corresponding to the public key, listed in the Digital Signature Certificate.

4. the subscriber's public key and private key constitute a functioning key pair.

5. the information contained in the Digital Signature Certificate is accurate, and

6. it has no knowledge of any material fact, which if it had been included in the Digital Signature Certificate would adversely affect the reliability of the representations made in clauses (a) to (d).

37. Suspension of Digital Signature Certificate.

1. Subject to the provisions of sub-section (2), the Certifying Authority which has issued a Digital Signature Certificate may suspend such Digital Signature Certificate -

    1. on receipt of a request to that effect from -the subscriber listed in toe Digital Signature Certificate, or

    2. any person duly authorised to act on behalf of that subscriber

    i. if it is of opinion that the Digital Signature Certificate should be suspended in public interest

2. A Digital Signature Certificate shall not be suspended for a period exceeding fifteen days unless the subscriber has been given an opportunity of being heard in the matter.

3. On suspension of a Digital Signature Certificate under this section, the Certifying Authority shall communicate the same to the subscriber.

38. Revocation of Digital Signature Certificate.

1. A Certifying Authority may revoke a Digital Signature Certificate issued by it -

    1. where the subscriber or any other person authorised by him makes a request to that effect, or

    2. upon the death of the subscriber, or

    3. upon the dissolution of the firm or winding up of the company where the subscriber is a firm or a company.

2. Subject to the provisions of sub-section (3) and without prejudice to the provisions of sub-section

(1), a CertifyingAuthority may revoke a Digital Signature Certificate which has been issued by it at any time, if it is of opinion that -

3. a material fact represented in the Digital Signature Certificate is false or has been concealed.

4. a requirement for issuance of the Digital Signature Certificate was not satisfied.

5. the Certifying Authority's private key or security system was compromised in a manner materially affecting the Digital Signature Certificate's reliability.

6. the subscriber has been declared insolvent or dead or where a subscriber is a firm or a company, which has been dissolved, wound-up or otherwise ceased to exist.

7. A Digital Signature Certificate shall not be revoked unless the subscriber has been given an opportunity of being heard in the matter.

8. On revocation of a Digital Signature Certificate under this section, the Certifying Authority shall communicate the same to the subscriber.

39. Notice of suspension or revocation.

1. Where a Digital Signature Certificate is suspended or revoked under section 37 or section 38, the Certifying Authority shall publish a notice of such suspension or revocation, as the case may be, in the repository specified in the Digital Signature Certificate for publication of such notice.

2. Where one or more repositories are specified, the Certifying Authority shall publish notices of such suspension or revocation, as the case may he. in all such repositories.

The Cyber Regulations Appellate Tribunal

48. Establishment of Cyber Appellate Tribunal.

2. The Central Government shall, by notification, establish one or more appellate tribunals to be known as the Cyber Regulations Appellate Tribunal.The Central Government shall also specify, in the notification referred to in sub-section (1), the matters and places in relation to which the Cyber Appellate Tribunal may exercise jurisdiction.

49. Composition of Cyber Appellate Tribunal.

A Cyber Appellate Tribunal shall consist of one person only (hereinafter referred to as the Residing Officer of the Cyber Appellate Tribunal) to be appointed, by notification, by the Central Government.

50. Qualifications for appointment as Presiding Officer of the Cyber Appellate Tribunal.

A person shall not be qualified for appointment as the Presiding Officer of a Cyber Appellate Tribunal unless he -

1. is, or has been. or is qualified to be, a Judge of a High Court, or
2. is or has been a member of the Indian Legal Service and is holding or has held a post in Grade I of that Service for at least three years.

51. Term of office

The Presiding Officer of a Cyber Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

52. Salary, allowances and other terms and conditions of service of Presiding Officer.

The salary and allowances payable to, and the other terms and conditions of service including pension, gratuity and other retirement benefits of. the Presiding Officer of a Cyber Appellate Tribunal shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Presiding Officer shall be varied to his disadvantage after appointment.

53. Filling up of vacancies.

If, for reason other than temporary absence, any vacancy occurs in the office n the Presiding Officer of a Cyber Appellate Tribunal, then the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Cyber Appellate Tribunal from the stage at which the vacancy is filled.

The salary and allowances payable to, and the other terms and conditions of service including pension, gratuity and other retirement benefits of. the Presiding Officer of a Cyber Appellate Tribunal shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Presiding Officer shall be varied to his disadvantage after appointment.

54. Resignation and removal.

The Presiding Officer of a Cyber Appellate Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the said Presiding Officer shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

The Presiding Officer of a Cyber Appellate Tribunal shall not be removed from his office except by an order by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court in which the Presiding Officer concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges.The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the aforesaid Presiding Officer.

55. Orders constituting Appellate Tribunal to be final and not to invalidate its proceedings.

No order of the Central Government appointing any person as the Presiding Officer of a Cyber Appellate Tribunal shall be called in question in any manner and no act or proceeding before a Cyber Appellate Tribunal shall be called in question in any manner on the ground merely of any defect in the constitution of a Cyber Appellate Tribunal.

56. Staff of the Cyber Appellate Tribunal.

1. The Central Government shall provide the Cyber Appellate Tribunal with such officers and employees as that Government may think fit

2. The officers and employees of the Cyber Appellate Tribunal shall discharge their functions under general superintendence of the Presiding Officer.

3. The salaries, allowances and other conditions of service of the officers and employees or' the Cyber Appellate Tribunal shall be such as may be prescribed by the Central Government.

PENALTIES AND ADJUDICATION

43. Penalty for damage to computer, computer system, etc.

If any person without permission of the owner or any other person who is incharge of a computer, computer system or computer network -

1. accesses or secures access to such computer, computer system or computer

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1. downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium.

2. i ntroduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network.

3. damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network.

4. disrupts or causes disruption of any computer, computer system or computer network

5. denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means.

6. provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder.

7. charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network.

he shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

Explanation : For the purposes of this section-

1. "computer contaminant" means any set of computer instructions that are designed-

    1. to modify, destroy, record, transmit data or programme residing within a computer, computer system or computer network, or

    2. by any means to usurp the normal operation of the computer, computer system, or computer network.

2. "computer data base" means a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video that are being prepared or have

been prepared in a formalised manner or have been produced by a computer, computer system or computer network and are intended for use in a computer, computer system or computer network.

3. "computer virus" means any computer instruction, information, data or programme that destroys, damages, degrades or adversely affects the performance of a computer resource or attaches itself to another computer resource and operates when a programme, daia or instruction is executed or some other event takes place in that computer resource.

4. "damage" means to destroy, alter, delete, add, modify or rearrange any computer resource by any means.

44. Penalty for failure to furnish information return, etc.

If any person who is required under this Act or any rules or regulations made thereunder to-

1. furnish any document, return or report to the Controller or ?he Certifying Authority fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure.

2. file any return or furnish any information, books or other documents within the time specified therefor in the regulations fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues.

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1. maintain books of account or records, fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues.

Offences

65. Tampering with computer source documents.

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Explanation. - For the purposes of this section, "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

66. Hacking with computer system.

1. Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack:

2. Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend upto two lakh rupees, or with both.

67. Publishing of information which is obscene in electronic form.

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

68. Power of Controller to give directions.

1. The Controller may, by order, direct a Certifying Authority or any employee of such Authority to take such measures or cease carrying on such activities as specified in the order if those are necessary to ensure compliance with the provisions of this Act, rules or any regulations made thereunder.

2. Any person who fails to comply with any order under sub-section (1) shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a Fine not exceeding two lakh rupees or to both.

69. Directions of Controller to a subscriber to extend facilities to decrypt information.

1. If the Controller is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign Stales or public order or for preventing incitement to the commission of any cognizable offence, for reasons to be recorded in writing, by order, direct any agency of the Government to intercept any information transmitted through any computer resource.

2. The subscriber or any person incharge of the computer resource shall, when called upon by any agency which has been directed under sub-section (1), extend all facilities and technical assistance to decrypt the information.

3. The subscriber or any person who fails to assist the agency referred to in sub-section (2) shall be punished with an imprisonment for a term which may extend to seven years.

70. Protected system.

1. The appropriate Government may, by notification in the Official Gazette, declare that any computer, computer system or computer network to be a protected system.

2. The appropriate Government may, by order in writing, authorise the persons who are authorised to access protected systems notified under sub-section (1).

3. Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

71. Penalty for misrepresentation.

Whoever makes any misrepresentation to, or suppresses any material fact from, the Controller or the Certifying Authority for obtaining any licence or Digital Signature Certificate, as the case may be. shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.