RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES AND REMEDIES

CS-PROFESSIONAL

MODULE-II

1. SHAREHOLDER'S DEMOCRACY & CORPORATE DISPUTES

1) SHAREHOLDER'S DEMOCRACY

❖ INTRODUCTION:

The concept of shareholders' democracy in the present-day corporate world denotes the shareholders' supremacy in the governance of the business and affairs of corporate sector either directly or through their elected representatives. The Government of India has been endeavoring to disperse the shareholdership as widely as possible to avoid concentration of ownership in few hands. It is a widely acclaimed fact that in any corporate enterprise the shareholders are the owners. But in fact they are seldom able to exercise any ownership rights. In order to protect the rights of shareholders and enable them to have control over the affairs of the company, the concept of shareholder's democracy has been introduced. Shareholders, through general meeting can appoint board of directors, who then manages the day to day affairs of the company. Hence, Shareholders are not active participants in the governance of the corporate process, still the directors, as per law, are answerable to the shareholders because shareholders are directly concerned with the economic viability of the investee company.

❖ MEANING:

Democracy means the rule of people, by people and for people. In that context the shareholders democracy means the rule of shareholders, by the shareholders', and for the shareholders' in the corporate enterprise, to which the shareholders belong. Precisely it is the ability of the shareholders to directly or indirectly manage the affairs of the company.

❖ CONCEPT OF SHAREHOLDER'S DEMOCRACY:

In order to provide authority to the shareholder's and enable them to exercise control over the affairs of the company there has been a clear demarcation between the powers of board of directors and that of shareholders. Shareholders cannot encroach upon the powers of board of directors and vice versa.

Some powers of shareholders are as following:

1. Alteration of Memorandum of Association and Articles of Association.
2. Further issue of share capital.
3. To transfer some portions of uncalled capital to reserve capital to be called up only in the event of winding up of the company.
4. To reduce the share capital of the company.
5. To shift the registered office of the company outside the state in which the registered office is situated at present.
6. To decide a place other than the registered office of the company where the statutory books, required to be maintained may be kept.
7. Payment of interest on paid-up amount of share capital for defraying the expenses on Construction when plant cannot be commissioned for a longer period of time.

8. To appoint auditors
9. To approach Central Government for investigation into the affairs of the company.
10. To allow Related Party Transaction
11. To allow a director, partner or his relative to hold office or place of profit.
12. Payment of commission of more than 1% of the net profits of the company to a managing or a whole-time director or a manager.
13. To make loans, to extend guarantee or provide security to other companies or make investment beyond the limit specified.
14. To borrow money and to charge out the assets of the company to secure the borrowed money.
15. To appoint directors.
16. To increase or reduce the number of directors within the limits laid down in Articles of Association.
17. To cancel, redeem debentures etc.
18. To make contribution to funds not related to the business of the company.

Some of the powers of board of directors are as following:

1. Make calls on shareholders.
2. Authorise the buyback of securities and shares.
3. Issue securities and shares.
4. Borrow monies.
5. Investing the funds.
6. Grant loans.
7. Approve the financial statement.

Section 179 of the Companies Act 2013 provides a general power to the Board of directors subject to restriction that powers cannot be exercised for the matters suppose to be decided by shareholders. Thus, in order to protect rights of shareholders, Companies Act has tried to demarcate the area of control of directors as well as that of shareholders so that shareholder's can indirectly participate and manage the affairs of the company by exercising powers like, electing directors, altering AOA and MOA and etc.

The courts have further determined two broad duties to be performed by a director:

1. Duties of utmost care and skill in managing the affairs of the company or else be liable for damages.
2. Fiduciary duties to act bona fide in the interest of the company, not to exercise powers for collateral benefit and not to earn profit from the position as a director.

PRACTICAL SCENARIO:

- Despite the powerful weapons handed over to the shareholders by the Companies Act, the shareholders have not been able to use them and most of the provisions remain dead. Consequently, the Board of directors of a large number of companies are elected only by a few shareholders who attend the Annual General Meetings.
- The shareholders democracy is dependent upon the voting strength of shareholders and also to a great extent on the availability of members attending their General Meetings either by themselves or through their proxy. However, the shareholders do not have enough time to spare from their busy schedules to concern themselves

with the affairs of the company in which they have invested. Although the concept of shareholders' democracy has been enshrined in the Companies Act, yet, because of the aforementioned deficiencies and flaws in the general body of shareholders as a whole, it is not reflected in the constitution of the Boards of directors of many companies in India.

- The Companies Act provided an opportunity to shareholders to participate in the decision making process by introducing provisions relating to passing of resolutions in respect of certain matters through e-voting.
- For achieving the shareholders' democracy, the shareholders have to unite and organise themselves on national, state and district levels and get their associations registered under the Societies Registration Act or any other applicable statute so that their voice is heard and they can assert themselves and safeguard the interests of their members

2) MAJORITY POWERS AND MINORITY RIGHTS

❖ INTRODUCTION

- Majority shareholders are those who own more than 50% shares of the Company. A company being an artificial person with no physical existence, functions through the instrumentality of the Board of directors who is guided by the wishes of the majority. It is a cardinal rule of company law that *prima facie* a majority of members of a company are entitled to exercise the powers of the company and generally to control its affairs. The resolution of a majority of shareholders, passed at a duly convened and held general meeting, upon any question with which the company is legally competent to deal, is binding upon the minority and consequently upon the company. Thus, the majority of the members enjoy the supreme authority to exercise the powers of the company and generally to control its affairs.
- Since the majority of the members are in an advantageous position to run the company according to their command, the minorities of shareholders are often oppressed. Hence, company law provides adequate protection for the minority shareholders when their rights are trampled or violated by the majority.

❖ PRINCIPLE OF NON-INTERFERENCE

- Principle of non-interference has been laid down in the famous case of ***Foss v. Harbottle.*** That no action can be brought by a member against the directors in respect of a wrong alleged to be committed to a company because the company itself is the proper party of such an action. It provides that though adequate protection is provided to the minority when their rights are violated by the majority, but the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company.
- The court will not usually intervene at the instance of shareholders in matters of internal administration and will not interfere with the management of a company by its directors so long they are acting within the powers conferred on them under the articles of the company. Court follows principle of noninterference in the matters of the company if they are within the scope of memorandum or articles of the company because court assumes that company.

❖ JUSTIFICATIONS FOR THE PRINCIPLE

Principle laid down in Foss v. Harbottle is justified and advantageous for following reasons:

1. **Recognition of the separate legal personality of company**: If a company has suffered some injury, and not the individual members, it is the company itself that should seek to redress because the company is a legal entity separate from its members.
2. **Need to preserve right of majority to decide:** The principle in Foss v. Harbottle preserves the concept of majority rule which provides right to majority to decide how the affairs of the company shall be conducted.
3. **Multiplicity of futile suits avoided:** Clearly, if every individual member were permitted to sue anyone who had injured the company through a breach of duty, there could be as many suits as there are shareholders. Legal proceedings would never cease, and there would be enormous wastage of time and money.
4. **Litigation at suit of a minority futile if majority does not wish it**: If the irregularity complained of is one which can be subsequently ratified by the majority it is futile to have litigation about it except with the consent of the majority in a general meeting.

❖ EXCEPTIONS TO THE RULE OF NON-INTERFERENCE

The cases in which rule of majority will not apply are called as exceptional cases and these cases protects the rights of minority.

Cases in which principle laid down in Foss v. Harbottle does not apply are as following:

1. **ULTRA VIRES ACT:** when the shareholders performs any act which is beyond the scope of MOA or AOA i.e. ultra vires then rule in Foss v. Harbottle will not apply and minority can make an application to the tribunal. Shareholder has the right to obtain restraining orders or orders of injunction from the court.
2. **FRAUD ON MINORITY:** when an action of shareholders amounts to fraud on minority, shareholder can individually make an application to the tribunal. Though there is no clear definition of the expression "fraud on the minority", but the court decides a particular case according to the surrounding facts.
   The general test which is applied to decide whether a case falls in the category of fraud on the minority or not is whether a resolution passed by the majority is "bona fide for benefit of the company as a whole"
3. **RESOLUTIONS REQUIRING SPECIAL MAJORITY PASSED BY SIMPLE MAJORITY:** if a resolution requires a special majority and resolution is passed by simple majority, then shareholder can individually make an application to the tribunal.
   Example- when a special resolution was required to be passed at the general meeting and resolution is passed without serving proper notice to the shareholders then shareholder can make an application to the Tribunal.
4. **BREACH OF DUTY:** The minority shareholder may bring an action against the company, where although there is no fraud, there is a breach of duty by directors and majority shareholders to the detriment of the company.

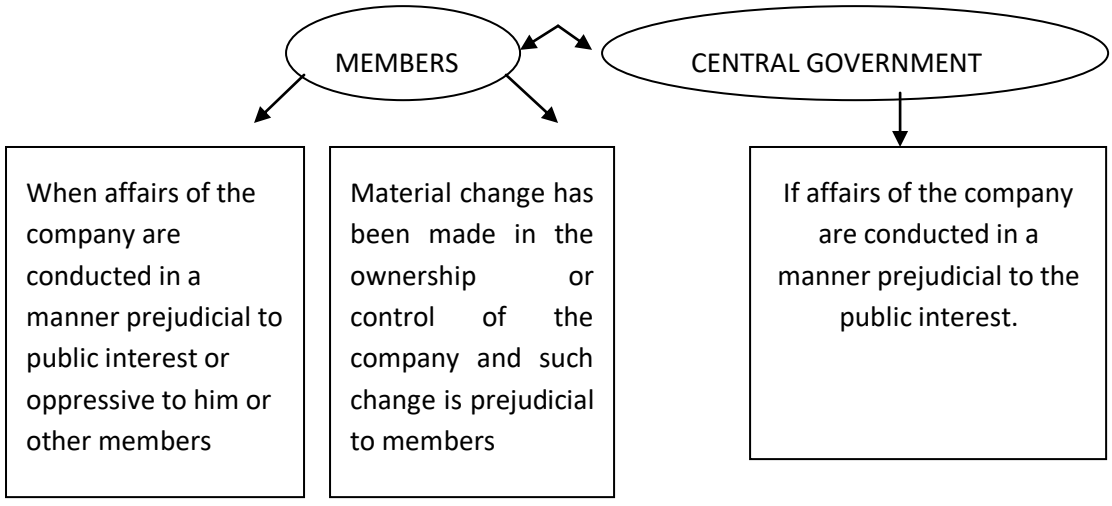
5. **WRONGDOERS IN CONTROL:** If the wrongdoers are in control of the company, the minority shareholders' representative action for fraud on the minority will be entertained by the court because if the minority shareholders are denied the right of action, their grievances in such case would never reach the court, for the wrongdoers themselves, being in control, will never allow the company to sue [*Edwards* v. *Halliwell*].
6. **PERSONAL ACTIONS:** Individual membership rights cannot be invaded by the majority of shareholders. An individual member is entitled to all the rights and privileges appertaining to his status as a member. In case there is an individual wrong, the individual can a file suit which is maintainable.
7. **PREVENTION OF OPPRESSION AND MISMANAGEMENT:** when majority shareholders are guilty of oppression and mismanagement then members of the company can make an application to the Tribunal and principle of non-interference will not be applied.
   (Oppression and mismanagement has been dealt in detail further)

3) OPPRESSION AND MISMANAGEMENT

❖ MEANING

Oppression and Mismanagement has not been defined specifically. However, when majority shareholders either pass any resolution which violates the rights of minority or departs from standards of fair dealing then, taking into consideration the circumstances, they may be held guilty of oppression and mismanagement.

❖ WHO CAN MAKE AN APPLICATION TO TRIBUNAL (Section 241)?



❖ RIGHT TO MEMBERS TO APPLY (Section 244)

According to section 244, members can apply under section 241 only if :

- In case of company having share capital:
  - not less than **one hundred members** of the company or
  - not less than **one-tenth of the total number of its members**, whichever is less,

- or **any member or members holding not less than one tenth of the issued share capital of the company**, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

- In case company having no share capital: **not less than one-fifth** of the total number of its members:
  Important: the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements so as to enable the members to apply
- Section 244(2) provides that where any members of a company are entitled to make an application under sub-section (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

❖ **POWERS OF TRIBUNAL**

According to section 242, tribunal will pass orders relating to:

a) the regulation of conduct of affairs of the company in future;
b) the purchase of shares or interests of any members of the company by other members thereof or by the company;
c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
d) restrictions on the transfer or allotment of the shares of the company;
e) the termination, setting aside or modification, of any agreement, arrived at, between the company and the managing director, any other director or manager, which in the opinion of the Tribunal, be just and equitable
f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to above. However, no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;
g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;
h) removal of the managing director, manager or any of the directors of the company;
i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause(h);
k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;
l) imposition of costs as may be deemed fit by the Tribunal;
m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

If tribunal has ordered for alteration in MOA or AOA, the company cannot make any alterations, without the permission of the tribunal, which are inconsistent with the order

If Tribunal has passed any order for alteration or termination or modification of any agreement then such order shall not give rise to any claims either against the company by the person suffering damages and no MD or other directors, whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director of the company:

a certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

- **Punishment for contravention:**
  If the company contravenes the order of the Tribunal the company shall be punishable with fine which shall **not be less than one lakh rupees** but which may **extend to twenty-five lakh rupees** and **every officer** of the company who is in default shall be **punishable with imprisonment** for a term which may **extend to six months or with fine** which shall **not be less than twenty-five thousand rupees** but which may **extend to one lakh rupees, or with both**.

4) CLASS ACTION SUITS

❖ INTRODUCTION

- In a class action suit, a large group of people, having same or similar injuries caused by the same person, collectively bring a claim to court, represented by one or more persons. This form of lawsuit is also called a representative action.
- The provisions of class action come under the head of oppression and mismanagement but there are some differences between the remedies sought under class action under Section 245 and under the general provisions of oppression and mismanagement under Section 242. While under Section 242 the NCLT can order acquisition of the company's shares, restrict transferability or allotment of shares, removal of managing director and other directors of the company, in class action, the orders will mainly be restraining orders. These restraining orders could be in the nature of restraining a company from committing an act which is beyond the scope of the company's memorandum of association or articles of association, declaring a resolution altering the charter documents as void if such resolutions are passed upon suppression of material facts or through a misstatement. An added advantage of the provisions on class action suit is that they cover depositors also. The provision enables representative action on behalf of similarly affected people, or for those who don't have the required numbers to file a case before the tribunal.

❖ FILING OF APPLICATION BEFORE THE TRIBUNAL

Members, depositors and any class of them can make an application to the tribunal for following orders-:

a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;
b) to restrain the company from committing breach of any provision of the company's memorandum or articles;
c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
d) to restrain the company and its directors from acting on such resolution;
e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
f) to restrain the company from taking action contrary to any resolution passed by the members;
g) to claim damages or compensation or demand any other suitable action from or against—
    a) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
    b) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct or
    c) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

h) to seek any other remedy as the Tribunal may deem fit.

❖ WHO CAN FILE AN APPLICATION?

- Following set of classes are recognized under the Act to file class action suits

    a) members
    b) depositors and
    c) any class of them.

- According to companies act, 2013 **members** of the company means:
    a) The subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
    b) Every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
    c) Every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository.
- **Depositors** are defined under deposit of companies rule as under:
    a) any member of the company who has made a deposit with the company in accordance with the provisions of sub-section (2) of section 73 of the Act, or
    b) any person who has made a deposit with a public company in accordance with the provisions of section 76 of the Act.

- **Further**, the phrase **other classes of them** under Section 245 of the Act refers to different classes of members and depositors viz. equity shareholders, preference shareholders, equity shareholders having different voting right, amongst preference shareholders convertible, non-convertible, cumulative non-cumulative, and bearing different rate of dividend; amongst depositor with different rate of return, different term of maturity, etc.

❖ AGAINST WHOM APPLICATION CAN BE FILED

Various persons/ entities against whom such actions can be taken are:

1. A company or its directors for any fraudulent, unlawful or wrongful act or omission;
2. An auditor including audit firm of a company for any improper or misleading statement of particulars made in the audit report or for any unlawful or fraudulent conduct.
3. An expert or advisor or consultant for an incorrect or misleading statement made to the company.

❖ REQUIRED NUMBER OF MEMBERS OR DEPOSITORS TO APPLY

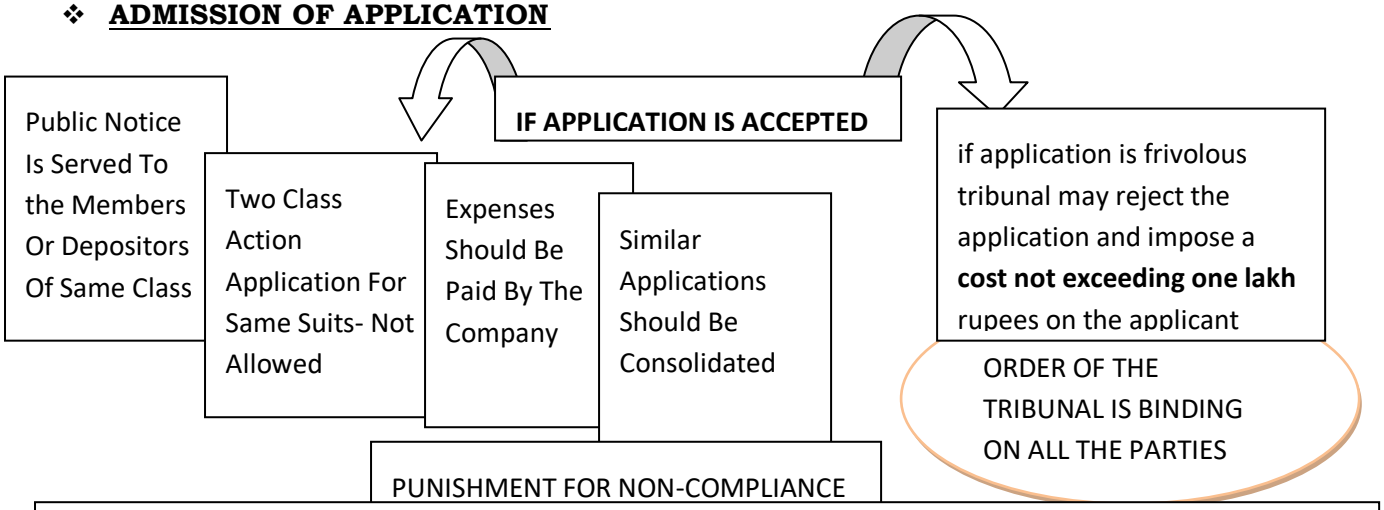
Members		Depositors
In case company is having share capital- (a) **at least five per cent**. of the total number of members of the company; or **one hundred members** of the company, whichever is less; or (a) member or members holding **not less than five per cent.** of the issued share capital of the company, in case of an unlisted company and member or members holding **not less than two per cent.** of the issued share capital of the company, in case of a listed company	In case company does not have a share capital: In the case of a company not having a share capital, not less than **one-fifth of the total number of its members**.	(a) **at least five per cent**. of the total number of depositors of the company; or **one hundred depositors** of the company, whichever is less; or; (b) depositor or depositors to whom the **company owes five per cent. of total deposits** of the company

❖ PARTICULARS TO BE TAKEN INTO CONSIDERATION BY THE TRIBUNAL

a) Whether the member or depositor is acting in good faith in making the application
b) any evidence before it as to the involvement of any person other than directors or officers of the company
c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;
d) any evidence which shows the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded;
e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be
    a. authorised by the company before it occurs; or
    b. ratified by the company after it occurs;

f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

❖ **ADMISSION OF APPLICATION**



IF A COMPANY FAILS TO COMPLY WITH THE ORDERS OF TRIBUNAL, IT SHALL BE PUNSIHABLE WITH:

- Fine which shall **not be less than five lakh rupees, extend to twenty-five lakh rupees and**
- Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees, extending to one lakh rupees.

❖ **BENEFITS OF CLASS ACTION SUITS**

Class action suits will benefit the Indian landscape on various fronts, some of which are illustrated below:

1. CLUBBING OF SIMILAR APPLICATION AND BAR OF FUTURE LITIGATION- When similar suits are filed against same defendants, it makes sense to combine them all and adjudicate it under one roof. This results in efficiency of judiciary, as it is not required to adjudicate similar cases number of times. Therefore, specific provisions are incorporated under the Act to enable NCLT to club all similar applications in any jurisdiction, into one.

According to section 245(5) (b) of the Companies Act, 2013 all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and if the members of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side. Moreover, no class action suit is supposed to be filed on similar cause of action.

2. REDUCTION OF COST: filing of suits under civil procedure code is very expensive and time consuming. Hence, similar applications are clubbed to save the time of both, the tribunal and parties, and reduce the cost.

3. COMPENSATION IN CASE SECURITY FRAUD: by class action suits one can claim damages and compensation from company, its directors and auditors. In PIL, one cannot claim compensation, damages or related remedy as it does not cover private nature dispute. Consumer complaints jurisdiction is limited, which can be exercised in matters related to consumers only, but in security cases such complaints do not exist. Moreover, if such suits are filed under the rule of tort and misfeasance before Civil Courts, then such matter will take years to see the sun shine. Hence, the provision of class action suit has been incorporated so as to enable the members of particular class to file a suit against the company and claim damages.

4. INVESTOR EDUCATION AS WELL AS AWARENESS: as soon as the application is accepted by the tribunal a public notice is served to all the members of the class. Hence, it spreads awareness and educates the investors of such measures.

❖ **RELIEF FROM TRIBUNAL**

1. **To restrain the company** from:

   • Doing an act which is contrary to the provisions of this Act or any other law

   • Taking action contrary to any resolution passed by the members;

   • Committing an act which is ultra vires the articles or memorandum of the company;

   • Committing breach of any provision of the company's memorandum or articles;

2. To **declare a resolution** altering MOA and AOA as **void** if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors;

3. To **claim damages or compensation or demand any other suitable action** from or against-

   (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct

   (ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

   (iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made

❖ **PENALTY FOR NON-COMPLIANCE OF ORDERS OF THE TRIBUNAL**

a) fine which shall not be less than Rs. 5 Lakh extending to Rs. 25 Lakh and
b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 years and with fine which shall not be less than Rs. 25,000/- but which may extend to Rs. 1,00,000/-.

5) TRANSFER AND TRANSMISSION OF SECURITIES (Section 56)

1. A company shall not register a transfer of securities of the company unless a proper instrument of transfer, duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company by the transferor or the transferee **within a period of sixty days** from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities. **However, where the instrument of transfer has been lost** or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.

2. Where an **application is made by the transferor alone and relates to partly paid shares**, the transfer shall not be registered, unless the company gives the notice of the application, to the transferee and the transferee gives no objection to the transfer **within two weeks** from the receipt of notice
3. **Transmission of shares** is a process by operation of law, where when a member dies or becomes insolvent his shares are transferred and registered in the name of legal heirs. Thus, transmission of shares takes place when a registered member dies or is adjudicated insolvent or lunatic by a competent Court. Unlike transfer of shares, transmission of shares does not require any instrument of transfer.

6) REFUSAL OF REGISTRATION AND APPEAL AGAINST SUCH REFUSAL

1. ***In a Private Company:*** If a private company refuses registration of transfer of shares, it may send a notice of refusal to the transferor and transferee within 30 days s from the date on which the instrument of transfer or the intimation of such transmission was delivered to the company. Only the transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, was delivered to the company.
2. ***In a Public Company:*** If a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

7) RECTIFICATION OF REGISTER OF MEMBERS

- If the name of any person is, without sufficient cause,
  a) entered in the register of members of a company, or
  b) after having been entered in the register, is, without sufficient cause, omitted therefrom, or

c) if a default is made, or unnecessary delay takes place in entering in the register, the fact of any person having become or ceased to be a member,

the **person aggrieved**, or **any member of the company**, or **the company** may appeal in such form as may be prescribed, to the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the register.

- The Tribunal may, after hearing the parties to the appeal pass following orders:
  a) dismiss the appeal or
  b) direct that the transfer or transmission shall be registered by the company within a period of ten days of the receipt of the order or
  c) direct rectification of the records of the depository or the register and direct the company to pay damages, if any, sustained by the party aggrieved.
- If any default is made in complying with the order of the Tribunal under this section, the company shall be punishable with:
  a) fine which shall not be less than one lakh rupees but which may extend to five lakh rupees **and**
  b) every officer of the company who is in default shall be punishable with:
    a) imprisonment for a term which may extend to one year **or**
    b) fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, **or**
    c) both.

8) PUNISHMENT FOR WRONGFUL WITHOLDING OF PROPERTY (SECTION 452)

If any officer or employee of a company
(a) Wrongfully obtains possession of any property, including cash of the company; or
(b) Having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,
he shall, on the complaint of the company or of any member or creditor or contributory thereof, be **punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.**

The Court trying an offence under sub-section (1) may also order such officer or employee

- to deliver up or refund, within a time to be fixed by it, the benefits that have been derived from such property or cash or
- in default, to undergo imprisonment for a term which may extend to two years.

2. FRAUD UNDER COMPANIES ACT 2013 AND INDIAN PENAL CODE 1860

1) INTRODUCTION

- A committee called as JJ Irani Committee was setup by the Government in 2004 to review the provisions of Companies Act, 1956. Committee found that the practice relating to imposition of penalties under provisions in the present Companies Act have been ineffective since there are not many cases under which punishment has actually been imposed. Thus, the committee felt that there should be stringent penalty for fraudulent inducement of persons to invest. As a result section 447 (which deals with fraud) was incorporated under Companies Act, 2013. The committee also took note of the fact that corporate frauds involve serious intricacies that may not be easy for state level law enforcement agencies to deal with them effectively and the same need to be referred to the Serious Fraud Investigation Office (SFIO). As a consequence, vide Section 211, the Companies Act, 2013 has provided for establishment of the SFIO.

2) FRAUD UNDER COMPANIES ACT, 2013

❖ **MEANING**

Section 447 of the company act defines fraud as following:

Fraud in relation to affairs of a company or any body corporate, includes

- any act,
- omission,
- concealment of any fact or
- abuse of position

committed by any person or any other person with the connivance in any manner, **with intent to deceive**, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss."

After examination of above definition, it can be analysed that fraud means:

1. any act, omission, concealment of facts or abuse of position by a person.
2. Intention is an important ingredient of fraud and
3. It is not necessary that there should a wrongful gain or wrongful loss to do a fraud. Thus, gain or loss arising out of the fraud cannot be a basis for deciding the violation or handing over punishment.

❖ **HOW IS IT DIFFERENT FROM COMPANIES ACT 1956?**

In the Companies Act, 1956 frauds detected at the time of winding up were dealt with under Section 542. Though punishments were specified in various Sections in the Companies Act, 1956 there was no one unified Section that dealt with fraud or prescription of penalties. However, the Companies Act, 2013 overcame the same. It specifically defines fraud under section 447 of the act and the same in referred in various places in the Act. For example, if the promoters have wrongfully published any information under section 34 of the act they will be held guilty for fraud under section 447. By specifying punishment in one section and making its reference in other sections of the act, the Act tries to ensure more unity.

❖ **USE OF SECTION 447 IN VARIOUS PLACES IN THE ACT**

Unlike Company Act 1956, Company Act, 2013 defines fraud under section 447 and same is referred under various other sections of the act.

Sl. No.	Section	Nature of violation
1	7	Incorporation of company
2	8	Charitable companies
3	34	Criminal liability for misstatement in prospectus
4	36	Punishment for fraudulently inducing persons to invest money
5	38	Punishment for personation for acquisition etc of securities.
6	46	Certificate of shares
7	56	Transfer and transmission of securities
8	66	Reduction of share capital
9	75	Damages for Fraud
10	76A	Punishment for Contravention of Section 73 or Section 76
11	86	Punishment for wilfully furnishes any false or incorrect information
12	90	Register of significant beneficial owners in a company
13	140	Removal, resignation of auditor and giving of special notice.
14	206	Power to call for information, inspect books and conduct inquiries
15	212	Investigation into Affairs of Company by Serious Fraud Investigation
16	213	Investigation into the company's affairs in other cases
17	229	Penalty for furnishing false statement, mutilation, destruction of
18	251	Fraudulent application for removal of name
19	339	Liability for fraudulent conduct of business
20	448	Punishment for false statement

3) INTENTION TO COMMIT FRAUD

Intention is one of the most important ingredients of fraud. Until and unless it is established that there was an intention to commit fraud, the accused cannot be held

guilty for fraud. An unintentional and mere accidental omission or commission generally will not stand the test of legal scrutiny in establishing a fraud. It has been held in the case of ***Ketan Parekh Vs. Securities & Exchange Board of India***

"Since, direct evidence is not available in the cases of fraud, surrounding circumstances have to be taken into consideration to prove the intention of the accused. The nature of the transaction executed, the frequency with which such transactions are undertaken, the value of the transactions, whether they involve circular trading and whether there is real change of beneficial ownership, the conditions then prevailing in the market are some of the factors which go to show the intention of the parties. Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn"

Hence, it is known that there may not be direct evidence to infer the intention of the parties, however, relevant circumstances will be taken into consideration to interpret the same.

4) UNLAWFUL GAIN OR LOSS

Another important ingredient, as per section 447, of fraud is making unlawful gain or loss. A person will not be held liable only if there is gain from the fraudulent transaction. He could be held liable even if the transaction is followed by no gain or unlawful loss. However, it is a established fact that if it is proved that parties had an intention to commit fraud then court may not take into consideration the unlawful gain or unlawful loss. Even without that ingredient getting fulfilled, a fraud will still be held committed.

Hence, though unlawful gain or loss is an ingredient of fraud it may not be taken into consideration by the court if there is a clear intention, on the part of accused, to commit fraud.

5) REVIEW COMMITTEE ON COMPANIES ACT, 2013

In order to review Companies Act, 2013, Ministry of Corporate Affairs formed a Committee called as Company Law Committee. The Committee has dealt with fraud and the corresponding provision i.e., Section 447 of the Companies Act, 2013. The Committee received suggestions that the ambit of Section 447 was too broad and even minor defaults would be punished with severe penalties, which are non-compoundable. The Committee observed that the provision has a potential of being misused hence, it recommended that only frauds, which **involve at least an amount of rupees ten lakh or one percent of the turnover of the company, whichever is lower, may be punishable under Section 447 (and non-compoundable).** Frauds below the limits, which do not involve public interest, may be given a differential treatment and compoundable since the cost of prosecution may exceed the quantum involved.

6) WHO CAN BE PERFORMING FRAUD ON THE COMPANY AND WHY

- Understanding who can commit fraudulent acts and possible motives can help in stall appropriate prevention mechanisms. This can include directors or any of the employees or even auditors or external consultants. However, we will confine our discussion to directors and employees because company becomes more vulnerable by their actions.
- Examples of fraud by promoters/directors:

  • Deceiving investors and making them invest in the company on the basis of fraudulent documents or financial statements or false assurances or ponzi schemes. Funds procured in this way will generally not be used for the purposes stated to the investors. Senior management can typically be involved in this. Further, this can also improve the share price, since a big investment will give the impression of demand for the shares. Promoters, who tend to hold a large stake in the company can benefit from this. *[Satyam Scam]*

  • Deceiving lenders - banks or financial institutions to lend money to the company, which can then be used for purposes other than those stated to the lenders. Usually committed in collusion with bank / financial institution officials, this type of fraud can benefit promoters or senior management. *[Kingfisher Airlines / IDBI Bank]*

  • Deceiving customers by devising schemes which would give the customer an incorrect impression about the products and services of the company and thus deceiving them into buying such products or services. [Speak Asia scam]

  • Deceiving government / regulators by false submissions or resorting to tax evasion mechanisms. [Recent GST fraud]

- Examples of fraud by senior management/employees

  • Stealing and leaking of confidential information to secure personal benefits.

  • Outright forgery where employees can use signature of their managers or directors to make company transactions for personal benefit.

  • Stealing company products every so often and using these for personal benefits. This can happen in case of factory employees involved in the bulk production of standardized items.

7) DUTIES OF AUDITORS OF THE COMPANY / COMPANY SECRETARY / COST ACCOUNTANT ON FRAUD REPORTING

- Section 143 of companies act provides powers and duties of auditors. It provides a *non-obstante* clause casting a duty on the auditors of the company to report to the central government an offence of fraud committed by the company or by its officers or employees if the amount involved in the fraud is one crore or above.

- However, if the amount involved in the fraud is less than one crore, the auditor may inform the same either to the Board or audit committee
- If the auditor fails to comply with the same, he shall be liable to pay a fine up to 25 lakhs.

8) CONSEQUENCES OF FRAUD BY DIRECTORS AND ITS EMPLOYEES

Any person guilty of fraud will be punished under section 447 of Companies Act, 2013 as following:

If amount involved in the fraud is **at least ten lakh rupees or one percent of the turnover**, whichever is less,	• imprisonment from six months to ten years **and** • fine ranging from the amount involved in the fraud to three times such amount (If the fraud **involves public interest**, the imprisonment will **not be less than three years**)
If the amount involved is **less than ten lakh rupees or one percent of the turnover and the fraud does not involve public interest**	• imprisonment up to five years **or** • fine up to twenty lakh rupees **or** • both
Moreover, If a director is found to be guilty of fraud and sentenced to imprisonment for six months or more	He would need to wait five years to be over after the expiry of the sentence to become a director of any other company. (If the fraud involved public interest, the limit will extend to 8 years)
It must be noted that the liability will be personal here i.e. the personal assets will be used to pay up the penalty.	

9) CORPORATE GOVERNANCE MECHANISM TO PREVENT FRAUD

Though there are provisions to punish those conducting fraudulent activities however there are certain corporate governance mechanism to prevent fraud at the initial stage itself. These are as following:

1. **SCREENING AND BACKGROUND CHECKING:** If you are going to place such substantial power in the hands of a director (refer Section 179 (1) of the Companies Act, 2013) and involve a senior employee in the functioning of the company from scratch, it is only appropriate that there be abundant screening, background checking and verification before someone is recommended for and appointed to director and senior managerial level positions. In case of regulated entities, particularly, there would be some kind of 'fitness and probity' norms for someone to be appointed as directors.
2. **STRONG INTERNAL CONTROLS:**

- Companies Act, 2013 realizes the importance of internal controls. Section 134(5)(e) of the Act requires the directors of a listed company to confirm, in their responsibility statement, that they had laid down internal financial controls to be followed by the company and that such controls are adequate and operating effectively
- Clearly laid down internal control systems and techniques such as established policies and procedures, maker- checker processes (separate people to generate and authorize transactions), limits on operation, block leaves etc. can all contribute towards reducing the possibilities of fraud and early detection. Since certain internal controls like maker checker and transaction limits can be installed through software systems, this is one of the very few fear or bias free fraud prevention mechanisms.

3. **WHISTLE BLOWING:** Section 179 of the act and LODR (for listed entities provides for the establishment of whistle blower mechanisms. Act expressly requires that whistleblowers be provided direct access to the Chairman of the Audit Committee and for adequate safeguards to avoid victimisation of the whistleblowers as the ineffective protection mechanisms might result in creating an atmosphere of fear. The stronger the protection to the whistleblowers more can be the chances of early fraud detections
4. **REMUNERATION:** Feeling of not being adequately remunerated can be one reason why a director or senior employee can be driven to commit fraud. Appropriate board evaluation and remuneration policies can result in establishing a measure for rewards against performance.
5. **EXIT CHECKS AND CLAW BACKS:** Exit interviews, particularly when employees are performing and are remunerated well, can raise red flags about possible involvement in fraud. Somewhere there are likely to be some answers which do not add up. The organization can then investigate.

   Claw back provisions in employment agreements, which enable the company to recover incentive and additional compensation paid to executives are an effective deterrent tool, since executive compensation tends to be largely performance linked. Claw back provisions would provide for recovery of such compensation (usually other than the base salary) in case of fraudulent misrepresentation or misstatements.

10)FRAUD UNDER INDIAN PENAL CODE

Indian Penal Code, 1860 does not define fraud. It's cheating which is considered as fraud under Indian penal Code.

❖ CHEATING (SECTION 415 TO 420)

A. MEANING

- Sections 415 to 420 of Indian Penal Code, 1860 deal with the offence of cheating. Section 415 provides that whoever, by deceiving any person,
  - fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or
  - to consent that any person shall retain any property, or
  - intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived**, and**
  - which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

  Explanation. - A dishonest concealment of facts is a deception within the meaning of this section.

> **REMEMBER** two keywords for cheating: a) deceiving someone; b) with dishonest intention

- 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.

B. INGREDIENTS OF CHEATING

From the above definition we can analyse that following are the ingredients of cheating:

1. Deception of any person
2. Fraudulently or dishonestly inducing any person:
   i) To deliver any property to any person or,
   ii) To consent that any person shall retain any property or
   iii) 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

D. PUNSIHMENT FOR CHEATING

Section 417 provides that whoever cheats shall be punished

- with imprisonment of either description for a term which may **extend to one year**, or
- with fine, or
- with both.

G. 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.

IMPORTANT: 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.

❖ CRIMINAL BREACH OF TRUST (SECTION 405 TO 409)

A. MEANING (SECTION 405)

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

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.

B. INGREDIENTS

After analyzing the above definition, it can be seen that criminal breach of trust has following ingredients:

1. The accused must be entrusted with the property or with dominion over it,

> The Supreme Court of India in ***V.R. Dalal* v. *Yugendra Naranji Thakkar***, 2008 (15) SCC 625, has held that the first ingredient of criminal breach of trust is entrustment and where it is missing, the same would not constitute a criminal breach of trust

2. The accused must
   a) dishonestly misappropriates or converts the property to his own use or,

b) dishonestly use or dispose of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust,

NOTE: If there is merely breach of trust it may be a civil wrong but when there is mens rea i.e. guilty mind, it will be covered under criminal breach of trust.

C. PUNISHMENT FOR CRIMINAL BREACH OF TRUST (SECTION 406)

According to 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.

❖ FORGERY

1. MEANING (SECTION 463)

Forgery is dealt with under section 463 and 465 of the Act. According to section 463 of the Act:

"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"

2. PUNSIHMENT (SECTION 465)

Whoever commits forgery shall be punished

- with imprisonment of either description for a term which may extend to two years, or
- with fine, or
- with both.

FRAUD UNDER SEBI (PROHIBITION OF FRAUDULENT AND UNFAIR TRADE PRACTICES RELATING TO SECURITIES MARKET) REGULATIONS, 2003

"Fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—

1. a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;
2. a suggestion as to a fact which is not true by one who does not believe it to be true;
3. an active concealment of a fact by a person having knowledge or belief of the fact;

4. a promise made without any intention of performing it;
5. a representation made in a reckless and careless manner whether it be true or false;
6. any such act or omission as any other law specifically declares to be fraudulent,
7. deceptive behaviour by a person depriving another of informed consent or full participation,
8. a false statement made without reasonable ground for believing it to be true.
9. the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.

BRAINSTORMING

Q1. Will Fraud by just one director make other directors liable?

According to Companies act, in case of default all the directors are held liable. Though non-executive directors do not participate in the day to day functioning of the company, however, non-participation cannot be a defence.

It provides that company and officers in default should be punishable with punishments prescribed. however, if any directors, manager or employees prove that the resolution has been passed without his knowledge or without his consent then same can be exempted from the punishments provided under the Act.

Though a director can be exempted from the punishment if he had no knowledge about the fraud, it becomes difficult to prove how the director was not aware about the functioning of the company when the notice of meetings are served to all the directors of the company. SS-1 mandates that the draft minutes need to be circulated to all the members of the board of directors and not only to those who attended the meeting. The proceedings of the Board can be available even to those who did not attend the meeting and they can therefore be considered to be aware of a contravention.

In such cases attendance registers, minutes, board papers play an important role. These documents helps to analyse how many people participated in the meeting, how many members assented to the resolution, how many members dissented and so on. Thus, initially all the directors are held liable for the fraudulent activities of the company, however if any director proves beyond reasonable doubt that he had no knowledge about the act or the act has not been performed with his consent, same will be exempted.

Q2. In a fraud by a director is the company fraudster or the victim?

When directors are acting on behalf of the company, if they deceive third parties, the company will also be penalised for this. In most legislations, the sections speaking about the offences by companies implicate the company and the officers in default. Although the company might be able to recover the loss from the director, this would be at a later stage. Initially, the company will have to make good the losses of the third parties or pay the penalties for the violations.

3. REGULATORY ACTION

Actions which the authorities take in order to ensure compliance with the provisions of law are called as regulatory actions. For example, in order to check whether company is in compliance with various provisions of the Act and applicable laws, Registrar is authorized to scrutinize the documents filed by the company. The actions taken by the Registrar to ensure companies compliance with various laws and regulations, are regulatory actions. These may be:

- Call for information
- Inspection
- Investigation
- Inquiry
- Search and seizure
- Litigation
- Arrest
- Penalty and
- Punishment.

1) INSPECTION, INQUIRY AND INVESTIGATION

Inspection, inquiry and investigation are most common form of regulatory actions. Section **206 to 229** of Companies Act, 2013 deals with inspection, inquiry and investigation amongst which section 206 to 208 specifically deals with inspection, inquiry, inspection report and search and seizure and section 210 to 229 deals with investigation.

2) PURPOSE OF CONDUCTING INSPECTION

Section 206 does not specify the circumstances or preconditions which must be satisfied to invoke these provisions. However, some of the objectives of conducting such inspections may be thus:

1) To detect concealment of income by providing false accounts.
2) To have knowledge about the mismanagement of the business of a company and transactions entered into by the company with an intent to defraud creditors, shareholders or otherwise for fraudulent or unlawful purposes.
3) To ascertain whether the statutory auditors have discharged their functions and duties in determining the true and fair view of a company's accounts and their proper maintenance.
4) To enable the Government to identify the amount of profits gained but not adequately accounted for.
5) To detect misapplication of funds leading a company in the state of financial crisis.
6) To keep a watch on performance of a company.

3) INSPECTION, INQUIRY, INSPECTION REPORT AND SEARCH AND SEIZURE (SECTION 206 TO 209)

❖ ORDER OF INSPECTION

There are three circumstances, where inspection may be ordered:

1. By registrar
2. By Regional Director under power delegated to it by Central Government
3. By Central Government by a general or special order.

INSPECTION ORDERED BY REGISTRAR:

Inspection may be ordered by the Registrar:

a) If no information or explanation is furnished to the Registrar within the time specified
b) If the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate
c) If the Registrar is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and does not disclose a full and fair statement of the information required.

INSPECTION ORDERED BY REGIONAL DIRECTOR:

There are seven regional directors and there is an Inspection unit attached to the office of every Regional Director for carrying out the inspection of the books of accounts of Companies. The Central Government may, on satisfaction that circumstance so warrant, direct inspection of books and papers of a company by an inspector appointed for the purpose.

INSPECTION ORDERED BY CENTRAL GOVERNMENT:

The Central Government may by general or special order authorise any statutory authority to carry out the inspection of books of account of a company or class of companies. Such inspection may be carried out by any statutory authority including SFIO, ICSI, ICAI, SEBI, IRDA, CCI, TRAI, etc. depending upon the circumstances of the case.

❖ INQUIRY

After inspection of documents registrar may further initiate inquiry if he is satisfied that the affairs of the company are being carried on-

a) for a fraudulent purpose
b) unlawful purpose
c) not in compliance with the provision of this Act or
d) Investor's grievances not being addressed.

However, before carrying out any inquiry Registrar should provide a reasonable opportunity of being heard to the company. The Registrar shall order inquiry after

informing the company of the allegation made against it by a written order and call for information or specification in writing within a specified time.

❖ CONDUCT OF INSPECTION AND INQUIRY

- Registrar has the power to require a company to
  a) furnish in writing information or explanation or
  b) to produce documents, after framing his opinion on scrutiny of any document filed by the company or any information received by him.

- where a Registrar or inspector calls for the books of account or other books and papers it shall be duty of every director, officer or other employee of the company to produce all these documents to the Registrar or inspector. They will furnish statements, information or explanation as the Registrar or inspector may require and shall render all assistance to the Registrar or inspector in connection with the inspection.
- If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company, who is in default shall be punishable
  - With imprisonment which may extend to 6 months
  - with a fine which may extend to one lakh rupees **and**
  - **In the case of a continuing failure**, with an additional fine which may extend to five hundred rupees for every day after the first during which the failure continues.
- If any director or officer of the company **disobeys the direction issued by the Registrar** or the inspector under this section, the director or the officer shall be punishable
  - with imprisonment which may extend to one year **and**
  - with fine which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees.
- If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

- The Registrar or inspector making an inquiry may:
  (a) make or cause to be made copies of books of account or other books and papers; or
  (b) place or cause to be placed any mark of identification on such books
  in token of the inspection having made.

❖ INSPECTION REPORT

According to **section 208**, the Registrar or inspector shall, after the inspection or an inquiry, submit a report in writing to the Central Government along with such documents, if any which may include a recommendation that further investigation into the affairs of the company is necessary giving his reasons in support.

❖ **SEARCH AND SEIZURE (SECTION 209)**

- The registrar or inspector may make an application to the special court for obtaining orders of search and seizure. Once the orders are obtained they can:
  1. enter, with such assistance as may be required, and search, the place or places where such books or papers are kept; and
  2. Seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.
- Special court may pass an order for search and seizure only when it is proved that the documents, books or registers of the company may be altered or destroyed.
- The Register or inspector shall return the books and papers within one hundred and eighty days after such seizure to the company from whose custody or power such books or papers were seized. These books and papers may be called for by the Registrar or inspector for a further period of one hundred and eighty days by an order in writing if they are needed again.
- They can take copies of or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.
- The provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures shall apply, mutatis mutandis, to every search and seizure.

4) INVESTIGATION (SECTION 210 TO 229)

Shareholders have been vested with various rights including the right to elect directors under the Companies Act, 2013. However, shareholders are often ill-equipped to exercise effective control over the affairs of companies, and, particularly in companies whose shareholders are widely scattered, and the affairs of such companies are managed by its Board of directors. Such a situation leads to abuse of power by persons in control of the affairs of company. It became, therefore, imperative for the Central Government to assume certain powers to investigate the affairs of the company in appropriate cases particularly where there was reason to believe that the business of the company was being conducted with the intent to defraud its creditors or members or for a fraudulent or unlawful purpose, or in any manner oppressive of any of its members. Sections 210 to 229 of the Companies Act, 2013, contain provisions relating to investigation of the affairs of company.

❖ **KINDS OF INVESTIGATION**

1. Investigation of the affairs of the company if it is necessary to investigate into the affairs of the company in public interest (Section 210)
2. Investigation on the order of Tribunal. (Section 213)
3. Investigation about the ownership of a Company (Section 216)
4. Investigation of the affairs of related companies (Section 219)
5. Investigation by Serious Fraud Investigation Office directed by Central government under (section 212)

❖ **INVESTIGATION OF THE AFFAIRS OF THE COMPANY (SECTION 210)**

- Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company,—
  a) on the receipt of a report of the Registrar or inspector;

b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
c) in public interest,

it may order an investigation into the affairs of the company.

- Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.
- For the purpose of investigation, the Central Government may appoint one or more inspectors to investigate the affairs of the company. These inspectors shall report on the affairs of the company in such manner as the central government may direct

❖ **INVESTIGATION INTO COMPANY'S AFFAIRS ON AN APPLICATION MADE BY MEMBERS OR OTHER PERSONS (SECTION 213)**

1. When an application is made to the Tribunal for passing an order for investigation of affairs of the company by following, Tribunal may make an order of investigation:
   a) Company having share capital- not less **100 members or members holding not less than one - tenth of the total voting power** or
   b) Company having share capital- not less than **one - fifth of the persons** on the company's register of members
2. The tribunal may pass similar order if an application is made **by any other person**, if it is satisfied that:
   a) the business of the company is being conducted with intent to defraud its creditors, members or any other person or for a fraudulent or unlawful purpose or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;
   b) person concerned in the formation of the company or the management of its affairs have been guilty of fraud or other misconduct towards the company or towards its members; or
   c) the members of the company have not been given all reasonable information including information relating to the calculation of commission payable to a managing or other director or the manager of the company.

IMPORTANT

Where an investigation is ordered by the Central Government , the Central Government may before appointing an inspector, require the applicant to give such security not exceeding twenty-five thousand rupees for payment of the costs and expenses of the investigation and such security shall be refunded to the applicant if the investigation results in prosecution.

Security is decided on the basis of following criteria:

S.	Turnover as per previous year balance sheet (Rs.)	Amount of
1	Turnover upto Rs. 50 crore	Rs. 10000
2	Turnover more than Rs. 50 crore and upto 200 crore	Rs. 15000
3	Turnover more than Rs. 200 crore	Rs. 25000

❖ **INVESTIGATION OF OWNERSHIP OF COMPANY (SECTION 216)**

- Where it appears to the Central Government that there is a reason so to do, it may appoint one or more inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons -

  (a) who are or have been financially interested in the success or failure, whether real or apparent, of the company; or

  (b) who are or have been able to control or to materially influence the policy of the company; or

  (c) who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company.

- The Central Government shall appoint one or more inspectors, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating financial control or material influence to the company.

❖ **INVESTIGATION INTO AFFAIRS OF RELATED COMPANIES (SECTION 219)**

Inspector has the power to investigate, after the approval of central Government, affairs of:

a) Any other body corporate which is or has at any relevant time been the company's subsidiary company or holding company or a subsidiary of its holding company;
b) Any other body corporate which is or has any relevant time been managed by any person as managing director or as manager of the company;
c) Any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or
d) Any person who is or has at any relevant time been the company's managing director or manager or employee

However, this investigation is in continuation of ongoing investigation under sections 210, 212 and 213.

PROCEDURES AND POWERS OF INSPECTOR

- Inspector may ask body corporates to produce books and papers necessary for the purpose of investigation.
- It shall be **duty of all past and present officers, other employees and agents** of a company or body corporate or a person under investigation -
  a) To preserve and to produce to an inspector or any other authorised person all books and papers of the company or relating to the company or other body corporate or the person which are in their custody or power, and
  b) Otherwise to give to the inspector all assistance in connection with the investigation which they are reasonable able to give.

- If any person fails or refuse -
    a. To produce to an inspector or authorised person any book or paper which is his duty;
    b. To furnish any information which is his duty to furnish;
    c. To appear before the inspector personally when required to do so or to answer any question which is put to him by the inspector;
    d. To sign the notes of any examination,

    He shall be punishable
    a) with imprisonment for a term which **may extend to six months and**
    b) with fine which shall **not be less than twenty five thousand rupees but may extend to one lakh rupees and**
    c) also with a further fine which may extend to two thousand rupees for every day after the first during which the failure or refusal continues.
- If any director or officer of the company disobeys the direction issued by the Registrar or the inspector, the director or the officer shall be punishable with
    - imprisonment which **may extend to one year and**
    - with fine which **shall not be less than twenty - five thousand rupees but which may extend to one lakh rupees.**

- An inspector may examine on oath -
    (a) Any past or present officer or employee,
    (b) With the prior approval of the Central Government, any other person,

    In relation to the affairs of the company or other body corporate or person and for that purpose may require any of those persons to appear before him personally. In case of investigation under Section 212, the prior approval of the Director of Serious Fraud Investigation
    Office shall be sufficient.
- Power of inspectors are similar to power of civil courts under civil procedure code, 1908, in respect of following matters:
    a. The discovery and production of books of account and other documents, at such place and time as may be specified by such person;
    b. Summoning and enforcing the attendance of persons and examining them on oath; and
    c. Inspection of any books, registers and other documents of the company at any place.

3. The inspector shall not keep books and papers **for more than one hundred eighty days** and returns the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced.
This initial period may be extended to one hundred and eighty days by an order in writing.

❖ **SEIZURE OF DOCUMENTS BY INSPECTOR**

If at all during investigation inspector is of the opinion that the documents, books or papers of the company or related company, can be destroyed or altered, the investigator may enter the place where the books are kept and seize such documents until the completion of investigation.

The inspector shall keep in his custody the books and papers seized up to the conclusion of the investigation as he considers necessary and thereafter shall return the same to the person from whose custody or power they were seized.

❖ FREEZING OF ASSETS OF THE COMPANY ON INQUIRY AND INVESTIGATION

The Tribunal may freeze the assets of the company or may direct that the removal, transfer or disposal shall not take place for the period not exceeding three years on:

1. a reference made to it by the Central Government
2. in connection with inquiry and investigation of the affairs of the Company
3. a complaint made by the members under section 244
4. a creditor having one lakh amount outstanding against the company or
5. any application received on reasonable grounds.

- However, the tribunal will pass such orders, if it appears that the removal, transfer or disposal of funds, assets, properties of the company is likely to take place prejudicial to the interests of the company or its shareholders or creditors or in public interest.

❖ IMPOSITION OF RESTRICTION UPON SECURITIES

- Tribunal may impose certain restrictions on the securities, for not more than 3 years, if Tribunal is of the opinion that there are certain facts about the securities which needs to be searched and such facts cannot be found out unless certain restrictions are imposed on the securities.

❖ INSPECTOR'S REPORT

- Inspectors appointed for the purpose of conducting investigation may form their report and submit the same to the Central Government. However, this report is different from the report made by the inspector's of Serious Fraud Investigating Office.
- members, creditors or any other person whose interest is likely to be affected may obtain a copy of the report by making an application to the Central Government. The report of any inspector shall be authenticated either -
  a. by the seal, if any of the company investigated; or
  b. by a certificate of a public officer having the custody of the report
- This report is admissible as evidence in the Court.

1. CRIMINAL PROSECUTION: Central Government may prosecute anybody on the basis of Inspector's report.

FOLLOW UP ACTIONS

2. DISGORGEMENT: Disgorgement is the act of giving up profits obtained illegally. The purpose of such a remedy, as in securities cases, is to deprive the wrongdoer of his or her ill-gotten gains.

Central government makes an application to the Tribunal to pass orders of disgorgement of assets, cash or properties obtained through illegal means.

3. Winding up

On the basis of the report, Central Government may present to the Tribunal:

a. petition for winding up of the company; or body corporate on the ground that it is just and equitable that it should be wound up; or
b. under Section 241; or
c. both.

4. Winding up proceeding for recovery

Central Government may itself bring proceeding for winding up in the name of body corporate

a. for the recovery of damages in respect of any fraud or other misconduct in connection with the promotion or formation or the management of the affairs of such company;
   or
b. for the recovery of any property of the company or body corporate which has been misapplied or wrongfully retained

❖ **EXPENSES OF INVESTIGATION**

Any expenses incurred by the Inspector shall first be borne by the Central Government but shall be reimbursed as mentioned below:

(a) any person convicted on a prosecution instituted or who is ordered to pay damages or restore any property would reimburse the expenses.
(b) any company or body corporate in whose name proceedings are brought to the extent of the amount or value of any sums as a result of such proceedings.
(c) if a prosecution is not instituted, the company, body corporate or applicants would reimburse the expenses.

❖ **INVESTIGATION INTO AFFAIRS OF A COMPANY (SECTION 212)**

- Central government can order an investigation under section 212 in addition to section 210. The Central Government may by order assign investigation into the affairs of a company –
  1. On receipt of a report of the Registrar or inspector under Section 208
  2. On intimation of a Special Resolution passed by a company that its affairs are required to be investigated
  3. In the public interest
  4. On request from any department of Central Government or State Government.

- Once, a case has been assigned to the Serious Fraud Investigation Office, the case shall not investigated by any other department of Central Government or State Government and all existing investigation shall also be transferred to the Serious Fraud Investigation Office.
- The Investigation Officer (IO) of the Serious Fraud Investigation Office has power of inspector under Section 217 and the company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

HISTORY OF SFIO

- SFIO was introduced under Companies Act, 2013 by virtue of recommendations of JJ Irani Committee. The SFIO was established as a multi-disciplinary organization under Ministry of Corporate Affairs, consisting of experts in the field of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation for detecting and prosecuting or recommending for prosecution white-collar crimes/ frauds. It normally took up only those cases for investigation which are characterized by:
  a) Complexity and having inter-departmental and multi-disciplinary ramifications;
  b) Substantial involvement of public interest to be judged by size, either in terms of monetary misappropriation or in terms of persons affected, and
  c) The possibility of investigation leading to or contributing towards a clear improvement in systems, laws or procedures.
- The SFIO shall investigate serious cases of fraud received from Department of company Affairs.

5) INVESTIGATIONS PROCEDURE BY SEBI UNDER SEBI ACT

1. Section 11 C

- Section 11C of the Act provides that where SEBI has reasonable ground to believe that
  - the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or
  - any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by SEBI.

it may, at any time by order in writing, direct **any officer not below the rank of Division Chief** (hereinafter referred to as the "Investigating Authority") to investigate the affairs of such intermediary or persons associated with the securities market or any other person and to report thereon to the Board.

- It is the duty of every manager, officer and other employee of the company and every intermediary or every person associated with the securities market to preserve and to produce to the Investigating Authority all the books, registers, other documents and record of, or relating to the company which are in their custody or power.
- If any person fails or refuses to produce any book, register, other document; or to furnish any information which it is his duty to furnish; or to appear before the Investigating Authority personally when required to do so or to answer any question which is put to him by the Investigating Authority; or to sign the notes of any examination, he shall be punishable with
  - **imprisonment** for a term which may extend to **one year**, **or**
  - **with fine**, which may extend to **one crore rupees, or**
  - with both, **and** also
  - with a **further fine** which **may extend to five lakh rupees for every day** after the first during which the failure or refusal continues.
- Where in the course of an investigation, the Investigating Authority has reasonable ground to believe that the books, registers, other documents and record of any intermediary or any person associated with securities market in any manner may be destroyed and altered, **the Investigating Authority may make an application to the Magistrate or Judge** of such during noted court in Mumbai, as may be notified by the Central Government for an order for the seizure of such books, registers, other documents and records.
- After considering the application and hearing the Investigating Authority, if necessary, the Magistrate or Judge of the Designed Court, by order, authorize the investigating authority -
  a. to enter, with such assistance, as may be required, the place or places where such books, registers, other documents and record are kept.
  b. to search that place or those places in the manner specified in the order and.
  c. to seize books, registers and other documents and records, it consider necessary for the purpose of the investigation.
- However, the Magistrate or Judge of the Designated Court shall not authorize seizure of books, registers, other documents and record of any listed public company or a public company which intends to get its securities listed on any recognized stock exchange unless such company indulges in insider trading or market manipulation.
- The Investigating Authority may keep in its custody any books, registers, other documents and record produced **for six months** and shall return the same to any person by whom or on whose behalf the books, registers, other documents and record are produced.

2. **<u>Section 11D</u>**

- Deals with the **cease and desist powers** of SEBI. If SEBI finds, after causing an inquiry to be made, that any person has violated, or is likely to violate any provisions of this Act, or any rules or regulations, it may pass an order requiring such person to cease and desist from committing or causing such violation.
- SEBI shall not pass such order in respect of any listed public company or a public company which intends to get its securities listed on any recognized stock exchange

unless SEBI has reasonable grounds to believe that such company has indulged in insider trading or market manipulation.

6) SEBI (PROHIBITION OF FRAUDULENT AND UNFAIR TRADE PRACTICES RELATING TO SECURITIES MARKET) REGULATIONS, 2003

- Where the appointing authority has reasonable ground to believe that—
  (a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market in violation of these regulations;
  (b) any intermediary or any person associated with the securities market has violated any of the provisions of the Act or the rules or the regulations,

  it may, at any time by order in writing, direct **any officer not below the rank of Division Chief** (hereinafter referred to as the "Investigating Authority") to investigate the affairs of such intermediary or persons associated with the securities market or any other person and to report thereon to the Board in the manner provided in section 11C of the Act.

- However, without prejudice to the provisions contained under section 11 Board can pass following orders:
  a) suspend the trading of the security found to be or prima facie found to be involved in fraudulent and unfair trade practice in a recognized stock exchange
  b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities
  c) suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position
  d) impound and retain the proceeds or securities in respect of any transaction which is in violation or prima facie in violation of these regulations
  e) direct and intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of a fraudulent and unfair transaction;
  f) require the person concerned to call upon any of its officers, other employees or representatives to refrain from dealing in securities in any particular manner
  g) prohibit the person concerned from disposing of any of the securities acquired in contravention of these regulations
  h) direct the person concerned to dispose of any such securities acquired in contravention of these regulations, in such manner as the Board may deem fit, for restoring the status quo ante

7) SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

- Whenever the Board is of the opinion that there are grounds for adjudging under any of the provisions in Chapter VI-A of the Act, it may appoint any of its officers not below the rank of Division Chief to be an adjudicating officer for holding an inquiry for the said purpose.

❖ **PROCESS FOR CONDUCTING INQUIRY:**

- While holding an inquiry a show cause notice has to be issued to such person requiring him to show cause why an inquiry should not be conducted against him, within 14 days from the date of receiving the notice and notice should clearly specify the offence that has been committed
- If, after showing the cause, the Board or the adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative.
- On the date fixed, the Board or the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.
- The Board or the adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry. *However, the personal hearing can be waived on the request of person concerned.*
- While holding an inquiry under this rule the Board or the adjudicating officer] shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which, in the opinion of the Board or the adjudicating officer, may be useful for or relevant to, the subject-matter of the inquiry.
- If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Board or the adjudicating officer, the Board or the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

❖ **ORDER OF THE BOARD OR ADJUDICATING AUTHORITY**

- After examination of evidences if Board or authorities are of the opinion that person is guilty then they may impose penalties as provided in the respective sections. However, before imposing penalties they will take following factors into consideration:

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default

(b) the amount of loss caused to an investor or group of investors as a result of the default

(c) the repetitive nature of the default.

- Every order made should contain reasons and should be in writing.
- The Board or the adjudicating officer who has passed an order, **may rectify any error apparent on the face of record** (any typographical error) on such order, either on its own motion or where such error is brought to his notice by the affected person **within a period of fifteen days** from the date of such order.
- Copy of an order will be sent to both the parties. A notice or an order issued under these rules shall be served on the person in the following manner:
  a) by delivering or tendering it to that person or his duly authorised agent ;
  b) by sending it to the person by fax or electronic mail or courier or speed post or registered post to the address of his place of residence or his last known place of

residence or the place where he carried on, or last carried on, business or personally works, or last worked, for gain

c) if it cannot be served under clause (a) or clause (b), by affixing it on the outer door or some other conspicuous part of the premises in which that person resides or is known to have last resided, or carried on business or personally works or last worked for gain and that written report thereof should be witnessed by two persons.

d) if it cannot be affixed on the outer door as per clause (c), by publishing the notice in at least two newspapers, one in a English daily newspaper having nationwide circulation and another in a newspaper having wide circulation published in the language of the region where that person was last known to have resided or carried on business or personally worked for gain.

8) INVESTIGATION UNDER FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

- Under FEMA Central Government establishes **Directorate of Enforcement** with directors and other officers, who then investigates if there is contravention under section 13 of the Act. The Central Government may also, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, **not below the rank of an Under Secretary** to the Government of India to investigate any contravention referred to in section 13.
- **Power of officers:**
  1) The officers shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 and shall exercise such powers, subject to such limitations laid down under that Act. (Powers of income tax authorities have been discussed in detail further).
- Where any document is produced or seized during investigation or has been received from any place outside India, the Adjudicating authority shall presume:

  a) presume, that the signature and every other part of such document have been signed by or is in the handwriting of, that particular person.
  b) presume, unless the contrary is proved, the truth of the contents of such document.
  c) admit the document in evidence despite the fact that it is not duly stamped, if such document is admissible in evidence;
- **Section 42 of the Act deals with contravention of the provisions of the Act by the Companies** and provides that where the person committing the contravention of the Act or Rules happened to be a company, every person who at the time the contravention was committed, was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly.

  However, no such persons shall be deemed to be guilty of committing any offence if he proves that such contravention took place without his knowledge or that he exercised adequate steps to prevent such contravention.

  In case the contravention is committed by a company and it is proved that such contravention is committed with the knowledge and consent or due to the neglect on the part of any director, manager or secretary or other officer of the company,

they will also be deemed to be guilty of contravention and liable to be proceeded against and punished accordingly.

9) INVESTIGATION UNDER FOREIGN CONTRIBUTION AND (REGULATION) ACT (FCRA)

- If the Central Government has any reason to suspect that any provision of this Act has been or is being, contravened by -
    - any political party; or
    - any person; or
    - any organisation; or
    - any association,

  it may, by general or special order, **authorise such Gazetted Officer**, **holding a Group A post** under the Central Government to inspect any account or record maintained by such political party, person, organisation or association.
- The Inspection officer has the power to call for such other information as may be required for the purpose of inspection. It is duty of the political party, organization, individual or association to provide required information to the inspector.
- If a prohibitory order is served on any person and such person pays, delivers or transfers or otherwise deals with any article or currency or security in contravention of such prohibitory order he shall be punishable with
    - imprisonment for a term which may **extend to three years**, or
    - with fine, or
    - with both or,
    - an **additional fine** equivalent to the market value of the article or the amount of the currency or security in respect of which the prohibitory order has been contravened by him.
- If any person accepts or assists any person, political party or organisation in accepting any foreign contribution or any currency or security from a foreign source, in contravention of any provision of this act, he shall be punishable
    - with imprisonment for a term which **may extend to five years**, or
    - with fine, or
    - with both
- If, after inspection of an account or record, the inspecting officer has any reasonable cause to believe that any provision of this Act or of any other law relating to foreign exchange has been, or is being, contravened, he may seize such account or record and produce the same before the court, authority or Tribunal in which any proceeding is brought for such contravention.
- The authorised officer shall return such account or record to the person from whom it was seized if no proceeding is brought within six months from the date of such seizure.
- If any article or currency which is seized is obtained through contravention, then same will be confiscated. However, this confiscation can be adjudged by such officer, not below the rank of an Assistant Sessions Judge, as the Central Government may, by notification in the Official Gazette, specify in this behalf
- Any person aggrieved by any order of confiscation it may prefer an appeal,

- where the order has been made by the Court of Session- to the High Court to which such Court is subordinate;
- where the order has been made by any officer specified- to the Court of Session within the local limits of whose jurisdiction such order of adjudication of confiscation was made,

within one month from the date of communication to such person of the order.

- Further the appellate court may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of one month, allow such appeal to be preferred within a **further period of one month**, but not thereafter.
- where the person committing the contravention of the Act or Rules happened to be a company, every person who at the time the contravention was committed, was in charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the contravention and liable to be proceeded against and punished accordingly. However, no such persons shall be deemed to be guilty of committing any offence if he proves that such contravention took place without his knowledge or that he exercised adequate steps to prevent such contravention.
  In case the contravention is committed by a company and it is proved that such contravention is committed with the knowledge and consent or due to the neglect on the part of any director, manager or secretary or other officer of the company, they will also be deemed to be guilty of contravention and liable to be proceeded against and punished accordingly.
- Any offence except those punishable only with imprisonment shall be compounded by the authorities appointed by the Central Government. However, any second or subsequent offence is committed within 3 years from the day of compounding then same will not be compounded

10)INQUIRY BY COMPETITION COMMISSION OF INDIA

- The Commission may inquire if there is contravention of the provisions of the act on its own motion or on –

(a) receipt of any information, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

- competition act strictly prohibits **anti-competitive agreements** and **abuse of dominant position**

1) ANTI COMPETITIVE AGREEMENTS

Anti-competitive agreements are those agreements which have appreciable adverse effect on the competition. Act that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which **causes or is likely to cause an appreciable adverse effect** on competition within India.

How to determine appreciable adverse effect

Commission while determining appreciable adverse effect on competition will take into consideration following factors:

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services; or
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

2) DOMINANT POSITION

Competition act strictly prohibits abuse of dominance. However, in order to analyse whether an enterprise possesses a dominating position, following factors have to be taken into consideration:

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development

- **RELEVANT MARKET**
  For determining whether a market constitutes a "relevant market", the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

RELEVANT GEOGRAPHIC MARKET

The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely: –

(a) regulatory trade barriers;

(b)local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs

RELEVANT PRODUCT MARKET

The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely: –

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers; and

(f) classification of industrial products

❖ **INQUIRY INTO COMBINATION BY COMMISSION**

- According to Section 20(1), the Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.
- According to Section 20(2), the Commission shall, on receipt of a notice under sub-section (2) of section 6, inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.
- **Limitation on inquiry into combination:** The Commission shall not initiate any inquiry after the expiry of one year from the date on which such combination has taken effect.
- **Determining appreciable adverse effect:** For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely: –
  a) actual and potential level of competition through imports in the market

b) extent of barriers to entry into the market
c) level of combination in the market
d) degree of countervailing power in the market
e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins
f) extent of effective competition likely to sustain in a market
g) extent to which substitutes are available or arc likely to be available in the market
h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination
i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market
j) nature and extent of vertical integration in the market
k) possibility of a failing business
l) nature and extent of innovation
m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition
n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

❖ **INVESTIGATION BY DIRECTOR GENERAL**

- Director General, if asked by the commission, may assist the commission in investigating into any contravention of the provisions of this Act or any rules or regulations. Director General have all the powers as are conferred upon the Commission. The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure**INCOME TAX ACT**

❖ **POWER TO CALL FOR INFORMATION**

The Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals) may:

1. require any firm to provide information relating to names and addresses of the partners of the firm.
2. require any HUF to provide information relating to names and addresses of the managers and partners of the family.
3. require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any previous year rent, interest, commission etc.
4. require any dealer, broker or agent or any person concerned in the management of a stock or commodity exchange to furnish a statement of the names and addresses of all persons to whom he or the exchange has paid any sum in connection with the transfer,
5. require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by the Assessing Office.

❖ POWER SIMILAR TO CIVIL COURTS

- The Income Tax authorities shall have the same powers as are vested in a court under the Code of Civil Procedure: —
  a) Summoning and examining witnesses on oath;
  b) Issuing commissions;
  c) Issuing inquiries
  d) Discovery or production of books of account and other documents
  e) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

❖ POWER OF SEARCH AND SEIZURE

- Search and seizure may take place where the Income Tax authorities' reason to believe that –
  a) any person to whom summons were issued has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or
  b) any person to whom summons were issued would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding
  c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property
- These officers may –
  a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that books or documents are kept
  b) open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred
  c) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search, except bullion, jewellery or other valuable article or thing, being stock-in-trade of the business
  d) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom
  e) make a note of any such money, bullion, jewelry or other valuable article or thing.
- The authorised officer may, during the course of the search or seizure or within a period of sixty days from the date on which the last of the authorisations for search was executed, make a reference to a Valuation Officer who will estimate the fair market value of the property in the manner provided under that section and submit a report of the estimate to the said officer within a period of sixty days from the date of receipt of such reference.
- If any person is not satisfied with the orders pf search and seizure, he may make an application to the Board and Board may pass necessary orders.

❖ POWER OF SURVEY

- An income-tax authority may enter –
  (a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction, or

(c) any place in respect of which he is authorised for the purposes of this section by such income-tax authority.

- an income-tax authority may enter any place of business or profession only during the hours at which such place is open for the conduct of business or profession and, in the case of any other place, only after sunrise and before sunset.
- An income-tax authority acting under this section may, – (i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom, (ia) impound and retain in his custody for such period as he thinks fit any books of account or other documents inspected by him.

11)CENTRAL BUREAU OF INVESTIGATION

- The Central Bureau of Investigation is an organization established under the Delhi Special Police Establishment Act, 1946. According to section 2 of this act CBI can deal with only offences specified under section 3 of Delhi Special Police Establishment Act, 1946. Its jurisdiction extends to Delhi and other Union territories. CBI can also conduct investigation in the state however, prior consent of state government will be required for the same. If the Supreme Court and High Courts, order CBI to investigate a crime anywhere in the country, no consent of state Government would be required.

❖ TYPE OF INESTIGATION

CBI has three divisions of investigation of crime:

- **Anti-corruption division**: it is the largest division having presence almost in all the States of India. It investigates cases under the Prevention of Corruption Act, 1988 against Public officials and the employees of Central Government, Public Sector Undertakings, Corporations or Bodies owned or controlled by the Government of India.
- **Economic offences division**: investigates major financial scams and serious economic frauds, including crimes relating to Fake Indian Currency Notes, Bank Frauds and Cyber Crime
- **Special crimes division**: investigates serious, sensational and organized crime under the Indian Penal Code and other laws on the requests of State Governments or on the orders of the Supreme Court and High Courts.

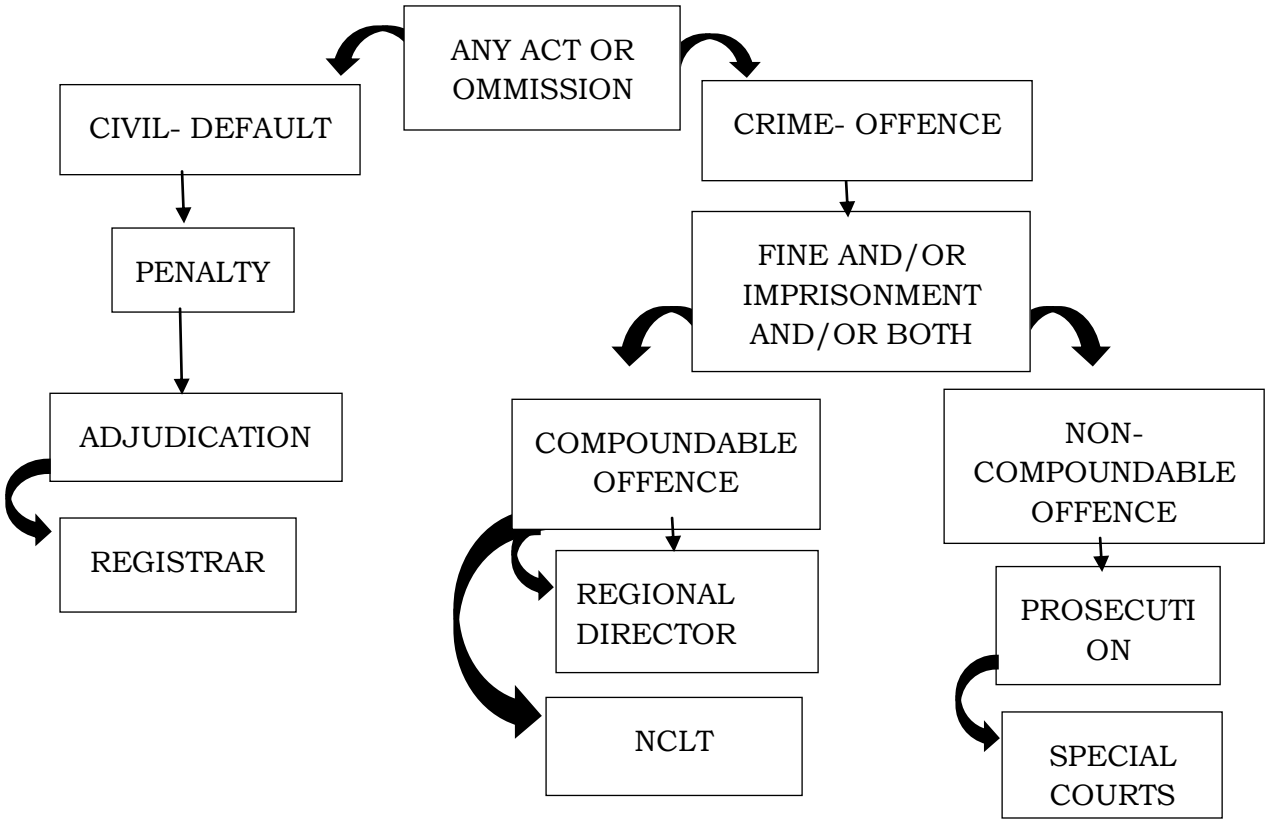
❖ ECONOMIC OFFENCE WING

- Economic Offence Wings are specialised wings of state police to handle investigation of economic offences. Economic and financial offences cover fraud, forgery and counterfeiting, offences against the legislation governing cheques (in particular forgery or use of stolen cheques), forgery or use of credit cards, undeclared employment, and offences against companies (such as misuse of company assets).

- The purpose of the Economic Offences Wing (EOW) is to prevent, detect and investigate cases of economic, cyber and Intellectual Property related crimes to ensure prompt justice and desired relief to the victims.
- The EOW strive to achieve excellence in the investigation of cases of economic crimes by adopting professional and modern methods and by being aware of the emerging trends in the field.
- The EOW is sensitive towards the victims of such cases where a large number of people get cheated by fraudsters and pursue such cases with good efforts and enthusiasm. It educates the public about the various modus operandi adopted by such criminals so that they don't fall prey to their evil designs
- The Cyber Crime Cell of EOW strives to be pro-active in adopting modern methods of investigation by continuously upgrading its capabilities to face the challenge of ever-increasing cyber crimes. It creates awareness amongst students and general public about such crimes.

4. ADJUDICATION, PROSECUTION, OFFENCES AND PENALTIES

1) INTRODUCTION



- Whether the Companies Act, 2013 ("Act") is a civil law or criminal law? The answer is - its mixture of both civil as well as criminal provisions with majority being criminal. The words "liable to penalties" denote civil nature of non-compliances

whereas the words "punishable with fine and/or imprisonment and/or both" denote criminal nature of non-compliances.

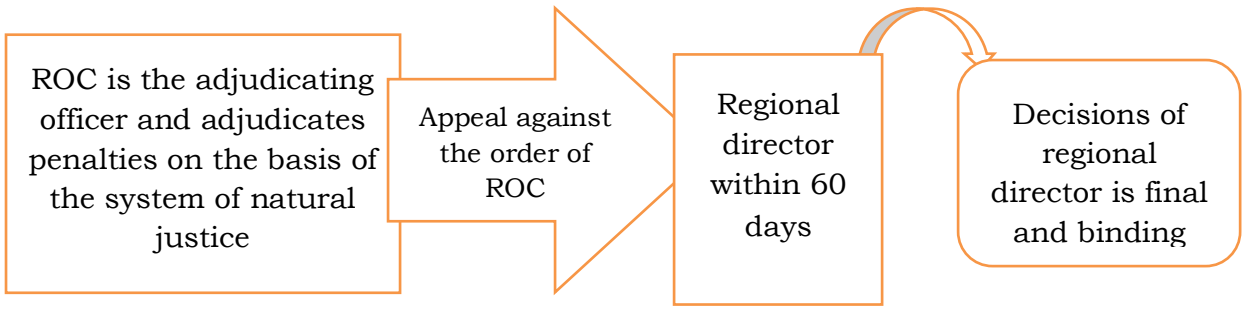
- A civil law is that branch of law which deals with private disputes. In civil suits individuals move to the court to protect their individual rights. There is no harm to the society. On the other hand, criminal law is that branch of law which believes in punishing the offenders not to protect the individual rights but to redress the harm done to the society.
- The companies act, 2013 clearly provides the mechanism and forums for administration of civil as well as criminal disputes. The power of adjudication of civil non-compliances (defaults liable for penalties) is being vested with the ROC and the power of adjudication of criminal non-compliances (offences punishable with fine/ imprisonment) is being vested with the special courts with sub-delegation of power of compounding of offences to Regional Director and NCLT.

2) PENALTIES UNDER THE ACT

- Penalties are imposed for a civil wrong. Non-Compliances under Companies Act are usually minor and technical in nature; hence, non-compliances have not been criminalised under the act. For all such non compliances, instead of fine, penalty is imposed by registrar of companies.
  There are 35 instances of non-compliances which have been classified as civil defaults and are subjected to penalties. Based on suggestion of report of committee constituted to review offences under the Act out of 35 instances at least 16 have been decriminalised.
- According to section 454A of the Act (introduced by the Companies (Amendment) Ordinance, 2018), the amount of penalty payable for any second or subsequent defaults shall be twice the amount prescribed under the Act in case the same default has been committed again within a period of 3 years from the date of order of imposing penalty for the first or earlier default.

3) ADJUDICATION OF PENALTIES

- The Registrar of Companies (ROC) has been shouldered with the responsibility of adjudicating officer for their respective jurisdiction. The Act envisages a natural justice-based mechanism of adjudication of penalties whereby the ROC has been mandated to provide reasonable opportunity of being heard to the Company and Officer in default before imposing any penalty.
- In case any person is aggrieved by order of the ROC imposing penalties, he may prefer an appeal to the concerned regional director within a period of 60 days and the decision of regional director on the matter shall be final and binding.



4) OFFENCES UNDER THE ACT

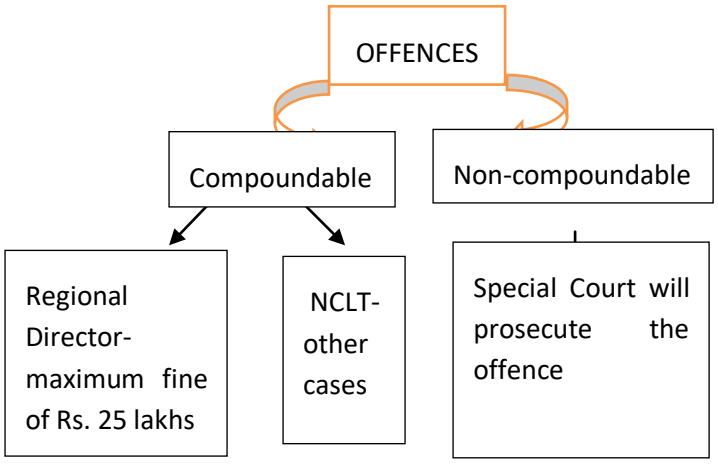
- Only 35 instances in the act has been classified as civil defaults. By virtue of recommendations by the committee setup to review the penal provisions of the act, 16 instances out of 35 instances have been decriminalised. Hence except these instances all other instances have been classified as offence punishable with fine or imprisonment or both or imprisonment and fine or imprisonment only or only fine.
- Wherever any section of the Act is silent on quantum of punishment or penalty for non-compliances of such section, section 450 of the Act comes into play and makes all such non-compliances punishable with fine **which may extend to Rs. 10,000 and in case of continuous contravention, a further fine of which may extend to Rs. 1,000 per day after the first during which the contravention continues.** Consequently, the general character of the Act remains criminal.
- For the purpose of punishment offences under the act are classified into two categories:
    - offences involving fraud
    - other offences

  there are many sections under the act which refer to section 447 and hence involves such amount of punishment as laid down under section 447 of the act. However, other offences of the act are punishable with such amount of fine or imprisonment as prescribed under different sections.

- Offences under the act are further classified as compoundable and non-compoundable. An offence punishable under the Act with imprisonment only or with imprisonment and also with fine is a non-compoundable offence. Accordingly, all other offences, i.e., offences punishable with a) fine only, or b) fine or imprisonment and c) fine or imprisonment or both are compoundable offences under the Act.

❖ JUDICIAL STRUCTURE FOR DEALING WITH OFFENCES UNDER THE ACT

Offences are usually classified as compoundable and non-compoundable in nature. According to section 435 of the Act Special Courts have only been given power to prosecute and try any offence under the act. However, those offences which are compoundable can now be examined by Regional Director or NCLT.



It is **important** to note that by virtue of recent amendments it has been made mandatory for all the companies to file returns or submit the documents within the prescribed time. the non-filing of forms, returns or documents within the time prescribed under relevant provision (for e.g., Form AOC-4 within 30 days of date of AGM) is now considered as a default or failure and the payment of additional fees does not absolve the Company from the liability of penalty or any other action under the Act for such default or failure.

5) COMPOUNDING

- There is no specific definition of the word compounding. However, in common language compounding is referred to as "to come to a settlement or agreement". To compound means to settle any matter by payment of additional compensation or money. By virtue of section 441 of The Companies Act, 2013 we can infer that compounding is nothing but admission of guilt by the person accused of violation of law. In the process of compounding, the person may either suo moto or on receipt of notice of default /initiation of prosecution, admits the commission of default and makes an application for compounding of the alleged offence. The defaulters agree to pay the fine which may be ordered by the Central Government.
- **Scenario under companies act 1956:**
  the offences under the Act were categorized as under:
  Category I: Offences punishable with fine only;
  Category II: Offences punishable with imprisonment or with fine or with both; and
  Category III: Offences punishable with imprisonment.
  Offences under Category I were compoundable without the Court's permission by the Regional Director or the erstwhile Company Law Board depending upon whether the quantum of fine exceeded Rs.50,000/- or not. Offences under Category II was compoundable by the above authorities with the permission of the Court only and offences under Category III were not at all compoundable but had to go through the trial in the Court.
- **Scenario under Companies Act 2013:**
  The above categorization has been carried forward in section 441 by the Companies Act, 2013 with some modifications as under:
  Category I : Offences punishable with fine only;
  Category II A : Offences punishable with imprisonment or with fine;
  Category II B : Offences punishable with imprisonment or with fine or with both;
  Category II C : Offences punishable with imprisonment and with fine; and
  Category III : Offences punishable with imprisonment only.
  Offences under Category I, IIA, IIB are compoundable by the Regional Director or by the National Company Law Tribunal or by any officer authorised by the Central Government and offences under Categories IIC and III go through the trial in the Special Court, as these are the offences which cannot be compounded.

SPECIAL COURTS

- Section 435 of the Companies Act, 2013 provides that the Central Government may, for the speedy trial of offences, establish or designate as many Special Courts as may be necessary.
- A Special Court shall consist of

6) ADJUDICATION

Adjudication has not ben specifically defined under companies act, 2013. However, adjudication is the process by which a judge reviews arguments and evidences of both the parties and after providing them an opportunity of being heard passes all necessary decisions.

HISTORY OF ADJUDICATION:

Technically, the words "adjudication" or "adjudicating authority" never found a place in the Companies Act until a new provision namely section 454 was inserted in the Companies Act, 2013.

It is not as if adjudication never happened before enactment of the Companies Act, 2013. Earlier CLB and now the NCLT has been adjudicating in a limited sense. But earlier the penal provisions which were in existence in many of the sections could not be implemented due to lack of judicial or quasi-judicial powers with the administrative authorities. The Registrar of Companies issued show cause notices to the officers in default, but it resulted in the launch of legal proceedings against them before a Magistrates Court.

J.J.Irani Committee, taking into consideration the complications, recommended in its report that "in-house procedure should be followed for the purpose of imposing penalties in the form of fine" .

Committee suggested that by introducing in-house procedure power to impose penalty may be vested with the Registrar of Companies. Hence, when a show cause notice is served and noticee fails to give any reply for the notice served within the specified period, Registrar instead of instituting a legal proceedings, can himself impose a penalty, as may be prescribed under the Act.

Taking into consideration the recommendations of the Committee, section 454 was incorporated under companies act, 2013.

By virtue of section 454 Central Government is now empowered to appoint any officer not below the rank of Registrar as adjudicating officer for the purpose of adjudging penalties prescribed under the Act.

Incorporation of Section 454 not only provides specific provisions for adjudication but also incorporates an in-house procedure, whereby the authority of Central Government, registrar can himself impose the penalties for the defaults.

- *Though Central Government by virtue of section 454 has been vested with the power of adjudication but a question arises that if Central Government will exercise its powers of adjudication, vested by section 454, then what is the use of compounding powers of the Central government vested with the RD and NCLT, by virtue of section 441 of companies act, 2013-*
  - *Q1. Does section 454 overlap section 441 or both sections play parallelly?*
  - *Q2. Under what circumstances can an adjudication be ordered u/s 454? Or in short what triggers an action u/s 454? Is it on the findings of the MCA that an offence has occurred following an inspection u/s 206 or on scrutiny of the Balance Sheet or from the statutory auditors' report or from the secretarial audit report?*
  - *Q3. Who orders Adjudication Proceedings u/s 454?*
  - *Q4. When a Suo motto application for compounding is pending, how does S.454 come into play?*

Before looking into the answer of abovementioned questions let us first understand the difference between compounding (S 441) and adjudication (S454).

1. **Adjudication order u/s 454 is appealable:** section 441 provides that no appeal can be made against the order of compounding of offences. Since, the compounding order is passed with the consent of the parties, they are not appealable, except in exceptional cases. However, adjudicating order passed u/s 454 is appealable.
2. **Order u/s 454 is arbitrary and not on consensus:** unlike order passed for compounding of offences, adjudicating order is not passed with the consent of the authorities. Though, an opportunity of being heard is given to both the parties before imposing any penalty but the orders are more arbitrary.
3. **Authorities:** Section 441 splits the power of compounding between RD and NCLT on the basis of monetary limits. However, Central Government by virtue of section 454, has authorised only Registrar to adjudicate the disputes and impose penalties as prescribed under the Act. The power of the Regional Director is confined only to the deal with the appeal of the order of the officers and not initiating adjudication itself.
4. **Interval between Two Similar Offences for Compounding u/s 441:** If any offence which was committed by company or the officers was compounded under section 441, and an offence similar to what was compounded earlier is committed again by a company or its officers within a period of three years from the date on which the earlier offence was compounded, then the provisions of this Section will not be applicable and the company and the officers concerned will not be eligible for compounding again. In other words, similar offence can be compounded only once in three years. However, there is no such restriction-imposed u/s 454 on adjudicating a penalty.
5. **No compounding u/s 441 can be done when Investigation is in progress:** section 441 prohibits compounding of any offence under section 441 either by the NCLT or the Regional Director or by the authorized officer if the investigation against such company has been initiated or is pending under the Act. There is no

such restriction provided under section 454 or its Rules. Therefore, adjudication proceedings can be initiated and continued while investigation is in progress.

6. **Hearing is mandatory in case of adjudication u/s 454**: As per Section 454(4) and Rule 3 of the Companies (Adjudication of Penalties) Rules, 2014, it is necessary to provide an opportunity of being heard to both the parties before passing any order for imposing penalties, as prescribed under the act. However, in addressing the prayers in a compounding application by the Regional Director or NCLT, the compounding authority need not give any opportunity to the defaulting parties of being heard since the section does not provide for any such opportunity to be given to the defaulting parties though natural justice demands such an opportunity.

Ans 1. Both these sections are independent of each other. The question of one section overriding the other does not arise. They operate concurrently but not parallelly (simultaneously). It is not possible that The Regional Director set the compounding process in motion u/s 441 and simultaneously the RoC passes an order adjudication u/s. 454. Both are not the same. Power of compounding is not vested with the Registrar, only RD or NCLT can accept an application for compounding. ROC only has the power to forward the applications of compounding to the relevant authorities.

The power to compound vested with the Regional Director or the NCLT is more subjective. They can provide many concessions depending on the facts. However, the powers of registrar are limited, he can provide penalties as provided in the act.

Hence, section 454 does not override section 441. They are two concurrent provisions of companies act but cannot run parallelly.

Ans 2.

1. There must have been a default or non-compliance of the provisions of the Companies Act, 2013;
2. The default has to be ascertained and the nature of non-compliance must be identified by the concerned office of the RoC
3. If the penal provisions in the section alleged to have been violated for which these proceedings are sought to be initiated are in the nature of penalty and not in the nature of fine or imprisonment

An application for compounding under section 441 is filed when there is an offence and not a default. When under the Act, penal provisions in the section alleged to have been violated are in the form of fine/fine or imprisonment/fine or imprisonment or both, only then an application can be accepted.

Ans 3. Either the RoC himself on a scrutiny of documents filed with him and on his satisfaction has to come to a conclusion that there has been non-compliance of the provisions of the Act or has to come to a conclusion of such non compliances based on any report on inspection or investigation, if any, under the relevant provisions of the Companies Act,2013.

Ans 4 when an application for compounding of offences has been filed, prima facie section 454 will not come into play. The RoC who has forwarded the compounding application to either of them with his report has to seek directions from the RD/NCLT

in such a case. The Regional Director/NCLT may agree for adjudication after giving justifiable reasons for his choice for adjudication overriding the compounding application in a speaking manner. But this decision can be challenged before the same RD under section 454(5) by the applicants to a suo motto compounding application if the RoC, being the adjudicating officer exercises his power u/s 454, on the grounds that the defaulting party itself has identified the non-compliance and none else and therefore, the offence will obviously come outside the purview of S.454.

Conclusion: To sum up, there is no contradiction between section 441 and 454 as they operate under their own separate spheres. Earlier, the RoC could only initiate the launching of criminal proceedings to implement the penal provisions of the sections which have been violated and the Magistrate's court gave the verdict after trial. Section 454 read with its rules has now given powers to the adjudicating officers from the administrative machinery to adjudicate the penalty instead of launching criminal proceedings before the Magistrate's Court as was being done earlier except when the offences fall under the appropriate Special Courts established under section 435 which is expected to speed up the delivery of justice. Compounding Powers continue to vest with the NCLT/ Regional Director in cases where the sections violated indicate fines.

7) OFFENECS TO BE COGNIZABLE AND NON BAILABLE UNDER COMPANIES ACT, 2013

- Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under the Companies Act, 2013 except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code. Section 212(6) provide, offence covered under section 447 of Companies Act ,2013 shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless-
  (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
  (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:
- A person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.
- The Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by –
  (i) the Director, Serious Fraud Investigation Office; or
  (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

8) OFFENCES AND PENALTIES UNDER SEBI ACT, 1992

SEBI has been authorised to levy penalties for adjudication of matter if it finds any statutory contravention has occurred. However, if a person is aggrieved by the orders passed by the SEBI it can make an appeal to Securities Appellate Tribunal, established under the Section 15K of the SEBI Act.

The Enforcement Department is responsible for handling Appeals against SEBI orders filed before the Hon'ble Securities Appellate Tribunal (SAT), Appeals filed against the SAT order in the Hon'ble Supreme Court, Criminal Complaints filed by SEBI in appropriate Courts and Settlement Proceedings.

The Enforcement Directorate consists of mainly three divisions:

1) SAT Litigation Division
2) Prosecution Division
3) Settlement Division

SAT LITIGATION DIVISION

1. This division handle appeals against orders of SEBI and its Adjudicating officers made to SAT.

2. it collaborates with senior advocates, law firms to represent SEBI or Adjudicating officers. In front of SAT.

3. It would also assist SEBI in filing affidavits/written submissions, as and when needed, while attending hearings.

PROSECUTION DIVISON

This division handles the work relating to filing prosecution proceedings under the Court

SETTLEMENT DIVISION

The Settlement Division is responsible for handling Registration of Settlement Application, Calculation of Settlement amount as per the Settlement Regulations, organizing Internal Committee Meeting between the Applicants and Internal Committee Members for formulating the settlement amount/terms, Organizing High Powered Advisory Committee (HPAC) Meeting, placing the recommendation of HPAC before the Panel of Whole Time Members for approval.

❖ **POWER TO ADJUDICATE 15-I**

- For the purpose of adjudging, the Board may appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry and imposing any penalty.
- Adjudicating officer so appointed has the power to call for any other information, documents or issue summons to any other person who is well aware of the facts of the case. If any person fails to comply with the instruction of the officer, he may impose such penalty as he deems fit.
- Board can anytime call for the order of the officer and if it is found that the order passed by the officer is wrong to such a extent that it is not in favor of securities market, board may increase the amount of penalty.
- Nothing contained in this section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal.

❖ **FACTORS TO BE TAKEN INTO ACCOUNT FOR ADJUDING PENALTY**

a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default
b) the amount of loss caused to an investor or group of investors as a result of the default
c) the repetitive nature of the default

IMPORTANT*:* All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

Any person against whom any proceedings have been initiated or may be initiated can file an application to the Board proposing for settlement of the proceedings initiated or to be initiated for the alleged defaults.

Taking into consideration the gravity and impact of the application board may admit the application on the payment of such amount by the defaulter as the Board may think fit

No appeal can be made to SAT against the order passed for settlement.

All settlement amounts, excluding the disgorgement amount and legal costs shall be credited to the Consolidated Fund of India.

9) PENATIES UNDER SECURITIES CONTRACTS(REGULATION) ACT, 1956

❖ **POWER TO ADJUDICATE**

Similar to above provisions.

❖ **FACTORS TO BE TAKEN INTO ACCOUNT WHILE ADJUDGING QUANTUM OF PENALTY**

Similar to above provisions.

❖ **RECOVERY OF AMOUNTS**

- If any person fails to pay the penalty or fails to comply with the order of disgorgement or fails to pay fees due to the board, the recovery officer may draw a certificate specifying the amount due and shall proceed to recover the same through following modes:
  a) attachment and sale of the person's movable property;
  b) attachment of the person's bank accounts;
  c) attachment and sale of the person's immovable property;
  d) arrest of the person and his detention in prison;
  e) appointing a receiver for the management of the person's movable and immovable properties.
- Recovery officer means any officer of the Board authorised by the Board to act as recovery officer.
- Recovery of amounts by a recovery officer will have priority over any other claim against such person.

❖ **APPEAL TO SAT**

- Every person aggrieved by the orders of Adjudicating authorities or SEBI can make an appeal to Securities Appellate Tribunal (SAT) within 45 days from date of receiving order by SEBI or AO.
- SAT on receiving an application can confirm, modify or set aside any order after giving equal opportunity of being heard to both the parties.
- Copy of order is send to both the parties.
- Appeal filed before SAT has to be disposed off as soon as possible and finally within 6 months from date of receipt of appeal.

❖ **OFFENCES AND CONTRAVENTION OF CERTAIN OFFENCES**

Without prejudice to any award of penalty by the adjudicating officer or the Securities and Exchange Board of India] under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or any rules or regulations or bye-laws for which no punishment is provided elsewhere in this Act, he shall be punishable **with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.**

If any person fails to pay the penalty imposed by the adjudicating officer or SEBI he shall be punishable **with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees, or with both.**

10)THE CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974

- Violations of foreign exchange regulations and smuggling activities are having an increasingly deleterious effect on the national economy and for effective prevention of such activities Parliament enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

❖ POWER TO MAKE ORDERS DETAINING CERTAIN PERSONS

- The Central Government or the State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, , may, if satisfied, with respect to any person (including a foreigner), that, with a view to preventing him from conservation or augmentation of foreign exchange or with a view to preventing him from–
  1. smuggling goods, or
  2. encouraging the smuggling of goods, or
  3. engaging in transporting or concealing or keeping smuggled goods, or
  4. dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
  5. protecting persons engaged in smuggling goods or in abetting the smuggling of goods,

  it is necessary so to do, make an order directing that such person be detained.
- When any detention orders are passed by the State government, a report in respect of such order shall be forwarded to the Central Government
- According to article 22 of Indian Constitution, when a person is detained, grounds of hi detention should be communicated to him as soon as possible but not later than 5 days and 15 days, in exceptional cases, from the date of detention.
- This order of execution can be executed at any place in India.

❖ POWER TO REGULATE PLACE AND CONDITIONS OF DETENTION (SECTION 5):

Every person against whom detention order has been made can be detained in any place and in such conditions as the appropriate Government may think fit. Such person can be removed from one place of detention to other, inside or outside the state, however, permission of Central Government would be required in latter case.

Section 5A:

Where detention has been made on two or more grounds, such detention order shall be deemed to have been made separately and such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are –

1. vague,
2. non-existent,
3. not relevant,
4. not connected or not proximately connected with such person, or
5. invalid for any other reason whatsoever.

❖ **POWERS IN RELATING TO ABSCONDING PERSONS (SECTION 7)**

If the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may –

1. make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class and thereupon the provisions of CrPC will apply.
2. by order notified in the Official Gazette direct the person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply with the order, **be punishable with imprisonment for a term which may extend to one year or with fine or with both**.

❖ **ADVISORY BOARDS**

- The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards each of which shall consist of a Chairman and two other persons
- The appropriate Government shall, within five weeks from the date of detention of a person under a detention order make a reference in respect thereof to the Advisory Board constituted
- The Advisory Board to which a reference is made shall after considering the reference and the materials placed before it and after calling for such further information as it may deem necessary it considers it essential so to do or if the person concerned desires to be heard in person, after hearing him in person, prepare its report specifying in a separate paragraph thereof its opinion as to whether or not there is sufficient cause for the detention of the person concerned and submit the same within eleven weeks from the date of detention of the person concerned;
- when there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board;
- a person against whom an order of detention has been made under this Act shall not be entitled to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, except that part of the report in which the opinion of the Advisory Board is specified, shall be confidential;
- In every case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit and in every case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

❖ **CASES IN WHICH AND CIRCUMSTANCES UNDER WHICH PERSONS MAY BE DETAINED FOR A PERIOD LONGER THAN THREE MONTHS WITHOUT OBTAINING THE OPINION OF ADVISORY BOARD (SECTION 9)**

Any person in respect of whom any order for detention has been passed before 31st day of July, 1999, such person can be detained without the permission of Advisory Board, for a period longer than 3 months but not more than 6 months, provided, Central Government or any officer of the Central Government, not below the rank of an Additional Secretary to that Government is satisfied that such person -

1.smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling

2. abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling
3. engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling, and makes a declaration to that effect within five weeks of the detention of such person.

❖ **MAXIMUM PERIOD OF DETENTION (SECTION 10)**

- **Maximum period of detention for cases**:

1. The maximum period for which any person may be detained in pursuance of any detention order to which the provisions of section 9 do not apply and which has been confirmed under clause (f) of section 8 shall be a period of one year from the date of detention or the specified period, [whichever period expires later]
2. The maximum period for which any person may be detained in pursuance of any detention order to which the provisions of section 9 apply and which has been confirmed under clause (f) of section 8 read with sub-section (2) of section 9 shall be a period of two years from the date of detention or the specified period, whichever period expires later.

❖ **REVOCATION OF DETENTION ORDERS (SECTION 11)**

- A detention order can be revoked or modified even though the order has been made by the officer of state Government or the officer of Central Government.
- The revocation of a detention order shall not bar the making of another detention order under section 3 against the same person.

11) CONTRAVENTION AND PENALTIES, ADJUDICATION AND APPEAL UNDER FEMA

❖ **PENALTIES (SECTION 13)**

	Person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve	penalty up to thrice the sum involved in such contravention **where such amount is quantifiable**, or

	Bank	up to two lakh rupees where the **amount is not quantifiable**, and where such **contravention is a continuing one,** further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues
	Person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the Act	penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property. in addition to the penalty person shall be punishable with imprisonment for a term which may extend to five years and with fine
If the Adjudicating Authority and if the Director of Enforcement, deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution by filing a Criminal Complaint against the guilty person.		
No court shall take cognizance of an offence except as on complaint in writing by an officer not below the rank of Assistant Director.		

❖ **ENFORCEMENT OF THE ORDERS OF ADJUDICATION AUTHORITY**

- If any person fails to make full payment of the penalty imposed on him within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment.
- No order for the arrest and detention of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter, calling him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied–

a) that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred or removed any part of his property, or
b) that the defaulter had the means to pay arrears since the issuing of notice by the Adjudicating authority but has refused or neglected to pay the same.

- Every person arrested in pursuance of a warrant of arrest shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable, within twenty-four hours of his arrest. However, if the defaulter pays the amount due to the officer arresting him, such person shall be immediately released.
- When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority after issuing warrant of arrest, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be granted civil imprisonment.
- Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:
- Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on the basis of security that he will after the expiration of specified period if the arrears are not satisfied.
- A person is detained in the civil prison on execution of certificate
    a) where the certificate is for a demand of an amount exceeding rupees one crore: up to three years, and
    b) in any other case: up to six months:

❖ **POWER TO RECOVER ARREARS OF PENALTY**

The Adjudicating Authority may, by order in writing, authorise an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.

❖ **POWER TO COMPOUND CONTRAVENTION**

Any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

❖ **DIRECTORATE OF ENFORCEMENT**

- The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, of this Act.
- The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation

- the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention.

12) ATTACHMENT, ADJUDICATION AND CONFISCATION UNDER PREVENTION OF MONEY LAUNDERING ACT (PMLA), 2002

❖ ATTACHMENT OF PROPERTY INVOLVED IN MONEY LAUNDERING

- Where the Director or any other officer not below the rank of Deputy Director authorised by the Director has reason to believe that any person is in possession of any proceeds of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner prejudicial to the provisions of the Act, then he may by order, provisionally attach such property for a period **not exceeding one hundred and eighty days** from the date of the order.
- No such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, or a complaint has been filed by a person authorised to investigate the offence.
- Immediately after attachment of the property, director or any officer authorized would forward a copy of the order, along with the material in his possession, to the Adjudicating Authority, in a sealed envelope.
- Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached from such enjoyment.
- The Director or any other officer who provisionally attaches any shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

❖ ADJUDICATING AUTHORITIES

1. Central Government shall by notification appoint any adjudicating authority, consisting of a Chairperson and two other members (one Member each shall be a person having experience in the field of law, administration, finance or accountancy).
2. A person shall not be qualified for appointment as member of adjudicating authority -
    - **in the field of law**, unless he –
        i) is qualified for appointment as District Judge or
        ii) has been a member of the Indian Legal Service and has held a post in Grade I of that service
    - **in the field of finance, accountancy or administration** unless he possesses such qualifications, as may be prescribed.
3. The Central Government shall appoint a Member to be the Chairperson of the Adjudicating Authority and Chairperson shall have the power to transfer members from one bench to another.
4. The Chairperson and every Member shall hold office as such for a **term of five years** or unless they attain the **age of 65 years**.

5. If, for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member, 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 Adjudicating Authority from the stage at which the vacancy is filled.
6. In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson enters upon his office.
7. When the Chairperson of the Adjudicating Authority is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson of the Adjudicating Authority until the date on which the Chairperson of the Adjudicating Authority resumes his duties.
8. Chairperson or Members can resign the office after serving a notice of same to the Central Government. However, the Chairperson or any other Member 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.
9. The Chairperson or any other Member shall not be removed from his office except by an order made by the Central Government after giving necessary opportunity of hearing.
10. Adjudicating authority is not bound to follow the principles laid down in Civil Procedure Code. They can follow the principles of Natural justice.
11. Powers of Adjudicating authority are similar to Civil Courts:
    a) discovery and inspection
    b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath
    c) compelling the production of records
    d) receiving evidence on affidavits
    e) issuing commissions for examination of witnesses and documents; and
    f) any other matter which may be prescribed.

❖ **ADJUDICATION**

1. On receipt of complaint if adjudicating authority is of the opinion that the person has committed any offence violating the provisions of the act, it may issue a notice to show cause within 30 days of receiving the notice as to why his properties should not be declared as property involved in money laundering and ask for sources of income and means through which the asset has been acquired.
   (If property involved in the offence is held by two or more persons then notice will be served to all such persons)
2. Considering the reply, received to the notice issued, hearing the aggrieved person and the Director or any other officer authorised by him and taking into account all relevant records pass an order providing whether property is involved in the case of money laundering.

However, if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

3. Where the adjudicating authority has confirmed the involvement of property in the offence of money laundering, it may pass an order to retain or seize the property involved.
4. Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money- laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.
5. Where on conclusion of a trial under this Act, the Special Court finds that the offence of money- laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.
6. Where the trial under this Act cannot be conducted by reason of the death of the accused, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property, pass appropriate orders regarding confiscation or release of the property, taking into consideration the material placed before it.
7. Where a property is confiscated with the Central Government, Special Court can also direct transfer of confiscated property to the claimant, who my have suffered a quantifiable loss due to the offence of money laundering. However, the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions.

Where due to the offence of money laundering property has been vested with the Central Government, Government will enjoy right on that property free from any encumbrances or lease hold interest.

❖ **APPELLATE TRIBUNAL UNDER PMLA**

APPELLATE TRIBUNAL

1. The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal, **within a period of forty-five days** from the date on which a copy of the order is received.
2. On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
3. The Appellate Tribunal shall send a copy of every order made to both the parties
4. The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally **within six months** from the date of filing of the appeal.

POWERS OF APPELLATE TRIBUNAL

Powers of Appellate Tribunal are similar to that of Civil Court under Civil Procedure Code, including

a) summoning and enforcing the attendance of any person and examining him on oath
b) requiring the discovery and production of documents
c) receiving evidence on affidavits
d) issuing commissions for the examination of witnesses or documents
e) reviewing its decisions
f) dismissing a representation for default or deciding it ex parte
g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte

APPEAL TO HIGH COURT

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal. However, if High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a **further period not exceeding sixty days.**

❖ **SPECIAL COURTS UNDER PMLA**

1. The Central Government, in consultation with the Chief Justice of the High Court, designate one or more Courts of Session as Special Court.
2. **Offences triable by Special Courts:**
   a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed
   b) upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial.

RELIEF AND REMEDIES

1) COMPOUNDING

❖ **INTRODUCTION**

- **MEANING:** There is no specific definition of the word compounding. However, in common language compounding is referred to as "to come to a settlement or agreement". To compound means to settle any matter by payment of additional compensation or money. Compounding is nothing but admission of guilt by the person accused of violation of law. In the process of compounding, the person may either Suo Moto or on receipt of initiation of prosecution, admit the commission of offence and make an application for compounding of the alleged offence.
- Only a compoundable offence can be compounded. There is no provision of compounding a non-compoundable offence.

❖ **BENEFITS OF COMPOUNDING**

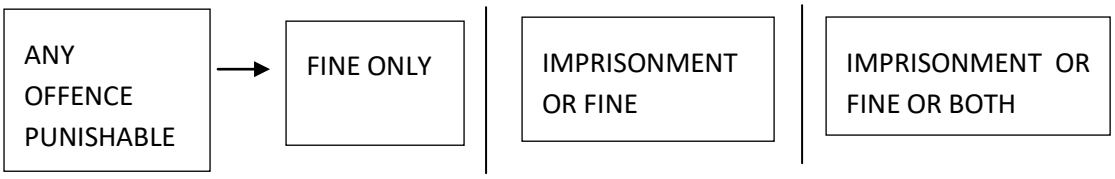
Benefits of compounding are as following:

- Buy peace of mind.
- It provides comfort to individuals and corporates and persons connected with it as they are not required to appear before prosecution authorities.
- Amount paid as compounding fee can be claimed as a tax deduction under the Income Tax Act while a penalty paid for contravention is not eligible for deduction.
- Speedy disposal of offences and justice.
- Judiciary can devote more time and concentrate on serious cases.

❖ COMPOUNDING PROVISIONS UNDER COMPANIES ACT, 2013

- Section 441 of the Companies Act, 2013 deals with the compounding of certain offences. Regional director and NCLT are two authorities which have been vested with the power to compound the offences; where the maximum amount of fine which may be imposed for an offence does not exceed Twenty-five lakh rupees, the Regional Director will have power to compound the offence and in all other cases Tribunal will have the power to compound the offence. Compounding can be done either before or after the institution of any prosecution.

A. WHICH OFFENCES CAN BE COMPOUNDED:



B. WHICH OFFENCES CANNOT BE COMPOUNDED:

1. ANY OFFENCE PUNISHABLE WITH IMPRISONMENT ONLY OR IMPRISONMENT AND ALSO WITH FINE

2. IF THE INVESTIGATION AGAINST SUCH COMPANY HAS BEEN INITIATED OR IS PENDING UNDER THIS ACT.

3. OFFENCE IS COMMITTED WITHIN A PERIOD OF THREE YEARS FROM THE DATE ON WHICH A SIMILAR OFFENCE COMMITTED

C. PROCEDURE FOR COMPOUNDING OF OFFENCES

- A resolution will be passed at the board meeting for compounding of offences.
- Application for compounding of offence will be made to the Registrar who will further forward it to Tribunal or Regional Director. The filing with ROC is done in the e-from GNL-1.
- RD or Tribunal will conduct hearing and decide the amount to be paid for compounding.
- Order of RD or Tribunal is then filed with the ROC with 30 days in form INC-28.

1. Where any offence is compounded before or after the institution of any prosecution, an information shall be given by the company to the Registrar **within seven days** from the date on which the offence is so compounded. Where offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence. Where the compounding of any offence is made after the institution of any prosecution compounding shall be brought by the Registrar to the notice of the court in which the prosecution is pending and on notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.
2. Any officer or other employee of the company who fails to comply with any order made by the Tribunal or the Regional Director or any officer authorised by the Central Government shall be punishable with **imprisonment for a term which may extend to six months, or with fine not exceeding one lakh rupees, or with both.**
3. No appeal can be made against the order of compounding.

❖ **COMPOUNDING PROVISIONS UNDER FEMA**

- According to section 15 of FEMA, if there is any contravention under section 13 of the act, the person committing such contravention can make an application to the Directorate of Enforcement and same shall be compounded within 180 days from the date of receipt of application. If any offence has been compounded, no further proceeding can be initiated.
- **COMPOUNDING AUTHORITIES:** Officers from RBI and officers from Directorate of Enforcement are authorized to compound the offences.
- **LIMITS OF COMPOUNDING:** any contravention committed by a person within a period of three years from the date on which a similar contravention was committed, cannot be compounded.

  If any appeal is made, the offence cannot be compounded.
- **PROCEDURE OF COMPOUNDING:**
  1. An application is to be made to the compounding authority either suo moto or on being advised to compound.
  2. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings and pass an order for after providing opportunity of being hear to both the parties within 180 days from the date of receiving the application.
  3. Where contravention is compounded before adjudication no inquiry can be made against such person.
  4. Where contravention is compounded after making a complaint such compounding shall be brought in the notice of adjudicating authority.
- **FACTORS CONSIDERED WHILE COMPOUNDING:**
  1. The amount of gain of unfair advantage.

2. The amount of loss caused to any authority/ agency/ exchequer.
3. Economic benefits accruing to the contravener from delayed compliance or compliance avoided.
4. The repetitive nature of the contravention, the track record and/or history of non-compliance of the contravene.
5. Contravener's conduct in undertaking the transaction, in disclosure of full facts in the application and submissions made during the personal hearing.

- The sum for which the contravention is compounded as specified in the order of compounding shall be paid by demand draft in favour of the Compounding Authority within fifteen days from the date of the order of compounding of such contravention. In case a person fails to pay the sum compounded within the time specified he shall be deemed to have never made an application for compounding.

❖ **COMPOUNDING PROVISIONS UNDER SEBI**

- Any offence punishable under the SEBI Laws, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending. Thus, if the offence is punishable with fine only or imprisonment or fine or with fine or imprisonment or both alone can be compounded.
- Compounding of Offence can take place after filing criminal complaint by SEBI. Where a criminal complaint has not yet been filed but is envisaged, the process for consent orders will be followed.
- In SEBI Laws, the term Settlement /Consent Order is significant and has to be understood along with or at the time of learning composition of offence. Consent order may be passed at any stage after probable cause of violation has been found under SEBI Laws. However, in the event of a serious and intentional violation, the process should not be completed till the factfinding process is completed whether by way of investigation or otherwise.

2) MEDIATION AND CONCILIATION

- **Mediation** means an act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute.
- **Conciliation** means the process of adjusting or settling disputes in a friendly manner through extra judicial mean.

❖ **DIFFERENCE BETWEEN MEDIATION AND CONCILIATION:**

MEDIATION

1. Mediation is the process by which the parties to a dispute have closed-door discussions on an issue in the presence of neutral mediator or mediators.
2. This is a voluntary process and is undertaken only if all the parties are willing to go by it.
3. The mediator, who is specially trained, helps the parties to determine how the matter can be settled, examining various options.

4. Mediation is a time-bound, private and confidential process. The information shared must be kept confidential by all parties, including the mediator.

CONCILIATION

The conciliation process is similar to mediation. But the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties. However, no such suggestions can be made by Mediators.

Both Mediator and Conciliator cannot impose their own settlement terms on the parties. Only terms agreed upon by the parties, can be impose on the parties, through an order passed by the Mediator or Conciliator.

❖ **COMPANIES ACT, 2013**

- Section 442 of the companies Act, 2013 provides that Central Government shall maintain a panel of experts to be called as Mediation and Conciliation Panel. Any party whose proceedings are pending before the Tribunal or Central Government can make an application to refer matter to such panel of experts.
- If the Central Government or Tribunal deems fit, they can suo moto refer the matter to the panel of experts.
- The panel will follow the procedure prescribed and dispose of the matter within a period of three months from the date of receiving the application.
- Any party aggrieved by the decisions of panel can raise objections before central Government or Tribunal.

❖ **COMPANIES (MEDIATION AND CONCILIATION) RULES**

In order to promote voluntary dispute resolution mechanism, Government came up with Mediation and Conciliation rules. It provides as following:

A. PANEL OF MEDIAOR AND CONCILIATORS

1. Rules provide that Regional Director (RD) will prepare a panel of experts, willing to act as mediators or conciliators.
2. RD may invite applications of persons possessing relevant qualifications and who is willing to get empaneled as mediator or conciliator.
3. RD may scrutinize the application and if the application is rejected, provide reasons for the same.
4. Interested person will make an application in form MDC-1.
5. The Regional Director shall invite applications from persons interested in getting empanelled as mediator or conciliator every year during the month of February and update the Panel which shall be effective from 1st of April of every year.

B. QUALIFICATIONS FOR EMPANELMENT

A person shall not be qualified for being empaneled as mediator or conciliator unless he –

a) has been a Judge of the Supreme Court of India; or
b) has been a Judge of a High Court; or
c) has been a District and Sessions Judge; or

d) has been a Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force; or
e) has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years' experience; or
f) is a qualified legal practitioner for not less than ten years; or
g) is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary; or
h) has been a Member or President of any State Consumer Forum; or
i) is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation.

C. DISQUALIFICATIONS FOR EMPANELMENT

A person shall be disqualified for being empaneled as mediator or conciliator, if he —

a) is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending or
b) has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude or
c) has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government or
d) has been punished in any disciplinary proceeding, by the appropriate disciplinary authority.

D. APPLICATION FOR APPOINTMENT OF MEDIATOR AND CONCILIATOR

1. Parties may agree to appoint a sole mediator or sole conciliator. Where parties are unable to agree upon a sole arbitrator or sole conciliator, Central Government may ask each party to nominate a mediator or conciliator or the Central Government or Tribunal may themselves appoint the mediator or conciliator.
2. Where parties make an application to the Tribunal or Central Government, on receipt of application, Tribunal or Central Government may appoint a mediator or conciliator from the panel of experts.
3. Central Government or Tribunal may suo moto refer a matter before the panel, in public interest.

E. PROCEDURE FOR DISPOSAL OF MATTERS

Mediators and conciliators are required to follow the laid down procedure:

1. He shall fix, in consultation with the parties, the dates and the time of each mediation or conciliation session, where all parties have to be present;
2. He shall hold the mediation or conciliation at the place decided by the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, or such other place where the parties and the mediator or conciliator jointly agree;
3. He may conduct joint or separate meetings with the parties;
4. Each party shall, ten days before a session, provide to the mediator or conciliator a brief memorandum providing issues which needs to be resolved;
5. Each party shall provide all the information as may be required by the mediator or conciliator.

F. TIME LIMIT FOR COMPLETION OF MEDIATION AND CONCILIATION

- The process for any mediation or conciliation shall be completed within a period of three months from the date of appointment of expert or experts from the Panel.
- However, if same cannot be completed within the said period, an application may be made to Tribunal or Central Government by the mediator or conciliator and if the Government or Tribunal deems fit, they can grant an extension of not more than three months.

G. COMMUNICATION BETWEEN MEDIATOR OR CONCILIATOR AND THE CENTRAL GOVERNMENT OR THE TRIBUNAL OR THE APPELLATE TRIBUNAL

In order to ensure neutrality, there is no communication between Central Government or Tribunal and Mediator or Conciliator. If at all any communication is required same shall be done in writing and copies of it will be distributed amongst the parties and their representatives.

Communication between the mediator or conciliator and the Central Government or the Tribunal or the Appellate Tribunal, shall be limited to communication by the mediator or conciliator:

i. About the failure of the party to attend;
ii. About the consent of the parties;
iii. About his assessment that the case is not suited for settlement through the mediation or conciliation;
iv. About settlement of dispute between the parties.

No mediator or conciliator shall be held liable for anything, which is done or omitted to be done by him, in good faith during the mediation or conciliation proceedings for civil or criminal action nor shall be summoned by any party to the suit or proceeding to appear before the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, to testify regarding information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation or conciliation proceedings.

H. WITHDRAWAL OF APPOINTMENT

Where the Central Government or the Tribunal receive any information about impartiality of the mediator or conciliator, it may withdraw the appointment and appoint any other mediator or conciliator in that proceeding.

I. SETTLEMENT AGREEMENT

- Where an agreement is reached between the parties, the same shall be reduced in a written format and shall be submitted to the mediator or conciliator, who then forwards it to the Central Government or the Tribunal.
- Where no agreement is reached between the parties or no settlement is possible, mediator or conciliator will inform the same to the Central Government or the Tribunal.

J. EXPENSES OF THE MEDIATION AND CONCILIATION

1. Expenses of Mediation and Conciliation are borne equally by the parties.
2. Each party shall bear the costs for production of witnesses on his side including experts or for production of documents.
3. The mediator or conciliator may, before the commencement of the mediation or conciliation, direct the parties to deposit equal share of the probable costs of the mediation or conciliation including the fees to be paid to the mediator or conciliator.

K. MATTERS NOT TO BE REFERRED TO THE MEDIATION OR CONCILIATION

Following matters are not referred for mediation and conciliation:

1. Cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.
2. Cases involving prosecution for criminal and non-compoundable offences.
3. Cases which involve public interest or interest of numerous persons.
4. The matters relating to proceedings in respect of inspection or investigation or the matters which for which applications for compounding have been made.

3) SETTLEMENT AND SETTLEMENT PROCEEDINGS CONSENT ORDER UNDER SEBI LAWS

❖ CONSENT ORDER

- Consent order is the order passed by the authorities to ensure settlement between the regulator and a person (Party) who may prima facie be found to have violated securities laws. However, if Board is of the opinion that consent cannot be reached between the parties, it may initiate proceedings before the appropriate authority.
- Consent orders tries to achieve twin goals of remedy and deterrence without resorting to litigation, lengthy proceedings and consequent delays. Therefore, it has been decided that administrative or civil actions may be settled between SEBI and a person (party) who may prima facie be found to have violated the securities laws or against whom administrative or civil action has been commenced for such violation.
- SEBI has issued a set of regulations to deal with settlement and procedure of settlement. These have been dealt in detail further.

❖ SECURITIES AND EXCHANGE BOARD OF INDIA (SETTLEMENT PROCEEDINGS) REGULATIONS, 2018

APPLICATION FOR SETTLEMENT

1. APPLICATION FOR SETTLEMENT

- Any person against whom any proceeding has been initiated or can be initiated can make an application to the Board.
- Applicant has to make complete disclosures about the alleged defaults in the application.

- If complete detail are not provided by the applicant and his application is returned, he has to submit a complete application within 15 days from the date of communication received from the Board.
- The application made should be accompanied by non-refundable fees, undertakings and waivers.

2. LIMITATION ON APPLICATION

- Any application made after the expiry of 60 days from the date on which the show cause notice was received, will not be considered, unless it is shown that there was a sufficient cause for delay.
- The provisions of this regulation shall not apply in the case of proceedings pending before the Tribunal or any court.

SCOPE OF SETTLEMENT

1. REJECTION OF APPLICATION

An application made to the Board can anytime be rejected on the following grounds:

- The applicant refuses to receive or respond to the communications sent by the Board;
- The applicant does not submit or delays the submission of information, document, etc., as called for by the Board
- The applicant who is required to appear, does not appear before the Internal Committee on more than one occasion
- The applicant does not remit the settlement amount within the period specified and/or does not abide by the undertaking and waivers.

2. WITHDRAWAL OF APPLICATION

An application can be withdrawn before the decision is communicated by the panel of members. However, once the application is withdrawn no application can be made for a similar default provided that on the recommendation of the High-Powered Advisory Committee, such an application may be considered subject to an increase of at least fifty percent over the settlement amount determined.

TERMS OF SETTLEMENT

1. SETTLEMENT TERMS

Settlement terms includes a settlement amount and non-monetary terms which includes the following:

a) Suspension or cessation of business activities for a specified period;
b) Exit from Management;
c) Disgorgement on account of the action or inaction of the applicant;
d) Refraining from acting as a partner or officer or director of an intermediary or as an officer or director of a company that has a class of securities regulated by the Board, for specified periods;
e) Cancel securities and reduce holdings where the securities are issued fraudulently, including bonus shares received on such securities, if any, and reimburse any dividends received, etc.;
f) Lock-in of securities;

g) Implementation of enhanced policies and procedures to prevent future securities laws violations and agreeing to appoint an independent consultant to review internal policies, processes and procedures.
h) Provide training and education to employees of intermediaries and securities market infrastructure institutions.

Money received **through application** has to be **credited to SEBI General Fund**, **Settlement amount**, excluding the cost, shall be **credited to consolidated fund of India** and the **amount of profits made by the applicant** may be disgorged as part of the settlement terms and shall be **credited to the Investor Protection and Education Fund.**

2. FACTORS TO BE CONSIDERED TO ARRIVE AT THE SETTLEMENT TERMS

Following factors have to be taken into consideration to arrive at the settlement terms, however, these factors are not restricted:

1. nature, gravity and impact of alleged default
2. the extent of harm and/or loss to the investors' and/or gains made by the applicant;
3. the role played by the applicant in case the alleged default is committed by a group of persons
4. processes that have been introduced since the alleged default to minimize future defaults or lapses;
5. economic benefits accruing to any person from the non-compliance or delayed compliance;
6. whether any other proceeding against the applicant for non-compliance of securities laws is pending or concluded
7. any other enforcement action that has been taken against the applicant for the same violation
8. any other factors necessary taking into consideration the fcats and circumstances of the case.

COMMITTEES

1. HIGH POWERED ADVISORY COMMITTEE

- The Board shall constitute a High-Powered Advisory Committee for consideration and recommendation of the terms of settlement.
- **Composition**:
  1. a **judicial member** who has been the Judge of the Supreme Court or a High Court and
  2. **three external experts** having expertise in securities market or in matters connected therewith or incidental thereto.
- **Term**: 3 years
- **Quorum**: three members
- High Powered Committee shall conduct its meetings in the manner specified by the Board however, if no consensus could be reached between the members, decision of judicial member will be considered as the final decision.

2. INTERNAL COMMITTEE

- Internal Committee is also constituted by the Board.
- **Composition:**
  1. an **officer of the Board not below the rank of Chief General Manager**
  2. such other officers as specified by the Board

PROCEDURE OF SETTLEMENT

1. PROCEEDINGS BEFORE THE INTERNAL COMMITTEE

1. Application is referred to Internal Committee to determine whether the proceedings may be settled and the settlement terms as per the regulations.
2. Committee can call for additional information, documents or personal appearance of applicants. It can also ask the applicant to submit revised settlement terms within a period not exceeding 10 working days.
3. The proposed settlement terms, if any, shall be placed before the High-Powered Advisory Committee.

2. PROCEEDINGS BEFORE THE HIGH-POWERED ADVISORY COMMITTEE

1. Internal committee will place settlement terms before the High-powered committee and the committee would take into consideration
   a) the application,
   b) settlement terms or revised settlement terms proposed by the applicant,
   c) factors specified,
   d) any material available on record.
2. Committee has the power to seek revision of terms and refer application back to Internal Committee.
3. The recommendations of the High-Powered Advisory Committee shall be placed before the Panel of Whole Time Members.

3. ACTION ON THE RECOMMENDATION OF HIGH-POWERED ADVISORY COMMITTEE

1. The Panel of Whole Time Members shall consider the recommendations of the High Powered Advisory Committee and may accept or reject the same
2. where the recommendations of the High Powered Advisory Committee to settle the specified proceedings are rejected, the panel of Whole Time Members shall record reasons for rejection of the recommendations and communicate the same to the applicant.
3. Where the recommendation of the High-Powered Advisory Committee have been rejected, the panel may return the application for re-examination of the settlement terms and thereafter the procedure as applicable in the case of an original application shall be followed by the Internal Committee and the High Powered Advisory Committee.
4. Where the Panel of Whole Time Members accepts the recommendation of the High-Powered Advisory Committee to settle the specified proceedings, the applicant shall be issued a notice of demand within seven working days of the decision of the panel and the applicant shall-
   a) remit the settlement amount forming part of the settlement terms, not later than fifteen calendar days from the date of receipt of the notice of demand
   b) fulfil/undertake in writing to abide by, the other settlement terms, if any, within the time provided to the applicant.

SUMMARY SETTLEMENT PROCEDURE

1. Before initiating any specified proceedings, Board may issue a notice of summary settlement, calling upon the person to whom the notice is served to file an application and submit a settlement amount or submit any undertaking in non-monetary terms. Provided that, the specified proceeding(s) shall not be settled under this Chapter, if in the opinion of the Board, the applicant has failed to make a full and true disclosure of facts or failed to co-operate in the required manner
2. The noticee may, within thirty calendar days from the date of receipt of the notice of settlement-
   a) File a settlement application
   b) remit the settlement amount as specified in the notice of settlement
   c) comply or undertake to comply with other non-monetary terms as specified in the notice of settlement
   d) ask for rectification of the calculation of the settlement amount, as communicated in the notice of settlement.
3. Noticee has to remit the amount within 30 days from the date of receiving the notice. However, if the Board deems fit, in a case of delay, it can grant an extension of not more than 15 days.
4. After receiving the settlement amount and being sure that noticee will comply with the terms of the settlement agreement, Board may pass an order of settlement.
5. The Board shall have the power to modify the enforcement action to be brought against the noticee and the notice of settlement shall not confer any right upon the noticee to seek settlement or avoid any enforcement action.

SETTLEMENT ORDERS

1. The Adjudicating Officer shall pass an appropriate order to dispose of the proceeding pending before him on the basis of the approved settlement terms. This order should contain the details of the alleged default, relevant provisions of the securities laws, brief facts and circumstances relevant to the alleged default, the admissions made by the applicant, if any and the settlement terms.
2. Settlement orders shall be served on the applicant and shall also be published on the website of the Board. However, the settlement orders in matters relating to the confidentiality shall not, directly or indirectly, disclose the identity of the applicant, but shall indicate the provisions of securities laws which the applicant is alleged to have violated.
3. Neither, a settlement order under these regulations shall be admissible as evidence in any other proceeding, nor affect the right of third parties arising out of the alleged default.
4. If the applicant fails to comply with the settlement order or at any time after the settlement order is passed, it comes to the notice of the Board that the applicant has not made full and true disclosure or has violated the undertakings or waivers, settlement order shall stand revoked and withdrawn and the Board shall restore or initiate the proceedings, with respect to which the settlement order was passed. Moreover, no cost paid for settlement will be refundable.
5. All information submitted and discussions held during the settlement proceedings shall be deemed to have been received or made in a fiduciary

capacity and the same may not be released to the public, if the same prejudices the interest of the Board and/or the applicant.

4) APPEAL AGAINST THE ORDERS

Right to appeal is a right available to an aggrieved party. Usually the justice is served fairly and equitably in every trial. However, in certain cases there may be a miscarriage of justice. Hence, right to appeal is a right provided under every law.

Companies Act, 2013, Foreign Exchange Management Act, 1999, SEBI Laws, Taxation laws all provide for the right of appeal against the order passed.

❖ **PROVISIONS OF APPEAL UNDER COMPANIES ACT, 2013**

APPEAL AGAINST THE ORDER OF NCLT

According to companies act, 2013, NCLT has the power to adjudicate the disputes. However, if any person is aggrieved by the orders of NCLT, they can make an appeal to NCLAT, within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved. If there is any sufficient cause of delay NCLAT may provide a extension of not more than 45 days.

PROCEDURE:

1. An appeal can be made against the order of NCLT, **within 45 days** from the date of receiving the order.
2. On the receipt of an appeal, NCLAT shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
3. NCLAT shall send a copy of every order made by it to NCLT and the parties to appeal.
4. Every appeal filed before the NCLAT shall be dealt with as expeditiously as possible and an endeavor should be made for the disposal of appeal **within three months** from the date of the filing of the appeal.
5. If the appeal is not disposed of within the period, NCLAT shall record the reasons for not disposing of the appeal within the period so specified and the Chairperson, after taking into account the reasons so recorded, **extend the period by such period not exceeding ninety day**s as he may consider necessary.

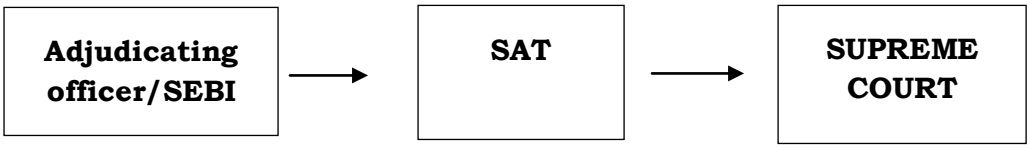
APPEAL AGAINST THE ORDER OF NCLAT

- If a person is aggrieved by the orders passed by NCLAT, it can make an appeal to the Supreme Court, **within a period of 60 days** from the date of receiving the order of the Tribunal.
- However, if the Supreme Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, it may allow the appeal to be filed within a further period **not exceeding sixty days.**

- Appeal to Supreme Court is possible only when there arises any question of law out of the order of NCLAT and not against any other order.

❖ **PROVISION OF APPEAL UNDER SECURITY LAWS**

Under Security Laws, SEBI and adjudicating officers are vested with the power to adjudicate defaults and offences. However, any person aggrieved by the orders of the Board or adjudicating authority can make an appeal to higher authorities.



APPEAL AGAINST THE ORDER OF ADJUDICATING AUTHORITY OR BOARD

Any person aggrieved by the orders of adjudicating authority or SEBI can make an appeal to SAT (Securities Appellate tribunal), **within 45 days** from the date of receiving the order. However, SAT can provide an extension provided there is sufficient cause for delay.

PROCEDURE:

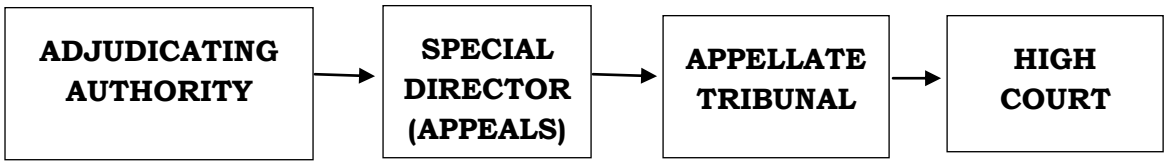
1. Any person aggrieved by the orders of AO or Board can file a memorandum of appeal before the registry of SAT.
2. Every application, document or letter file before the Tribunal should be typewritten or printed neatly, cleanly and legibly on one side of a good quality paper.
3. On receipt of an appeal the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
4. Every appeal filed before the Tribunal shall be dealt with as expeditiously as possible and an endeavour should be made for the disposal of appeal **within six months** from the date of the filing of the appeal.

APPEAL AGAINST THE ORDER OF SAT

Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court **within sixty days** from the date of communication of the decision or order of the Securities Appellate Tribunal to him on only question of law arising out of such order.

Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a **further period not exceeding sixty days.**

❖ **PROVISONS OF APPEAL UNDER FEMA**



APPEAL TO SPECIAL DIRECTOR (APPEALS)

Any person aggrieved by an order made by the Adjudicating Authority, **being an Assistant Director of Enforcement or a Deputy Director of Enforcement,** may prefer an appeal to the Special Director (Appeals), **within forty-five days** from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. The Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period.

PROCEDURE:

1. The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities.
2. Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals), within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person.
3. On receipt of an appeal the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit confirming, modifying or setting aside the order appealed against.
4. The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.

APPEAL TO APPELLATE TRIBUNAL

The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals) under this Act.

PROCEDURE:

1. **Central Government or any person** aggrieved by an order made by an Adjudicating Authority or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal. However, any person while making an appeal deposit the amount of such penalty with such authority as may be notified by the Central Government. (Tribunal may dispense with such deposit if it is of the opinion that such deposit may cause undue hardship to the applicant).
2. Appeal shall be filed **within a period of forty-five days** from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government.
3. On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
4. Every appeal filed before the Tribunal shall be dealt with as expeditiously as possible and an endeavor should be made for the disposal of appeal **within 180 days** from the date of the filing of the appeal. where any appeal could not be disposed off within the said period of one hundred and eighty days, the Appellate

Tribunal shall record its reasons in writing for not disposing off the appeal within the said period.

5. A copy of the order of the Tribunal will be sent to both the parties.

APPEAL TO HIGH COURT

Any person aggrieved by any decision or order of the Appellate Tribunal or the Special Director (Appeals) may file an appeal to the High Court **within sixty days** from the date of communication of the decision or order of the Appellate Tribunal or the Special Director (Appeals) to him only on any question of law arising out of such order.

The High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further **period not exceeding sixty days.**

5) PROFESSIONAL DRESS

The professional dress prescribed under the code of conduct for the professional is required to be worn by the authorised representative while appearing before the authorities. The Council of ICSI has approved the following Guidelines for Professional Dress Code for Company Secretaries to appear before judicial / quasi-judicial bodies and tribunals like NCLT- NCLAT, SAT, etc.:

1. For Male Members:

a) Navy Blue Suit (Coat & Trouser), with CS logo, Insignia OR Navy Blue Blazer over a sober colored Trouser
b) Neck Tie (ICSI)
c) White full sleeve Shirt
d) Formal Black Leather Shoes (Shined)

2. For Female Members:

a) Navy Blue corporate suit (Coat & Trouser), could be with a neck tie/ Insignia OR
b) Saree / any other dress of sober colour with Navy Blue Blazer with CS logo
c) A sober footwear like Shoes/Bellies/Wedges, etc (shined)

6. CRISIS MANAGEMENT & RISK AND LIABILITY MITIGATION

1) FAMILY TREE OF CONCEPTS

2) CRISIS MANAGEMENT

- Crisis management is the identification of threats to an organization and its stakeholders, and the methods used by the organization to deal with these threats. In order to reduce uncertainty in the event of a crisis, organizations often create a crisis management plan.
- In order to have a business continuity plan to cope up with the crisis, most firms start by conducting **risk analysis** on their operations. Risk analysis is the process of identifying any adverse events that may occur and the likelihood of the events occurring. For example, a risk manager may estimate that the probability of a flood occurring within a company's area of operation is very high. The worst-case scenario of a flood will be destroying the company's computer systems and hard drives, thereby, losing pertinent data on customers, suppliers, and ongoing projects. Once, the risk manager identifies the possible risks and impact of these risks on the company, a plan will be developed by the crisis management team to cope up with such emergency.
- However, Crisis management is not similar to risk management. Risk management involves planning for events that might occur in the future but crisis management involves reacting to negative events during and after they have occurred. For example, An oil company may have a plan in place to deal with the possibility of an oil spill, but if such a disaster actually occurs, the magnitude of the spill, the backlash of public opinion, and the cost of cleanup can vary greatly and may exceed expectations.

❖ **TYPES OF CRISIS**

1. **Natural crisis:** crisis caused due to events beyond the control of human beings is called as natural crisis. Tornadoes, Earthquakes, Hurricanes, Landslides, Tsunamis, Flood, Drought all result in natural disaster.
2. **Technological crisis:** these kinds of crisis occur due to failure in technology. Breakdown of machine, corrupted software and so on give rise to technological crisis.
3. **Confrontation crisis:** Confrontation crises arise when employees fight amongst themselves. Individuals do not agree to each other and eventually perform acts like boycotts, strikes for indefinite periods and so on. In such a type of crisis, employees disobey superiors; give them ultimatums and force them to accept their demands. Internal disputes, ineffective communication and lack of coordination give rise to confrontation crisis
4. **Crisis of malevolence:** Organizations face crisis of malevolence when some notorious employees take the help of criminal activities and extreme steps to fulfill their demands. Acts like kidnapping company's officials, false rumors all lead to crisis of malevolence.
5. **Crisis of organizational misdeeds:** Crises of organizational misdeeds arise when management takes certain decisions knowing the harmful consequences of the same towards the stakeholders and external parties. Crisis of organizational misdeeds can be further classified into following three types:
   a) Crisis of Skewed Management Values: Crisis of Skewed Management Values arises when management supports short term growth and ignores broader issues.
   b) Crisis of Deception: Organizations face crisis of deception when management makes fake promises and wrong commitments to the customers.
   c) Crisis of Management Misconduct: Organizations face crisis of management misconduct when management indulges in acts like accepting bribes, passing on confidential information and so on.
6. **Crisis due to Workplace Violence**: Such a type of crisis arises when employees are indulged in violent acts such as beating employees, superiors in the office premises itself
7. **Crisis due to Rumors**: Spreading false rumors about the organization and brand lead to crisis. Employees must not spread anything which would tarnish the image of their organization.
8. **Bankruptcy:** A crisis also arises when organizations fail to pay its creditors and other parties. Lack of fund leads to crisis.
9. **Crisis Due to Natural Factors:** Disturbances in environment and nature such as hurricanes, volcanoes, storms, flood; droughts, earthquakes etc result in crisis.
10. **Sudden Crisis:** As the name suggests, such situations arise all of a sudden and on an extremely short notice. Managers do not get warning signals and such a situation is in most cases beyond any one's control.
11. **Smouldering Crisis**: Neglecting minor issues in the beginning lead to smouldering crisis later. Managers often can foresee crisis, but they ignore the same and wait for someone else to take an action. Employees should be warned immediately to avoid such a situation.

❖ **CASE STUDIES ON CRISIS MANAGEMENT**

In order to understand corporate crisis, below laid down are some of the major corporate crisis:

FACEBOOK'S SILENCE ABOUT IT'S DATA BREACH

The social media giant remained silent for three year knowing the fact that consulting firm hired by Donald Trump improperly accessed information on millions of people. Facebook was the subject of bad news, as the New York Times reported that it shared even more user data with outside companies than previously acknowledged.

Moral of the story: When the news broke, disclosure is the most effective strategy in a crisis. Companies need to explain what happened on their own terms and regain confidence by demonstrating that they have learned a lesson and are taking immediate steps to change course.

LOCKHEED MARTIN ASKS PEOPLE TO SHARE PHOTOS OF ITS PRODUCTS

In August, the world's largest weapons maker tweeted: "Do you have an amazing photo of one of our products? Tag us in your pic and we may feature it during our upcoming #WorldPhotoDay celebration on Aug. 19!" People quickly responded with pictures showing the impact of its weapons, including an image of bloody UNICEF backpacks belonging to children killed in Yemen with a bomb made by the company. Lockheed Martin later deleted the tweet.

Moral of the story: Although it's important to engage in conversations on social media, carefully consider possible responses before asking for content.

3) PROFESSIONAL LIABILITY

- Professional liability insurance protects professionals such as accountants, lawyers and physicians against negligence and other claims initiated by their clients.
- It is required by professionals who have expertise in a specific area because general liability insurance policies do not offer protection against claims arising out of business or professional practices such as negligence, malpractice or misrepresentation. Depending on the profession, professional liability insurance may have different names.

❖ **HOW PROFESSIONAL LIABILITY INSURANCE WORKS**

- Professional liability policies will indemnify the insured against loss arising from any claim or claims made during the policy period by reason of any covered error, omission or negligent act committed in the conduct of the insured's professional business during the policy period. Incidents occurring before the coverage was activated may not be covered, although some policies may include retroactive date.
- Coverage does not include criminal prosecution, nor all forms of legal liability under civil law, only those listed in the policy.
- Wordings of one policy may differ from the other. While a number of policy wordings are designed to satisfy a stated minimum approved wording, which makes them easier to compare, others differ dramatically in the coverages they provide.

❖ GENERAL LIABILITY ISNURANCE V. PROFESSIONAL LIABILITY INSURANCE

GENERAL LIABILITY INSURANCE

- General Liability Insurance covers business from a general lawsuit that any business could face. It comes into picture when any person who does not work for the company sues company for:
    - Bodily injuries they incurred on commercial premises.
    - Damage caused their property.
    - Advertising injuries like slander, libel, misappropriation, and copyright infringement
- General Liability Insurance pays for legal expenses like lawyers' fees, court costs, and settlements or judgments and any small-business owner, no matter their industry or the size of their business, can face these claims, that's why many consider this policy to be the keystone of a business protection plan.

PROFESSIONAL LIABILITY INSURANCE

- Professional liability insurance also works on the same grounds, however, they specifically covers suits filed against professional services. It comes into picture when a third person files sues a professional for:
    - Negligent services
    - Failure to fulfil contractual promises
    - Incomplete work
    - Mistakes or omissions
- The Professional Liability policy ensures that the professional won't be liable to pay legal expenses, regardless of claim app earing to be valid.

❖ DO GENERAL LIABILITY AND PROFESSIONAL LIABILITY EVER COVER THE SAME CLAIMS?

Both general liability and professional liability covers the liability of the insured, however, general liability protects the business against any claim and professional liability protects the professionals against any claim filed by the third party. They don't cover the same liabilities, however, below laid down are few points to show how both the insurances are alike:

1. Both General Liability and Professional Liability policies work together to reduce your expenses when accidents and oversights land you in legal trouble.
2. Each policy requires client contract.

Differences between General Liability and Professional Liability:

1. General Liability and Professional Liability cover different risk exposures. Only General Liability can spare your business from lawsuits and only Professional Liability Insurance can protect you from the high cost of professional mistakes that caused a financial loss to the third party.
2. General Liability protects the insured from lawsuits over finished work that physically harms someone. However, Professional Liability Insurance concerns

itself with lawsuits over financial losses that result from someone's products or services.

❖ **PROFESSIONAL INDEMNITY INSURANCE**

- Professional Indemnity Insurance is a type of business insurance, typically for organizations that provide consultation or any professional services to its clients. It covers the businesses against the suits filed by the clients due to the financial loss they have suffered from their advices and services.
- Most organizations decide to take up professional indemnity insurance keeping in mind their own protection against a large sum of money they may have to pay, in case they have caused their clients a huge loss due to their own mistakes and wrong advice.
- The professional indemnity insurance policy will only cover the claims that are made during the tenure of the policy. Any financial loss due to a false advice, the negligence, or the faulty analyses will only be covered if those mistakes were made during the tenure of the insurance policy. Claims made before or after the period of the policy will not be covered.
- Such a policy is taken up by the following businesses–
  a) Consultants
  b) Brokers
  c) Agents
  d) Notaries public
  e) Brokers from real estate
  f) Architects
  g) Insurance agent
  h) Landscape architects
  i) Management consultants
  j) IT - Information technology service providers
  k) Attorneys
  l) Engineers
- Professional Indemnity (PI) insurance is the safety net that protects you if your practice's risk management strategies fail. If a client or third party is unhappy with your advice, they may hold you, their accountant, legally responsible and make a claim for economic loss. Company Secretaries and Accountants can also be found liable for breach of contract, negligence or breach of statute, such as misleading and deceptive conduct in consumer protection laws. In such cases professional liability insurance plays an important role and protects from major financial loss that could have occur.
- However, following are excluded from professional indemnity policy:
  1. Contractual Liability.
  2. Loss arising directly or indirectly out of the actual or alleged discharge, release, seepage or escape of pollutants.
  3. Any claim based upon or arising out of insolvency or bankruptcy of any insured
  4. Any claim based upon, warranty, guarantee or estimate with respect to fees, costs, quantities, duration or date of completion.

4) D&O POLICY

- With directors increasingly being held personally responsible for the management decisions made during every working day, a rise has been seen in demand for D&O cover in India. While a Company's liability is limited by shares or by guarantee; the personal liability of a Director and/or Officer of a Company is unlimited. Every time a claim or allegation arises, a Director's personal assets are at risk. Hence, Directors and Officers Liability Insurance plays an important role.
- Directors and Officers Liability Insurance (D&O) covers the cost of legal defense of directors, even in their individual capacity, when the company is unable to defend them. The D&O cover applies to former, present, and future members of the board of directors or any employee performing a managerial role.
- Usually, the policy covers the following:
  1. Management Liability
  2. Management indemnification
  3. Non-Profit Outside Directorship Liability
  4. Estates and legal representatives of incapacitated or deceased insured individuals covered
  5. Spousal Liability extension
  6. Cover for the creation or acquisition of new Subsidiary companies (effective from the date of acquisition or creation)
- The D&O policy offers the following coverages:
  1. It covers any loss or damage that the company may incur because of actions mistakenly taken in the individual capacity as directors and officers under the Memorandum and Articles of Association.
  2. It includes loss or damage arising from claims made against directors and officers for any wrongful act done in their official capacity.
  3. It covers legal expenditure incurred with the written consent of the insurance companies arising out of the prosecution of any director or officer at any investigation, enquiry or other proceedings by the authority empowered to do so.
  4. It covers expenses incurred by the company's shareholders in pursuance of a claim against a director/ officer for which the insurance company is legally obliged to pay, as per the court's direction.
  5. It provides indemnity to the legal heirs or legal representatives of the director/officer if the director or officer becomes insolvent.
- Reasons to buy D&O insurance are as following:
  1. Personal assets of directors are at risk: If a director has been accused of breaching duties, their personal assets are at.
  2. Defending a legal action is an expensive affair: The legal costs and expenses in litigations involving directors are usually complex and costly.
  3. Employees can sue directors: It is not only shareholders who can file a case against the directors as even employees reach the court to challenge the decision of the directors. It is a hard reality that in today's corporate world, there has been a rise in the number of cases filed by employees, related to sexual harassment or wrongful dismissal.
  4. Customers can take legal actions: In some cases, customers also reach the court against misrepresentations made in the advertisement materials and deceptive trade practices.
  5. Enquiry initiated by regulatory authorities: Regulatory bodies, like SEBI, Revenue Department, etc.; can initiate enquiry against directors.

❖ **TRIGGER FOR BUYING D&O COVER IN INDIA**

1. **SEBI (LODR) Regulations, 2015** has provided that with effect from October 1, 2018, the top 500 listed entities, by market capitalization calculated as on March 31 of the preceding financial year, shall undertake Directors and Officers insurance ('D and O insurance') **for all their independent directors** of such quantum and for such risks as may be determined by its board of directors.
2. **Globalisation** of Indian companies has also increased the firms requirement for D&O policy as with globalization risk of claims and litigation for the directors and officers of a company also shows a significant increase.
3. **Stricter Regulations** is also one of the strongest reasons behind firms increasing their requirement for purchasing insurance for the company.
4. With Indian companies gaining a greater **understanding of the benefits of D&O insurance**, the demand for the cover is expected to increase further. In fact as private company D&O insurance policies provide broader coverage at a relatively low cost compared to publicly listed companies; D&O cover ought to further increase among private companies.
5. Since, Indian companies are getting themselves **listed on foreign stock exchanges, acquiring or merging with non-Indian companies** it creates a litigious environment and high legal costs making D&O insurance important for the companies.

❖ **KEY TAKEAWAYS – TEN THINGS A DIRECTOR SHOULD BE CONVERSANT ABOUT HIS / HER D&O POLICY- AN UNIVERSAL APPROACH**

1. **How Much Insurance Do We Have And How Much Do One Need**?
   There is no exact science to determining the limits of D&O insurance a particular company should maintain. However, reputable commercial insurance brokers and other vendors have developed benchmarking data, based on market caps, annual revenues, industry, etc. that provide information regarding how your company's limits stack up against similar/peer companies.
2. **Who Shares the Insurance Policies?**
   D&O insurance often covers all directors, officers and employees, as well as the company. This means that significant claims against the company and employees may deplete the limits available for individual officers and directors.
3. **When is Coverage Triggered?**
   D&O Insurance coverage is usually triggered when a claim is made against the directors or employees in order to protect them from legal costs that may be incurred. However, D&O insurance coverage triggers have become much broader in recent years. In addition to coverage for lawsuits by shareholders, policies often now cover individual directors and officers for investigations by regulatory bodies.
4. **What is Covered Under the D&O Policy?**
   In addition to defense costs and the costs of settlements/judgments arising from shareholder actions, many policies now cover attorneys' fees and other expenses related to responding to both formal and informal investigations
5. **Who are Insurers?**
   Insurance companies should be selected very carefully after considering the company's reputation in the market and its claim handling procedures.
6. **What is not Covered?**

It is always advised to make sure the exclusions of the policies before affixing your signature on the same as exclusions for many activities is very common in practice.

7. **How to protect in a crisis?**
   One should clearly understand how a notice is to be provided to the insurance companies in the case of crisis because a major loss may occur merely because of the delay in sending a notice.
8. **What is Side A Insurance and Why is it Needed?**
   It is one of the most important coverages for individual directors and officers, as it directly protects against loss of personal assets as a result of claims. It kicks in when the company is unable to indemnify the acts of directors or employees.
9. **What is Independent Director Insurance?**
   It provides a separate set of coverage limits dedicated solely to independent/outside directors of a company.

❖ D&O INSURANCE FOR NON-PROFIT ORGANISATIONS

- It's not necessary that any large non-profit organisations may require D&O insurance. Directors and officers of every size of nonprofit organization have meaningful exposure to personal liability. Usually the directors of non-profit organisations lack knowledge of their duties and responsibilities towards the non-profit they serve. Hence, it's necessary to protect their action through D&O insurance policies. Nonprofit boards that fail to protect their organizations with a D&O insurance policy find that the cost of just one claim is larger than the cost of any insurance premiums they would have paid, if they had purchased a D&O insurance policy.
- D&O insurance does not prevent claims from occurring, but it removes the high costs incurred in defending those claims.
- In summary, regardless of the organization's size and board experience, all nonprofit organizations need to purchase D&O insurance protection. In addition to a D&O insurance policy, all nonprofit boards should develop an effective risk management plan to protect individual directors, protect the organization and prevent claims against the D&O insurance policy.

5) OTHER RISK MITIGATION APPROACHES

❖ RISK OVERSIGHT FUNCTION OF BOARD OF DIRECTORS

It is the responsibility of the Board to delve deeper into their organisation's risk management practices and consider risk factor as an integral part of organizational strategy. Though, Board does not play a direct role in managing the risks of the company but it's role is limited to risk oversight of management and corporate issues that affect risk.

Boards should be looking at areas that either may be subject to risk or may be out of compliance with established practices of risk management, from a global and domestic perspective. Specific areas that Board should review include:

a) Fiduciary Duties
b) Laws and Regulations
c) Stock Exchange listing requirements

d) Established and evolving best practices- domestic and worldwide

FIDUCIARY DUTIES

- The Delaware courts have taken the lead in formulating the national legal standards for directors' duties for risk management. Under the Caremark line of cases, these courts have held that directors can be liable for a failure of board oversight only where there is "sustained or systemic failure of the board to exercise oversight.
- In re The Goldman Sachs Group, Inc. Shareholder Litigation, decided in October 2011, the court dismissed claims against directors of Goldman Sachs based on allegations that they failed to properly oversee the company's alleged excessive risk taking in the subprime mortgage securities market and caused reputational damage to the company by hedging risks in a manner that conflicted with the interests of its clients. Chief among the plaintiffs' allegations was that Goldman Sachs' compensation structure, as overseen by the board of directors, incentivized management to take on ever riskier investments with benefits that inured to management but with the risks of those actions falling to the shareholders. In dismissing the plaintiffs' Caremark claims, the court reiterated that, in the absence of "red flags," the manner in which a company evaluates the risks involved with a given business decision is protected by the business judgment rule and will not be second-guessed by judges.
- Thus, while it is true that the Delaware Supreme Court has not indicated a willingness to alter the strong protection afforded to directors under the business judgment rule that underpins Caremark and its progeny, cases serve as reminders that board processes and decision-making may still be questioned only where there are specific allegations that directors ignored "red flags,".
- Companies should adhere to reasonable and prudent practices and should not structure their risk management policies around only the minimum requirements needed to satisfy the business judgment rule.

LAWS AND REGULATIONS

1. **DODD FRANK ACT:** The Dodd-Frank Act created new federally mandatory risk management procedures for financial institutions. Dodd-Frank requires bank holding companies with total assets of $10 billion or more, and certain other non-bank financial companies as well, to have a separate risk committee which includes at least one risk management expert having experience in managing risk of large companies.
2. **SECURITIES AND EXCHANGE COMMISSION:**
   The SEC requires companies to disclose in their annual reports "factors that make an investment in a registrant's securities speculative or risky. On April 3, 2016, the SEC began seeking public comment on a concept release to modernize and simplify business and financial disclosure requirements in Regulation S-K. In this regard, the SEC has proposed eliminating the risk factor examples provided in Item 503(c) of Regulation S-K, because "the inclusion of these examples could suggest that a registrant must address each one of its risk factor disclosures, regardless of the

significance to its business." According to the SEC, eliminating such examples will encourage companies to provide less boilerplate risk factor disclosure.

The SEC also requires companies to disclose the board's role in risk oversight, the relevance of the board's leadership structure to such matters and the extent to which risks arising from a company's compensation policies are reasonably likely to have a "material adverse effect" on the company.

3. **FOREIGN CORRUPT PRACTICES ACT:**

In November 2017, the Department of Justice announced a new FCPA enforcement policy that codified and enhanced a pilot program launched in April 2016. Under the pilot program, companies were eligible for a credit if they voluntarily self-reported FCPA misconduct; fully cooperated with the DOJ's investigation, including disclosing all relevant facts and identifying culpable individuals; and implemented timely and appropriate remedial measures. The pilot program, proved to be of great success and hence, DOJ implemented an enhance version of the programme. the DOJ and the SEC have pledged continued vigorous enforcement of the FCPA, and have brought significant enforcement actions against both individuals and corporations. In countries from Europe to South America to Asia, new anti-corruption laws are taking effect, and enforcement actions are being pursued.

4. **CYBER SECURITIES:**

the EU's General Data Protection Regulation (GDPR), imposes stringent requirements on both data collection and data processing, including increased data security mandates, enhanced obligations to obtain data owner consent, and strict breach notification requirements. the GDPR is extraterritorial in its reach, and carries severe penalties for noncompliance–up to 4% of worldwide revenue.

he New York State Department of Financial Services (DFS) has implemented detailed and prescriptive regulations of its own, requiring covered institutions–entities authorized under New York State banking, insurance or financial services laws–to meet strict minimum cybersecurity standards.

SEC has also issued certain notifications in 2018 in regards to which the public companies should disclose the role of boards in cyber risk management, at least where cyber risks are material to a company's business. It requires the public companies to evaluate the degree of cyber risks and incidents and make necessary disclosures in a proper manner. In its newly issued guidance, the SEC warns that "directors, officers, and other corporate insiders must not trade a pubic company's securities while in possession of material nonpublic information, which may include knowledge regarding a significant cybersecurity incident experienced by the company"

❖ **RECOMMENDATIONS FOR IMPROVING RISK OVERSIGHT**

Actions that the board and appropriate board committees may consider as part of their risk management oversight include the following:

a) review company's risk tolerance ability and check whether the company's strategy is consistent with the agreed-upon risk tolerance for the company.
b) establish a clear framework for holding the CEO accountable for building and maintaining an effective framework for risk tolerance and providing the board with regular, periodic reports on the company's risk status.

c) review with management the categories of risk the company faces, the likelihood of occurrence, the potential impact of those risks, measures should be taken to remove such risks and action plans to be employed if a given risk materializes.
d) review with management the assumptions and analysis undertaken for determination the company's principal risks and whether adequate procedures have been established to ensure that new or are properly identified, understood and accounted.
e) review the risk policies and procedures adopted by management, including procedures for reporting matters to the board and appropriate committees and providing updates, to assess whether they are appropriate and comprehensive.
f) review implementation of its risk policies and procedures, to assess whether they are being properly followed and are effective.
g) review with management the quality, type and format of risk-related information provided to directors.
h) review the means by which the company's risk management strategy is communicated to all appropriate groups within the company so that it is properly integrated into the company's business strategy.
i) review internal systems of formal and informal communication across divisions and control functions to encourage the prompt and coherent flow of risk-related information within the departments of the company.
j) review reports from management, independent auditors, internal auditors, legal counsel, regulators, stock analysts and outside experts as considered appropriate regarding risks the company faces and the company's risk management function.

In addition to considering the foregoing measures, the board may also want to focus on identifying external pressures that can push a company to take excessive risks and consider how best to address those pressures.

❖ **LEGAL COMPLIANCE PROGRAMS**

- It is the duty of the senior management to provide legal compliance programme to Board or Committee and how they are designed to address the company's risk profile and detect and prevent wrongdoing.
- Compliance programs of the company are tailored according to the specific company's needs and there are a number of principles that needs to be considered in reviewing the programme. There should be a strong "tone at the top" from the board and senior management emphasizing the company's commitment to full compliance with legal and regulatory requirements, as well as internal policies. A well-tailored compliance program and a culture that values ethical conduct are still critical factors that the DOJ will assess under the Federal Sentencing Guidelines when the corporate engages in misconduct.
- A compliance program should be designed by persons with relevant expertise and will typically include interactive training as well as written materials.
- Compliance policies should be reviewed periodically to assess their effectiveness and to make any necessary changes. Policies and procedures should fit with business realities. A rulebook that looks good on paper but is not followed will end up hurting rather than helping.
- Finally, there should be clear reporting systems in place both at the employee level and at the management level so that employees understand when and to whom

they should report suspected violations and so that management understands the board's or committee's informational needs for its oversight purposes.

❖ SPECIAL CONSIDERATION REGARDING CYBER SECURITY RISK

- With the increase in technology, cyber crimes have perpetually increased. In light of the growing number of successful cyber attacks on even the most technologically sophisticated entities, lawmakers and regulators in the United States and abroad have increased their attention to cybersecurity risk.
- Corporate leaders should also implement comprehensive cybersecurity risk mitigation programs, deploying the latest defensive technologies without losing focus on core security procedures like patch installation and employee training, executing data and system testing procedures, implementing effective and regularly exercised cyber incident response plans, and ensuring that the board is engaged in cyber risk oversight.
- Boards should perform their risk oversight function with respect to cyber security and evaluate their company's preparedness for a possible cybersecurity breach, as well as the company's action plan in the event that a cybersecurity breach occurs. As addressed in in The Conference Board's "A Strategic Cyber-Roadmap for the Board", boards should consider the following actions, with respect to preparations:
  1. Ensure a cyber incident response plan is in place that identifies risk and identifies necessary notifications to be issued as part of a pre-existing notification plan.
  2. ensure that the company has developed effective response technology and services (e.g., off-site data back-up mechanisms and data loss prevention technology)
  3. ensure that the company's legal counsel is well versed with technology systems and cyber incident management to reduce response time.
  4. establish relationships with cyber information sharing organizations and engage with law enforcement before a cyber security incident occurs.

❖ SPECIAL CONSIDERATIONS REGARDING ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) RISKS

- ESG risks represent a specific subset of general risks that a company must manage where relevant, by identifying and mitigating company-specific risks, such as environmental liabilities, labor standards, consumer and product safety and leadership succession.
- While boards have been overseeing management of such material risks for as long as they have existed, scrutiny by the public and some of the largest institutional investors in the ESG issues and how they are being evaluated, disclosed and managed, has been increased.
- As the public conversation on the role of companies in addressing environmental and social issues is continuously increasing, boards should consider how their risk oversight role specifically applies to ESG-related risk. In large part, the board's function in overseeing management of ESG-related risks, such as supply chain disruptions, energy sources and alternatives, labor practices and environmental impacts involves application of risk oversight practices on the basis of specific issues.

- The board should work with management to identify ESG issues that are pertinent to the business and its customers and decide what policies and processes are appropriate for assessing, monitoring and managing ESG risks, as ESG matters have become primary for investors and public.
- Creating more focused board committees or subcommittees, such as a "corporate responsibility and sustainability" committee, that is specifically tasked with oversight of specified ESG matters or updating existing committee charters and board-level corporate governance guidelines to address the board's approach to such topics may also be considered. However, the board should ensure that any committee tasked with ESG risk oversight properly coordinates with any other committees tasked with other types of risk oversight so that the board as a whole is satisfied.

❖ ANTICIPATING FUTURE RISKS

Company's risk management should include constantly assessing the future risks of a company. Anticipating future risks is a key element of avoiding those risks which may result into crises.

In reviewing risk management, the board or relevant committees should ask the company's executives to discuss the most likely sources of material future risks and how the company is addressing any risk prone areas.

❖ ENTERPRISE RISK MANAGEMENT

- Risk management, also known as Enterprise Risk Management ("ERM"), is a systematic and holistic approach for firms to address all their risks, whether operational, strategic or financial, comprehensively. ERM focuses on identifying risks, developing and monitoring a risk management system and reacting to risk events, when they occur. In India, both the Companies Act, 2013 and the Listing Guidelines view risk management practices as one of the fundamental functions of the board of directors.
- The Committee of Sponsoring Organizations of the Treadway Commission (COSO), was the one who began articulating a risk management framework. Following several corporate governance scandals around the world, COSO issued a detailed report defining ERM. The COSO approach presents eight interrelated components of ERM:
  - internal environment (the tone of the organization)
  - setting objectives
  - event identification
  - risk assessment
  - risk response
  - control activities
  - information and communications
  - monitoring
- ERM's significance can be seen from the value it creates when implemented properly and value it destroys when there are shortcomings:
  1. **Value creation:** ERM is a critical component of value creation. Effective ERM can enable a company to manage potential future events that create uncertainty

and respond to uncertainty in a manner that reduces the likelihood of downside surprises. ERM can also help a company improve the quality of risk taking and thereby, give the company a competitive advantage.

2. **Avoiding value destruction**: A company cannot preserve its value if its ERM is below standard. Failures in risk management have contributed to some of the most significant scandals and losses suffered by companies. Recent significant failures include environmental disasters (e.g. BP), financial fraud (e.g. Enron, WorldCom, Satyam).

CHALLENGES FACING BOARDS OF DIRECTORS IN DEVELOPING ERM

Though, over the past few years corporate India has become much more engaged with and sensitized with ERM, they face significant challenges in designing and implementing an effective ERM system. Some among these challenges are as following:

1. **Effectively linking risk and strategy**: Integrating risk management into the overall corporate strategy is a challenge for many India firms. The challenge is to have an ERM system that encompasses a process capable of being applied in strategy across the enterprise. Linking risk with strategy means that risk managers must be integrated in implementing the company's strategy and must not be separated from the board and management, so that the actual risk taken is tied to the company's risk appetite and ability.
2. **Implementing cost-effective risk management for small and medium-sized enterprises:** the costs of risk management failures can be high but designing and implementing efficient ERM can also be costly, especially for small and medium-sized firms.
3. **Addressing all major areas of risk:** Board needs to have an overview of all the risks. They should consider how all the risk inter-relate rather than teaching them separately.
4. **Mitigating new risks:** In India, many complex areas of risks have emerged in the last decade, which has made risk management particularly challenging. According to a 2015 survey, the top five risks for Indian firms include:
    - corruption, bribery and corporate fraud;
    - information and cyber security;
    - terrorism and insurgency;
    - business espionage; and
    - Crime

ENHANCING THE BOARD'S RISK MANAGEMENT ROLE

- Board needs to take few steps to enhance risk management system and it's role in risk oversight. COSO released certain recommendations which Board must take into consideration:
    1. Understand the company's risk philosophy and concur with its risk appetite.
    2. Review the company's risk portfolio against that appetite.
    3. Know the extent to which management has established effective enterprise risk management.
    4. Be apprised of the most significant risks and whether management is responding appropriately.

- To accomplish all these, certain review mechanisms are necessary on the part of the board. Hence, the Board must review:
  a) The company's procedures for (a) identifying when risks arise and (b) the actions to be taken if material risks arise;
  b) The quality and types of risk-related information provided to the board;
  c) Management's implementation of the company's risk policies and procedures and their communication across the firm.
  d) The company's risk management functions.
  e) Reports from internal and external experts, such as auditors, legal counsel and analysts, to ensure that appropriate risks are being considered.
  f) Whether the board members who are responsible for risk oversight have the necessary experience, knowledge and expertise to oversee the company's risk management matters.
  g) The qualifications and backgrounds of risk management personnel and policies applicable to the risk management personnel, to ensure if they are appropriate taking into consideration companies' size and scope of operations.
- Risk management is an integral component of good corporate governance and same has been supported by Kumar Manglam Birla, member of the Committee on Corporate Governance, formed to implement corporate governance in India.
- Several large companies and financial institutions worldwide no longer exist or have been taken over precisely because they neglected the basic rules of risk management and control. Some common risk management problems in relation to corporate governance that appeared in many financial institutions before and during the crisis was because-:
  1. Risks were frequently not linked to strategy
  2. Organizations weren't always in a position to develop intelligent responses to risks;
  3. Boards didn't take stakeholders into account while responding to risk;

7.MISREPRESENTATION AND MALPRACTICES– CIVIL AND CRIMINAL TRIAL PROCEDURE

6) CODE OF CRIMINAL PROCEDURE, 1973

- Code of Criminal Procedure, 1973 [CrPC] is a procedural law which applies to every offence punishable under the IPC or any other special or local law. The trial procedure for offences under any law in India will be only in accordance with the provisions of CrPC, unless the law concerned has a different provision that provides

a different procedure in any respect. For instance, Companies Act, 2013 provides for the establishment of Special Court for trial of offences, however, the procedure followed would still be the same as specified in CrPC.

- While the substantive law creates and defines offences and prescribes penalties for commission of offences, CrPC contains a complete procedural code for trial of offences. It creates the machinery for detection of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected persons and the imposition of the suitable punishment on the guilty person. CrPC provides a clear mechanism for investigation and trial of offences through an effective administrative and judicial process enabling a speedy and less costly trial of offences.

7) CRIMINAL PROCEEDINGS VIS-À-VIS CIVIL PROCEEDINGS

- There is a great deal of difference between civil proceedings and criminal proceedings. Civil proceedings are conducted to protect an individual right, vested under the law.
- A civil proceeding is distinguished from a criminal proceeding by the fact that if the criminal proceeding is taken to a logical conclusion and if the accused is found guilty, there may be imposition of a sentence of fine or imprisonment or both including a capital punishment. However, in civil proceedings there may be an award of compensation and damages.
- The standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given

Question: If both civil and criminal proceedings are pending against the accused, which should be dealt with first?

In the case of ***MS Sheriff v. The State of Madras*** *two civil suits for damages for wrongful confinement and two criminal prosecutions under section 344, Indian Penal Code for wrongful confinement, were pending against the accused. However, the consideration before the hon'ble Supreme Court was that the simultaneous prosecution of the criminal proceedings and the civil suits will embarrass the accused. Hence, it is to be decided which proceedings should be stayed.*

Court held: As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. This, however, is not a hard and fast rule. It may change from facts to facts and circumstances and to circumstances.

8) CRIMINAL COURTS AND CIVIL COURTS

The Civil Court, ordinarily is to be understood with reference to the Civil Procedure Code and whenever there is a reference to a principal court of original jurisdiction, it would be a District Court and that was originally known in the Act. Very rarely the High Court came into the picture as the court of first instance.

Once it is an offence, obviously, no civil court can exercise its jurisdiction and the punishment has to be awarded by a competent court established under CrPC. It is not to say that the statute creating an offence may not provide for a forum duly empowered to deal with penal provisions, but the procedure followed is that laid down under CrPC.

9) PUBLIC PROSECUTORS AND COMPANY PROSECUTORS

PUBLIC PROSECUTOR

- A public officer who conducts criminal proceedings on behalf of the state or in the public interest is called as public prosecutor. The role of a prosecutor lies in placing before the court all the material and evidences, whether it helps the accused or otherwise.
- a person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor only if he has been in practice as an advocate for not less than 7 years. the Central Government or the State Government may appoint, a person who has been in practice as an advocate for not less than 10 years as a Special Public Prosecutor.
- The Office of the Public Prosecutor is a very responsible Office and he has an important role to play in the Criminal Justice Delivery System. The Public Prosecutors are to be independent, unbiased and impartial while conducting prosecution. The Prosecutors cannot be allowed to be controlled either administratively or in any other mode by the Police Department". It was held repeatedly by the Hon'ble Supreme Court and various High Courts that there should be complete separation of Public Prosecutors, Additional Public Prosecutors, Special Public Prosecutors and Assistant Public Prosecutors from the control or supervision in any form by the Police, as, such control or supervision would invade into the independence of the institution of Prosecutors and would bring harm to the Criminal Justice Delivery System.

COMPANY PROSECUTOR

- When a Registrar or any other person authorized, to file a complaint for any offence under the Companies Act, 1956, files a complaint, the prosecution is conducted in the trial court by a special category of officers called Company Prosecutors.
- They are appointed under s 624A of the Companies Act, 1956 by the Central Government.
- The company prosecutors have all the powers and privileges of public prosecutors appointed by State Government under CrPC.
- Under section 443 of the Companies Act, 2013 it has been provided the Central Government may appoint generally, or for any case, one or more persons, as company prosecutors for the conduct of prosecutions arising out of this act and the

persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code on Public Prosecutors appointed under section 24 of the Code.

10)CRIMINAL COURTS AND THEIR POWERS

- **Courts of Magistrates** are the basic courts for conducting trial of criminal offences. However, in Metropolitan Cities such as Mumbai, Kolkata and Chennai, etc have special category of Magistrates called **Presidency Magistrates or Chief Metropolitan Magistrates**.
- The following are the powers of criminal courts:

Name	Powers
Judicial Magistrates of Class I / Metropolitan Magistrates / Sub-divisional Judicial Magistrates	To award imprisonment up to 3 years or fine up to INR 10,000/-, or both.
Chief Judicial / Chief Metropolitan Magistrate	To award imprisonment up to 7 years and / or fine. For fine, no upper limit has been prescribed.
Assistant Sessions Judge	To award imprisonment up to 10 years and / or fine. For fine, no upper limit has been prescribed
Sessions Judge / Additional Sessions Judge	To award any sentence authorised by a substantive law. Sentence of death should be subject to confirmation by High Court
High Court	To award any sentence as authorised by a substantive law

- Section 435 of the Companies Act, 2013 states that offences that are punishable with imprisonment of two years or more shall be tried by special courts established or designated as stated under clause (a) of sub section 2 of section 435 and other offences shall be tried by special courts established or designated as stated under clause (b) of sub section 2 of section 435.

11)COURTS UNDER THE COMPANIES ACT, 2013

- Companies Act, 2013 defines and declares what "court" means. As per section 2(29) of the Act, court means High Court, having jurisdiction in the place where the registered office of the Company is situated, district court, in cases where the Central Government has, by notification, empowered any district court to exercise all or any of the jurisdictions conferred upon the High Court.
- However, with specific references to offences under Companies Act, 2013 Court means the Court of Session, the Special Court established under section 435 or any Metropolitan Magistrate or a Judicial Magistrate of the First Class.
- Thus, for the purpose of trying offences under the Companies Act, there are only three courts - viz., the Court of Session; the Special Court if established or designated by Central Government under s 435 of the Companies Act, 2013 and the Court of the Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under the Companies Act, 2013.
- The Companies Act seeks to establish a special court consisting of a single judge appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working. The Special Court has powers to try all the offences under this Act. Section 435 of the Act states that the Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary. It shall consist of-
  a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and
  b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences.
- **Section 436**:

a) Section 436 of companies Act, 2013 states that, all offences shall be tried by the Special Court established for the area in which the registered office of the company is situated. where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under s 167(2) or s 167(2A) of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in the custody as he thinks fit **for a period not exceeding 15 days in the whole where such Magistrate is a Judicial Magistrate** and **7 days in the whole where such Magistrate is an Executive Magistrate.** However, if such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction.
   *(**Section 167 of the CrPC** empowers the Magistrate, to commit a person to custody of the police for a specified period if he is satisfied that there are grounds for doing so. Where the offence in question is punishable with death, imprisonment for life or imprisonment for a term not less than ten years, the total period for permitting such detention cannot exceed ninety days and in other cases, for a period not exceeding 60 days. Further, at a time, the maximum period of detention cannot exceed 15 days, and every time police requires the custody of the accused, the accused must be forwarded to the Magistrate for this purpose)*
b) It contains another non-obstante clause, which says that Special Court may, notwithstanding anything contained in CrPC, try in a summary way any offence under the Companies Act which is punishable with imprisonment for a term not exceeding 3 years and no sentence of imprisonment for a term exceeding 1 year

shall be passed. Hence, if the offence in question is punishable with imprisonment for period of exceeding three years, the question of deciding trial of an offence summarily does not arise.

- The offences under the Companies Act which are punishable with imprisonment of two years or more are triable only by the Special Court established under s 435 of the Companies Act, 2013. In case the offences are punishable with imprisonment of a term less than two years, a Judicial Magistrate or a Metropolitan Magistrate will have the power to try the offence. The Special Court need not be an altogether new Court established for this purpose. It could be an existing court designated as a Special Court by Notification issued under s 435 of the Companies Act, 2013.
- So far as s 436 of the Companies Act, 2013 is concerned, it is clear that any offence under this Act which is punishable with imprisonment not exceeding three years may be tried in a Special Court in a summary way. This power is absolutely subject to the discretion of the Special Court. However, there is a caveat in the proviso which says that the Special Court may try the offence in a summary way, even though it is an offence punishable with imprisonment of not exceeding three years, only if it is of the tentative view that it may not be necessary to pass a sentence of imprisonment for a term exceeding one year. This requirement arises because, when an offence is tried in a summary way, the Special Court, upon conviction of the accused, cannot award of sentence of imprisonment of a term which is more than a period of one year. In case, during the course of a summary trial, if it appears to the Special Court, that a sentence of imprisonment exceeding one year may have to be passed, s 436 enables the court to close this summary trial and proceed to hear or rehear the case as a regular trial. Thus, s 436 is only providing an option to try offences under the Act in a summary way, which are punishable with imprisonment with a term not exceeding 3 years, subject to the condition that, in case of conviction, the maximum sentence that could be passed in such a case cannot exceed 1 year.

12)TRIAL PROCEDURE FOR SUMMONS CASES

❖ SUMMONS

A summon is an authoritative call to the accused person, to appear in court to answer to a charge of an offence. It is a process issued from the office of a court of justice requiring the persons to whom it is addressed to attend the court for the purpose provided.

❖ SUMMONS CASE AND WARRANT CASE

- Warrant case means a case relating to an offence punishable with death, imprisonment for a term exceeding two years and summons case is a case which is not a warrant case. This means that any offence punishable with imprisonment for a term exceeding two years will be a warrant case and any offence punishable with imprisonment for a term less than two years will be a summons case.
- A warrant case relates to a serious offence while a summons case relates to a comparatively less serious offence. Hence, trial procedure prescribed for a warrant case is elaborated as compared to summons case.

- As per CrPC in a summons case a summon is issued to the accused person by the authority, so as to provide answer to the charge of an offence. However, in a warrant case a warrant of arrest is issued for the arrest of the accused.

Under Companies Act, 2013 most of the cases are punishable with imprisonment for a term not exceeding two years. Hence, most of the cases are summons cases. There are only few cases which are punishable with imprisonment for a term exceeding two years.

❖ **SERVICE OF SUMMONS ON CORPORATE BODIES AND SOCIETIES**

- According to CrPc, summons is considered to be served on the corporate bodies or societies if they are served to the Secretary, Principal officer, Chief Officer or other Local Manager of the corporation by a registered post.
- According to companies act, 2013, for a company formed and registered under the Act a document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company. The registered office of a company can be verified at the office of the Registrar of Companies. However, if the company has not intimated the registered office or changed registered office, then it is an offence punishable under law.

❖ **NOTICE TO THE ACCUSED**

- As per s 251 of CrPC, when in a summons case, the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty, or has any defence to make, but it shall not be necessary to frame a formal charge. While the section dispenses with a formal charge in a summons case, it does not dispense with the statement of the particulars of the offence for which the accused is to be dealt with.
- The purpose of questioning the accused under the section is to inform him of the charge against him. The accused should know the offence and the facts constituting the offence because of which he is accused and is about to be put on the trial.

❖ **DISPENSING WITH THE PERSONAL ATTENDANCE OF ACCUSED / COMPLAINANT**

- Presence of accused is necessary for a fair trial. However, as per section 205 of CrPc whenever the Magistrate issues a summon, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. In such cases the pleader of the accused can, in his stead, plead guilty to the "charge", or make an answer to the statement of allegations. According to section 206 of CrPc, where complainant is represented by a pleader or magistrate is of the opinion that personal attendance of complainant is not necessary, the Magistrate may dispense with the attendance of the complainant and continue with the case.
- Under Companies Act, 2013 the complainant is usually the Registrar of Companies. The Registrar files an application to dispense with his personal appearance in which he states that he is a public servant and he is filing this complaint in his official capacity. when complaint is filed by registrar of companies, the personal attendance of the complainant shall not be necessary unless the court requires his personal attendance at the trial.

❖ **FURNISHING A COPY OF THE COMPLAINT TO THE ACCUSED**

Any summons send to the accused should be accompanied by the complaint filed by the complainant, so that whenever the accused appears before the Court, he has a fair idea of allegations.

13)FRAMING OF CHARGE

In a summons case it is not necessary to frame a formal charge. However, a formal charge is framed if the case is a warrant case

CAN DIFFERENT OFFENCES BE CLUBBED IN A SINGLE TRIAL?

- CrPc provides for the trial of more than one offence in a single trial. If series of acts are connected and form a same transaction then more than one offence, committed by a person, can be tried together in a single trial. In Madan Gopal Dey and Anor. v. State, Calcutta High Court held, that if several offences are committed in the course of same transaction, their joinder can be authorized for the purpose of a single trial.
- Only when there is continuity under the acts complained of, charges arising out of those acts are joined for a single trial. Hence, continuity is an important factor that needs to be taken into consideration for the clubbing of offences in a trial.

❖ **ADMISSION OF GUILT**

- According to CrPc accused has an option to plead guilty or not guilty. If the accused pleads guilty, then Magistrate may record the words used by the accused and convict the accused. The right of appeal of the accused depends upon the fact whether he pleaded guilty or not.
- The Magistrate has the discretion to accept or not to accept the plea of guilty. Before accepting the plea of guilty, the Magistrate should satisfy that the accused has understood the charge and pleaded guilty after realising the consequences of admission of the offence.
- when a Magistrate, having jurisdiction over the offence under trial, finds the accused guilty of that offence but is not competent to pass a punishment appropriate for the offence, he is supposed to submit the entire proceedings to the Chief Judicial Magistrate.

❖ **PLEA OF GUILTY WITHOUT APPEARING BEFORE MAGISTRATE**

In small cases it is possible for the accused to admit the guilt without personal appearance. On receiving a summons issued under s 206 of CrPC, if the accused desires to plead guilty to the charge without appearing before the Magistrate, as per s 253 of CrPC, the accused can inform his plea to the Magistrate through a letter and remit the amount of fine specified in the summons.

❖ **DENIAL OF OFFENCE**

When once there is a denial of the offence under s 251 of the Act, the Magistrate is required to proceed to hear the prosecution and to take the prosecution evidence under s 254 of the Act.

14)SUMMONING OF WITNESSES OF PROSECUTION

The magistrate may issue summons to the witness, directing him to attend or produce any document or thing. However, the Magistrate may before summoning any witness direct that the reasonable expense of the witness incurred in attending for the purposes of the trial be deposited in court.

❖ RECORDING OF EVIDENCE

- CrPc provides that evidence is to be taken into consideration in the presence of the accused. However, in case the presence of the accused has been dispensed by the Magistrate, evidence can be taken in front of the pleader. The concern of the criminal court should primarily be the administration of criminal justice and presence of the accused in the court is not for marking his attendance in the court. It is to enable the court to proceed with the trial. If the trial can be progressed even in the absence of the accused, the court can take into account the magnitude of the sufferings which a accused may have to bear by the order of making himself present in the court in that particular case.
- In all summons cases, the Magistrate shall make a memorandum as the examination of each witness proceeds, in the language of the court. However, if he is unable to make such memorandum himself, he shall record his reason of inability, cause such memorandum to be made in writing or from his dictation in open court and sign the same, which shall form part of the record.
- If the accused is present and if he is unable to understand the language in which any evidence is given, the Magistrate should ensure that the evidence is interpreted in the open court in the language understood by the accused.

❖ ARGUMENTS OF PROSECUTION

As soon as prosecution evidence are completed, they proceed with the arguments, as per section 314 of CrPc.

❖ PERSONAL EXAMINATION OF THE ACCUSED

- There will be an examination of the accused so that the accused is enabled to explain personally the circumstances which appear in evidence against him. The court may examine the accused by questioning him at any stage without previous warning, however, the court shall put such questions to the accused generally on the case after examination of the witnesses for the prosecution and before the accused is called on for his defence.
- Personal examination of the accused is mandatory after examination of the witnesses for the prosecution and before the accused is called on for his defence except when the personal attendance of the accused has been dispensed with.

❖ HEARING OF THE ACCUSED

- After the personal examination of accused, the Magistrate shall hear the accused and take all the evidences that he produce in his defence.

- The accused should be heard on every circumstance appearing in evidence against him because failure to hear the accused amounts to a fundamental error in a criminal trial and it is an error that cannot be cured by s 465 of CrPC.

❖ ARGUMENTS OF THE ACCUSED

After submitting the evidence, accused can proceed with his arguments.

❖ POWER OF THE COURT TO SUMMON/ EXAMINE WITNESS

- At any stage of trial, the court has power to summon any person as a witness and examine any person who is present, though the court might not have summoned him.
- The court also has the power at any stage of trial, to recall and reexamine a person already examined.

❖ ISSUE OF SUMMONS TO PRODUCE DOCUMENT OR THING

- Where any court or a police officer considers that the production of a document or thing is necessary or desirable, for the purpose of any proceeding under CrPC, the court may issue a summon or the police officer may issue a written order to any person who is believed to be in possession of such document or thing requiring him to produce such document or thing.
- It should be noted that it is not desirable to issue a summon or an order directing an accused to produce a document or a thing. An accused cannot be compelled to produce something, which will be incriminating him. This limitation can be traced to Article 20 of the Constitution of India

❖ ACQUITTAL OR CONVICTION

- After considering the evidence of both prosecution and accused, Magistrate gives an order of acquittal or conviction. If after considering the evidences of prosecution and accused, it is found that accused is not guilty, then Magistrate may pass an order of acquittal.
- Where the Prosecutor has sought the assistance of the Court for securing the attendance of the witnesses, the court has to take some steps for the attendance of the witnesses, before passing any order for acquittal. But if the prosecution did not take proper steps to produce the witnesses or ask the court to give them time to do the same, or to issue fresh summons, the court can record the order of acquittal.

❖ CONVICTION WITHOUT BEING CHARGED

As discussed earlier, no formal charges are framed under summons case, however, an accused can be convicted on the basis of details available in complaint or summons. A Magistrate may convict an accused of any offence, if he is convinced that from the facts admitted or proved, the accused appears to have committed the said offence.

❖ **WITHDRAWAL OF COMPLAINT**

- A complainant can withdraw his complaint at any time before a final order is passed with the permission of the Magistrate provided he satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint.
- On a bare reading of this section, therefore, it can be manifested that a complainant has no legal or vested right to withdraw a complaint as and when he wishes. Withdrawal of the complaint under s 257 of CrPC is permissible only if the Magistrate is satisfied that there are sufficient grounds for permitting such withdrawal.

❖ **POWERS OF TRIAL COURT TO DROP PROCEEDINGS**

Magistrate has the power to drop the proceedings against accused of there are no valid charges in the complaint. Supreme Court held in the case of ***KK Mathew v. State of Kerala:***

"If Magistrate is satisfied that there is no offence mentioned in the complaint for which the accused could be tried, then he may drop the proceedings. Since, the order issuing the process in an interim order and not a judgement, it can be varied or recalled, by the Magistrate"

❖ **POWER OF COURT TO CONVERT SUMMONS CASE INTO WARRANTS CASE**

As per section 259 of CrPC during the course of trial of a summons case relating to an offence punishable with **imprisonment for a term exceeding six months**, if the Magistrate is of the opinion that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of warrant cases, the Magistrate may do so and commence with the fresh proceedings.

❖ **ISSUE OF WARRANT FOR RECOVERY OF FINES**

As per s 421 of CrPC, where an offender has been sentenced to pay a fine, the Court has the authority to issue a warrant for the payment of the amount by attachment of any movable properly belonging to the offender and further can issue a warrant to the Collector of the District authorizing him to realize the amount as arrears of land revenue or movable or immovable property.

The Orissa High Court in ***Hrushikesh Panda v. State of Orissa and Ors***., issued a non-bailable warrant against the Manager of the Company for the payment of fine, however, it was held that the fine has been imposed on the company and it is the liability of the company to pay the same as company has a separate legal entity. High Court however, further held that legal dues of a company could be realized only by attaching the assets of the company and not by putting the managing director or any of the directors in prison.

15)CAN A PERSON BE PROSECUTED AGAIN FOR THE SAME OFFENCE?

- Section 300 of CrPC contains adequate provisions to protect a person from being prosecuted for the same offence again. In order to interpret the provisions of section

300, courts have laid down that person cannot again be tried on the same facts for the offence for which he was earlier tried or for any other offence arising there from. This section becomes applicable when a court of competent jurisdiction had already tried the accused and has either acquitted or convicted him.

16)TRIAL PROCEDURE BEFORE A SESSIONS COURT

As the Judge of a Special court is going to be of the rank of the Sessions Judge or the Additional Sessions Judge, the Special Court has to follow this procedure as if it were a trial before a Court of Sessions.

1. According to section 225, 226 and 227, the prosecution shall be conducted by the Prosecutor. The prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused and if upon consideration of the evidences, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall the discharge the accused. It is a stage prior to the framing of charge. If the accused is not discharged, charges are framed under section 228.
2. If after the charge is framed the accused pleads guilty, s 229 provides that the Judge shall record the plea and may, in his discretion, convict him thereon. However, if he does not enter a plea of guilty, prosecution would proceed with his evidence.
3. If, on the completion of the prosecution evidence and examination of the accused, the Judge considers that there is no evidence that the accused committed the offence with which he is charged, the Judge shall record an order of acquittal
4. If the Judge does not record an acquittal under s 232, the accused would have to be called upon to enter on his defense as required by s 233. After the evidence-in-defense is completed and the arguments heard as required by s 234, s 235 requires the Judge to give a judgment for the case.
5. Section 353 of CrPC requires the Judgment to be pronounced in the open court. Even if the accused is in custody, he should be brought to the court when the judgment is pronounced.
6. Section 354 specifically requires the Court to state in the Judgment the offences for which the accused has been convicted and sentenced or of which he has been acquitted. As per s 354 of CrPC, the judgment
   a) shall be written in the language of the Court
   b) shall contain the point or points for determination, the decision thereon and the reasons for the decision
   c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced; and
   d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.
7. Section 355 of CrPC is concerned with the manner in which a Metropolitan Magistrate will make the Judgment. Judgement should state the below points in all the cases in which an appeal lies from the final order:
   - the serial number of the case
   - the date of the commission of the offence
   - the name of the complainant (if any)

- the name of the accused person, and his parentage and residence
- the offence complained of or proved
- the plea of the accused and his examination (if any)
- the final order
- the date of such order

8. Section 357 of CrPC is about the power of the Court to order payment of compensation. Such order could require a part of the fine to be awarded with regard to:
    a) Who will bear the expenses of prosecution
    b) Payment of compensation for any loss caused, when compensation can be recovered by such person in a Civil Court.
    c) In case of cheating, theft or robbery, compensating to any bona fide purchaser for the loss of the property.
9. Thus, trial comes to end with an order of acquittal or where the order is an order of conviction, it ends with an order of sentence that mentions the punishment awarded to the convicted person and it goes without saying that the sentence has to be as authorised by the applicable law.

17)PROBLEMS OF TRIAL SYSTEM

❖ STRICT ADHERENCE OF TRIAL PROCEDURE IS ESSENTIAL

Strict adherence of trial procedure is essential, however when person is sentenced to undergo imprisonment, he is deprived of his personal liberty. Taking same into consideration Justice V.R.Krishna Iyer in State of Punjab v. Shamlal Murari, said that – "we must always remember that procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice"

❖ DETAILED WRITTEN ORDERS UNNECESSARY AT EVERY STAGE OF TRIAL

The Supreme Court in ***Kanti Bhadra Shah v. State of West Bengal***, said that it is unnecessary to write detailed orders, at all stages of the criminal justice such as issuing process, remanding the accused to custody, framing charge etc. The apex court further held that at the stage of framing charge there need to be only a prima facie case and there is no need for giving reasons for his decision to frame charges.

❖ WRONGFUL CONVICTION - A CASE STUDY

P. Venkatakrishna Reddy v. Registrar of Companies

- The inspecting officer came to the registered office of the company in the period between 1 August 1985 and 3 August 1985; Section 209A (2) of the Act has cast the mandatory duty on the inspecting officers to require all the books of account and papers of the company to be produced by the company or its employees specifying the time within which they should produce and the place for the production and inspection of the same; The accused did not produce the account books of the company in the said period. Therefore, it is alleged that they have contravened the provisions of section 209A(5) and s 209A(8) of the Act; On completion of the inspection, Radhakrishnan, a director of the company, gave a letter, requesting time till 10 September 1985, to produce the books of account, which was followed by

another letter, asking further time till 20 September 1985; But books were not produced till 14 October 1986.

- The trial court found the revision petitioner guilty of the offence tried against him and accordingly convicted and sentenced him. On appeal the learned Principal Sessions Judge confirmed the finding of the trial court.
- The contention in the revision petition was as follows:
  1. The prosecution launched against the accused is clearly an error of law.
  2. The finding of conviction and sentence recorded by the both courts against the revision petitioner are liable to be set aside by the interference of this court.
  3. Where books of account and papers were not produced before them for inspection, it was imperative on the part of the inspecting officers, to require the company or its employees to produce such books of account or the papers of the company within such time as they may think fit.
  4. The Registrar or the person appointed for such inspection may specify the time, date and place where the company or its staff should comply with their requirements. This condition appears to be a sine qua non before launching criminal prosecution.
  5. The Registrar issued a show cause notice to the managing director of the company, requesting o show within 10 days why a penal action should not be initiated and that if no reply is given it will be presumed that you have nothing to say in defence. It has to be noticed that the revision petitioner had addressed a letter to the Additional Registrar of Companies on 27 February 1986, wherein he has stated that S. Radhakrishnan, director, has been entrusted with the day to day running of the company from February, 1985, onwards, and that since the said Radhakrishnan died on 17 November 1985, the required documents of the company could not be produced when inspection was made from 1 August 1985 to 3 August 1985. Therefore, to procure the said documents and papers from the custody of the said Radhakrishnan and to produce before the authority, he wanted 30 days time.
  6. This was followed by another notice sent to the revision petitioner.
- The High Court expressed no hesitation to hold as follows:
  - Ample and convincing cause has been shown by the revision petitioner on behalf of the company to the authorities concerned for not producing the books of account or the papers of the company as required. There was no response at all from the authorities to the explanation and cause shown to the notice given by them. Significantly till 17 February 1986, for a period of more than six months they were silent and did not proceed against the accused. The delay is to be taken as relevant in context of the opportunity provided under s 209A(2) made available to the accused herein to provide his explanation or cause for their non-compliance, if any. Without doing so, launching prosecution in spite of their explanation would clearly be not only against the spirit of the mandatory obligations provided in the section itself but also against the principles of natural justice.
  - Both the trial court as well as the lower appellate court clearly and totally overlooked the above said legal aspects. The conviction and sentence recorded by both the courts against the revision petitioner are set aside and the fine amount paid, if any, shall be refunded to the revision petitioner immediately.

❖ **ERRONEOUS INTERPRETATIONS AND CONSEQUENT EFFECTS - A CASE STUDY**

The Delhi High Court in ***Satish Dayal v. Mackinnon Mackenzie and Co. Limited*** provided how judicial officers wrongly interpret the provisions of law and how such wrong notions and unwanted elaboration of requirements of law could bring up litigations and prolong trial process.

18)APPEALS UNDER CRPC

Section 373 and 374 of CrPc lays down the provision of appeals and section 375 and 376 contain the restrictions relating to appeals.

Section 373

According to section 117, Magistrate may execute a bond and pass an order to give Security if it is proved that any person against whom inquiry is issued may breach public peace. However, if any person is aggrieved from the order requiring security for keeping peace or good behavior, he can make an appeal to the Court of Session under section 373 of CrPc.

Section 374

Section 374 enables appeals by a person who has been convicted of an offence. It says:

1. Any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court.
2. Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial; may appeal to the High Court.

Section 375

Section 375 imposes a bar on appeal under section 374. It provides that when an accused has pleaded guilty and has been convicted on such plea, no appeal shall be made if conviction is by High Court or if the conviction is by the Court of Session, Metropolitan Magistrate or Magistrate of first class. The appeal may lie only with respect to the extent or legality of the sentence.

Section 376

Section Notwithstanding anything contained in section 374, there shall be no appeal by a convicted person in any of the following cases, namely—

1. where a High Court passes only a sentence of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees, or of both such imprisonment and fine;
2. where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or of both such imprisonment and fine;
3. where a Magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees; or

4. where, in a case tried summarily, a Magistrate empowered to act under section 260 passes only a sentence of fine not exceeding two hundred rupees;

Appeal would however lie in the following situations:

a. that the person convicted has been ordered to furnish security to keep the peace; or
b. that a direction for imprisonment in default of payment of fine is included in the sentence; or
c. that more than one sentence of fine is passed in the case, if the total amount of fine imposed does not exceed the amount hereinbefore specified in respect of the case.

19)REFERENCE, CALLING FOR RECORDS, REVISION POWERS

REFERENCE

- Section 395 of CrPC provides, when a question as to the validity of any Act or Ordinance or Regulation or of any provisions or question of law arises in a court before which a case is pending for disposal, the court should state its opinion and refer the same to the High Court.

CALLING FOR RECORDS

- Section 397 of CrPC says that the High court or the Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself as to the correctness and legality of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court. When calling for such record of inferior Court, High Court can even direct suspension of order or suspension of execution of sentence or if the accused is in confinement, release on bail or bond pending such examination. Section provides that such power to call of records and examine the records cannot be exercised in relation to any interlocutory orders passed in appeal, enquiry, trial or other proceeding.
- In ***Bhaskar Industries Ltd. v. Bhiwani Denim and Apparels Ltd. and Ors*** it was held that - "whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. The safe test laid down by this Court through a series of decisions is this: If the contention of the petitioner who moves the superior court in revision, as against the order under challenge is upheld, would the criminal proceedings as a whole culminate? If it would, then the order is not interlocutoiy in spite of the fact that it was passed during any interlocutory stage "
- It is clear t if a person has made an application under section 397 to the High Court or the Sessions Judge, no further application can be made by that person to any other Court.

REVISION POWERS

- Section 401 of CrPC contains an important provision conferring powers of revision upon the High Court. It flows from an application made under section 397 of CrPC calling for and examining records of an inferior court. It may also arise even otherwise if High Court comes to know about any proceeding that requires intervention.

- The High Court has as much powers to entertain and do the revision as it could reject the revision application. It further states that when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided in section 392 of CrPC. (section 392 of CrPC says that when judges are divided in their opinions then they may refer the same to another judge of the same court, and after his opinion deliver a final judgement)
- The power of High Court in section 402 does not extend of converting a finding of acquittal into one of conviction.
- where an appeal under CrPC lies against any order or finding and no such appeal has been preferred, no proceedings for revision under section 402 should be entertained at the instance of the party who could have appealed. Section 401(5) of CrPC states that where under CrPC an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

20)APPEAL IN CASE OF ACQUITTAL

- Section 378(1) states that
  a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and nonbailable offence;
  b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.
- The High Court has powers to admit the appeal or refuse to admit the same. Without obtaining the leave of the High Court, the appeals under section 378 are not possible.
- In technical offences arising from delays, deficiencies, deviations and defaults of provisions under the Companies Act, 2013, acquittal will be rare and if acquittal happens, it would mean there has been something radically wrong with the prosecution.
- Section 444 of the Companies Act, 2013 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may, in any case arising under this Act, direct any company prosecutor or authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court, and an appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

21)POWERS OF THE APPELLATE COURT

- Section 386 of the CrPC declares the powers of an Appellate Court. It states that the Appellate Court may dismiss the appeal if it considers that there is no sufficient

ground for interfering with the order under appeal. Before doing so, the Appellate Court must peruse the records, hear the appellant or his pleader, if he appears, and also the Public Prosecutor, if he appears.

- If the Appellate Court has not dismissed the appeal, it may –
  1. in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, or find him guilty and pass sentence on him according to the law.
  2. in an appeal from a conviction, reverse the finding and the sentence and acquit the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court.
  3. in an appeal for enhancement of sentence, reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence.
  4. in an appeal from any other order, alter or reverse such order.
  5. make any amendment or any consequential or incidental order that may be justified or proper.
- Appellate Court shall not enhance the sentence unless the accused has been given an opportunity of showing cause against such enhancement.
- The Appellate Court shall not inflict greater punishment than the court passing the order or sentence under appeal for the offence, which in its opinion the accused has committed.
- Section 386(b) of CrPC gives ample powers to the Appellate Court in relation to an appeal arising from an order of conviction and the Appellate Court may even acquit the person convicted of an offence by the trial court.
- Section 389 of CrPC states that if any appeal is made by a convicted person, the Appellate Court may, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. However, before releasing on bail or on his own bond, a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release.
- Section 389 also states that if the convicted person satisfies the Court, which has passed the order for conviction that he intends to present an appeal, the Court shall,
  a) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
  b) where the offence for which such person has been convicted is bailable, and he is on bail

order that the convicted person be released on bail unless there are special reasons for refusing the bail. The Court shall give sufficient time to present the appeal and obtain the orders of the Appellate Court.

22)POWERS OF THE SUPREME COURT

- As per Article 132 of the Constitution, an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court whether in a civil or

criminal or any other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law.

- As per Article 134 of the Constitution an appeal shall lie before the Supreme Court in a criminal proceeding, from any judgment, final order or sentence,
    - If the High Court on appeal has reversed the order of acquittal of an accused and sentenced him to death or
    - Has withdrawn a case from any subordinate court and had convicted the accused and sentenced him to death or
    - When the High Court certifies under Article 134A that it is a fit case to appeal before the Supreme Court.
- As per Article 136 of the Constitution Supreme Court has the power to grant a special leave for appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in India.

- As per section 406 of CrPC, the Supreme Court is empowered to transfer, in the interests of justice, cases and appeals from one High Court to another High Court or from one subordinate court to another.

23)IMPORTANT PRINCIPLES

After analysing various judgements and orders of Supreme Court, it can be said that below mentioned principles are certain broad but basic principles in Criminal Justice System:

- The purpose of the criminal trial is to provide fair and impartial justice uninfluenced by external factors.
- Free and fair trial is sine qua non of Article 21 of the Constitution. It is the idea of law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system.
- Any person accused of an offence before a criminal court or against whom proceedings are instituted under the Code, may of right be defended by a pleader of his choice.

24)CONTINUING OFFENCES

- Before dwelling deep into the meaning of the expression “Continuing Offences”, it would be necessary to understand section 472 of Code of Criminal Procedure which states that in the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. Section 472 is essentially the most relevant section of CrPC when it comes to continuing offences.
- From the purview of penal clauses contained in the Companies Act, 2013, it would be seen that almost every penal clause speaks about a fine for every day during which the default continues. Merely because the penal clauses so provide, does that mean the offence is continuing? Would such a penal clause suggest that the offence in question is a continuing offence? Would therefore, the benefit of section 472 of CrPC be available to persons filing criminal complaints?

- It is necessary to understand how the expression "Continuing Offences" has to be construed in order to answer those questions.
- The Supreme Court in ***Bagirath Kanoria v. State of M.P.*** observed that "the question whether a particular offence was a 'continuing offence' must necessarily depend upon the following factors:
  1. the language of the statute which created that offence;
  2. the nature of the offence; and
  3. the purpose which was intended to be achieved by constituting the particular act as an offence
- The Karnataka High Court further held that "a continuing cause of action in civil law is a cause of action, which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."
- An analysis of the above meaning and decisions show that the following are the basic factors for constituting a continuing offence:
  1. The effect of commission of an offence should continue to prevail for any number of days after the date on which it is first committed.
  2. The effect should be understood from the point of view of intention of the legislation.
  3. The statute should have made the compliance requirement a compulsory one.
  4. The language used in the statute should be given due weight.
  5. The penal clause should provide for a penalty, which is liable to be levied during the period of continuance of the offence.

CONTINUING OFFENCES UNDER THE COMPANIES ACT

After various discussions and debates, High Courts have held that defaults committed under companies Act, 2013 are continuous in nature.

The Karnataka High Court in ***Shree Dharma Sugar Industries (P) Limited and Ors. v. Registrar of Companies*** observed that - "Rule 11 prescribes that contravention of any of the provisions of the Rules shall be punishable with fine which may extend to INR500, and where the offence is a continuing one, with a further fine of INR50 for every day during which the default continues. The court further held that once there has been a default in filing the return as required under Rule 10 on or before June 30, the offence under Rule 10 is complete, and it cannot be said that the offence continues to be committed till the return is filed