EXECUTIVE PROGRAMME

GENERAL AND COMMERCIAL LAWS

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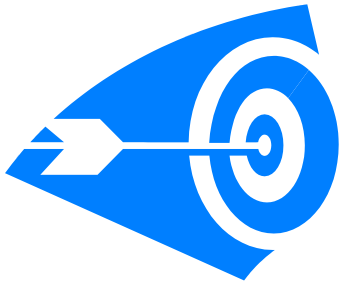
EXECUTIVE PROGRAMME

GENERAL AND COMMERCIAL LAWS

STUDY I

CONSTITUTION OF INDIA



LEARNING OBJECTIVES

The subject of Constitutional law is of abiding interest and is constantly in the process of development. The basic objective of this lesson is to make the students understand the basic frame work of the Constitution and important provisions stipulated therein.

At the end of the Study Lesson, you should be able to understand

- Broad Framework of the Constitution
- Fundamental Rights
- Directive Principles of State Policy
- Fundamental Duties
- Ordinance Making Powers of the President and the Governor
- Legislative Powers of the Union and the States
- Freedom of Trade, Commerce and Intercourse
- Constitutional Provisions Relating to State Monopoly
- The Judiciary and the Writ Jurisdiction
- Delegated Legislation

I. BROAD FRAMEWORK OF THE CONSTITUTION

The Constitution of India came into force on January 26, 1950. It is a comprehensive document containing 395 Articles (divided into 22 Parts) and 12 Schedules. Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens and other persons in a number of entrenched provisions and for the principles to be followed by the State in the governance of the country, labelled as “Directive Principles of State Policy”. All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from it and the Constitution derives its authority from the people.

1. Preamble

The preamble to the Constitution sets out the aims and aspirations of the people of India. It is a part of the Constitution (AIR 1973 SC 1961). The preamble declares India to be a Sovereign, Socialist, Secular, Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

The polity assured to the people of India by the Constitution is described in the preamble as a Sovereign, Socialist, Secular, and Democratic Republic. The expression "Sovereign" signifies that the Republic is externally and internally sovereign. Sovereignty in the strict and narrowest sense of the term implies independence all round, within and without the borders of the country. As discussed above, legal sovereignty is vested in the people of India and political sovereignty is distributed between the Union and the States.

The democratic character of the Indian polity is illustrated by the provisions conferring on the adult citizens the right to vote and by the provisions for elected representatives and responsibility of the executive to the legislature.

The word "Socialist", added by the 42nd Amendment, aims to secure to its people "justice—social, economic and political". The Directive Principles of State Policy, contained in Part IV of the Constitution are designed for the achievement of the socialistic goal envisaged in the preamble. The expression "Democratic Republic" signifies that our government is of the people, by the people and for the people.

2. Structure

Constitution of India is basically federal but with certain unitary features.

The majority of the Supreme Court judges in *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461, were of the view that the *federal features* form the basic structure of the Indian Constitution. However, there is some controversy as to whether the Indian Constitution establishes a federal system or it stipulates a unitary form of Government with some basic federal features. Thus, to decide whether our Constitution is federal, unitary or quasi federal, it would be better to have a look at the contents of the Constitution.

The essential features of a Federal Polity or System are—dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution. The political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity as follows:

(a) In India, there are Governments at different levels, like Union and States.

(b) Powers to make laws have been suitably distributed among them by way of various lists as per the Seventh Schedule.

(c) Both Union and States have to follow the Constitutional provisions when they make laws.

(d) The Judiciary is independent with regard to judicial matters and judiciary can test

the validity of law independently. The Supreme Court decides the disputes between the Union and the States, or the States *inter se.*

(e) The Constitution is supreme and if it is to be amended, it is possible only by following the procedure explained in **Article 368** of the Constitution itself.

From the above, it is clear that the Indian Constitution basically has federal features. But the Indian Constitution does not establish two co-ordinate independent Governments. Both the Governments co-ordinate, co-operate and collaborate in each other's efforts to achieve the ideals laid down in the preamble.

Judicial View

The question as to whether the Indian Constitution has a federal form of Government or a unitary constitution with some federal features came up in various cases before the Supreme Court and the High Courts. But in most cases, the observations have been made in a particular context and have to be understood accordingly. The question rests mostly on value judgement i.e. on one's own philosophy.

Peculiar Features of Indian Federalism

Indian Constitution differs from the federal systems of the world in certain fundamental aspects, which are as follows:

(1) *The Mode of Formation:* A federal Union, as in the American system, is formed by an agreement between a number of sovereign and independent States, surrendering a defined part of their sovereignty or autonomy to a new central organisation. But there is an alternative mode of federation, as in the Canadian system where the provinces of a Unitary State may be transformed into a federal union to make themselves autonomous.

India had a thoroughly Centralised Unitary Constitution until the Government of India Act, 1935 which for the first time set up a federal system in the manner as in Canada viz., by creation of autonomous units and combining them into a federation by one and the same Act.

(2) *Position of the States in the Federation:* In a federal system, a number of safeguards are provided for the protection of State's rights as they are independent before the formation of federation. In India, as the States were not previously sovereign entities, the rights were exercised mainly by Union, e.g., residuary powers.

(3) *Citizenship etc:* The framers of the American Constitution made a logical division of everything essential to sovereignty and created a dual polity with dual citizenship, a double set of officials and a double system of the courts. There is, however, single citizenship in India, with no division of public services or of the judiciary.

(4) Residuary Power: Residuary power is vested in the Union. In other words, the Constitution of India is neither purely federal nor purely unitary. It is a combination of both and is based upon the principle that "In spite of federalism the national interest ought to be paramount as against autocracy stepped with the establishment of supremacy of law".

Test your knowledge

When did the constitution of India come into force?

(a) January 26, 1947
(b) January 26, 1948
(c) January 26, 1949
(d) January 26, 1950

Correct answer: d

II. FUNDAMENTAL RIGHTS

The Constitution seeks to secure to the people "liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and fraternity assuring the dignity of the individual". With this object, the fundamental rights are envisaged in Part III of the Constitution.

1. The Concept of Fundamental Rights

Political philosophers in the 17th Century began to think that the man by birth had certain rights which were universal and inalienable, and he could not be deprived of them. The names of Rousseau, Locke, Montaesgue and Blackstone may be noted in this context. The Declaration of American Independence 1776, stated that all men are created equal, that they are endowed by their creator with certain inalienable rights: that among these, are life, liberty and the pursuit of happiness. Since the 17th century, it had been considered that man has certain essential, basic, natural and inalienable rights and it is the function of the State to recognise these rights and allow them a free play so that human liberty may be preserved, human personality developed and an effective cultural, social and democratic life promoted. It was thought that these rights should be entrenched in such a way that they may not be interfered with, by an oppressive or transient majority in the Legislature. With this in view, some written Constitutions (especially after the First World War) guarantee rights of the people and forbid every organ of the Government from interfering with the same.

The position in England: The Constitution of England is unwritten. No Code of Fundamental Rights exists unlike in the Constitution of the United States or India. In the doctrine of the sovereignty of Parliament as prevailing in England it does not envisage a legal check on the power of the Parliament which is, as a matter of legal theory, free to make any law. This does not mean, however, that in England there is no recognition of these basic rights of the individual. The object in fact is secured here in a different way. The protection of individual freedom in England rests not on constitutional guarantees but on public opinion, good sense of the people, strong common law, traditions favouring individual liberty, and the parliamentary form of Government. Moreover, the participation of U.K. in the European Union has made a difference. (See also the Human Rights Act, 1998).

The position in America: The nature of the Fundamental Rights in the U.S.A. has been described thus: The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the Courts.

The fundamental difference in approach to the question of individual rights between England and the United States is that while the English were anxious to protect individual rights from the abuses of executive power, the framers of the American Constitution were

apprehensive of tyranny, not only from the executive but also from the legislature. While the English people, in their fight for freedom against autocracy stopped with the establishment of Parliamentary supremacy, the Americans went further to assert that there had to be a law superior to the legislature itself and that the restraint of such paramount written law could only save them from the fears of absolution and autocracy which are ingrained in the human nature.

So, the American Bill of Rights (contained in first ten Amendments of the Constitution of the U.S.A.) is equally binding upon the legislature, as upon the executive. The result has been the establishment in the United States of a 'Judicial Supremacy', as opposed to the 'Parliamentary Supremacy' in England. The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights.

The position in India: As regards India, the Simon Commission and the Joint Parliamentary Committee had rejected the idea of enacting declaration of Fundamental Rights on the ground that abstract declarations are useless, unless there exists the will and the means to make them effective. The Nehru Committee recommended the inclusion of Fundamental Rights in the Constitution for the country. Although that demand of the people was not met by the British Parliament under the Government of India Act, 1935, yet the enthusiasm of the people to have such rights in the Constitution was not impaired. As a result of that enthusiasm they were successful in getting a recommendation being included in the Statement of May 16, 1946 made by the Cabinet Mission-(which became the basis of the present Constitution) to the effect that the Constitution-making body may adopt the rights in the Constitution. Therefore, as soon as Constituent Assembly began to work in December, 1947, in its objectives resolution Pt. Jawahar Lal Nehru moved for the protection of certain rights to be provided in the Constitution. The rights as they emerged are contained in Part III of the Constitution the title of which is "Fundamental Rights". The Supreme Court in *Pratap Singh* v. *State of Jharkhand*, (2005) 3 SCC 551 held that Part III of the Constitution protects substantive as well as procedural rights and hence implications which arise there from must efficiently be protected by the Judiciary.

2. Inclusion of Fundamental Rights in Part III of the Constitution

Part III of the Indian Constitution guarantees six categories of fundamental rights. These are:

(i) Right to Equality—Articles 14 to 18;

(ii) Right to Freedom—Articles 19 to 22;

(iii) Right against Exploitation—Articles 23 and 24;

(iv) Right to Freedom of Religion—Articles 25 to 28;

(v) Cultural and Educational Rights—Articles 29 and 30;

(vi) Right to Constitutional Remedies—Articles 32.

[Earlier the right to property under Article 31 was also guaranteed as a Fundamental Right which has been removed by the 44th Constitutional Amendment Act, 1978. Now right to property is not a *fundamental right*, it is now only a legal right.

Apart from this, Articles 12 and 13 deal with definition of 'State' and 'Law'

respectively. Articles 33 to 35 deal with the general provisions relating to Fundamental Rights. No fundamental right in India is absolute and reasonable restrictions can be imposed in the interest of the state by valid legislation and in such case the Court normally would respect the legislative policy behind the same. *People's Union for Civil Liberties* v. *Union of India,* (2004) 2 SCC 476.

From the point of view of persons to whom the rights are available, the fundamental rights may be classified as follows:

(a) Articles 15, 16, 19 and 30 are guaranteed only to *citizens*.

(b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to any person on the soil of India—citizen or foreigner.

(c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are absolute limitations upon the legislative power.

For convenience as well as for their better understanding it is proper to take each of these separately. But some related terms are necessary to be understood first.

3. Definition of State

With a few exceptions, all the fundamental rights are available against the State. Under Article 12, unless the context otherwise requires, "the State" includes—

(a) the Government and Parliament of India;

(b) the Government and the Legislature of each of the States; and

(c) all local or other authorities:

(i) within the territory of India; or

(ii) under the control of the Government of India.

The expression 'local authorities' refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards. The Supreme Court has held that 'other authorities' will include all authorities created by the Constitution or statute on whom powers are conferred by law and it is not necessary that the authority should engage in performing government functions (*Electricity Board, Rajasthan* v. *Mohanlal*, AIR 1967 SC 1957). The Calcutta High Court has held that the electricity authorities being State within the meaning of Article 12, their action can be judicially reviewed by this Court under Article 226 of the Constitution of India. (*In re: Angur Bala Parui,* AIR 1999 Cal. 102). It has also been held that a university is an authority (*University of Madras* v. *Shanta Bai,* AIR 1954 Mad. 67). The Gujarat High Court has held that the President is "State" when making an order under Article 359 of the Constitution (*Haroobhai* v. *State of Gujarat*, AIR 1967, Guj. 229). The words "under the control of the Government of India" bring, into the definition of State, not only every authority within the territory of India, but also those functioning outside, provided such authorities are under the control of the Government of India. In *Bidi Supply Co.* v. *Union of India*, AIR 1956 SC 479, State was interpreted to include its Income-tax department.

The Supreme Court in *Sukhdev Singh* v. *Bhagatram,* AIR 1975 SC 1331 and in *R.D. Shetty* v. *International Airports Authority,* AIR 1979 SC 1628, has pointed out that corporations acting as instrumentality or agency of government would become 'State' because obviously they are subjected to the same limitations in the field of constitutional or administrative law as the government itself, though in the eye of law they would be

distinct and independent legal entities. In *Satish Nayak* v. *Cochin Stock Exchange Ltd.* (1995 Comp LJ 35), the Kerala High Court held that since a Stock Exchange was independent of Government control and was not discharging any public duty, it cannot be treated as 'other authority' under Article 12.

Test for instrumentality or agency of the State

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

(1) If the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.

(2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.

(3) Whether the corporation enjoys a monopoly status which is conferred or protected by the State.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or an instrumentality.

(5) If the functions of the corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying a corporation as an instrumentality or agency of government.

(6) If a department of government is transferred to a corporation, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government.

An important decision on the definition of State in Article 12 is ***Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111. A seven Judge Bench of the Supreme Court by a majority of 5:2 held that CSIR is an instrumentality of "the State" falling within the scope of Article 12. The multiple test which is to be applied to ascertain the character of a body as falling within Article 12 or outside is to ascertain the nature of financial, functional and administrative control of the State over it and whether it is dominated by the State Government and the control can be said to be so deep and pervasive so as to satisfy the court "of brooding presence of the Government" on the activities of the body concerned.**

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

Judiciary although an organ of State like the executive and the legislature, is not specifically mentioned in Article 12. However, the position is that where the Court performs judicial functions, e.g. determination of scope of fundamental rights vis-a-vis legislature or executive action, it will not occasion the infringement of fundamental rights and therefore it will not come under 'State' in such situation (*A.R. Antualay* v. *R.S. Nayak*, (1988) 2 SCC 602). While in exercise of non-judicial functions e.g. in exercise of rule-making powers, where a Court makes rules which contravene the fundamental rights of citizens, the same could be challenged treating the Court as 'State'.

4. Justifiability of Fundamental Rights

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

Exsiting Laws: Article 13(1) relates to the laws already existing in force, i.e. laws which were in force before the commencement of the Constitution (pre constitutional laws). A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Future Laws: Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution (post constitutional laws). After the Constitution comes into force the State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right.

The word 'law' according to the definition given in Article 13 itself includes—

> "... any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

It is clear that like definition of State in Article 12, the definition of 'law' in Article 13 is not exhaustive, e.g. it does not speak of even laws made by Parliament or State Legislatures which form the largest part of the body of laws. Because of this nature of the definition, the issue came up before the Supreme Court as to whether a Constitutional Amendment by which a fundamental right included in Part III is taken away or abridged is also a law within the meaning of Article 13. The Court twice rejected the view that it includes a Constitutional Amendment, but third time in the famous *Golaknath case* (A.I.R. 1967 S.C. 1643) by a majority of 6 to 5, the Court took the view that it includes such an amendment and, therefore, even a Constitutional amendment would be void to the extent it takes away or abridges any of the fundamental rights. By the Constitution (Twenty-Fourth Amendment) Act, 1971 a new clause has been added to Article 13 which provides that—

> "Nothing in this Article shall apply to any amendment of this Constitution made under Article 368"

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

Doctrine of Severability

One thing to be noted in Article 13 is that, it is not the entire law which is affected by the provisions in Part III, but on the other hand, the law becomes invalid only to the extent to which it is inconsistent with the Fundamental Rights. So only that part of the law will be declared invalid which is inconsistent, and the rest of the law will stand. However, on this point a clarification has been made by the Courts that invalid part of the law shall be severed and declared invalid if really it is severable, i.e., if after separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive, otherwise the Court shall declare the entire law as invalid. This is known as the rule of severability.

The doctrine has been applied invariably to cases where it has been found possible to separate the invalid part from the valid part of an Act. Article 13 only says that any law which is inconsistent with the fundamental rights is void "to the extent of inconsistency" and this has been interpreted to imply that it is not necessary to strike down the whole Act as invalid, if only a part is invalid and that part can survive independently. In *A.K. Gopalan* v. *State of Madras*, A.I.R.1950 S.C. 27, the Supreme Court ruled that where an Act was partly invalid, if the valid portion was severable from the rest, the valid portion would be maintained, provided that it was sufficient to carry out the purpose of the Act.

From above, it is clear that this doctrine applies only to pre constitutional laws as according to **Article 13(2)**, State cannot even make any law which is contrary to the provisions of this Part.

Doctrine of Eclipse

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

The doctrine was first evolved in *Bhikaji Narain Dhakras* v. *State of M.P.,* A.I.R. 1955 S.C. 781. In this case, the validity of C.P. and Berar Motor Vehicles Amendment Act, 1947, empowering the Government to regulate, control and to take up the entire motor transport business, was challenged. The Act was perfectly a valid piece of legislation at the time of its enactment. But on the commencement of the Constitution, the existing law became inconsistent under Article 13(1), as it contravened the freedom to carry on trade and business under Article 19(1)(g). To remove the infirmity the Constitution (First Amendment) Act, 1951 was passed which permitted creation by law of State monopoly in respect of motor transport business. The Court held that the Article by reason of its language could not be read as having obliterated the entire operation of the inconsistent law or having wiped it altogether from the statute book. In case of a pre-Constitution law or statute, it was held, that the *doctrine of eclipse* would apply. The relevant part of the judgement is:

"The true position is that the impugned law became as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity."

However, there was a dispute regarding the applicability of the doctrine of eclipse, whether it should be applicable to both pre-Constitution and post-Constitution laws or only to pre-constitution laws. Some decisions were in favour of both laws and some were in favour of pre-constitution laws only. There is no unambiguous judicial pronouncement to that effect.

Waiver

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

The Article has been invoked in many cases. Some of the important cases and observations are as under:

Single Person Law

A law may be constitutional, even though it relates to a single individual, if that single individual is treated as a class by himself on some peculiar circumstances. The case is *Charanjit Lal Chowdhary* v. *Union of India*, AIR 1951 SC 41, in this case, the petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The company through its directors had been managing and running a textile mill of the same name. Later, on account of mis-management, a situation had arisen that brought about the closing down of the mill, thus affecting the production of an essential commodity, apart from causing serious unemployment amongst certain

section of the community. The Central Government issued an Ordinance which was later replaced by an Act, known as Sholapur Spinning & Weaving Co. (Emergency Provisions) Act, 1950. With the passing of this Act, the management and the administration of the assets of the company were placed under the control of the directors appointed by the Government. As regards the shareholders, the Act declared that they could neither appoint a new director nor could take proceedings against the company for winding up. The petitioner filed a writ petition on the ground that the said Act infringed the rule of equal protection of laws as embodied in Article 14, because a single company and its shareholders were subjected to disability as compared with other companies and their shareholders. The Supreme Court dismissed the petition and held the legislation as valid. It laid down that the law may be constitutional even though it applies to a single individual if on account of some special circumstances or reasons applicable to him only, that single individual may be treated as a class by himself. However, in subsequent cases the Court explained that the rule of presumption laid down in *Charanjit Lal's* case is not absolute, but would depend on facts of each case.

For a valid classification there has to be a rational nexus between the classification made by the law and the object sought to be achieved. For example a provision for district-wise distribution of seats in State Medical colleges on the basis of population of a district to the population of the State was held to be void (*P. Rajandran* v. *State of Mysore,* AIR 1968 SC 1012).

5. Right of equality

Articles 14 to 18 of the Constitution deal with equality and its various facets. The general principle finds expression in Article 14. Particular applications of this right are dealt with in Articles 15 and 16. Still more specialised applications of equality are found in Articles 17 and 18.

Article 14: Equality before the law and equal protection of the laws

Article 14 of the Constitution says that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

As is evident, Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The expression 'equality before the law' which is barrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts. The second expression "the equal protection of the laws" which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhurary* v. *Union of India,* AIR 1951 SC 41). The right to equality is also recognised as one of the basic features of the Constitution (*Indra Sawhney* v. *Union of India,* AIR 2000 SC 498).

As a matter of fact all persons are not alike or equal in all respects. Application of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality. Of course, mathematical equality is not intended. Equals are to be governed by the same laws. But as regards unequals, the same laws are not complemented. In fact, that would itself lead to inequality.

Equality is a comparative concept. A person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are 'similarly situated' to the complainant. (*Glanrock Estate (P) Ltd.* v. *State of T N* (2010) 10 SCC 96)

Legislative classification

A right conferred on persons that they shall not be denied equal protection of the laws does not mean the protection of the same laws for all. It is here that the doctrine of classification steps in and gives content and significance to the guarantee of the equal protection of the laws. To separate persons similarly situated from those who are not, legislative classification or distinction is made carefully between persons who are and who are not similarly situated. The Supreme Court in a number of cases has upheld the view that Article 14 does not rule out classification for purposes of legislation. Article 14 does not forbid classification or differentiation which rests upon reasonable grounds of distinction.

The Supreme Court in *State of Bihar* v. *Bihar State 'Plus-2' lectures Associations,* (2008) 7 SCC 231 held that now it is well settled and cannot be disputed that Article 14 of the Constitution guarantees equality before the law and confers equal protection of laws. It prohibits the state from denying persons or class of persons equal treatment; provided they are equals and are similarly situated. It however, does not forbid classification. In other words, what Article 14 prohibits is discrimination and not classification if otherwise such classification is legal, valid and reasonable.

Test of valid classification

Since a distinction is to be made for the purpose of enacting a legislation, it must pass the classical test enunciated by the Supreme Court in *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 SC 75. Permissible classification must satisfy two conditions, namely; (i) it must be founded on an *intelligible differentia* which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational nexus with the object sought to be achieved by the statute in question.

After considering leading cases on equal protection clause enshrined in Article 14 of the constitution, the five-Judge Bench of the Supreme Court in *Confederation of Ex-Servicemen Assns.* v. *Union of India,* (2006) 8 SCC 399 stated: "In our judgement, therefore, it is clear that every classification to be legal, valid and permissible, must fulfill the twin test; namely :

(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and

(ii) Such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question".

The classification may be founded on different basis, such as, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. A legal and valid classification may be based on educational qualifications (*State of Bihar* v. *Bihar State 'Plus-2' lecturers Associations and Others,* (2008) 7 SCC 238)

A law based on a permissible classification fulfills the guarantee of the equal protection of the laws and is valid. On the other hand if it is based on an impermissible classification it violates that guarantee and is void. Reiterating the test of reasonable classification, the Supreme Court in *Dharam Dutt* v. *Union of India,* (2004) 1 SCC 712 held that laying down of intelligible differentia does not, however mean that the legislative classification should be scientifically perfect or logically complete.

Scope of Article 14

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

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

(ii) Permissible classification must satisfy two conditions, namely, (a) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (b) the differentia must have a relation to the object sought to be achieved by the statute in question.

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

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

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

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

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

A remarkable example of the application of the principle of equality under the Constitution is the decision of the Constitution Bench of the Supreme Court in *R.K. Garg* v. *Union of India*, AIR 1976 SC 1559. The legislation under attack was the Special Bearer Bonds (Immunities and Exemptions) Act, 1981. It permitted investment of black money in the purchase of these Bonds without any questions being asked as to how this money came into the possession.

In a public interest litigation it was contended that Article 14 had been violated, because honest tax payers were adversely discriminated against by the Act, which legalized evasion. But the Supreme Court rejected the challenge, taking note of the magnitude of the problem of black money which had brought into being a parallel economy.

Finally it should be mentioned that Article 14 invalidates discrimination not only in substantive law but also in procedure. Further, it applies to executive acts also.

In the recent past, Article 14 has acquired new dimensions. In *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597*,* the Supreme Court held that Article 14 strikes at arbitrariness in State action and ensures a fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence (See also *Ramana Dayaram Shetty* v. *International Airport Authority,* AIR 1979 SC 1628; *Kasturi Lal* v*. State of J&K, AIR 1980 SC 1992)*. In *Ajay Hasia* v. *Khalid Mujib,* AIR 1981SC 487*,* the Supreme Court held " …. what Article 14 strikes at is arbitrariness because an action that is arbitrary must necessarily involve negation of equality….. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such action." In this case the system of selection by oral interview, in addition to written test was upheld as valid, but allocation of above 15 per cent of the total marks for interview was regarded as arbitrary and unreasonable and liable to be struck down as constitutionally invalid.

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

In *Secy., State of Karnataka* v. *Umadevi,* (2006) 4 SCC *1,* the Supreme Court has held that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding the violation of Article 14.

Article 15: Prohibition of discrimination on grounds of religion etc.

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of:

(a) religion

(b) race

(c) caste

(d) sex

(e) place of birth or

(f) any of them

Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and 15(4) create certain exceptions to the right guaranteed by Article 15(1) and 15(2). Under Article 15(3) the State can make special provision for women and children. It is under this provision that courts have upheld the validity of legislation or executive orders discriminating in favour of women (*Union of India* v. *Prabhakaran,* (1997) 2 SCC 633).

Article 15(4) permits the State to make special provision for the advancement of—

(a) Socially and educationally backward classes of citizens;

(b) Scheduled casts; and

(c) Scheduled tribes.

Article 16: Equality of opportunity in matters of public employment.

Article 16(1) guarantees to all citizens equality of opportunity in matters relating to employment or appointment of office under the State.

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

However, there are certain exceptions provided in Article 16(3), 16(4) and 16(5). These are as under:

(1) Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State on a Union Territory, under any local or other authority within the State or Union Territory, residence within that State or Union Territory prior to such employment or appointment shall be an essential qualification. [Article 16(3)]

(2) A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. [Article 16(4)]

(3) A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. [Article 16(5)]

The Supreme Court in *Secy. of State of Karnataka* v*. Umadevi (3)* (2006) 4 SCC 1 held that adherence to the rule of equality in public employment is a basic feature of the Constitution and since the rule of law is the core of the Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14. Equality of opportunity is the hallmark and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. Thus any public employment has to be in terms of the Constitutional Scheme.

Test your knowledge

As per The Declaration of American Independence 1776, which of the following rights are endowed by the creator on all men?

(a) Life
(b) Liberty
(c) Virtue
(d) Pursuit of happiness

Correct answer: a, b, and d

Article 17: Abolition of untouchability

Article 17 says that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

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

In 1955 Parliament enacted the Untouchability (Offences) Act 1955. In 1976, the Act was amended and renamed as the "Protection of Civil Rights Act, 1955" making changes in the existing law namely, all offences to be treated as non-compoundable and offences punishable upto three months to be tried summarily; punishment of offences enhanced; preaching of untouchability or its justification made an offence; a machinery envisaged for better administration and enforcement of its provisions.

Article 18: Abolition of titles

Article 18 is more a prohibition rather than a fundamental right. British Government used to confer titles upon persons who showed special allegiance to them. Many persons were made Sir, Raj Bahadur, Rai Saheb, Knight, etc. These titles had the effect of creating a class of certain persons which was regarded superior to others and thus had the effect of perpetuating inequality. To do away with that practice, now Article 18 provides as under:

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

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

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

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

from or under a foreign State.

It has been pointed out by the Supreme Court that the framers of the Constitution prohibited titles of nobility and all other titles that carry suffixes or prefixes, as they result in the distinct class of citizens. However, framers of the Constitution did not intend that the State should not officially recognise merit or work of an extra ordinary nature. The National awards are not violative of the principles of equality as guaranteed by the provisions of the Constitution. The theory of equality does not mandate that merit should not be recognised. The Court has held that the National awards do not amount to "titles" within the meaning of Article 18(1) and they should not be used as suffixes or prefixes. If this is done, the defaulter should forfeit the National award conferred on him/her, following the procedure laid down in regulation 10 of each of the four notifications creating these National awards.

6. Rights Relating to Freedom

Articles 19-22 guarantee certain fundamental freedoms.

The six freedoms of citizens

Article 19(1), of the Constitution, guarantees to the citizens of India six freedoms, namely:

(a) freedom of speech and expression;

(b) assemble peaceably and without arms;

(c) form associations or unions

(d) move freely, throughout the territory of India;

(e) reside and settle in any part of the territory of India;

(f) practise any profession, or to carry on any occupation, trade or business.

These freedoms are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen. At the same time, none of these freedoms is absolute but subject to reasonable restrictions specified under clauses (2) to (6) of the Article 19. The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:

(a) The restriction can be imposed by law and not by a purely executive order issued under a statute;

(b) The restriction must be reasonable;

(c) The restriction must be imposed for achieving one or more of the objects specified in the respective clauses of Article 19.

Reasonableness

It is very important to note that the restrictions should be reasonable. If this word ‘reasonable’ is not there, the Government can impose any restrictions and they cannot be challenged. This word alone gives the right to an aggrieved person to challenge any restriction of the freedoms granted under this Article.

Reasonableness of the restriction is an ingredient common to all the clauses of

Article 19. Reasonableness is an objective test to be applied by the judiciary. Legislative judgment may be taken into account by the Court, but it is not conclusive. It is subject to the supervision of Courts. The following factors are usually considered to assess the reasonableness of a law:

(i) The objective of the restriction;

(ii) The nature, extent and urgency of the evil sought to be dealt with by the law in question;

(iii) How far the restriction is proportion to the evil in question

(iv) Duration of the restriction

(v) The conditions prevailing at the time when the law was framed.

The onus of proving to the satisfaction of the Court that the restriction is reasonable is upon the State.

Procedural and Substantiveness

In determining the reasonableness of a law, the Court will not only see the surrounding circumstances, but all contemporaneous legislation passed as part of a single scheme. It is the reasonableness of the restriction and not of the law that has to be found out, and if the legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the court can take judicial notice of such Acts forming part of the same legislative plan (*Krishna Sagar Mills* v. *Union of India,* AIR 1959 SC 316).

The phrase 'reasonable restrictions' connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. In determining the reasonableness of a statute, the Court would see both the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. The reasonableness of a restriction has to be determined in an objective manner and from the point of view of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations. The Court is called upon to ascertain the reasonableness of the restrictions and not of the law which permits the restriction. The word 'restriction' also includes cases of prohibition and the State can establish that a law, though purporting to deprive a person of his fundamental right, under certain circumstances amounts to a reasonable restriction only. Though the test of reasonableness laid down in clauses (2) to (6) of Article 19 might in great part coincide with that for judging 'due process' under the American Constitution, it must not be assumed that these are identical. It has been held that the restrictions are imposed in carrying out the Directive Principles of State Policy is a point in favour of the reasonableness of the restrictions.

Scope and Limitations on the Freedoms

(a) Right to freedom of speech and expression

It need not to be mentioned as to how important the freedom of speech and expression in a democracy is. A democratic Government attaches a great importance to this freedom because without freedom of speech and expression the appeal to reason which is the basis of democracy cannot be made. The right to speech and expression includes right to make a good or bad speech and even the right of not to speak. One may

express oneself even by signs. The Courts have held that this right includes the freedom of press and right to publish one's opinion, right to circulation and propagation of one's ideas, freedom of peaceful demonstration, dramatic performance and cinematography. It may also include any other mode of expression of one's ideas. **The Supreme Court in *Cricket Association of Bengal* v. *Ministry of Information & Broadcasting* (*Govt. of India*), AIR 1995 SC 1236, has held that this freedom includes the right to communicate through any media - print, electronic and audio visual.**

The freedom of speech and expression under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. This freedom includes the freedom of press as it partakes of the same basic nature and characteristic (*Maneka Gandhi* v. *Union of India,* AIR 1978 S.C. 597). However no special privilege is attached to the press as such, distinct from ordinary citizens. In *Romesh Thapar* v. *State of Punjab,* AIR 1950 S.C. 124, it was observed that "freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the process of popular Government is possible". Imposition of pre-censorship on publication under clause (2), is violative of freedom of speech and expression.

The right to freedom of speech is infringed not only by a direct ban on the circulation of a publication but also by an action of the Government which would adversely affect the circulation of the paper. The only restrictions which may be imposed on the press are those which clause (2) of Article 19 permits and no other (*Sakal Papers (P) Ltd.* v. *Union of India,* AIR 1962 SC 305).

Regarding Commercial advertisements **it was held in *Hamdard Dawakhana* v. *Union of India,* AIR 1960 SC 554 that they do not fall within the protection of freedom of speech and expression because such advertisements have an element of trade and commerce. A commercial advertisement does not aim at the furtherance of the freedom of speech. Later the perception about advertisement changed and it has been held that commercial speech is a part of freedom of speech and expression guaranteed under Article 19(1)(a) and such speech can also be subjected to reasonable restrictions only under Article 19(2) and not otherwise (*Tata Press Ltd*. v. *MTNL,* AIR 1995 SC 2438).**

The right to know, 'receive and impart information' has been recognized within the right to freedom of speech and expression (*S.P. Gupta* v. *President of India,* AIR 1982 SC 149. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. *(Secretary, Ministry of I&B, Govt. of India* v. *Cricket Association of Bengal,* (1995) 2 SCC 161)

The right to reply, i.e. the right to get published one's reply in the same news media in which something is published against or in relation to a person has also been recognised under Article 19(1)(a), particularly when the news media is owned by the State within the meaning of Article 12. It has also been held that a Government circular having no legal sanction violates Article 19(1)(a), if it compels each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection (*Bijoe Emmanuel* v. *State of Kerala,* (1986) 3 SCC 615). Impliedly the Court has recognised in Article 19(1)(a) the right to remain silent.

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

Dramatic performance is also a form of speech and expression. In *K.A. Abbas* v. *Union of India,* AIR 1971 S.C. 481, the Court held that censorship of films including (pre-censorship) is justified under Article 19(1)(a) and (2) of the Constitution but the restrictions must be reasonable. The right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the latter has also been recognized. *(Odyssey Communications (P) Ltd.* v. *Lokvidayan Sangathan,* AIR 1988 SC 1642.

Clause (2) of Article 19 specifies the limits upto which the freedom of speech and expression may be restricted. It enables the Legislature to impose by law reasonable restrictions on the freedom of speech and expression under the following heads:

Permissible Restrictions

(1) Sovereignty and integrity of India.

(2) Security of the State.

(3) Friendly relations with foreign States.

(4) Public Order.

(5) Decency or morality or

(6) Contempt of court.

(7) Defamation or

(8) Incitement to an offence.

Reasonable restrictions under these heads can be imposed only by a duly enacted law and not by the executive action (*Express News Papers Pvt. Ltd.* v. *Union of India,* (1986) 1 SCC 133).

Corporations

The Supreme Court, initially expressed the view that a Corporation is not a citizen within the meaning of Article 19 and, therefore, cannot invoke this Article. Subsequently the Supreme Court held that a company is a distinct and separate entity from its shareholders and refused to tear the corporate veil for determing the constitutionality of the legislation by judging its impact on the fundamental rights of the shareholders of the company (*TELCO* v. *State of Bihar,* AIR 1965 S.C. 40). But a significant modification is made by the Supreme Court in *R.C. Cooper* v. *Union of India,* AIR 1970 S.C. 564 (also called the *Bank Nationalisation* case). The Supreme Court ruled that the test in determining whether the shareholder's right is impaired is not formal but is essentially qualitative. If the State action impaired the rights of the shareholders as well as of the company, the Court will not deny itself jurisdiction to grant relief. The shareholders' rights are equally affected, if the rights of the company are affected (*Bennett Coleman & Co.,* AIR (1973) S.C. 106).

(b) Freedom of assembly

The next right is the right of citizens to assemble peacefully and without arms [Art. 19(1)(b)]. Calling an assembly and putting one's views before it is also intermixed with the right to speech and expression discussed above, and in a democracy it is of no less importance than speech. However, apart from the fact that the assembly *must be peaceful* and *without arms*, the State is also authorised to impose reasonable restrictions on this right in the interests of:

(i) the sovereignty and integrity of India, or

(ii) public order.

Freedom of assembly is an essential element in a democratic Government. In the words of Chief Justice *Waite* of the Supreme Court of America, "the very idea of Government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect of public affairs". The purpose of public meetings being the education of the public and the formation of opinion on religious, social, economic and political matters, the right of assembly has a close affinity to that of free speech under Article 19(1)(a).

(c) Freedom of association

The freedom of association includes freedom to hold meeting and to takeout processions without arms. Right to form associations for unions is also guaranteed so that people are free to have the members entertaining similar views [Art. 19(1)(c)]. This right is also, however, subject to reasonable restrictions which the State may impose in the interests of:

(i) the sovereignty and integrity of India, or

(ii) public order, or

(iii) morality.

A question not yet free from doubt is whether the fundamental right to form association also conveys the freedom to deny to form an association. **In *Tikaramji* v. *Uttar Pradesh,* AIR 1956 SC 676, the Supreme Court observed that assuming the right to form an association "implies a right not to form an association, it does not follow that the negative right must also be regarded as a fundamental right".** However, the High Court of Andhra Pradesh has held, that this right necessarily implies a right not to be a member of an association. Hence, the rules which made it compulsory for all teachers of elementary schools to become members of an association were held to be void as being violative of Article 19(1)(c) *(Sitharamachary* v. *Sr. Dy. Inspector of Schools,* AIR 1958 A.P. 78). This view gets support from O.*K. Ghosh* v. *Joseph,* AIR 1963 SC 812. It has been held that a right to form associations or unions does not include within its ken as a fundamental right a right to form associations or unions for achieving a particular object or running a particular institution (2004) 1 SCC 712.

(d) Freedom of movement

Right to move freely throughout the territory of India is another right guaranteed under Article 19(1)(d). This right, however, does not extend to travel abroad, and like

other rights stated above, it is also subject to the reasonable restrictions which the State may impose:

(i) in the interests of the general public, or

(ii) for the protection of the interests of any scheduled tribe.

A law authorising externment or interment to be valid must fall within the limits of permissible legislation in clause (5), namely restrictions must be reasonable and in the interests of the general public or for the protection of the interests of the Scheduled Tribes.

(e) Freedom of residence

Article 19(1)(e) guarantees to a citizen the right to reside and settle in any part of the territory of India. This right overlaps the right guaranteed by clause (d). This freedom is said to be intended to remove internal barriers within the territory of India to enable every citizen to travel freely and settle down in any part of a State or Union territory. This freedom is also subject to reasonable restrictions in the interests of general public or for the protection of the interests of any Scheduled Tribe under Article 19(5). That apart, citizens can be subjected to reasonable restrictions (*Ebrahim* v. *State of Bom.,* (1954) SCR 923, 950). Besides this, certain areas may be banned for certain kinds of persons such as prostitutes (*State of U.P.* v. *Kaushaliya*, AIR 1964 SC 416, 423).

[(f) Right to acquire, hold and dispose of property — deleted by 44th Amendment in 1978.]

(g) Freedom to trade and occupations

Article 19(1)(g) provides that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

An analysis of the case law reveals that the emphasis of the Courts has been on social control and social policy. However, no hard and fast rules have been laid down by the Court for interpreting this Article. The words *'trade', 'business', 'profession'* used in this Article have received a variety of interpretations. The word 'trade' has been held to include the occupation of men in buying and selling, barter or commerce, work, especially skilled, thus of the widest scope *(Safdarjung Hospital* v. *K.S. Sethi,* AIR 1970 S.C. 1407).

The word 'business' is more comprehensive than the word 'trade'. Each case must be decided according to its own circumstances, applying the common sense principle as to what business is. A *profession* on the other hand, has been held ordinarily as an occupation requiring intellectual skill, often coupled with manual skill. Like other freedoms discussed above, this freedom is also subject to reasonable restrictions. Article 19(6) provides as under :

Nothing in sub-clause (g) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions in the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.

Article 19(1)(g) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business. The freedom is not uncontrolled, for, clause (6) of the Article authorises legislation which (i) imposes reasonable restrctions on this freedom in the interests of the general public; (ii) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and (iii) enables the State to carry on any trade or business to the exclusion of private citizens, wholly or partially.

In order to determine the reasonableness of the restriction, regard must be had to the nature of the business and conditions prevailing in that trade. It is obvious that these factors differ from trade to trade, and no hard and fast rules concerning all trades can be laid down. The word 'restriction' used in clause (6) is wide enough to include cases of total prohibition also. Accordingly, even if the effect of a law is the elimination of the dealers from the trade, the law may be valid, provided it satisfies the test of reasonableness or otherwise.

The vital principle which has to kept in mind is that the restrictive law should strike a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19. The restriction must not be of an exessive nature beyond what is required in the interests of the public.

Monopoly

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

However, after the Constitutional (Amendment) Act, 1951, the State can create a monopoly in favour of itself and can compete with private traders. It has been held in *Assn. of Registration Plates* v. *Union of India,* (2004) SCC 476 that the State is free to create monopoly in favour of itself. However the entire benefit arising therefrom must

ensure to the benefit of the State and should not be used as a clock for conferring private benefit upon a limited class of persons.

(a) Protection in respect of conviction for offences

Articles 20, 21 and 22 provide a system of protection, relevant to the criminal law. Article 20 guarantees to all persons — whether *citizens* or *non-citizens-three* rights namely:—

(i) Protection against ex-post facto laws

According to Article 20(1), no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Ex-post facto laws are laws which punished what had been lawful when done. If a particular act was not an offence according to the law of the land at the time when the person did that act, then he cannot be convicted under a law which with retrospective declares that act as an offence. For example, what was not an offence in 1972 cannot be declared as an offence under a law made in 1974 giving operation to such law from a back date, say from 1972.

Even the penalty for the commission of an offence cannot be increased with retrospective effect. For example, suppose for committing dacoity the penalty in 1970 was 10 years imprisonment and a person commits dacoity in that year. By a law passed after his committing the dacoity the penalty, for his act cannot be increased from 10 to 11 years or to life imprisonment.

In *Shiv Bahadur Singh* v. *State of Vindhya Pradesh,* AIR 1953 S.C. 394, it was clarified that Article 20(1) prohibited the conviction under an *ex post facto law*, and that too the substantive law. This protection is not available with respect to procedural law. Thus, no one has a vested right in procedure. A law which nullifies the rigour of criminal law is not affected by the rule against *ex post facto law* (*Rattan Lal* v. *State of Punjab,* (1964) 7 S.C.R. 676).

(ii) Protection against double jeopardy

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

(iii) Protection against self-incrimination

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

1. that he must be accused of an offence;
2. that there must be a compulsion to be a witness; and
3. such compulsion should result in his giving evidence against himself.

So, if the person was not an accused when he made a statement or the statement was not made as a witness or it was made by him without compulsion and does not result

as a statement against himself, then the protection available under this provision does not extend to such person or to such statement.

The 'right against self-incrimination' protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. [*Selvi* v. *State of Karnataka*, AIR 2010 SC 1974].

(b) Protection of life and personal liberty

Article 21 confers on every person the fundamental right to life and personal liberty. It says that,

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The right to life includes those things which make life meaningful. For example, the right of a couple to adopt a son is a constitutional right guaranteed under Article 21 of the Constitution (see, *Philips Alfred Malvin* v. *Y.J. Gonsalvis and others,* AIR 1999 Ker. 187). The right to life enshrined in Article 21 guarantees right to live with human dignity. Right to live in freedom from noise pollution is a fundamental right protected by Article 21 and noise pollution beyond permissible limits is an inroad into that right. (*Noise Pollution* (v), *in re,* (2005) 5 SCC 733.

The majority in the case of *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27, gave a narrow meaning to the expression 'personal liberty' within the subject matter of Articles 20 to 22 by confining it to the liberty of the person (that is, of the body of a person). The majority of the judges also took a narrow view of the expression *'procedure established by law'* in this case. In the *State of Maharashtra* v. *Prabhakar Pandurang Sanzigri,* AIR 1966, SC 424, Subba Rao J. considered the inter-relation between Articles 19 and 21 as was discussed by the majority Judges in the *A.K. Gopalan's case* and came to the conclusion that "that view was not the last word on the subject".

The expression 'liberty' in the 5th and 14th Amendments of the U.S. Constitution has been given a very wide meaning. The restricted interpretation of the expression 'personal liberty' preferred by the majority judgement in *A.K. Gopalan's case* namely, that the expression 'personal liberty' means only liberty relating to or concerning the person or body of the individual, has not been accepted by the Supreme Court in subsequent cases.

That the expression 'personal liberty' is not limited to bodily restraint or to confinement to prison, only is well illustrated in *Kharak Singh* v. *State of U.P,* AIR 1963 SC 1295. In that case the question raised was of the validity of the police regulations authorising the police to conduct what are called as domiciliary visits against bad characters and to have surveillance over them. The court held that such visits were an invasion, on the part of the police, of the sanctity of a man's home and an intrusion into his personal security and his right to sleep, and therefore violative of the personal liberty of the individual, unless authorised by a valid law. As regards the regulations authorising surveillance over the movements of an individual the court was of the view that they were not bad, as no right to privacy has been guaranteed in the Constitution.

However, in *Gobind* v. *State of M.P.,* AIR 1975 S.C. 1378, Mathew, J. asserted that the right to privacy deserves to be examined with care and to be denied only when an important countervailing interest is shown to be superior, and observed that this right will have to go through a process of case-by-case development. Mathew, J. explained that even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as emanating from them, the right is not absolute and it must be read subject to restrictions on the basis of compelling public interest.

Refusal of an application to enter a medical college cannot be said to affect person's personal liberty under Article 21 (*State of A.P.* v. *L. Narendranathan,* (1971) 1 S.C.C. 607).

In *Satwant Singh Sawhney* v. *A.P.O., New Delhi*, AIR 1967 S.C. 1836, it was held that right to travel is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel, except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, the denial of a passport amounts to deprivation of personal liberty. In the absence of any procedure pescribed by the law of land sustaining the refusal of a passport to a person, it's refusal amounts to an unauthorised deprivation of personal liberty guaranteed by Article 21. This decision was accepted by the Parliament and the infirmity was set right by the enactment of the Passports Act, 1967.

It was stated in *Maneka Gandhi* v. *Union of India,* AIR 1978 S.C. 597, that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad, and no person can be deprived of this right except according to procedure prescribed by law. In this case, it was clearly laid down that the fundamental rights conferred by Part III of the Constitution are not distinct and mutually exclusive. Thus, a law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has still to stand the test of one or more of fundamental rights conferred by Article 19 which may be applicable to a given situation.

Procedure established by law: The expression 'procedure established by law' means procedure laid down by statute or procedure prescribed by the law of the State. Accordingly, first, there must be a law justifying interference with the person's life or personal liberty, and secondly, the law should be a valid law, and thirdly, the procedure laid down by the law should have been strictly followed.

The law laid down in *A.K. Gopalan* v. *State of Madras,* AIR 1950 SC 27, that the expression 'procedure established by law' means only the procedure enacted by a law made by the State was held to be incorrect in the *Bank Nationalisation Case* (1970) 1 S.C.C. 248. Subsequently, in *Maneka Gandhi's* case (AIR 1978 SC 49), it was laid down, that the law must now be taken to be well settled that Article 21 does not exclude Article 19 and a law prescribing a procedure for depriving a person of 'personal liberty' will have to meet the requirements of Article 21 and also of Article 19, as well as of Article 14.

The procedure must be fair, just and reasonable. It must not be arbitrary fanciful or oppressive. An interesting, follow-up of the *Maneka Gandhi's* case came in a series of cases.

In *Bachan Singh* v. *State of Punjab,* AIR 1980 S.C. 898, it was reiterated that in Article 21 the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.

Presently, this term personal liberty extends to variety of matters like right to bail, right not to be handcuffed except under very few cases, right to speedy trial, right to free legal aid etc.

7. Article 21A: Right to Education

This was introduced by the Constitution (Eighty sixth Amendment) Act, 2002. According to this, the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Protection against arrest and detention

Although Article 21 does not impose a limitation on the legislature in so far as the deprivation of life or personaly liberty is concerned, yet a legislative Act providing for such deprivation is subject to the procedureal safeguards provided in Article 22 and if it does not provide for any of these safeguards it shall be declared unconstitutional. However, Article 22 does not apply uniformly to all persons and makes a distinction between:

(a) alien enemies,
(b) person arrested or detained under preventive detention law, and
(c) other persons.

So far as alien enemies are concerned the article provides no protection to them. So far as persons in category (c) are concerned, it provides the following rights (These rights are not given to persons detained under preventive detention law).

(i) A person who is arrested cannot be detained in custody unless he has been informed, as soon as he may be, of the grounds for such arrest.
(ii) Such person shall have the right to consult and to be defended by a legal practitioner of his choice.
(iii) A person who is arrested and detained must be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time of journey. And such a person shall not be detained in custody beyond twenty-four hours without the authority of magistrate.

Preventive Detention

Preventive detention means detention of a person without trial. The object of preventive detention is not to punish a person for having done something but to prevent him from doing it. No offence is proved nor any charge formulated and yet a person is detained because he is likely to commit an act prohibited by law. Parliament has the power to make a law for preventive detention for reasons connected with defence, foreign affairs or the security of India. Parliament and State Legislatures are both entitled to pass

a law of preventive detention for reasons connected with the security of State, the maintenance of public order, or the maintenance of supplies and services essential to the community.

Safeguards against Preventive Detention

Article 22 (amended by the 44th Constitution Amendment Act, 1978)[1] contains following safeguards against preventive detention:

(a) such a person cannot be detained for a longer period than three months unless:

(i) An Advisory Board constituted of persons who are or have been or are qualified to be High Court judges has reported, before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention.

(ii) Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention and the procedure to be followed by an Advisory Board.

(b) The authority ordering the detention of a person under the preventive detention law shall:

(i) communicate to him, as soon as may be, the grounds on which the order for his detention has been made, and

(ii) afford him the earliest opportunity of making the representation against the order.

It may, however, be noted that while the grounds for making the order are to be supplied, the authority making such order is not bound to disclose those facts which it considers to be against the public interest.

Test your knowledge

Choose the correct answer

Which of the following articles prohibit the State from discriminating against any citizen on grounds of religion, race, caste, sex, or place of birth?

(a) Article 15(1)
(b) Article 15(2)
(c) Article 15(3)
(d) Article 15(4)

Correct answer: a

8. Right against Exploitation

[1]. *The changes proposed by the Constitution (Forty-fourth Amendment), Act, 1978 have not been notified as yet.*

This group of fundamental rights consists of Articles 23 and 24. They provide for rights against exploitation of all citizens and non-citizens. Taking them one by one they guarantee certain rights by imposing certain prohibitions not only against the State but also against private persons.

(a) Prohibition of traffic in human beings and forced labour

Article 23 imposes a complete ban on traffic in human beings, federal and other similar forms of forced labour. The contravention of these provisions is declared punishable by law. Thus the traditional system of beggary particularly in villages, becomes unconstitutional and a person who is asked to do any labour without payment or even a labourer with payment against his desire can complain against the violation of his fundamental right under Article 23.

'Traffic' in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose them of. 'Begar' means involuntary work without payment.

The State can impose compulsory service for public purposes such as conscription for defence for social service etc. While imposing such compulsory service the State cannot make any discrimination on grounds only of religion, race, caste or class or any of them. (Clause 2 of Article 23).

(b) Prohibition of employment of children

Article 24 prohibits the employment of children below the age of fourteen in any factory or mine. The Employment of Children Act, 1938; The Factories Act, 1948; The Mines Act, 1952; The Apprentices' Act, 1961; and the Child Labour (Prohibition and Regulation) Act, 1986 are some of the important enactments in the statute book to protect the children from exploitation by unscrupulous employers.

The Supreme Court has issued detailed guidelines as to child labour in *M.C. Mehta* v. *State of T.N.,* AIR 1993 S.C. 699.

9. Right to Freedom of Religion

With Article 25 begins a group of provisions ensuring equality of all religions thereby promoting secularism.

Freedom of conscience and free profession, practice and propagation of religion.

Article 25 gives to every person the:

(i) freedom of conscience, and

(ii) the right freely to profess, practice and propagate religion.

But this freedom is subject to restrictions imposed by the State on the following grounds:

(i) public order, morality and health,

(ii) other provisions in Part III of the Constitution,

(iii) any law regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice, and

(iv) any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The Supreme Court in *State of Karnataka* v*. Dr. Praveen Bhai Thogadia*, (2004) 9 SCC 684, held that secularism means that State should have no religion of its own and

each person, whatever his religion, must get an assurance from the State that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience.

The freedom of religion conferred by the present Article is not confined to the citizens of India but extends to all persons including aliens and individuals exercising their rights individually or through institutions (*Ratilal* v. *State of Bombay,* (1954) SCR 105, *Stanslaus* v. *State,* AIR 1975 M. 163).

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

(a) The Concept of Religion

Our Constitution does not define the word religion. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic — There are well-known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in any system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its follower to accept, it might prescribe rituals and observances, ceremonies and modes or worship which are regarded as integral parts of religion and those forms and observances might extend even to matters of food and dress (*Justice Mukherjee in Commr. of H.R.E., Madras* v. *Sirur Mutt,* A.I.R. 1954 S.C. 282).

(b) Freedom to manage religious affairs

Although no clear cut distinction is possible, yet it may be said that while Article 25 discussed above protects the religious freedom of individuals. Article 26, deals with the collective rights of religious denominations. Here the question may be raised as to what is a religious denomination? In the words of our Supreme Court:

"The word *'denomination'* has been defined in the Oxford Dictionary to mean a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name. It is well known that the practice of setting up *Maths* as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankaracharya, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, in many cases it is the name of the founder and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnavas, undoubtedly constitute a religious denomination, and so do the followers of Madhavacharya and other religious teachers" (*Mukherjee J. in Commr. of H.R.E., Madras* v. *Sirur Mutt.,* A.I.R. 1954 S.C. 282).

However, a religious denomination is not a 'citizen'. Now coming to the provisions of Article 26, it grants to every religious denomination or any sect thereof the right—

(i) to establish and maintain institutions of religious and charitable purposes;

(ii) to manage its own affairs in matters of religion;

(iii) to own and acquire movable and immovable property; and

(iv) to administer such property in accordance with law.

All these rights are subject to public order, morality and health, and, therefore, if they conflict then the right will give way to these exceptions. One more exception may be noted. A denomination's right to manage its own affairs in matters of religion is subject to the State's power to throw open Hindu religious institutions of a public nature to all classes or sections of Hindus covered in Article 25.

(c) Freedom as to payment of tax for the promotion of any particular religion

According to Article 27, no person can be compelled to pay any taxes, the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. It is notable that freedom not to pay taxes is only with respect to those taxes the proceeds of which are specially appropriated in payment of expenses for the promotion or maintenance of any particular religion or denomination.

(d) Freedom as to attendance at religious instruction or religious worship in educational institutions

Article 28 prohibits religious instruction in certain educational institutions and gives freedom to a person to participate in such religious instructions. The Article states that—

(i) No religious instruction can be provided in any educational instituion wholly maintained out of State funds. However, this prohibiton does not extend to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(ii) No person attending an educational institution recognised by the State or receiving aid out of State funds cannot be required:

(a) to take part in any religious instruction that may be imparted in such institution; or

(b) to attend any religious worship that may be conducted in such institution or any premises attached thereto,

unless such person or if such person is a minor, his guardian has given his consent thereto. It may, however, be noted that although person can be compelled to take religious instructions or attend worship, without his consent, yet at the same time such person is not entitled to perform any religious ceremony or worship which is contrary to the tenets of that educational institution (*Sanjib* v. *St. Paul's College*, 61 C.W.N. 71).

Test your knowledge

State whether the following statement is "True" or "False"

The right to speech and expression includes right to make a good or bad speech.

- True
- False

Correct answer: True

10. Cultural and Educational Rights [Rights of Minorities]

Minority

The word 'minority' has not been defined in the Constitution. The Supreme Court in *D.A.V. College, Jullundur* v. *State of Punjab,* A.I.R. 1971, S.C. 1737, seems to have stated the law on the point. It said that minority should be determined in relation to a particular impugned legislation. The determination of minority should be based on the area of operation of a particular piece of legislation. If it is a State law, the population of the State should be kept in mind and if it is a Central Law the population of the whole of India should be taken into account.

The two Articles guarantee the following rights:

(a) Protection of interests of Minorities

Article 29 guarantees two rights:

(i) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own has the right to conserve the same. Thus, citizens from Tamil Nadu or Bengal has the right to conserve their language or culture if they are living in Delhi, a Hindi speaking area and *vice versa*.

(ii) No citizen can be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them. This provision is general and applies to each citizen individually and is not confined to a group of citizens. An exception is made to this right to the effect that if a special provision is made for the admission of persons belonging to educationally or/and socially backward classes or scheduled castes or scheduled tribes it shall be valid.

(b) Right of Minorities to establish and administer educational institutions

The rights guaranteed to the minorities in Article 30 are even more important than those covered by Article 29. Following rights are declared in Article 30 :

(i) All minorities, whether based on religion or on language, shall have the right to establish and administer educational institutions of their choice. It may be noted here that this right is not limited only to linguistic minorities but it extends to religious minorities also. Both of them have been given the freedom to establish and administer educational institutions of their own choice. So they can establish educational institution of any type and cannot be restrained from its administration. The maladministration may be checked by the State but administration cannot be entrusted to outside hands. Mal-administration defeats

the very object of Article 30, which is to promote excellence of minority institutions in the field of education (*All Saints High School* v. *Government of A.P.*, AIR 1980 SC 1042). And in that educational institution they may teach religion, or may give secular education, but no bar can be imposed on their choice. In the matter of medium of instruction also, the minorities are completely free to adopt any medium of their choice.

(ii) The State cannot, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. It has been held that the State cannot impose conditions in granting aid to such institutions. Further, the minority institutions are also entitled to recognition and the State cannot deny them that right, merely because they do not follow the directions of the State which impair rights under Article 30 (In *re. Kerala Education Bill* 1957, A.I.R. 1958 S.C. 956; *Sidhrajbhai* v. *State of Gujarat,* A.I.R. 1963 S.C. 540).

In *DAV College* v. *State of Punjab,* AIR 1971 SC 1737, it was held that any community—religious or linguistic, which is numerically less than 50 percent of the population of that State, is a minority within the meaning of Article 30. The expression minority in Article 30(1) is used as distinct from 'Any sections of citizens' in Article 29(1) which lends support to the view that Article 30(1) deals with national minorities or minorities recognised in the context of the entire nation (*St. Xaviers College* v. *State of Gujarat,* AIR 1974 SC 1389).

The right conferred on religious and linguistic minorities to adminster educational institutions of their choice, though couched in absolute terms, is not free from regulation. Delhi High Court in *Delhi Abibhavak Mahasangh* v. *U.O.I.* and others AIR 1999 Delhi 124 held that Article 30(1) of the Constitution does not permit, minorities to indulge in commercialisation of education in the garb of constitutional protection. For the application of this right minority institutions are divided into three classes: (i) institution which neither seek aid nor recognition from the State; (ii) institution that seek aid from the State; and (iii) institutions which seek recognition but not aid. While the institutions of class (i) cannot be subjected to any regulations except those emanating from the general law of the land such as labour, contract or tax laws, the institutions in classes (ii) and (iii) can be subjected to regulations pertaining to the academic standards and to the better administration of the institution, in the interest of that institution itself.

In *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481, is an eleven Bench decision dealing with right of minorities to establish and administer educational institutions and correctness of the decision in *St. Stephen's College* case. While interpreting Article 30, the Supreme Court held that minority includes both linguistic and religious minorities and for determination of minority status, the unit would be the State and not whole of India. Further, the right of minorities to establish and administer educational institutions (including professional education) was not absolute and regulatory measures could be imposed for ensuring educational standards and maintaining excellence thereof. Right of minorities included right to determine the procedure and method of admission and selection of students, which should be fair and transparent and based on merit.

The Constitution (44th Amendment Act) has introduced new sub-clause (1A) which provides that wherever compulsory acquisition of any property of an educational institution established and administered by a minority is provided under any law, the State shall ensure that the amout fixed by or determined under any such law is such as would not restrict or abrogate the right guaranteed under this Article.

11. Articles 31A, 31B and 31C relating to Property

Right to property is no more a fundamental right which was previously guaranteed under Part III of the Constitution by Article 31.

But the right to property has been inserted by Article 300A under Part XII of the Constitution. Article 300A reads — "No person shall be deprived of his property save by authority of law".

Saving of Laws Providing for Acquisition of Estates etc.

Then follows Article 31A which is an exception to the right of equality as guaranteed in Article 14 and to the six freedoms as guaranteed in Article 19, if they come into conflict with any law mentioned in Article 31A.

Such laws are those which provide for—

(i) the acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights. 'Estate' here means the property included within that expression according to the land tenurers applicable in the area where it is situated. And 'rights' in relation to an estate means proprietory and other intermediary rights. In short, such laws are those which related to agrarian reforms, or

(ii) the taking over of the management of any property by the State for a limited period in the public interest or in order to secure the proper management of the property, or

(iii) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(iv) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors or managers of corporations, or of any voting rights of shareholders thereof, or

(v) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence.

However, limitations, have been imposed with respect to the laws relating to the acquisition of the estates. They are:

(a) If such a law is made by a State Legislature then it cannot be protected by the provisions of Article 31A unless such law having been reserved for the consideration of the President has received his assent, and

(b) If the law provides for the acquisition of (i) any land within the ceiling limit applicable in that area, (ii) any building or structure standing thereon or

apartment thereto, it (law) shall not be valid unless it provides for payment of compensation at a rate which shall not be less than the market value thereof. This provision, however, has been amended by the Constitution (29th Amendment) Act.

Validation of certain Acts and Regulations

Article 31B certain laws against attack on the ground of violation of any fundamental rights. The laws so protected are specified in the Nineth Schedule to the Constitution. These laws also relate mainly to land reforms.

Saving of Laws giving effect to certain Directive Principles

Article 31C added by 25th Amendment of the Constitution lifted to the constitutional limitations on the powers of State, imposed by Article 14 (equality before law) and Article 19 (freedoms) as regards law giving effect to the policy of the State towards securing the principles — specified in clause (b) or clause (c) of Article 39. These principles are—

(i) that the ownership and control of the matenal resources of the community are so distributed as best to subserve the common good, and

(ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The issue whether the 24th, 25th and 29th Amendments made by Parliament were valid or not was raised in the Supreme Court. In [*Kesavananda Bharti* v. *State of Kerala*, (1973) S.C.C. 225], the majority judgement (of a full bench of 13 judges) upheld the power of Parliament to amend the Constitution provided it did not alter its basic framework.

By the 42nd Amendment in Article 31-C for the words the principles specified in clause (a) or clause (c) of Article 34 the words in all or any of the principles laid down in Part IV were substituted. But this substitution was held to be void by the Supreme Court in *Minerva Mills* v. *Union of India,* (1980) 2 SCC 591.

12. Right to Constitutional Remedies

Article 32 guarantees the enforcement of Fundamental Rights. It is remedial and not substantive in nature. The rest of the Articles 33 to 35 relate to supplementary matters and do not create or guarantee any right. Therefore, we shall discuss Art. 32 first and then rest of the Articles i.e. 33-35 briefly.

Remedies for enforcement of Fundamental Rights

It is a cardinal principle of jurisprudence that where there is a right there is a remedy (*ubi jus ibi remedium*) and if rights are given without there being a remedy for their enforcement, they are of no use. While remedies are available in the Constitution and under the ordinary laws, Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of this fundamental right. It is really a far reaching provision in the sense that a person need not first exhaust the other remedies and then go to the Supreme Court. On the other hand, he can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*, whichever may be appropriate for the enforcement of the right, the violation of which has been alleged. This power of the Supreme Court to issue directions, etc., may

also be assigned to other Courts by Parliament without affecting the powers of the Supreme Court.

The right to move the Supreme Court is itself a guarantee right and the significance of this has been assessed by Gajendragadkar, J. in the following words:

"The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should, in the words of Patanjali Sastri, J., regard itself 'as the protector and guarantor of fundamental rights', and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights. In discharging the duties assigned to it, this Court has to play the role of 'sentinel on the *qui vive'* (*State of Madras* v. *V.G. Row,* AIR 1952 SC 196) and it must always regard it as its solemn duty to protect the said fundamental rights 'zealously and vigilantly' *Daryao* v. *State of U.P.,* AIR 1961 SC 1457).

Where a fundamental right is also available against the private persons such as the right under Articles 17, 23 and 24, the Supreme Court can always be approached for appropriate remedy against the violation of such rights by private individuals. *(Peoples' Union for Democratic Rights* v. *Union of India,* AIR 1982 SC 1473). A petitioners challenge under Article 32 extends not only to the validity of a law but also to an executive order issued under the authority of the law.

The right guaranteed by Article 32 shall not be suspended except as provided in the Constitution. Constitution does not contemplate such suspension except by way of President's order under Article 359 when a proclamation of Emergency is in force.

Again in Article 31C the words appearing at the end of the main paragraph, namely and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy were declared to be void in *Kesavananda's* case.

Supplementary provisions

Articles 33-35 — contain certain supplementary provisions.

Article 33 authorises Parliament to restrict or abrogate the application of fundamental rights in relation to members of armed forces, para-military forces, police forces and analogous forces.

Article 34 is primarily concerned with granting indemnity by law in respect of acts done during operation of martial law. The Constitution does not have a provision authorizing proclamation of martial law. Article 34 says that Parliament may by law indemnify any person in the service of the Union or of State or any other person, for an act done during martial law.

Article 35 provide that wherever parliament has by an express provision been empowered to make a law restricting a fundamental right Parliament alone can do so, (and not the state legislature).

13. Amendability of the Fundamental Rights

(A) Since 1951, questions have been raised about the scope of amending process contained in Article 368 of the Constitution. The basic question raised was whether the Fundamental Rights are amendable. The question whether the word 'Law' in Clause (2) of Article 13 includes amendments or not or whether amendment in Fundamental Rights guaranteed by Part III of the Constitution is permissible under the procedure laid down in Article 368 had come before the Supreme Court in *Shankari Prasad* v. *Union of India,* A.I.R. 1951 S.C. 458, in 1951 where the First Amendment was challenged. The Court held that the power to amend the Constitution including the Fundamental Rights, was contained in Article 368 and that the word 'Law' in Article 13(2) did not include an amendment to the Constitution which was made in exercise of constituent and not legislative power. This decision was approved by the majority judgement in *Sajjan Singh* v. *State of Rajasthan,* A.I.R. 1965 S.C. 845.

Thus, until the case of I.C. *Golak Nath* v. *State of Punjab*, A.I.R. 1967, S.C. 1643, the Supreme Court had been holding that no part of our Constitution was unamenable and that parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368 itself.

(B) **But, in *Golak Nath's* case, a majority overruled the previous decisions and held that the Fundamental Rights are outside the amendatory process if the amendment takes away or abridges any of the rights. The majority, in *Golak Nath's* case, rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Article 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Article 13(2).**

(C) To nullify the effect of *Golak Nath's* case, Parliament passed the Constitution (Twenty-Fourth Amendment) Act in 1971 introducing certain changes in Article 13 and Article 368, so as to assert the power of Parliament (denied to it in *Golak Nath's* case) to amend the Fundamental Rights. **The Constitutional validity of the 24th Amendment was challenged in the case of *Kesavanand Bharti* v. *State of Kerala,* A.I.R. 1973 S.C. 1461. The Supreme Court upheld the validity of 24th Constitutional Amendment holding that Parliament can amend any Part of the Constitution including the Fundamental Rights. But the Court made it clear that Parliament cannot alter the basic structure or framework of the Constitution.** In *Indira Gandhi* v. *Raj Narain,* AIR 1975 S.C. 2299, the appellant challenged the decision of the Allahabad High Court who declared her election as invalid on ground of corrupt practices. In the mean time Parliament enacted the 39th Amendment withdrawing the control of the S.C. over election disputes involving among others, the Prime Minister. The S.C. upheld the challenge of 39th amendment and held that democracy was an essential feature forming part of the basic structure of the Constitution. The exclusion of Judicial review in Election disputes in this manner damaged the basic structure. The *doctrine of 'basic structure'* placed *a limitation on the powers of the Parliament to introduce* substantial alterations or to make a new Constitution.

To neutralise the effect of this limitation, the Constitution (Forty-Second Amendment) Act, 1976 added to Article 368 two new clauses. By new clause (4), it has been provided

that no amendment of the Constitution made before or after the Forty-Second Amendment Act shall be questioned in any Court on any ground. New clause (5) declares that there shall be no limitation whatever on the Constitutional power of parliament to amend by way of addition, variation or repeal the provisions of this Constitution made under Article 368.

The scope and extent of the application of the doctrine of basic structure again came up for discussion before the S.C. in *Minerva Mill Ltd.* v. *Union of India,* (1980) 3 SCC, 625. The Supreme Court unanimously held clauses (4) and (5) of Article 368 and Section 55 of the 42nd Amendment Act as unconstitutional transgressing the limits of the amending power and damaging or destroying the basic structure of the Constitution.

In *Woman Rao* v. *Union of India,* (1981) 2 SCC 362 the Supreme Court held that the amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they , or any one or more of them are beyond the constitutional power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. [See also *Bhim Singh Ji* v. *Union of India* (1981)1 SCC 166.]

In *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261 the Supreme Court held that power of judicial review is an integral and essential feature of the Constitution constituting the basic part , the jurisdiction so conferred on the High Courts and the Supreme Court is a part of in- violable basic structure of the Constitution.

In *I.R. Coelho* v. *State of T.N.,* (2007) 2 SCC 1, Article 31-B as introduced by the Constitution (First amendment) Act 1951 was held to be valid by the Supreme Court. The fundamental question before the nine Judge Constitution Bench was whether on or after 24.4.1973 (i.e. when the basic structure of the Constitution was propounded) it is permissible for the Parliament under Article 31-B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so what is the effect on the power of judicial review of the court. The challenge was made to the validity of the urban land (Ceiling and Regulation) Act, 1976 which was inserted in the Ninth Schedule.

The Supreme Court held that all amendments to the Constitution made on or after 24.4.1973 by which Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touch stone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles under lying them. So also any law included in Schedule IX do not become part of the Constitution. They derive their validity on account of being included in Schedule IX and this exercise is to be tested every time it is undertaken. If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law on the principles declared in this judgement. However, if a law held to be violative of any rights of Part III is subsequently incorporated in the Ninth Schedule after 24.4.1973 such a violation shall be open to challenge on the ground that it destroys or damages the basic structure doctrine.

In *Glanrock Estate (P) Ltd.* v. *State of Tamil Nadu* (2010) 10 SCC 96, the Supreme Court upheld constitutional validity of Constitution (Thirty-fourth) Amendment Act, 1974. By Constitution (Thirty-fourth) Amendment Act, 1974 Gudalur Janman Estates (Abolition & Conversion into Ryotwari) Act, 1969 was inserted in the Ninth Schedule as item 80.

It was alleged that the 1969 Act violated the principle of equality because by the T N Land Reforms (Fixation of Ceiling on Land) Act, 1961 only ceiling surplus forest lands vested in the State but by the 1969 Act all forests vested in the State. The constitutional amendment was further challenged on the ground that it validated the 1969 Act by inserting it in the Ninth Schedule in spite of Section 3 of the 1969 Act having been declared as unconstitutional in Balmadies case, (1972) 2 SCC 133, thereby violating the principles of judicial review, rule of law and separation of powers. (Section 3 had been declared unconstitutional in Balmadies case because it could not be shown how vesting of forest lands was an agrarian reform.)

Upholding the constitutional validity of the amendment, the Supreme Court held:

None of the facets of Article 14 have been abrogated by the Constitution (Thirty-fourth Amendment) Act, 1974, which included the 1969 Act in the Ninth Schedule. When the 1969 Act was put in the Ninth Schedule in1 974, the Act received immunity from Article 31(2) with retrospective effect.

It is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31-B. If every breach of Articl3 14, however egregious, is held to be unprotected by Article 31-B, there would be no purpose in protection by Article 31-B.

In the present case, not even an ordinary principle of equality under Article 14, leave aside the egalitarian equality as an overarching principle, is violated. Even assuming for the same of argument that Article 14 stood violated, even then the 1969 Act in any event stood validated by its insertion in the Ninth Schedule vide the Constitution (Thirty-fourth Amendment) Act, 1974.There is no merit in the submission that the Constitution (Thirty-fourth Amendment) Act, 1974 by which the 1969 Act was inserted in the Ninth Schedule as item 80 seeks to confer naked power on Parliament and destroys basic features of the Constitution, namely, judicial review and separation of powers as well as rule of law.

The doctrine of basic structure provides a touchstone on which validity of the constitutional amendment Act could be judged. Core constitutional values/ overarching principles like secularism; egalitarian equality etc. fall out side the amendatory power under Article 368 of the Constitution and Parliament cannot amend the constitution to abrogate these principles so as to rewrite the constitution. [In *Glanrock Estate (P) Ltd.* v. *State of T N* (2010) 10 SCC 96.]

III. DIRECTIVE PRINCIPLES OF STATE POLICY

The Sub-committee on Fundamental Rights constituted *by the Constituent Assembly* has suggested two types of Fundamental Rights — one which can be enforced in the Courts of law and the other which because of their different nature cannot be enforced in the law Courts. Later on however, the former were put under the head ‘Fundamental Rights’ as Part III which we have already discussed and the latter were put separately in Part IV of the Constitution under the heading ‘Directive Principles of State Policy’ which are discussed in the following pages.

The Articles included in Part IV of the Constitution (Articles 36 to 51) contain certain Directives which are the guidelines for the future Government to lead the country. Article 37 provides that the ‘provisions contained in this part (i) *shall not be enforceable by any Court*, but the principles therein laid down are neverthless (ii) *fundamental in the governance of the country* and it shall be the duty of the state to apply these principles in making laws. The Directives, however, differ from the fundamental rights contained in

Part-III of the Constitution or the ordinary laws of the land in the following respects :

(i) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.

(ii) The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive neither the state nor an individual can violate any existing law.

(iii) The Directives per-se do not confer upon or take away any legislative power from the appropriate legislature.

(iv) The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.

(v) The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.

(vi) Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the Constitution upon the exercise of the legislative and executive power by the state.

Conflict between a Fundamental Right and a Directive Principle

The declarations made in Part IV of the Constitution under the head 'Directive Principles of State Policy' are in many cases of a wider import than the declarations made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two classes of the provisions may easily arise. What will be the legal position if a law enacted to enforce a Directive Principle violates a Fundamental Right? Initialy, the Courts, adopted a strict view in this respect and ruled that a Directive Principle could not override a Fundamental Right, and in case of conflict between the two, a Fundamental Right would prevail over the Directive Principle.

When the matter came before the Supreme Court in *State of Madras* v. *Champakram Dorairajan,* AIR 1951 S.C. 226, where the validity of a Government order alleged to be made to give effect to a Directive Principle was challenged as being violative of a Fundamental Right, the Supreme Court made the observation that :

"The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights."

The Court ruled that while the Fundamental Rights were enforceable, the Directive Principles were not, and so the laws made to implement Directive Principles could not take away Fundamental Rights.

The Supreme Court also pointed out that looking at Directive Principles, we find as was envisaged by the Constitution makers, that they lay down the ideals to be observed by every Government to bring about an economic democracy in this country. Such a democracy actually is our need and unless we achieve it as soon as possible, there is a danger to our political and constitutional democracy of being overthrown by undemocratic and unconstitutional means.

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

(a) State to secure a social order for the promotion of welfare of the people:

(1) The State must strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political should inform all the institutions of the national life (Article 38).

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

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

(i) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(ii) that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods;

(iii) that the operation of the economic systems does not result in the concentration of wealth and means of production to the common detriment;

(iv) equal pay for equal work for both men and women;

(v) that the health and strength of workers and children is not abused and citizens are not forced by the economic necessity to enter avocation unsuited to their age or strength;

(vi) that childhood, and youth are protected against exploitation and against moral and material abandonment (Article 39).

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

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

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

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

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

(ff) The State take steps, by suitable legislation or in any other way, to secure the

participation of workers in the management of undertakings, establishments or other organisations engaged in any industry (Article 43A).

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

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

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

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

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

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

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

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

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

IV. FUNDAMENTAL DUTIES

Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution Forty-second Amendment) Act, 1976.

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

These Fundamental Duties are:

(a) to abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) To cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the

people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

(k) To provide opportunities for education to one's child or, as the case may be, ward between the age of six and fourteen years.

Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their implementation. Fundamental duties can't be enforced by writs (*Surya Narain* v. *Union of India,* AIR 1982 Raj 1). The Supreme Court in *AIIMS Students' Union v. AIIMS* (2002) SCC 428 has reiterated that though the fundamental duties are not enforceable by the courts, they provide a valuable guide and aid to the interpretation of Constitutional and legal issues.

Further, in *Om Prakash* v. *State of U.P.* (2004) 3 SCC 402, the Supreme Court held that fundamental duties enjoined on citizens under Article 51-A should also guide the legislative and executive actions of elected or non-elected institutions and organizations of citizens including municipal bodies.

Test your knowledge

State whether the following statement is "True" or "False"

The fundamental duties are imposed upon the States and not upon the citizens.

- True
- False

Correct answer: False

V. ORDINANCE MAKING POWERS

1. Of the President

In its Article 53 the Constitution lays down that the "executive power of the union shall be vested in the president". The President of India shall, thus, be the head of the 'executive power' of the union. The executive power may be defined as the power of "carrying on the business of Government" or "the administration of the affairs of the state" excepting functions which are vested in any other authority by the Constitution. The various powers that are included within the comprehensive expression 'executive power' in a modern state have been classified under various heads as follows:

(i) Administrative power, i.e., the execution of the laws and the administration of the

departments of Government.

(ii) Military power, i.e., the command of the armed forces and the conduct of war.

(iii) Legislative power, i.e., the summoning prorogation, etc. of the legislature.

(iv) Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

These powers vest in the President under each of these heads, subject to the limitations made under the Constitution.

Ordinance-making power

The most important legislative power conferred on the President is to promulgate Ordinances. Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say it may relate to any subject in respect of which parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.

On the other hand, according to Article 13(3)(a) “Law” includes an “Ordinance”. But an Ordinance shall be of temporary duration. It may be of any nature, i.e., it may be retrospective or may amend or repeal any law or Act of Parliament itself.

This independent power of the executive to legislate by Ordinance has the following peculiarities:

(i) the Ordinance-making power will be available to the President only when both the Houses of Parliament have been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. However, Ordinance can be made even if only one House is in Session because law cannot be made by that House in session alone. Both the Houses must be in session when Parliament makes the law. The President’s Ordinance making power under the Constitution is not a co-ordinate or parallel power of legislation along with Legislature.

(ii) this power is to be exercised by the President on the advice of his Council of Ministers.

(iii) the President must be satisfied about the need for the Ordinance and he cannot be compelled

(iv) the Ordinance must be laid before Parliament when it re-assembles, and shall automatically cease to have effect at the expiration of 6 weeks from the date of re-assembly or before resolutions have been passed disapproving the Ordinance.

(v) the period of six weeks will be counted from the latter date if the Houses reassemble on different dates.

Judicial review of the President’s satisfaction is not totally ruled out.

(i) *A.K. Roy* v. *Union of India,* AIR 1982 SC 710.

(ii) *Cooper* v. *Union of India,* AIR 1970 SC 564.

2. Of the Governor

The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally there shall be a Governor for each State but the same person can be appointed as Governor for two or more states. The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. The head of the executive power to a State is the Governor just as the President for the Union.

Powers: The Governor possesses executive, legislation and judicial powers as the Presidents except that he has no diplomate or military powers like the President.

Ordinance making power

This power is exercised under the head of 'legislative powers'. The Governor's power to make Ordinances as given under Article 213 is similar to the Ordinance making power of the President and have the force of an Act of the State Legislature. He can make Ordinance only when the state Legislature or either of the two Houses (where it is bicameral) is not in session. He must be satisfied that circumstances exist which render it necessary to take immediate action. While exercising this power Governor must act with the aid and advise of the Council of Ministers. But in following cases the Governor cannot promulgate any Ordinance without instructions from the President:

(a) if a Bill containing the same provisions would under this constitution have required the previous section of the President.

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President.

(c) an Act of the state legislature containing the same provisions would under this constitution have been invalid under having been reserved for the consideration of the President, it had received the assent of the President.

The Ordinance must be laid before the state legislature (when it re-assembles) and shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

Test your knowledge

Which of the following powers are held by the Governor?

- Executive power
- Military power
- Legislative power
- Judicial power

Correct answer: a, c, and d

VI. LEGISLATIVE POWERS OF THE UNION AND THE STATES

1. Two Sets of Government

The Indian Constitution is essentially federal.

Dicey, in the "Law of Constitution' has said "Federation means the distribution of the force of the state among a number of co-ordinate bodies, each originating in and controlled by the Constitution". The field of Government is divided between the Federal and State Governments which are not subordinate to one another but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle.

A federal constitution establishes a dual polity as it comprises two levels of Government. At one level, there exists a Central Government having jurisdiction over the whole country and reaching down to the person and property of every individual therein. At the other level, there exists the State Government each of which exercises jurisdiction in one of the States into which the country is divided under the Constitution. A citizen of the federal country thus becomes subject to the decrees of two Government — the central and the regional.

The Union of India is now composed of 28 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. The result is that the States are not delegates of the Union and though there are agencies and devices for Union control over the States in many matters, the States are autonomous within their own spheres as allotted to them by the Constitution. Both the Union and States are equally subject to the limitations imposed by the Constitution, say, for example, the exercise of legislative powers being limited by Fundamental Rights. However, there are some parts of Indian territory which are not covered by these States and such territories are called Union Territories.

The two levels of Government divide and share the totality of governmental functions and powers between themselves. A federal constitution thus envisages a division of governmental functions and powers between the centre and the regions by the sanction of the Constitution.

Chapter I of Part XI (Articles 245 to 255) of the Indian Constitution read with Seventh Schedule thereto covers the legislative relationship between the Union and the States. In analysis of these provisions reveals that the entire legislative sphere has been divided on the basis of:

(a) territory with respect to which the laws are to be made, and

(b) subject matter on which laws are to be made.

2. Territorial Distribution

The Union Legislature, i.e., Parliament has the power to make laws for the whole of the territory of India or any part thereof, and the State Legislatures have the power to make laws for the whole or any part of the territory of the respective States. Thus, while the laws of the Union can be enforced throughout the territory of India, the laws of a State cannot be operative beyond the territorial limits of that States. For example, a law passed by the legislature of the Punjab State cannot be made applicable to the State of Uttar

Pradesh or any other state. However, this simple generalisation of territorial division of legislative jurisdiction is subject to the following clarification.

(A) Parliament

From the territorial point of view, Parliament, being supreme legislative body, may make laws for the whole of India; or any part thereof; and it can also make laws which may have their application even beyond the territory of India. A law made by Parliament is not invalid merely because it has an extra-territorial operation. As explained by Kania C.J. in *A.H. Wadia* v. *Income-tax Commissioner,* A.I.R. 1949 F.C. 18, 25 "In the case of sovereign Legislature, questions of extra-territoriality of any enactment can never be raised in the municipal courts as a ground for challenging its validity. The legislation may offend the rules of International law, may not be recognised by foreign courts, or there may be practical difficulties in enforcing them but these are questions of policy with which the domestic tribunals are not concerned".

A Union Territory is administered directly by the Central Executive. Article 239(1) provides save as otherwise provided, by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify. Article 239A empowers Parliament to create local Legislatures or Council of Ministers or both for certain Union Territories with such constitutional powers and functions, in each case, as may be specified in the law. Article 246(4) provides that Parliament can make a law for a Union Territory with respect to any matter, even if it is one which is enumerated in the State List. With regard to Union Territories, there is no distribution of legislative powers. Parliament has thus plenary powers to legislate for the Union Territories with regard to any subject. These powers are, however, subject to some special provisions of the Constitution.

(B) State Legislature

A State Legislature may make laws only for the state concerned. It can also make laws which may extend beyond the territory of that State. But such law can be valid only on the basis of "territorial nexus". That is, if there is sufficient nexus or connection between the State and the subject matter of the law which falls beyond the territory of the State, the law will be valid. **The sufficiency of the nexus is to be seen on the basis of the test laid down by our Supreme Court in *State of Bombay* v. *R.M.D.C.,* A.I.R. 1957 S.C. 699, according to which two conditions, must be fulfilled:**

(i) the connection must be real and not illusory; and

(ii) the liability sought to be imposed by that law must be pertinent to that connection.

If both the conditions are fulfilled by a law simultaneously then only it is valid otherwise not. To illustrate, in the case cited above a newspaper in the name of "Sporting Star" was published and printed at Bangalore in Mysore (now Karnataka) State. It contained crossword puzzles and engaged in prize competitions. It had wide circulation in the State of Bombay (now Maharashtra) and most of its activities such as the standing invitations, the filling up of the forms and the payment of money took place within that State. The State of Bombay imposed a tax on the newspaper. The publishers challenged the validity of the law on the ground that it was invalid in so far it covered a subject matter falling beyond the territory of that State because the paper was published in another

State. The Supreme Court, applying the doctrine of territorial nexus, held that the nexus was sufficient between the law and its subject-matter to justify the imposition of the tax. So in this way, the state laws may also have a limited extra-territorial operation and it is not necessary that such law should be only one relating to tax-matters.

3. Distribution of Subject Matter of Legislation

In distributing the subjects on which legislation can be made, different constitutions have adopted different pattern. For example, in the U.S.A. there is only one short list on the subject. Either by their express terms or by necessary implication some of them are exclusively assigned to the Central Government and the others concurrent on which Centre and the States both can make laws. The subjects not enumerated in this list, i.e., residuary subjects, have been left for the States. Similar pattern has been followed in Australia but there is one short list in which a few subjects have been exclusively assigned to the Centre and there is a a longer list in which those subjects are enumerated on which Centre and States both can make laws. By necessary implication a few of these concurrent subject have also become exclusively Central subjects. The unenumerated subjects fall exclusively within the State jurisdiction. A different pattern has been adopted in Canada where there are three lists of subjects, one consists of subjects exclusively belonging to the Centre, the other consists of those exclusively belonging to the States and the third where both can make law. Thus residuary subjects fall within the central jurisdiction. The Government of India Act, 1935 followed the Canadian pattern subject to the modification that here the lists of subjects were much more detailed as compared to those in the Canadian Constitution and secondly, the residuary subjects had been left to the discretion of the Governor-General which he could assign either to Centre or to the States.

The Constitution of India, substantially follows the pattern of the Government of India Act, 1935 subject to the modification that the residuary subjects have been left for the Union as in Canada. To understand the whole scheme, the Constitution draws three long lists of all the conceivable legislative subjects. These lists are contained in the VIIth Schedule to the Constitution. List I is named as the Union List. List II as the State List and III as the Concurrent List. Each list contains a number of entries in which the subjects of legislation have been separately and distinctly mentioned. The number of entries in the respective lists is 97, 66 and 47. The subjects included in each of the lists have been drawn on certain basic considerations and not arbitrarily or in any haphazard manner.

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

Concurrent List, Criminal law; marriage and divorce; transfer of property; contracts; economic and social planning; commercial and industrial insurance; monopolies; social security and social insurance; legal, medical and other professions; price control, electricity; acquisition and requisition of property are some of the illustrative matters included in the Concurrent List.

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

(i) The entries relating to tax have been separated from other subjects and thus if a subject is included in any particular List it does not mean the power to impose tax with respect to that also follows. Apart from that, while other subjects are in the first part of the List in one group, the subjects relating to tax are given towards the end of the List.

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

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

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

So far we have discussed the general aspect of the subject matters of legislation or of the items on which Legislation could be passed. The next question that arises is, who will legislate on which subject? Whether, it is both Centre and the States that can make laws on all subjects included in the three Lists or there is some division of power between the two to make laws on these subjects? The answer is that the Constitution makes clear arrangements as to how the powers shall be exercised by the Parliament or the State Legislatures on these subjects. That arrangement is mainly contained in Article 246, but in addition to that, provisions have also been made in Articles 247 to 254 of the Constitution. A wholesome picture of this arrangement is briefly given below.

Test your knowledge

Choose the correct answer

Which pattern was followed by The Government of India Act, 1935?

- Australian
- Canadian
- British
- African

Correct answer: b

4. Legislative Powers of the Union and the States with respect to Legislative Subjects

The arrangement for the operation of legislative powers of the Centre and the States with respect to different subjects of legislation is as follows:

(a) With respect to the subject enumerated in the Union i.e., List I, the Union

Parliament has the *exclusive* power to make laws. The State Legislature has no power to make laws on any of these subjects and it is immaterial whether Parliament has exercised its power by making a law or not. Moreover, this power of parliament to make laws on subjects included in the Union List is notwithstanding the power of the States to make laws either on the subjects included in the State List or the Concurrent List. If by any stretch of imagination or because of some mistake — which is not expected — the same subject which is included in the Union List is also covered in the State List, in such a situation that subject shall be read only in List I and not in List II or List III. By this principle the superiority of the Union List over the other two has been recognised.

(b) With respect to the subjects enumerated in the State List, i.e., List II, the legislature of a State has *exclusive* power to make laws. Therefore Parliament cannot make any law on any of these subjects, whether the State makes or does not make any law.

(c) With respect to the subjects enumerated in the Concurrent List, i.e., List III, Parliament and the State Legislatures both have powers to make laws. Thus, both of them can make a law even with respect to the same subject and both the laws shall be valid in so far as they are not repugnant to each other. However, in case of repugnancy, i.e., when there is a conflict between such laws then the law made by Parliament shall prevail over the law made by the State Legislature and the latter will be valid only to the extent to which it is not repugnant to the former. It is almost a universal rule in all the Constitutions where distribution of legislative powers is provided that in the concurrent field the Central law prevails if it conflicts with a State law. However, our Constitution recognises an exception to this general or universal rule. The exception is that if there is already a law of Parliament on any subject enumerated in the Concurrent List and a state also wants to make a law on the same subject then a State can do so provided that law has been reserved for the consideration of the President of India and has received his assent. Such law shall prevail in that State over the law of Parliament if there is any conflict between the two. However, Parliament can get rid of such law at any time by passing a new law and can modify by amending or repealing the law of the State.

(d) With respect to all those matters which are not included in any of the three lists, Parliament has the exclusive power to make laws. It is called the residuary legislative power of Parliament. The Supreme Court has held that the power to impose wealth-tax on the total wealth of a person including his agricultural land belongs to Parliament in its residuary jurisdiction *(Union of India* v. *H.S. Dhillon,* A.I.R. 1972 S.C. 1061).

Test your knowledge

State whether the following statement is "True" or "False"

With respect to the subjects enumerated in the Concurrent List, only the Parliament and not the State Legislature has powers to make laws.

- True
- False

Correct answer: False

5. Power of Parliament to make Laws on State List

We have just discussed that the State legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach upon them. However, our Constitution makes a few exceptions to this general rule by authorising Parliament to make law even on the subjects enumerated in the State List. Following are the exceptions which the Constitution so recognises:

(a) In the National Interest (Article 249)

Parliament can make a law with respect to a matter enumerated in the State List if the Council of States declares by a resolution supporetd by two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make a law on that matter. By such declaration Parliament gets the authority to legislate on that matter for the whole or part of the country so long as the resolution of the Council of States remains in force. But such resolution shall remain in force for a period not exceeding one year. However, a fresh resolution can be passed a the end of one year to give extended lease to the law of Parliament and that way the law of Parliament can be continued to remain in force for any number of years.

The laws passed by Parliament under the provision cease to have effect automatically after six months of the expiry of the resolution period. Beyond that date, such Parliamentary law becomes inoperative except as regards the thing done or omitted to be done before the expiry of that law.

(b) During a proclamation of emergency (Article 250)

While a Proclamation of Emergency is in operation, Article 250 of the Constitution of India removes restrictions on the legislative authority of the Union Legislature in relation to the subjects enumerated in the State List. Thus, during emergency, Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List. These laws will cease to have effect on the expiration of six months after the proclamation ceases to operate. After that date, such union laws shall become inoperative, except in respect of things done or omitted to be done before the expiry of the said period. Under Article 352, if the President is satisfied that a grave emergency exists where-by the security of India or any part of the territory thereof is threatened whether by war, or external aggression or armed rebellion, he may by proclamation make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation. It is not necessary that there is an actual war or armed rebellion. It is enough that the President is satisfied that there is an imminent danger of such war or armed rebellion as the case may be. The proclamation of emergency shall not be issued except when the decision of the union cabinet that such proclamation may be issued, has been communicated to the President in writing. Every such proclamation shall be laid before each House of Parliament and unless it is approved by both the Houses by a majority of not less than two-thirds of the members present and voting within a period of 30 days thereof, such proclamation shall cease to operate. If any such proclamatioin is issued at a time when the House of People (Lok Sabha) has been dissolved, or the dissolution of the House of People takes place during the period of one month referred to above but before passing the resolution, and if a resolution approving the proclamation has been passed by the Council of State (Rajya Sabha), the proclamation shall cease to operate at the expiry of thirty days from the date

on which the House of the People (Lok Sabha) first sits after it's reconstitution, unless before the expiration of the said period of thirty days a resolution approving the proclamation has also passed by the House of the People.

A proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of passing of the second resolution approving the proclamation. But this period of six months may be extended by a further period of six months, if, within the first six months, both the Houses of Parliament pass a resolution approving the continuance in force of such proclamation. *Prior to the Constitution 44th Amendment Act, the position was that the proclamation when approved by both the Houses of Parliament would remain in the force for an indefinite period unless and until the President chose to revoke the proclamation in exercise of the power conferred by the then Article 352(2)(a).*

Article 353 provides that while a proclamation of emergency is in operation, the Parliament shall have the power to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Union or officers and authorities of the Union as respects that matter, notwithstanding, that it is one which is not enumerated in the Union List.

(c) Breakdown of Constitutional Machinery in a State (Article 356 and 357)

In case the Governor of a State reports to the President, or he is otherwise satisfied that the Government of a State cannot be carried on according to the provisions of the Constitution, then he (President) can make a proclamation to that effect. By that proclamation, he can assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State, and declare that the powers of Legislature of that State shall vest in Parliament. Parliament can make laws with respect to all state matters as regards the particular state in which there is a breakdown of constitutional machinery and is under the President's rule. Further it is not necessary that the legislature of the concerned state should be suspended or dissolved before it is brought under the President's rule, but practically it so happens. It is important to note that the President cannot, however, assume to himself any of the powers vested in or exercisable by a High Court or to suspend, either in whole or in part, the operation of any provision of the Constitution relating to the High Courts.

Under the Constitution of India, the power is really that of the Union Council of Ministers with the Prime Minister as its head. The satisfaction of the President contemplated by this Article is subjective in nature. The power conferred by Article 356 upon the President is a conditional power. It is not an absolute power. The existence of material-which may comprise of, or include, the report(s) of the Governor — is a pre-condition. The satisfaction must be formed on relevant materials. Though the power of dissolving the Legislative Assembly can be said to be implicit in Clause (1) of Article 356, it must be held, having regard to the overall Constitutional scheme that the President shall exercise it only after the proclamation is approved by both the Houses of Parliament under Clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly under Sub-clause (c) of Clause (1). The proclamation under Clause (1) can be issued only where the situation contemplated by the clause arises. Clause (3) of Article 356, is conceived as a control on the power of the President and also as a safeguard against its abuse (*S.R. Bommai* v. *Union of India,* AIR 1994 SC 1918).

Clause 2 of Article 356 provides that any such proclamation may be revoked or varied by a subsequent proclamation. It may, however, be noted that the presidential proclamation is valid only for six months at a time and that also if approved by both the Houses of Parliament within a period of two months from the date of proclamation. A fresh proclamation can be issued to extend the life of the existing one for a further period of six months but in no case such proclamation can remain in force beyond a consecutive period of three years. The Constitution (Fourty-Second) Amendment Act, 1976 inserted a new clause (2) in Article 357. It provides that any law made in exercise of the Power of the Legislature of the State by Parliament or the President or other Authority referred to in Sub-clause (a) of Clause (1) which Parliament or the President or such other Authority would not, but for the issue of a proclamation under Article 356 have been competent to make shall, after the proclamation has ceased to operate, continue in force until altered, or repealed or amended by a competent Legislature or other authority. This means that the laws made during the subsistence of the proclamation shall continue to be in force unless and until they are altered or repealed by the State Legislature. So an express negative act is required in order to put an end to the operation of the laws made in respect of that State by the Union.

The action of the President under Article 356 is a constitutional function and the same is subject to judicial review. The Supreme Court or High Court can strike down the proclamation if it is found to be *mala fide* or based on wholly irrelevant or extraneous grounds. If the Court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. (see *S.R. Bommai's case*).

(d) On the request of two or more States (Article 252)

Article 252 of the Constitution enumerates the power of Parliament to legislate for state. The exercise of such power is conditional upon an agreement between two or more States requesting Parliament to legislate for them on a specified subject. This article provides that, if two or more States are desirous that on any particular item included in the State List there should be a common legislation applicable to all such States then they can make a request to Parliament to make such law on that particular subject. Such request shall be made by passing a resolution in the legislatures of the State concerned. If request is made in that form then parliament can make law on that subject as regards those States. The law so made may be adopted by other States also, by passing resolutions in their legislatures. Once, however, such law has been made, the power of those State legislatures which originally requested or which later on adopted such law is curtailed as regards that matter; and only Parliament can amend, modify or repeal such a law on similar request being made by any State or States. If any of the consenting States makes a law on that subject then its law will be invalid to the extent to which it is inconsistent with a law of Parliament.

To take an example, Parliament passed the Prize Competitions Act, 1955 under the provisions of the Constitution.

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

Parliament has exclusive power with respect to foreign affairs and entering into treaties and agreements with foreign countries and implementing of treaties and agreements and conventions with foreign countries. But a treaty or agreement concluded

with another country may require national implementation and for that purpose a law may be needed. To meet such difficulties, the Constitution authorises Parliament to make law on any subject included in any list to implement:

(i) any treaty, agreement or convention with any other country or countries, or

(ii) any decision made at any international conference, association or other body.

These five exceptions to the general scheme of distribution of legislative powers on the basis of exclusive Union and State Lists go to show that in our Constitution there is nothing which makes the States totally immune from legislative interference by the Centre in any matter. There remains no subject in the exclusive State jurisdiction which cannot be approached by the Centre in certain situations. But by this, one must not conclude that the distribution of legislative power in our Constitution is just illusory and all the powers vest in the Centre. On the other hand, the distribution of legislative powers is real and that is the general rule but to face the practical difficulties the Constitution had made a few exceptions which are to operate within the circumscribed sphere and conditions.

6. Interpretation of the Legislative Lists

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

(a) *Plenary Powers:* The first and foremost rule is that if legislative power is granted with respect to a subject and there are no limitations imposed on the power, then it is to be given the widest scope that its words are capable of, without, rendering another item nugatory. In the words of Gajenderagadkar, C.J.

"It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. A general word used in an entry ... must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it (*Jagannath Baksh Singh* v. *State of U.P.,* AIR 1962 SC 1563).

Thus, a legislature to which a power is granted over a particular subject may make law on any aspect or on all aspects of it; it can make a retrospective law or a prospective law and it can also make law on all matters ancillary to that matter. For example, if power to collect taxes is granted to a legislature, the power not to collect taxes or the power to remit taxes shall be presumed to be included within the power to collect taxes.

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

(c) *Pith and Substance Rule:* The rule of pith and substance means that where a law in reality and substance falls within an item on which the legislature which

enacted that law is competent to legislate, then such law shall not become invalid merely because it incidentally touches a matter outside the competence of legislature. In a federal Constitution, as was observed by Gwyer C.J. "it must inevitably happen from time to time that legislation though purporting to deal with a subject in one list touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere" (*Prafulla Kumar* v. *Bank of Khulna,* AIR 1947 PC 60). Therefore, where such overlapping occurs, the question must be asked, what is, "pith and substance" of the enactment in question and in which list its true nature and character is to be found. For this purpose the enactment as a whole with its object and effect must be considered. By way of illustration, acting on entry 6 of List II which reads "Public Health and Sanitation". Rajasthan Legislature passed a law restricting the use of sound amplifiers. The law was challenged on the ground that it dealt with a matter which fell in entry 81 of List I which reads: "Post and telegraphs, telephones, wireless broadcasting and other like forms of communication", and, therefore, the State Legislature was not competent to pass it. The Supreme Court rejected this argument on the ground that the object of the law was to prohibit unnecessary noise affecting the health of public and not to make a law on broadcasting, etc. Therefore, the pith and substance of the law was "public health" and not "broadcasting" (*G. Chawla* v. *State of Rajasthan,* AIR 1959 SC 544).

(d) *Colourable Legislation:* It is, in a way, a rule of interpretation almost opposite to the one discussed above. The Constitution does not allow any transgression of power by any legislature, either directly or indirectly. However, a legislature may pass a law in such a way that it gives it a colour of constitutionality while, in reality, that law aims at achieving something which the legislature could not do. Such legislation is called colourable piece of legislation and is invalid. **To take an example in *Kameshwar Singh* v. *State of Bihar,* A.I.R. 1952 S.C. 252, the Bihar Land Reforms Act, 1950 provided that the unpaid rents by the tenants shall vest in the state and one half of them shall be paid back by the State to the landlord or zamindar as compensation for acquisition of unpaid rents. According to the provision in the State List under which the above law was passed, no property should be acquired without payment of compensation. The question was whether the taking of the whole unpaid rents and then returning half of them back to them who were entitled to claim, (i.e., the landlords) is a law which provides for compensatioin. The Supreme Court found that this was a colourable exercise of power of acquisition by the State legislature, because "the taking of the whole and returning a half means nothing more or less than taking of without any return and this is naked confiscation, no matter in whatever specious form it may be clothed or disguised".**

The motive of the legislature is, however, irrelevant for the application of this doctrine. Therefore, if a legislature is authorised to do a particular thing directly or indirectly, then it is totally irrelevant as to with what motives — good or bad — it did that.

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

Test your knowledge

State whether the following statement is "True" or "False"

During emergency, the Parliament shall have power to make laws for the whole or any part of the territory of India with respect to all matters in the State List.

- True
- False

Correct answer: True

VII. FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

This heading has been given to Part XIII of the Constitution. This part originally consisted of seven articles — Articles 301 to 307 — of which one (Art. 306) has been repealed. Out of these articles it is the first, i.e., 301 which, in real sense, creates an overall comprehensive limitation on all legislative powers of the Union and the State which affect the matters covered by that Article. This Article guarantees the freedom of trade, commerce and intercourse and runs in the following words:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

The opening words of this Article clearly show, and it has been so held by the Supreme Court, that except the provisions contained under this Part, i.e., Articles 302 to 307 under no other provision of the Constitution the free flow of trade and commerce can be interfered with. The object of the freedom declared by this Article is to ensure that the economic unity of India may not be broken by internal barriers.

The concept *of trade, commerce and intercourse* today is so wide that from ordinary sale and purchase it includes broadcasting on radios, communication on telephone and even to non-commercial movement from one place to another place. If such is the scope of trade and commerce then any law relating to any matter may affect the freedom of trade, commerce and intercourse, e.g., it may be said that the law which imposes the condition of licence for having a radio violates the freedom of trade and commerce, or a law which regulates the hours during which the electricity in a particular locality shall be available may be called as affecting the freedom of trade and commerce because during those hours one cannot use the radio or television or one cannot run this factory. If that view is taken then every law shall become contrary to Articles 301 and unless saved by Articles 302 to 307 shall be unconstitutional. **To avoid such situations the Supreme Court in the very first case on the matter (*Atiabari Tea Co.* v. *State of Assam,* A.I.R. 1951 S.C. 232) declared that only those laws which "directly and immediately" restrict or impede the freedom of trade and commerce are covered by Article 301 and such laws which directly and incidentally affect the freedom guaranteed in that article are not within the reach of Article 301.** The word 'intercourse' in this article is of

wide import. It will cover all such intercourse as might not be included in the words 'trade and commerce'. Thus, it would cover movement and dealings even of a non-commercial nature (*Chobe* v. *Palnitkar,* A.I.R. 1954 Hyd. 207). The word, free in Article 301 cannot mean an absolute freedom. Such measures as traffic regulations licensing of vehicles etc. are not open to challenge.

It was further held in the next case (*Automobile Transport Ltd.* v. *State of Raj.,* A.I.R. 1962 S.C. 1906) that regulations that facilitate the freedom of trade and commerce and compensatory taxes are also saved from the reach of Article 301. About compensatory taxes the Supreme Court has doubted the correctness of its own views in a later case *Khyerbari Tea Co.* v. *State of Assam,* A.I.R. 1964 S.C. 925.

With respect to regulatory laws also, we may say that if they are the laws which facilitate the freedom of trade and commerce then they are not at all laws which impede the free flow of trade and commerce directly or indirectly. The freedom of trade and commerce guaranteed under Article 301 applies throughout the territory of India; it is not only to inter-state but also to intra-state trade commerce and intercourse. But in no way it covers the foreign trade or the trade beyond the territory of India. Therefore, the foreign trade is free from the restriction of Article 301.

Trade and commerce which are protected by Article 301 are only those activities which are regarded as lawful trading activities and are not against policy. The Supreme Court held that gambling is not "trade". Similarly, prize competitions being of gambling in nature, cannot be regarded as trade or commerce and as such are not protected under Article 301 (*State of Bombay* v. *RMDC,* AIR 1957 SC 699).

The freedom guaranteed by Article 301 is not made absolute and is to be read subject to the following exceptions as provided in Articles 302-305.

(a) Parliament to Impose Restriction in the Public Interest

According to Article 302 Parliament may, by law, impose such restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest.

(b) Parliament to make Preference or Discrimination

Parliament cannot by making any law give preference to one State over the other or make discrimination between the States except when it is declared by that law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India [Article 303 (1) and (2)].

(c) Power of the State Legislature

The Legislature of a State may by law:

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse within the State as may be required in the public interest.

However, no bill or amendment for making a law falling in this provision can be

introduced or moved in the Legislature of a State without the previous sanction of the President. [Article 304]

In *Kalyani Stores* v. *State of Orissa,* Supreme Court held that Article 304 enables State legislature to impose taxes on goods from other States, if goods produced within the state are subjected to such taxes. A subsequent assent of President is also sufficient, as held in *Karnataka* v. *Hansa Corpn.,* (1981) SC 463.

(d) Saving of Existing Laws

The law which was already in force at the commencement of the Constitution shall not be affected by the provisions of Article 301 except in so far as the President may, by order, otherwise direct (Art 305).

(e) Saving of Laws providing for State Monopoly

The laws which create State monopoly in any trade, etc. are saved from attack under Article 301, i.e., they are valid irrespective of the fact that they directly impede or restrict the freedom of trade and commerce. So, if the State creates a monopoly in road, transporters cannot complain that their freedom of trade and commerce has been affected or if the State created monopoly in banking then other bankers cannot complain that their freedom of trade and commerce has been restricted.

The last provision (Article 307) in Part XIII which need not even be mentioned except by way of information authorises Parliament to appoint by law such authority as it considers appropriate for carrying out purposes of Articles 301 to 304 and to confer on the authority so appointed such powers and duties as it thinks necessary.

VIII. CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

Creation of monopoly rights in favour of a person or body of persons to carry on any business *prima facie* affects the freedom of trade. But in certain circumstances it can be justified.

After the Constitution (Amendment) Act, 1951, the States create a monopoly in favour of itself, without being called upon to justify its action in the Court as being reasonable.

Sub-clause (ii) of clause (6) of Article 19 makes it clear that the freedom of profession, trade or business will not be understood to mean to prevent the state from undertaking either directly or through a corporation owned or controlled by it, any trade, business, industry or service, whether to the exclusion, complete or partial, citizens or otherwise.

If a law is passed creating a State monopoly the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the state monopoly. Sub-clause (ii) of clause (6) protects only the essential and basic provisions. If there are other provisions which are subsidiary or incidential to the operation of the monopoly they do not fall under Article 19(6)(ii). **It was held by Shah, J. in *R.C. Cooper* v. *Union of India,* (1970) 1 SCC 248 (known as *Bank Nationalisation case)*, that the impugned law which prohibited the named banks from carrying the banking business was a necessary incident of the business assumed by the Union and hence was not liable to be challenged under Article**

19(6)(ii) in so far as it affected the right of a citizen to carry on business.

IX. THE JUDICIARY

Courts

The Supreme Court

The Courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country (both for matters of ordinary law and for interpreting the Constitution) is an institution created by the Constitution. Immediately before independence, the Privy Council was the highest appellate authority for British India, for matters arising under ordinary law. But appeals from High Courts in constitutional matters lay to the Federal Court (created under the Government of India Act, 1935) and then to the Privy Council. The Supreme Court of India, in this sense, has inherited the jurisdiction of both the Privy Council and the Federal Court. However, the jurisdiction of the Supreme Court under the present Constitution is much more extensive than that of its two predecessors mentioned above.

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

High Courts

The High Courts that function under the Constitution were not created for the first time by the Constitution. Some High Courts existed before the Constitution, although some new High Courts have been created after 1950. The High Courts in (British) India were established first under the Indian High Courts Act, 1861 (an Act of the U.K. Parliament). The remaining High Courts were established or continued under the Constitution or under special Acts. High Courts for each State (or Group of States) have appellate, civil and criminal jurisdiction over lower Courts. High Courts have writ jurisdiction to enforce fundamental rights and for certain other purposes.

Some High Courts (notably) Bombay, Calcutta and Delhi, have ordinary original civil jurisdiction (i.e. jurisdiction to try regular civil suits) for their respective cities. High Courts can also hear references made by the Income Tax Appellate Tribunal under the Income Tax Act and other tribunals.

It should be added, that the "writ" jurisdiction vested at present in all High Courts by the Constitution was (before the Constitution came into force) vested only in the High Courts of Bombay, Calcutta and Madras (i.e. the three Presidency towns).

Subordinate Courts

Finally, there are various subordinate civil and criminal courts (original and appellate), functioning under ordinary law. Although their nomenclature and powers have undergone change from time to time, the basic pattern remains the same. These have been created, not under the Constitution, but under laws of the competent legislature. Civil Courts are created mostly under the Civil Courts Act of each State. Criminal courts are created mainly under the Code of Criminal Procedure.

Civil Courts

In each district, there is a District Court presided over by the District Judge, with a number of Additional District Judges attached to the court. Below that Court are Courts of Judges (sometimes called subordinate Judges) and in, some States, Munsiffs. These Courts are created under State Laws.

Criminal Courts

Criminal courts in India primarily consist of the Magistrate and the Courts of Session. Magistrates themselves have been divided by the Code of Criminal Procedure into 'Judicial' and 'Executive' Magistrates. The latter do not try criminal prosecutions, and their jurisdiction is confined to certain miscellaneous cases, which are of importance for public tranquillity and the like. Their proceedings do not end in conviction or acquittal, but in certain other types of restrictive orders. In some States, by local amendments, Executive Magistrates have been vested with powers to try certain offences.

As regards Judicial Magistrates, they are of two classes : Second Class and First Class. Judicial Magistrates are subject to the control of the Court of Session, which also is itself a Court of original jurisdiction. The powers of Magistrates of the two classes vary, according to their grade. The Court of Session can try all offences, and has power to award any sentence, prescribed by law for the offence, but a sentence of death requires confirmation by the High Court.

In some big cities (including the three Presidency towns and Ahmedabad and Delhi), the Magistrates are called Metropolitan Magistrates. There is no gradation *inter se*. Further, in some big cities (including the three Presidency towns and Ahmedabad and Hyderabad), the Sessions Court is called the "City Sessions Court", its powers being the same as those of the Courts of Session in the districts.

Special Tribunals

Besides these Courts, which form part of the general judicial set up, there are hosts of specialised tribunals dealing with direct taxes, labour, excise and customs, claims for accidents caused by motor vehicles, copyright and monopolies and restrictive trade practices.

For the trial of cases of corruption, there are Special Judges, appointed under the Criminal Law Amendment Act, 1952.

Test your knowledge

Choose the correct answer

Which of the following courts can advise the President on a reference made by the President on questions of fact and law?

(a) Supreme court

(b) High court

(c) Criminal court

(d) Civil court

Correct answer: (a)

X. WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

In the words of Dicey, prerogative writs are *'the bulwark of English Liberty'.* The expression 'prerogative writ' is one of Engish common law which refers to the extraordinary writs granted by the sovereign, as fountain of justice on the ground of inadequacy of ordinary legal remedies. In course of time these writs were issued by the High Court as extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. Under the Constitution by virtue of Article 226, every High Court has the power to issue directions or orders or writs including writs in the nature of *Habeas corpus, Mandamus, Prohibition, Quo warranto* and *Certiorari* or any of them for the enforcement of fundamental rights stipulated in Part III of the Constitution or for any other purpose.This power is exercisable by each High Court throughout the territory in relation to which it exercises jurisdiction. Where an effective remedy is available, the High Court should not readily entertain a petition under Article 226 of the constitution of India e.g. under the Companies Act, a share holder has very effective remedies for prevention of oppression and mismanagement. Consequently High Court should not entertain a petition under the said Article (*Ramdas Motors Transport Company Limited* v. *T.A. Reddy,* AIR 1997 SC 2189).

The Supreme Court could be moved by appropriate proceedings for the issue of directions or orders or writs, as referred to under Article 226 for the enforcement of the rights guaranteed by Part III of the Constitution. Article 32 itself being a fundamental right, the Constitutional remedy of writ is available to anyone whose fundamental rights are infringed by state action. Thus we see the power of the High Courts to issue these writs is wider than that of the Supreme Court, Whereas:

(a) an application to a High Court under Article 226 will lie not only where some other limitation imposed by the Constitution, outside Part III, has been violated, but, an application under Article 32 shall not lie in any case unless the right infringed is 'Fundamental Right' enumerated in Part III of the Constitution;

(b) while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Article 226, issue a writ against any person, Government or other authority only if such person or authority is physically resident or located within the territorial jurisdiction of the particular High Court or if the cause of action arises within such jurisdiction.

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as "the protector and guarantor of fundamental rights" by Article 32 (1). Although the Constitution has provided for concurrent writ jurisdiction of the High Courts it is not necessary, that an aggrieved petitioner should first apply to the High Court and then to the Supreme Court (*Romesh Thappar* v*. Madras*).

The jurisdiction of the High Court also extends to the enforcement of rights other than fundamental rights provided there is a *public duty*. The Supreme Courts jurisdiction to issue writs extends to all fundamental rights (*Common Cause* v *Union of India,* A.I.R. 1999 SC 2979).

Types of Writs

A brief discription of the various types of writs is given below:

1. Habeas Corpus

The writ of *Habeas corpus* - an effective bulwark of personal liberty – is a remedy available to a person who is confined without legal justification. The words '*Habeas Corpus*' literally mean "to have the body". When a *prima facie* case for the issue of writ has been made then the Court issues a *rule nisi* upon the relevant authority to show cause why the writ should not be issued. This is in national order to let the Court know on what grounds he has been confined and to set him free if there is no justification for his detention. This writ has to be obeyed by the detaining authority by producing the person before the Court. Under Articles 32 and 226 any person can move for this writ to the Supreme Court and High Court respectively. The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty for the issuance of the writ of *Habeas Corpus* as no man can be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner. An appeal to the Supreme Court of India may lie against an order granting or rejecting the application (Articles 132, 134 or 136). The disobedience to this writ is met with by punishment for contempt of Court under the Contempt of Courts Act.

2. Mandamus

The word '*Mandamus'* literally means we command. The writ of *mandamus* is, a command issued to direct any person, corporation, inferior court, or Government requiring him or it do a particular thing specified therein which pertains to his or its office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction while resort to certiorari and prohibition arises when the tribunal has wrongly exercised jurisdiction or exceeded its jurisdiction and are available only against judicial and quasi-judicial bodies. *Mandamus* can be issued against any public authority. It commands activity. The writ is used for securing judicial enforcement of public duties. In a fit case, Court can direct executives to carry out Directive Principles of the Constitution through this writ (*State of Maharashtra* v. *MP Vashi,* 1995 (4) SCALE). The applicant must have a legal right to the performance of a legal duty by the person against whom the writ is prayed for. It is not issued if the authority has a discretion.

The Constitution of India by Articles 226 and 32 enables *mandamus* to be issued by the High Courts and the Supreme Court to all authorities.

Mandamus does not lie against the President or the Governor of a State for the exercise of their duties and power (Article 361). It does not lie also against a private individual or body except where the state is in collusion with such private party in the matter of contravention of any provision of the Constitution of a statute. It is a discretionary remedy and the High Court may refuse if alternative remedy exists except in case of infringement of fundamental rights.

3. Prohibition

A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

While *mandamus* commands activity, prohibition commands inactivity, it is available only against judicial or quasi judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent this writ

may be of right and not a matter of discretion.

4. Certiorari

It is available to any person, wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially in excess of their legal authority" (See *The King* v. *Electricity Commissioners,* (1924) I.K.B. 171, P. 204-5).

The writ removes the proceedings from such body to the High Court, to quash a decision that goes beyond its jurisdiction. Under the Constitution of India, all High Courts can issue the writ of *certiorari* throughout their territorial jurisdiction when the subordinate judicial authority acts (i) without or in excess of jurisdiction or in (ii) contravention of the rules of natural justice or (iii) commits an error apparent on the face of the record. The jurisdiction of the Supreme Court to issue such writs arises under Article 32. Although the object of both the writs of *prohibition* and of *certiorari* is the same, prohibition is available at an earlier stage whereas *certiorari* is available at a later stage but in similar grounds i.e. *Certiorari* is issued after authority has exercised its powers.

5. Quo Warranto

The writ of *quo warranto* enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is an usurper. The holder of the office has to show to the court under what authority he holds the office. It is issued when:

(i) the office is of public and of a substantive nature,

(ii) created by statute or by the Constitution itself, and

(iii) the respondent has asserted his claim to the office. It can be issued even though he has not assumed the charge of the office.

The fundamental basis of the proceeding of *Quo warranto* is that the public has an interest to see that a lawful claimant does not usurp a public office. It is a discretionary remedy which the court may grant or refuse.

Test your knowledge

Choose the correct answer

Which of the following writs enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is a usurper?

(a) Habeas Corpus
(b) Mandamus
(c) Certiorari
(d) Quo Warranto

Correct answer: d

XI. DELEGATED LEGISLATION

The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances which cannot always be foreseen, in implementing our socio-economic policies pursuant to the establishment of a

welfare state as contemplated by our Constitution, have made it necessary for the legislatures to delegate its powers. Further, the Parliamentary procedure and discussions in getting through a legislative measure in the Legislatures is usually time consuming.

The three relevant justifications for delegated legislation are:

(i) the limits of the time of the legislature;

(ii) the limits of the amplitude of the legislature, not merely its lack of competence but also its sheer inability to act in many situations, where direction is wanted; and

(iii) the need of some weapon for coping with situations created by emergency.

The delegation of the legislative power is what Hughus, Chief Justice called, flexibility and practicability *(Currin* v. *Wallace* 83 L. ed. 441).

Classification of delegated legislation

The American writers classify delegated legislation as contingent and subordinate. Further, legislation is either supreme or subordinate. The Supreme Law or Legislation is that which proceeds from supreme or sovereign power in the state and is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some sovereign or supreme authority.

Classification of Subordinate Legislation

1. Executive Legislation

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

2. Judicial Legislation

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

3. Municipal Legislation

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

4. Autonomous Legislation

Under this head fall the regulations which autonomus bodies such as Universities make in respect of matters which concern themselves.

5. Colonial Legislation

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

Principles applicable

A body, to which powers of subordinate legislation are delegated, must directly act within the powers which are conferred on it and it cannot act beyond its powers except to the extent justified by the doctrine of implied powers. The doctrine of implied powers means where the legislature has conferred any power, it must be deemed to have also granted any other power without which that power cannot be effectively exercised.

Subordinate legislation can not take effect unless published. Therefore, there must be promulgation and publication in such cases. Although there is no rule as to any particular kind of publication.

Conditional legislation is defined as a statute that provides controls but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statue. In other words in sub-ordinate legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation, the power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority, the time and manner of carrying its legislation into effect (*Hamdard Dawa Khana* v. *Union of India,* AIR, 1960 SC 554).

While delegating the powers to an outside authority the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby. If an Act is contrary to the provisions of the Constitution, it is void. Our Constitution embodies a doctrine of judicial review of legislation as to its conformity with the Constitution.

Test your knowledge

State whether the following statement is "True" or "False"

The Subordinate Legislation is defined as a statute that provides control but specifies that they are to come into effect only when a given administrative authority finds the existence of conditions defined in the statute.

- True
- False

Correct answer: False

In England, however, the position is different. Parliament in England may delegate to any extent and even all its power of law-making to an outside authority. In U.S.A., the Constitution embodies the doctrine of separation of powers, which prohibits the executive being given law making powers. **On the question whether there is any limit beyond which delegation may not go in India, it was held in *In re-Delhi Laws* Act, 1912 AIR 1951 SC 332, that there is a limit that essential powers of legislation or essential legislative functions cannot be delegated. However, there is no specific provision in the Constitution prohibiting the delegation. On the question whether such doctrine is recognised in our Constitution, a number of principles in various judicial decisions have been laid down which are as follows:**

(a) The primary duty of law-making has to be discharged by the Legislature itself. The Legislature cannot delegate its primary or essential legislative function to an outside authority in any case.

(b) The essential legislative function consists in laying down the 'the policy of the law' and 'making it a binding rule of conduct'. The legislature, in other words must itself lay down the legislative policy and principles and must afford sufficient guidance to the rule-making authority for carrying out the declared policy.

(c) If the legislature has performed its essential function of laying down the policy of the law and providing guidance for carrying out the policy, there is no constitutional bar against delegation of subsidiary or ancillary powers in that behalf to an outside authority.

(d) It follows from the above that an Act delegating law-making powers to a person or body shall be invalid, if it lays down no principles and provides no standard for the guidance of the rule-making body.

(e) In applying this test the court could take into account the statement in the preamble to the act and if said statements afford a satisfactory basis for holding that the legislative policy or principle has been enunciated with sufficient accuracy and clarity, the preamble itself would satisfy the requirements of the relevant tests.

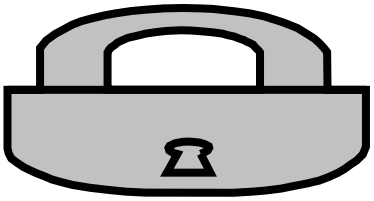
(f) In every case, it would be necessary to consider the relevant provisions of the Act in relation to the delegation made and the question as to whether the delegation made is *intra vires* or not will have to be decided by the application of the relevant tests.

(g) Delegated legislation may take different forms, viz. conditional legislation, supplementary legislation subordinate legislation etc., but each form is subject to the one and same rule that delegation made without indicating intelligible limits of authority is constitutionally incompetent.

LESSON ROUND-UP

- The Constitution of India came into force on January 26, 1950. The preamble to the Constitution sets out the aims and aspirations of the people of India. Constitution of India is basically federal but with certain unitary features. The essential features of a Federal Polity or System are – dual Government, distribution of powers, supremacy of the Constitution, independence of Judiciary, written Constitution, and a rigid procedure for the amendment of the Constitution.
- The fundamental rights are envisaged in Part III of the Constitution. These are: (i) Right to Equality; (ii) Right to Freedom; (iii) Right against Exploitation; (iv) Right to Freedom of Religion; (v) Cultural and Educational Rights; (vi) Right to Constitutional Remedies.
- The Directive Principles as envisaged by the Constitution makers lay down the ideals to be observed by every Government to bring about an economic democracy in this country.
- Article 51A imposing the fundamental duties on every citizen of India was inserted by the Constitution (Forty-second Amendment) Act, 1976. The objective in introducing these duties is not laid down in the Bill except that since the duties of the citizens are not specified in the Constitution, so it was thought necessary to introduce them.
- The most important legislative power conferred on the President is to promulgate Ordinances. The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of the Parliament. The Governor's power to make Ordinances is similar to the Ordinance making power of the President and has the force of an Act of the State Legislature.
- The Union of India is composed of 28 States and both the Union and the States derive their authority from the Constitution which divides all powers-legislative, executive and financial, between them. Both the Union and States are equally subject to the limitations imposed by the Constitution. However, there are some parts of Indian territory which are not covered by these States and such territories are called Union Territories.
- The courts in the Indian legal system, broadly speaking, consist of (i) the Supreme Court, (ii) the High Courts, and (iii) the subordinate courts. The Supreme Court, which is the highest Court in the country is an institution created by the Constitution. The jurisdiction of the Supreme Court is vast including the writ jurisdiction for enforcing Fundamental Rights.
- The increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances, have made it necessary for the legislatures to delegate its powers.
- While delegating the powers to an outside authority, the legislature must act within the ambit of the powers defined by the Constitution and subject to the limitations prescribed thereby.

SELF-TEST QUESTIONS



1. The Constitution of India is “federal in character but with unitary features”. Comment.
2. Are the following laws valid?
   (a) A law of Parliament made with respect to a subject enumerated in the State list on which State has made no law,
   (b) A law of Parliament on a subject enumerated in the concurrent list on which the State law already exists.
3. Is a law made by Parliament with respect to a matter included in the State List and made applicable to the State of U.P. valid in any of the following situations?
   (a) When proclamation of emergency is in force.
   (b) When there has been a breakdown of constitutional machinery in the State.
4. What is the test of reasonable classification and how does it operate? Illustrate.
5. A person can approach the Supreme Court directly if—
   (a) any of his fundamental rights is violated;
   (b) any of his right is violated
   Which statement is correct?
6. Define the term State with reference to the rights guaranteed under Part III of the Constitution of India.
7. Freedom of trade, commerce and intercourse is violated.
   (a) if a law affects freedom to trade, commerce or intercourse;
   (b) if a law directly and immediately restricts the flow of trade commerce and intercourse.
   Which of the two statements is correct?
8. Discuss the Ordinance making powers of the President and of the Governor.
9. Does a law made by a State to create monopoly rights in favour of a person to carry on any business affect the freedom of trade?
10. Write short notes on:
    (i) Delegated Legislation.
    (ii) *Writ of Habeas Corpus.*
    (iii) *Writ of Mandamus.*
    (iv) *Writ of Certiorari.*
    (v) Right to Constitutional Remedies.

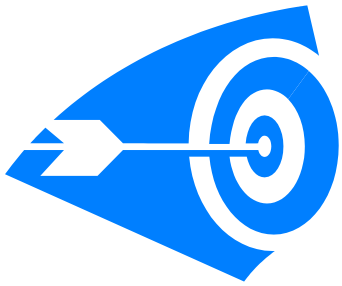
11. Write a note on ‘Equality before the Law’.
12. Discuss the relationship between Fundamental Rights and Directive Principles of State Policy.
13. Discuss the rights of minorities to establish their own institutions.
14. The freedom of speech and expression guaranteed by the Constitution of India is not absolute. Discuss with the help of decided cases.
15. When and how does the Constitution of India permit the Government to restrict the freedom of trade and commerce?

Suggested Readings:

(1) V.N. Shukla’s the Constitution of India — *Prof. Mahendra P. Singh*
(2) Constitution of India — *Durga Das Basu*
(3) Constitutional Law of India — *H.M. Seervai*
(4) Constitutional Law — *Justice M. Hidayatullah*

STUDY II

INTERPRETATION OF STATUTES



LEARNING OBJECTIVES

The complexity of modern legislation demands a clear understanding of the principles of construction applicable to it. The students will understand the general principles of interpretation as well as internal and external aids in interpretation of the statutes.

At the end of the Study Lesson you should be able to understand:

- Need for and Object of Interpretation
- General Principles of Interpretation
- Internal and External Aids in Interpretation.

1. INTRODUCTION

A statute has been defined as "the will of the legislature" (*Maxwell, Interpretation of Statutes*, 11th ed. p. 1). Normally, it denotes the Act enacted by the legislature.

A statute is thus a written "will" of the legislature expressed according to the form necessary to constitute it as a law of the state, and rendered authentic by certain prescribed forms and solemnities. (*Crawford,* p. 1)

According to *Bouvier's Law Dictionary*, a statute is "a law established by the act of the legislative power i.e. an Act of the legislature. The written will of the legislature. Among the civilians, the term 'statute' is generally applied to laws and regulations of every sort law which ordains, permits or prohibits anything which is designated as a statute, without considering from what source it arises".

The Constitution of India does not use the term 'statute' but it employs the term "law" to describe an exercise of legislative power.

Statutes are commonly divided into following classes: (1) *codifying,* when they codify the unwritten law on a subject; (2) *declaratory,* when they do not profess to make any alteration in the existing law, but merely declare or explain what it is; (3) *remedial,* when they alter the common law, or the judge made (non-statutory) law; (4) *amending*, when they alter the statute law; (5) *consolidating*, when they consolidate several previous statutes relating to the same subject matter, with or without alternations of substance; (6) *enabling*, when they remove a restriction or disability; (7) *disabling or restraining*, when they restrain the alienation of property; (8) *penal*, when they impose a penalty or forfeiture.

2. NEED FOR AND OBJECT OF INTERPRETATION

The following observation of Denning L.J. in *Seaford Court Estates Ltd.* v. *Asher,* (1949) 2 K.B. 481 (498), on the need for statutory interpretation is instructive: "It is not within human powers to forsee the manifold sets of facts which may arise; and that; even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judge's trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. To put into other words : A judge should ask himself the question : If the makers of the Act had themselves come across this luck in the texture of it, how would they have straight ended it out? He must then do as they would have done. *A judge must not alter the material of which it is woven, but he can and should iron out the creases.*

The object of interpretation has been explained in *Halsbury's Laws of England* 3rd Ed., vol. 2, p. 381 in the following words : "The object of all interpretation of a 'Written Document' is to discover the intention of the author, the written declaration of whose mind the document is always considered to be. Consequently, the construction must be as clear to the minds and apparent intention of the parties as possible, and as the law will permit. The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, and not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent of the intention. It is not possible to guess at the intention of the parties and substitute the presumed for the expressed intention. The ordinary rules of construction must be applied, although by doing so the real intention of the parties may, in some instances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law". The object of interpretation, thus, in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.

According to *Salmond*, interpretation or construction is the process by which the Courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed.

Test your knowledge

Choose the correct answer

The purpose of the interpretation is:

(a) To understand the statute according to one's own comprehension

(b) To make a guess of what is written

(c) To see what is the intention expressed by the words used

(d) To be able to change the meaning according to the situation

Correct answer: c

3. GENERAL PRINCIPLES OF INTERPRETATION

At the outset, it must be clarified that, it is only when the intention of the legislature as expressed in the statute is not clear, that the Court in interpreting it will have any need for the rules of interpretation of statutes. It may also be pointed out here that since our legal system is, by and large, modelled on Common Law system, our rules of interpretation are also same as that of the system. It is further to be noted, that the so called rules of interpretation are really guidelines.

(i) Primary Rules

(a) The Primary Rule : Literal Construction

According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning. The objectives 'natural', 'ordinary' and 'popular' are used interchangeably.

Interpretation should not be given which would make other provisions redundant (*Nand Prakash Vohra* v. *State of H.P.*, AIR 2000 HP 65).

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed according to the ordinary and natural meaning of the words. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases."

"Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used". (Brett M.R.)

It is trite that construction of a statute should be done in a manner which would give effect to all its provisions [*Sarbajit Rick Singh* v. *Union of India,* (2008) 2 SCC 417].

It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the

legislature intended something which it omitted to express.

A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions of another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated.

Similarly, the main part of the section must not be construed in such a way as to render a proviso to the section redundant.

Some of the other basic principles of literal construction are:

(i) Every word in the law should be given meaning as no word is unnecessarily used.

(ii) One should not presume any omissions and if a word is not there in the Statute, it shall not be given any meaning.

While discussing rules of literal construction the Supreme Court in *State of H.P* v. *Pawan Kumar* (2005) 4 SCALE, P.1, held:

— One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words.

— If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended, abridged, so far as to avoid such an inconvenience, but no further.

— The onus of showing that the words do not mean what they say lies heavily on the party who alleges it.

He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.

(b) The Mischief Rule or Heydon's Rule

In *Heydon's Case*, in 1584, it was resolved by the Barons of the Exchequer "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered: (1) What was the Common Law before the making of the Act; (2) What was the mischief and defect for which the Common Law did not provide; (3) What remedy the parliament had resolved and appointed to cure the disease of the Commonwealth; and (4) The true reason of the remedy.

Although judges are unlikely to propound formally in their judgements the four questions in Heydon's Case, consideration of the "mischief" or "object" of the enactment is common and will often provide the solution to a problem of interpretation. Therefore, when the material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words is the rule laid down in Heydon's

case which has “now attained the status of a classic”. The rule directs that the Courts must adopt that construction which “shall suppress the mischief and advance the remedy”. But this does not mean that a construction should be adopted which ignores the plain natural meaning of the words or disregard the context and the collection in which they occur. (See *Umed Singh* v. *Raj Singh,* A.I.R. 1975 S.C. 43)

The Supreme Court in *Sodra Devi's* case, AIR 1957 S.C. 832 has expressed the view that the rule in Heydon's case is applicable only when the words in question are ambiguous and are reasonably capable of more than one meaning.

The correct principle is that after the words have been construed in their context and it is found that the language is capable of bearing only one construction, the rule in Heydon's case ceases to be controlling and gives way to the plain meaning rule.

(c) Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat

Normally, the words used in a statute have to be construed in their ordinary meaning, but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words, does not meet the ends as a fair and a reasonable construction. Exclusive reliance on the bare dictionary meaning of words' may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough interpreting the provision, it becomes necessary to have regard to the subject matter of the statute and the object which it is intended to achieve.

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

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

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

Courts can depart from dictionary meaning of a word and give it a meaning which will advance the remedy and suppress the mischief provided the Court does not have to conjecture or surmise. A construction will be adopted in accordance with the policy and object of the statute (*Kanwar Singh* v. *Delhi Administration*, AIR 1965 S.C. 871). To make the discovered intention fit the words used in the statute, actual expression used in it may be modified (*Newman Manufacturing Co. Ltd*. v. *Marrables*, (1931) 2 KB 297, *Williams* v. *Ellis*, 1880 49 L.J.M.C.). If the Court considers that the litera legis is not clear, it, must interpret according to the purpose, policy or spirit of the statute (ratio-legis). It is, thus,

evident that no invariable rule can be established for literal interpretation.

In *RBI* v. *Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424. the Supreme Court stated. If a statute is looked at in the context of its enactment, with the glasses of the statute makers provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clauses each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.(See also *Chairman Indira Vikas Pradhikaran* v. *Pure Industrial Coke and Chemicals Ltd.,* AIR 2007 SC 2458).

(d) Rule of Harmonious Construction

A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the Courts to avoid "a head on clash" between two sections of the same Act and, "whenever it is possible to do so, to construct provisions which appear to conflict so that they harmonise" (*Raj Krishna* v. *Pinod Kanungo*, A.I.R. 1954 S.C. 202 at 203).

Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect may be given to both. This is what is known as the "rule of harmonius construction".

The Supreme Court applied this rule in resolving a conflict between Articles 25(2)(b) and 26(b) of the Constitution and it was held that the right of every religious denomination or any section thereof to manage its own affairs in matters of religion [Article 26(b)] is subject to a law made by a State providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)(b)]. See *Venkataramana Devaru* v. *State of Mysore*, A.I.R. 1958 S.C. 255.

Test your knowledge

State whether the following statement is "True" or "False"

According to the Rule of Literal Construction, a statute is interpreted according to the general meaning of the words even if it leads to absurdity.

Correct answer: False

(e) Rule of Ejusdem Generis

Ejusdem Generis, literally means "of the same kind or species". The rule can be stated thus:

(a) In an enumeration of different subjects in an Act, general words following specific words may be construed with reference to the antecedent matters, and the construction may be narrowed down by treating them as applying to things of the same kind as those

previously mentioned, unless of course, there is something to show that a wide sense was intended; (b) If the particular words exhaust the whole genus, then the general words are construed as embracing a larger genus.

In other words, the *ejusdem generis* rule is that, where there are general words following particular and specific words, the general words following particular and specific words must be confined to things of the same kind as those specified, unless there is a clear manifestation of a contrary purpose. It is merely a rule of construction to aid the Courts to find out the true intention of the Legislature (*Jage Ram* v. *State of Haryana,* A.I.R. 1971 S.C. 1033). To apply the rule the following conditions must exist:

(1) The statute contains an enumeration by specific words,

(2) The members of the enumeration constitute a class,

(3) The class is not exhausted by the enumeration,

(4) A general term follows the enumeration,

(5) There is a distinct genus which comprises more than one species, and

(6) There is no clearly manifested intent that the general term be given a broader meaning that the doctrine requires. (See *Thakura Singh* v. *Revenue Minister,* AIR 1965 J & K 102)

The rule of *ejusdem generis* must be applied with great caution because, it implies a departure from the natural meaning of words, in order to give them a meaning or supposed intention of the legislature. The rule must be controlled by the fundamental rule that statutes must be construed so as to carry out the object sought to be accomplished. The rule requires that specific words are all of one genus, in which case, the general words may be presumed to be restricted to that genus.

Whether the rule of *ejusdem generis* should be applied or not to a particular provision depends upon the purpose and object of the provision which is intended to be achieved.

(ii) Other Rules of Interpretation

(a) Expressio Unis Est Exclusio Alterius

The rule means that express mention of one thing implies the exclusion of another.

At the same time, general words in a statute must receive a general construction, unless there is in the statute some ground for limiting and restraining their meaning by reasonable construction; because many things are put into a statute *ex abundanti cautela,* and it is not to be assumed that anything not specifically included is for that reason alone excluded from the protection of the statute. The method of construction according to this maxim must be carefully watched. The failure to make the ‘expressio’ complete may arise from accident. Similarly, the ‘exclusio’ is often the result of inadvertence or accident because it never struck the draftsman that the thing supposed to be excluded requires specific mention. The maxim ought not to be applied when its application leads to inconsistency or injustice.

Similarly, it cannot be applied when the language of the Statute is plain with clear meaning *(Parbhani Transport Co-operative Society ltd v Regional Transport Authority, AIR 1960 SC 801)*

(b) Contemporanea Expositio Est Optima Et Fortissima in Lege

The maxim means that the best way to give the meaning to a document or proposition of a law is to read it as it would have read when it was made. Where the words used in a statute have undergone alteration in meaning in course of time, the words will be construed to bear the same *meaning as they had when the statute was passed on* the principle expressed in the maxim. In simple words, old statutes should be interpreted as they would have been at the date when they were passed and prior usage and interpretation by those who have an interest or duty in enforcing the Act, and the legal profession of the time, are presumptive evidence of their meaning when the meaning is doubtful.

But if the statute appears to be capable of only interpretation, the fact that a wrong meaning had been attached to it for many years, will be immaterial and the correct meaning will be given by the Courts except when title to property may be affected or when every day transactions have been entered into on such wrong interpretation.

(c) Noscitur a Sociis

The *'Noscitur a Sociis'* i.e. "It is known by its associates". In other words, meaning of a word should be known from its accompanying or associating words. It is not a sound principle in interpretation of statutes, to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim 'noscitur a socitis' has much relevance in understanding the import of words in a statutory provision (*K. Bhagirathi G. Shenoy* v. *K.P. Ballakuraya*, AIR 1999 SC 2143).

The rule states that where two or more words which are susceptible of analogous meaning are coupled together, they are understood in their cognate sense. It is only where the intention of the legislature in associating wider words with words of narrower significance, is doubtful that the present rule of construction can be usefully applied.

The *same words bear the same meaning in the same* statute. It is a matter of common sense that a particular word should be attributed with same meaning throughout a Statute. But this rule will not apply:

(i) when the context excluded that principle.

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

(iii) where it would cause injustice or absurdity.

(iv) where different circumstances are being dealt with.

(v) where the words are used in a different context. Many do not distinguish between the rule and the *ejusdem generis* doctrine. But there is a subtle distinction as pointed out in the case of *State of Bombay* v. *Hospital Mazdoor Sabha,* (1960) 2 SCR 866.

(d) Strict and Liberal Construction

In Wiberforce on Statute Law, it is said that what is meant by 'strict construction' is that "Acts, are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended", while by 'liberal construction' is meant that "everything is to be done in advancement of the remedy that can be done consistently

with any construction of the statute". Generally criminal laws are given strict interpretation and unless the accused is found guilty strictly as per the provisions of the law, he cannot be punished. For instance, when an Act provided for punishment for causing wound by cutting or stabbing and the accused caused wound by biting, it was not covered under that provision as cutting or stabbing implied using an external instrument while biting and causing wound does not involve any external instrument. Labour and welfare laws, on the other hand are given liberal interpretation as they are beneficial pieces of legislation. Beneficial construction to suppress the mischief and advance the remedy is generally preferred.

A Court invokes the rule which produces a result that satisfies its sense of justice in the case before it. "Although the literal rule is the one most frequently referred to in express terms, the Courts treat all three (viz., the literal rule, the golden rule and the mischief rule) as valid and refer to them as occasion demands, but do not assign any reasons for choosing one rather than another. Sometimes a Court discusses all the three approaches. Sometimes it expressly rejects the 'mischief rule' in favour of the 'literal rule'. Sometimes it prefers, although never expressly, the 'mischief rule' to the 'literal rule'.

Test your knowledge

State whether the following statement is "True" or "False"

The rule of *Ejusdem Generis* must be applied with great caution because it implies a departure from the natural meaning of words.

Correct answer: True

4. PRESUMPTIONS

Where the meaning of the statute is clear, there is no need for presumptions. But if the intention of the legislature is not clear, there are number of presumptions. These are :

(a) that the words in a statute are used precisely and not loosely.

(b) that *vested rights*, i.e., rights which a person possessed at the time the statute was passed, *are not taken away without express words, or necessary implication or without compensation.*

(c) *that "mens rea", i.e., guilty mind is required for a criminal act.* There is a very strong presumption that a statute creating a criminal offence does not intend to attach liability without a guilty intent.

The general rule applicable to criminal cases is *"actus non facit reum nisi mens sit rea" (The act itself does not constitute guilt unless done with a guilty intent).*

(d) that the *state is not affected* by a statute unless it is expressly mentioned as being so affected.

(e) that a statute *is not intended to be consistent with the principles of International Law.* Although the judges cannot declare a statute void as being repugnant to International Law, yet if two possible alternatives present themselves, the judges will choose that which is not at variance with it.

(f) that the *legislature knows* the state of the law.

(g) that the *legislature does not make any alteration* in the existing law unless by

express enactment.

(h) that the legislature *knows the practice of the executive and the judiciary.*

(i) *legislature confers powers necessary to carry out duties imposed by it.*

(j) that the *legislature does not make mistake.* The Court will not even alter an obvious one, unless it be to correct faulty language where the intention is clear.

(jj) *the law compels no man to do that which is futile or fruitless.*

(k) *legal fictions* may be said to be statements or suppositions which are known, to be untrue, but which are not allowed to be denied in order that some difficulty may be overcome, and substantial justice secured. It is a well settled rule of interpretation that in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

(l) where powers and duties are inter-connected and it is not possible to separate one from the other in such a way that powers may be delegated while duties are retained and *vice versa*, the *delegation of powers takes with it the duties.*

(m) *the doctrine of natural justice* is really a doctrine for the interpretation of statutes, under which the Court will presume that the legislature while granting a drastic power must intend that it should be fairly exercised.

5. INTERNAL AND EXTERNAL AIDS IN INTERPRETATION

In coming to a determination as to the meaning of a particular Act, it is permissible to consider two points, namely, (1) the external evidence derived from extraneous circumstances, such as, previous legislation and decided cases etc., and (2) the internal evidence derived from the Act itself.

(a) Internal Aids in Interpretation

The following may be taken into account while interpreting a statute:

Title

The long title of an Act is a part of the Act and is admissible as an aid to its construction. The long title sets out in general terms, the purpose of the Act and it often precedes the preamble. It must be distinguished from short title which implies only an abbreviation for purposes of reference, the object of which is identification and not description. To give an example, The Civil Procedure Code, 1908 is a long title and CPC 1908 is a short title. The true nature of the law is determined not by the name given to it but by its substance. However, the long title is a legitimate aid to the construction.

While dealing with the Supreme Court Advocates (Practice in High Court) Act, 1951 bearing a full title as “An Act to authorise Advocates of the Supreme Court to practice as of right in any High Court”, S.R. Das, J. observed: “One cannot but be impressed at once with the wording of the full title of the Act. Although there are observations in earlier English Cases that the title is not a part of the statute and is, therefore, to be excluded from consideration in construing the statutes. It is now a settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of an enactment.

Preamble

The true place of a preamble in a statute was at one time, the subject of conflicting decisions. **In *Mills* v. *Wilkins,* (1794) 6 Mad. 62, Lord Hold said: "the preamble of a statute is not part thereof, but contains generally the motives or inducement thereof". On the other hand, it was said that "the preamble is to be considered, for it is the key to open the meaning of the makers of the Act, and the mischief it was intended to remedy".** The modern rule lies between these two extremes and is that where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it, but where the enacting part is ambiguous, the preamble can be referred to explain and elucidate it (*Raj Mal* v. *Harnam Singh,* (1928) 9 Lah. 260). In *Powell* v. *Kempton Park Race Course Co.,* (1899) AC 143, 157, Lord Halsbury said: "Two propositions are quite clear — One that a preamble may afford useful light as to what a statute intends to reach and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment". This rule has been applied to Indian statutes also by the Privy Council in *Secretary of State* v. *Maharaja Bobbili,* (1920) 43 Mad. 529, and by the Courts in India in a number of cases (See for example, *Burrakur Coal Co.* v. *Union of India*, AIR 1961 SC 154. Referring to the cases in Re. *Kerala Education Bill*, AIR 1958 SC 956 and *Bishambar Singh* v. *State of Orissa*, AIR 1954 SC 139, **the Allahabad High Court has held in *Kashi Prasad* v. *State,* AIR 1967 All. 173, that even though the preamble cannot be used to defeat the enacting clauses of a statute, it has been treated to be a key for the interpretation of the statute.**

Supreme Court in *Kamalpura Kochunni* v. *State of Madras*, AIR 1960 SC 1080, pointed out that the preamble may be legitimately consulted in case any ambiguity arises in the construction of an Act and it may be useful to fix the meaning of words used so as to keep the effect of the statute within its real scope.

Heading and Title of a Chapter

In different parts of an Act, there is generally found a series or class of enactments applicable to some special object, and such sections are in many instances, preceded by a heading. It is now settled that the headings or titles prefixed to sections or group of sections can be referred to in construing an Act of the legislature. But conflicting opinions have been expressed on the question as to what weight should be attached to the headings. A "heading", according to one view "is to be regarded as giving the key to the interpretation of

clauses ranged under it, unless the wording is inconsistent with such interpretation; and so that headings, might be treated "as preambles to the provisions following them". But according to the other view, resort to the heading can only be taken when the enacting words are ambiguous. So Lord *Goddard, C.J*. expressed himself as: However, the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the sections where there cannot be any doubt as to the ordinary meaning of the words". Similarly, it was said by Patanjali Shastri, J.: "Nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment". In this regard, the Madhya Pradesh High Court in *Suresh Kumar* v. *Town Improvement Trust*, AIR 1975 MP 189, has held: "Headings or titles prefixed to sections or group of sections may be referred to as to construction of doubtful expressions; but the title of a chapter cannot be used to restrict the plain terms of an enactment".

The Supreme Court observed that ..... "the headings prefixed to sections or entries (of a Tariff Schedule) cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or the sub-heading may be referred to as an aid for construing the provision but even in such a case aid could not be used for cutting down the wide application of the clear words used in the provision" (*Frick India Ltd.* v. *Union of India*, AIR 1990 SC 689).

Marginal Notes

In England, the disposition of the Court is to disregard the marginal notes. In our country the Courts have entertained different views. Although opinion is not uniform, the weight of authority is in favour of the view that the marginal note appended to a section cannot be used for construing the section.

"There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament" (*Balraj Kumar* v. *Jagatpal Singh*, 26 All. 393). Patanjali Shastri, J., after referring to the above case with approval observed : "Marginal notes in an Indian statute, as in an Act of Parliament cannot be referred to for the purpose of construing the Statute" *(C.I.T*. v*. Anand Bhai Umar Bhai,* A.I.R. 1950 S.C. 134). At any rate, there can be no justification for restricting the section by the marginal note, and the marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear and unambiguous (*Chandraji Rao* v. *Income-tax Commissioner,* A.I.R. 1970 S.C. 158).

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

Marginal notes appended to the Articles of the Constitution have been held to constitute part of the Constitution as passed by the Constituent Assembly and therefore, they have been made use of in consulting the Articles, e.g. Article 286, as furnishing prima facie, "some clue as to the meaning and purpose of the Article".

When reference to marginal note is relevant? The Supreme Court has held that the marginal note although may not be relevant for rendition of decisions in all types of cases but where the main provision is sought to be interpreted differently, reference to marginal note would be permissible in law. [*Sarbajit Rick Singh* v. *Union of India* (2008) 2 SCC 417; See also *Dewan Singh* v. *Rajendra Prasad* (2007) 1 Scale 32].

Interpretation Clauses

It is common to find in statutes "definitions" of certain words and expressions used elsewhere in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply. A definition section may borrow definitions from an earlier Act and definitions so borrowed need not be found in the definition section but in some provisions of the earlier Act.

The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to 'mean' such and such, the definition is *prima facie* restrictive and exhaustive, whereas where the word defined is declared to 'include' such and such, the definition is *prima facie* extensive. Further, a definition may be in the form of 'means and includes', where again the definiton is exhaustive. On the other hand, if a word is defined 'to apply to and include', the definition is understood as extensive. (See *Balkrish*an v. *M. Bhai* AIR 1999 MP 86)

A definition section may also be worded in the form 'so deemed to include' which again is an inclusive or extensive definition and such a form is used to bring in by a legal fiction something within the word defined which according to ordinary meaning is not included within it.

A definition may be both inclusive and exclusive i.e. it may include certain things and exclude others. In such a case limited exclusion of a thing may suggest that other categories of that thing which are not excluded fall within the inclusive definition.

The definition section may itself be ambiguous and may have to be interpreted in the light of the other provisions of the Act and having regard to the ordinary connotation of the word defined. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give precision and certainty to a word or a phrase which would otherwise be vague and uncertain but not to contradict or supplement it altogether.

When a word has been defined in the interpretation clause, *prima facie* that definition governs whenever that word is used in the body of the statute.

When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language, the provision and the object intended to be served thereby.

Proviso

"When one finds a proviso to a section the natural presumption is that, but for the

proviso, the enacting part of the section would have included the subject-matter of proviso". In the words of Lord Macmillan: "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to the case".

As stated by Hidayatullah, J. : "As a general rule, **a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule**".

A distinction is said to exist between the provisions worded as 'proviso', 'exception' or 'saving clause'. 'Exception' is intended to restrain the enacting clause to particular cases; 'proviso' is used to remove special cases from the general enactment and provide for them specially; and 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing.

Test your knowledge

Choose the correct answer

The purpose of interpretation clause is:

(a) To give dictionary meaning of the word or expression.
(b) To give an overview of the statute
(c) To give complete meaning of the statute
(d) To avoid the necessity of frequent repetitions in describing all the subject-matter to which the word or expression so defined is intended to apply

Correct answer: d

Illustrations or Explanation

"Illustrations attached to sections are part of the statute and they are useful so far as they help to furnish same indication of the presumable intention of the legislature. An explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. But illustrations cannot have the effect of modifying the language of the section and they cannot either curtail or expand the ambit of the section which alone forms the enactment. The meaning to be given to an 'explanation' must depend upon its terms, and 'no theory of its purpose can be entertained unless it is to be inferred from the language used" (*Lalla Ballanmal* v. *Ahmad Shah,* 1918 P.C. 249).

An explanation, normally, should be so read as to harmonise with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section. It is also possible that an explanation may have been added *ex abundanti cautela* to allay groundless apprehension.

Schedules

The schedules form a part of the statute and must be read together with it for all purposes of construction. But expression in the schedule cannot control or prevail against the express enactment (*Allen* v. *Flicker*, 1989, 10 A and F 6.40).

In *Ramchand Textile* v. *Sales Tax Officer*, A.I.R. 1961, All. 24, the Allahabad High Court has held that, if there is any appearance of inconsistency between the schedule and the enactment, the enactment shall prevail. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

There are two principles or rules of interpretation which ought to be applied to the combination of an Act and its schedule. If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then the Act and the schedule must be read as if the schedule were operating for that purpose only. If the language of a clause in the schedule can be satisfied without extending it beyond for a certain purpose, in spite of that, if the language of the schedule has in its words and terms that go clearly outside the purpose, the effect must be given by them and they must not be treated as limited by the heading of the part of the schedule or by the purpose mentioned in the Act for which the schedule is *prima facie* to be used. One cannot refuse to give effect to clear words simply because *prima facie* they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act.

Whether a particular requirement prescribed by a form is mandatory or directory may have to be decided in each case having regard to the purpose or object of the requirement and its interrelation with other enacting provisions of the statute; and it is difficult to lay down any uniform rule. Where forms prescribed under the rules become part of rules and, the Act confers an authority prescribed by rules to frame particulars of an application form, such authority may exercise the power to prescribe a particular form of application.

The statement of objects and reasons as well as the ‘notes on clauses of the Bill relating to any particular legislation may be relied upon for construing any of its provisions where the clauses have been adopted by the Parliament without any change in enacting the Bill, but where there have been extensive changes during the passage of the Bill in Parliament, the objects and reasons of the changed provisions may or may not be the same as of the clauses of the original Bill and it will be unsafe to attach undue importance to the statement of objects and reasons or notes on clauses.

The Courts have only to enquire, what has the legislature thought fit to enact?

Regarding the reference to the statement of objects and reasons, it is a settled law that it can legitimately be referred to for a correct appreciation of:

(1) what was the law before the disputed Act was passed;

(2) what was the mischief or defect for which the law had not provided;

(3) what remedy the legislature has intended; and

(4) the reasons for the statute.

(b) External Aids in Interpretation

Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. Where the words of an Act are clear and unambiguous, no resource to extrinsic matter, even if it consists of the sources of the codification, is permissible. But where it is not so, the Court can consider, apart from the intrinsic aids, such as preamble and the purview of the Act, both with the prior events leading up to the introduction of the Bill, out of the which the Act has emerged, and subsequent events from the time of its introduction until its final enactment like the legislation, history of the Bill, Select Committee reports.

Parliamentary History

The Supreme Court, enunciated the rule of exclusion of Parliamentary history in the way it is enunciated by English Courts, but on many occasions, the Court used this aid in resolving questions of construction. The Court has now veered to the view that legislative history within circumspect limits may be consulted by Courts in resolving ambiguities.

It has already been noticed that the Court is entitled to take into account "such external or historical facts as may be necessary to understand the subject-matter of the statute", or to have regard to "the surrounding circumstances" which existed at the time of passing of the statute. Like any other external aid, the inferences from historical facts and surrounding circumstances must give way to the clear language employed in the enactment itself.

Reference to Reports of Committees

The report of a Select Committee or other Committee on whose report an enactment is based, can be looked into "so as to see the background against which the legislation was enacted, the fact cannot be ignored that Parliament may, and often does, decide to do something different to cure the mischief. So we should not be unduly influenced by the Report *(Letang* v. *Cooper* (1964) 2 All. E.R. 929; see also *Assam Railways & Trading Co. Ltd.* v. *I.R.C*. (1935) A.C. 445).

When Parliament has enacted a statute as recommended by the Report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision (*Davis* v. *Johnson* (1978) 1 All. E.R. 1132. But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies.

Present trends in the European Economic Community Countries and the European Court, however, is to interpret treaties, conventions, statutes, etc. by reference to *travaux preparatories,* that is, all preparatory records such as reports and other historical material.

Social, Political and Economic Developments and Scientific Invention

Reference to other Statutes

It has already been stated that a statute must be read as a whole as words are to be understood in their context. Extension of this rule of context, permits reference to other statutes in *pari materia, i.e*. statutes dealing with the same subject matter or forming part of the same system. *Viscount Simonds* conceived it to be a right and duty to construe every word of a statute in its context and he used the word in its widest sense including other statutes in *pari materia*.

The meaning of the phrase *'pari materia'* has been explained in an American case in the following words: "Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the words *simlis.* It is used in opposition to it intimating not likeness merely, but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. When the two pieces of legislation are of differing scopes, it cannot be said that they are in pari materia.

It is a well accepted legislative practice to incorporate by reference, if the legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and subjects of the Act.

Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. But the later law is entitled to weight when it comes to the problem of construction.

Generally speaking, a subsequent Act of a legislature affords no useful guide to the meaning of another Act which comes into existence before the later one was ever framed. Under special circumstances the law does, however, admit of a subsequent Act to be resorted to for this purpose but the conditions, under which the later Act may be resorted to for the interpretation of the earlier Act are strict. Both must be laws on the same subject and the part of the earlier Act which is sought to be construed must be ambiguous and capable of different meanings.

Although a repealed statute has to be considered, as if it had never existed, this does not prevent the Court from looking at the repealed Act in *pari materia* on a question of construction.

The regulations themselves cannot alter or vary the meaning of the words of a statute, but they may be looked at as being an interpretation placed by the appropriate Governent department on the words of the statute. Though the regulations cannot control construction of the Act, yet they may be looked at, to assist in the interpretation of the Act and may be referred to as working out in detail the provisions of the Act consistently with their terms.

Dictionaries

When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of the word, regard must always be had to the context as it is a fundamental rule that *"the meaning of words and expressions used in an Act must take their colour from the context in which they appear".* Therefore, when the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers". As stated by *Krishna Aiyar, J.* "Dictionaries are not dictators of statutory construction where the benignant mood of a law, and more emphatically the definition clause furnish a different denotation". Further,

words and expressions at times have a 'technical' or a 'legal meaning' and in that case, they are understood in that sense. Again, judicial decisions expounding the meaning of words in construing statutes in pari materia will have more weight than the meaning furnished by dictionaries.

Use of Foreign Decisions

Use of foreign decisions of countries following the same system of jurisprudence as ours and rendered on statutes in *pari materia* has been permitted by practice in Indian Courts. The assistance of such decisions is subject to the qualification that prime importance is always to be given to the language of the relevant Indian Statute, the circumstances and the setting in which it is enacted and the Indian conditions where it is to be applied.

Test your knowledge

State whether the following statement is "True" or "False"

When a word is not defined in the Act itself, it is permissible to refer to dictionaries.

Correct answer: True

LESSON ROUND-UP

- A statute normally denotes the Act enacted by the legislature. The object of interpretation in all cases is to see what is the intention expressed by the words used. The words of the statute are to be interpreted so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used.
- The General Principles of Interpretation are Primary Rules and other Rules of Interpretation.
- The primary rules are:
  - *Literal Construction:* According to this rule, the words, phrases and sentences of a statute are ordinarily to be understood in their natural, ordinary or popular and grammatical meaning unless such a construction leads to an absurdity or the content or object of the statute suggests a different meaning.
  - *The Mischief Rule or Heydon's Rule:* The rule directs that the Courts must adopt that construction which "shall suppress the mischief and advance the remedy".
  - *Rule of Reasonable Construction i.e. Ut Res Magis Valeat Quam Pareat:* According to this rule, the words of a statute must be construed *ut res magis valeat quam pareat*, so as to give a sensible meaning to them. A provision of law cannot be so interpreted as to divorce it entirely from common sense; every word or expression used in an Act should receive a natural and fair meaning.
  - *Rule of Harmonious Construction:* Where in an enactment, there are two provisions which cannot be reconciled with each other, they should be so

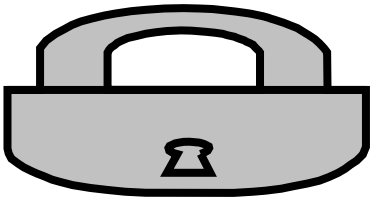
interpreted that, if possible, effect may be given to both.

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

- Other Rules of Interpretation are:

- *Expressio Unis Est Exclusio Alterius:* The rule means that express mention of one thing implies the exclusion of another.
- *Contemporanea Expositio Est Optima Et Fortissima in Lege:* The maxim means that a contemporaneous exposition is the best and strongest in law.
- *The 'Noscitur a Sociis'* i.e. "It is known by its associates". In other words, meaning of a word should be known from its accompanying or associating words.
- *Strict and Liberal Construction:* What is meant by 'strict construction' is that "Acts, are not to be regarded as including anything which is not within their letter as well as their spirit, which is not clearly and intelligibly described in the very words of the statute, as well as manifestly intended", while by 'liberal construction' is meant that "everything is to be done in advancement of the remedy that can be done consistently with any construction of the statute".
- *Presumptions:* Where the meaning of the statute is clear, there is no need for presumptions. But if the intention of the legislature is not clear, there are number of presumptions.
- Internal and External Aids in Interpretation.
- *Internal Aids in Interpretation:* The following may be taken into account while interpreting a statute:
- Title; Preamble; Heading and Title of a Chapter; Marginal Notes; Interpretation Clauses; Proviso; Illustrations or Explanations; and Schedules.
- *External Aids in Interpretation:* Apart from the intrinsic aids, such as preamble and purview of the Act, the Court can consider resources outside the Act, called the extrinsic aids, in interpreting and finding out the purposes of the Act. There are: Parliamentary History; Reference to Reports of Committees; Reference to other Statutes; Dictionaries and Use of Foreign Decisions.

SELF-TEST QUESTIONS



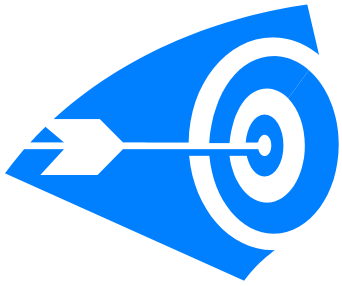
1. Discuss the need and object for interpretation of statutes.
2. Write notes on the following indicating their importance as an aid to interpretation of statutes:
   (i) Preamble.
   (ii) Interpretation clause.
3. What are the internal and external aids which could be taken into account while interpretation.
4. Write short notes on:
   (i) Golden rule.
   (ii) Harmonious construction.
5. Briefly discuss general principles of interpretation.
6. What do you understand by the rule of ejudem generis in interpretation of statutes?
7. "External aids of interpretation of statutes have to be used with great caution and sparingly too". Comment.

Suggested Readings:

(1) Interpretation of Statutes—*Chatterjee*
(2) Legislation and Interpretation—*Jagadish Swarup*
(3) Maxwell on the interpretation of Statutes—*P. St. J. Langon*
(4) Principles of Statutory Interpretation—*Justice G.P. Singh*

STUDY III

LAW RELATING TO SPECIFIC RELIEF, ARBITRATION AND CONCILIATION, TORTS, LIMITATION AND EVIDENCE



LEARNING OBJECTIVES

The object of this study lesson is to impart basic knowledge to the students regarding law relating to Specific Relief, Arbitration and Conciliation, Torts, Limitation and Evidence.

At the end of this Study Lesson, you should be able to understand the basic legal frame work envisaged under the

- Specific Relief Act
- Arbitration and Conciliation Act
- Limitation Act
- Evidence Act and the
- Remedies available to a person under the law of torts.

I LAW RELATING TO SPECIFIC RELIEF

1. INTRODUCTION

The law relating to specific relief in India is provided in the Specific Relief Act of 1963. The Specific Relief Act, 1963 was enacted to define and amend the law relating to certain kinds of specific relief.

The expression ‘specific relief’ means a relief in specie. It is a remedy which aims at the exact fulfillment of an obligation.

2. SCOPE OF THE ACT

The Specific Relief Act, 1963 is not exhaustive. It does not consolidate the whole law on the subject. As the Preamble would indicate, it is an Act ”to define and amend the law relating to certain kinds of specific relief”. It does not purport to lay down the law relating to specific relief in all its ramifications (AIR 1972 SC 1826)

There are other kinds of specific remedy provided for by other enactments e.g. the

Transfer of Property Act deals with the specific remedies available to a mortgagor or mortgagee; the Partnership Act deals with the specific remedies like dissolution and accounts as between partners.

Under the Specific Relief Act, 1963, remedies have been divided as specific relief (Sections 5-35) and preventive relief (Sections 36-42). These are:

(i) Recovering possession of property (Sections 5-8);
(ii) Specific performance of contracts (Sections 9-25);
(iii) Rectification of Instruments (Section 26);
(iv) Rescission of contracts (Sections 27-30);
(v) Cancellation of Instruments (Section 31-33);
(vi) Declaratory decrees (Sections 34-35); and
(vii) Injunctions (Sections 36-42).

3. WHO MAY SUE FOR SPECIFIC PERFORMANCE

Section 15 lays down that specific performance of a contract may be obtained by (a) any party thereto; (b) the representative in interest or the principal, of any party thereto; provided that where the learning, skill, insolvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party; (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder; (d) where the contract has been entered into by tenant-for-life in due exercise of a power the remainder man; (e) a reversioner in possession, where the agreement is a convenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such convenant; (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach; (g) when a company has entered into a contract and subsequently becomes amalgamated with another company the new company which arises out of the amalgamation; (h) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such a contract is warranted by the terms of the incorporation of the company provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Generally, only a party to the contract can get its specific performance. The section gives the list of persons who can sue for specific performance of a contract. The general principle is that in a suit for specific performance of a contract, all the parties to the contract should be parties to the suit and no one else.

Test your knowledge

State whether the following statement is "True" or "False"

Generally, only a party to the contract can get its specific performance.

- True
- False

Correct answer: True

Contracts which can be specifically enforced

Section 10 provides the cases in which specific performance of contract is enforceable. It says that except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced (a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done, or (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. The explanation provides that unless and until the contrary is proved, the Court shall presume:

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and (ii) that the breach of a contract to transfer movable property can be so relieved except in the two cases: (a) where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market, and (b) where the property is held by the defendant as the agent or trustee of the plaintiff.

So, under this Section, contracts for sale of patent right, copy right, shares of a company which are not easily available, future property, chattels of special value, etc., are specifically enforceable. In an agreement for sale of agricultural land, the respondent vendor wilfully avoided the execution of sale deed after receiving full sale consideration. Rajasthan High Court held that compensation by way of damages would not be substituted to execution of sale deed. The Court directed the respondents to enforce the specific performance of the agreement (*Ram Karan and others* v. *Govind Lal and other,* AIR 1999 Raj. 167). In a suit for specific performance of contract of sale of a house, a stranger to the contract cannot seek to be impleaded. That will change the very nature of the suit.

To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract *Mankaur* v. *Hartar Singh* (2010) 10 SCC 512.

Cases in which specific performance of contracts connected with trusts enforceable

Section 11 lays down that except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust. But if a trustee enters into a contract in excess of his powers then such a contract cannot be specifically enforced.

Illustrations

A contracts with B to paint a picture for B and B agrees to pay Rs. 1000 for the same. The picture is painted. ‘B’ is entitled to have it delivered to him on payment or tender of Rs. 1,000.

A is a trustee of land with power of lease it for 7 years. He enters into a contract with B to grant a lease of the land for 7 years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of company have power to sell the concern with the sanction of a general meeting of the shareholders, Directors contract to sell it without any such sanction. This contract cannot be specifically enforced.

Specific performance of part of a contract

Section 12 deals with specific performance of a part of a contract. Sub-section (1) lays down the general principle that except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract. Sub-sections (2)-(4) lay down the exceptions to this general rule as follows:

(i) Sub-section 2 says that where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of the either party, direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

A contracts to sell B a piece of land consisting of 100 *bighas*. It turns out that 98 *bighas* of the land belongs to A and the two remaining *bighas* to a stranger, who refuses to part with them. The two bighas are not necessary for the use of enjoyment of the 98 *bighas,* nor so important for such use or enjoyment that the loss of them may not be made in goods or in money. A may be directed at the suit of B to convey to B the 98 *bighas* and to make compensation to him. For not conveying the two remaining *bighas;* B may be directed at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less the sum awarded as compensation for the deficiency.

(ii) Sub-section 3 lays down that where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either (a) forms a considerable part of the whole, though admitting of compensation in money; or (b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the party (i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement, and (ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

For example, A contracts to sell B a piece of land consisting of 100 bighas for Rs. 1,00,000. It turns out that only 50 bighas of land belong to A. 50 bighas are substantial part of the contract. A cannot demand specific performance of the contract but B can demand specific performance to get 50 bighas of land from A by paying the full consideration i.e. Rs. 1,00,000.

(iii) Sub-section 4 lays down that when a part of a contract which taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part. For the purposes of this section, a party to the contract shall be deemed to be unable to perform

the whole of his part of it, if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance.

Section 13 lays down the rights of a purchaser or lessee against the seller or lessor with no title or imperfect title. It lays down that where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter) has the following rights, namely: (a) if the vendor or lessor has, subsequent to the contract, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest; (b) where the concurrence of other persons is necessary for validating the title, and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence and when conveyance by other person is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance; (c) where the vendor professes to sell unencumbered property but the property is, mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee; (d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title, or imperfect title, the defendant has a right to a return of his deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject matter of the contract. Sub-section (2) of Section 13 lays down that the aforesaid provisions of the sections shall also supply, as far as may be to contracts for or hire of movable property.

Test your knowledge

As per Section 10, which of the following cases are specifically enforceable?

(a) Contracts for sale of patent right
(b) Copy right
(c) Rent laws
(d) Future property

Correct answer: (a), (b), and (d)

Contracts which cannot be specifically enforced

Section 14 lays down the contracts which cannot be specifically enforced. They are (a) A contract for the non-performance of which compensation in money is an adequate relief; (b) A contract which runs into such minute and numerous details that the Court cannot enforce specific performance of its material terms or which is dependant upon the personal qualification or volition of the parties or a contract from its nature is such that the Court cannot enforce specific performance; (c) A contract which is in its nature determinable; (d) A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise. Sub-section (2) lays down that save as provided by the Arbitration Act, 1943, no contract to refer present or future difference to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions for the said Act apply) and

has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit.

Sub-section (3) lays down that notwithstanding anything contained in clause (a) or clause (c) or clause (d) of Sub-section (1), the Court may enforce specific performance in the following cases: (a) where the suit is for the enforcement of a contract—(i) to execute a mortage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once; provided that where only a part of the loan has been advanced the vendor is willing to advance the remaining part of the loan in terms of the contract; or (ii) to take up and pay for any debentures of a company; (b) where the suit is for (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business, or (ii) the purchase of a share of a partner of a firm (c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land provided that the following conditions are fulfilled, namely, (i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work; (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the land on which the building is to be constructed or other work is to be executed.

Illustrations

A contracts to sell and B contracts to buy, one lakh of rupees in the four per cent Central Government loan; the contract may be specifically performed.

A contracts to render personal service to B or A contracts to marry B or A contracts to employ B on personal service or A, an author, contracts with B, a publisher to complete a literary work. B cannot enforce specific performance of these contracts. Not only contract of personal service, but any contract requiring personal skill, knowledge or volition of the parties, for example, to marry, to paint a picture, to complete a literary work or to sing or act at a theatre will not be specifically enforced as such contracts would require a constant and general superintendence as cannot be conveniently undertaken by a Court of Justice.

A and B contract to become partners, the contract is not specifying the duration of the proposed partnership. In such a case the contract cannot be specifically enforced since, either A and B might at once dissolve the partnership (*Scott* v. *Rayment* (1868) L.R. 7 Eq. 112).

The Court will not decree specific performance of an agreement if it be of such a nature that better justice will be done by leaving the parties to their remedy in damages (*Wilson* v. *Northampton & Banbury Junction Rly. Co.* (1874) 9 C.H. App. 279).

The very foundation of specific performance of a contract is that an award for damages does not afford the aggrieved party a complete remedy. If in the opinion of the Court damages will be an adequate remedy, specific performance of the contract cannot be decreed (*Ramji Patel* v. *Rao Kishore,* (1929) P.C. 190).

In such a case pecuniary compensation is equated with the specific performance of the contract. It can be decreed only when the remedy at law is not adequate or is defective. The court may come to the conclusion that the ends of justice will be served better by awarding the damages instead of the specific performance of the contract.

A Contract may be specifically enforced:

(a) If it is one for non-performance of which the mere payment of money would not be an adequate relief; and

(b) the contract is otherwise, proper to be specifically enforced. Section 14(1)(b) provides three reasons for refusing specific performance:

  (i) When a contract runs into minute or numerous details; or

  (ii) When a contract is dependent upon the personal qualification or volition of the parties; or

  (iii) When the contract by nature is such that the Court cannot enforce, specific performance of its material terms.

In the same way, contracts of personal service cannot be specifically enforced. These contracts are based upon the personal relations of the parties. They require mutual trust and confidence of the parties. When the contract is for personal service, it requires some skill or talent or of some intellectual pursuit, and in that case a decree for its specific performance cannot be passed by the court, as it will never know if the decree has been truthfully and fully executed. The Court will refuse specific performance of a contract if it is of such a nature that the Court cannot enforce its specific performance.

Under Section 14(1)(c) contracts which are in their nature determinable cannot be specifically enforced.

The Court will not enforce a contract which is in its nature determinable by the defendant. Determinable contract is such a contract where one of the parties can put an end to it. So even if a decree is passed, the defendant by putting an end to the contract, will evade the decree. A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership can not be specifically performed, for if it were so performed, either A or B might at once dissolve the partnership.

4. RECOVERY OF POSSESSION OF MOVABLE AND IMMOVABLE PROPERTY

Sections 5 to 8 deal with recovery of possession of property. Property may either be (i) immovable, or (ii) movable. Sections 5 and 6 deal with recovery of possession of immovable property while Sections 7 and 8 deal with movable property.

Recovery of possession of specific immovable property

According to Section 5, a person, entitled to the possession of specific immovable property may recover the same in the manner provided by the Code of Civil Procedure, 1908. The word ‘person’ includes any company or association or body of individuals, whether incorporated or not. The action under Section 5 arises when claim is made on the basis of “title”.

Recovery of possession of dispossessed immovable property

The Act provides another relief under Section 6 for the recovery of possession of immovable property where the claim is based merely on 'possession'. Section 6 provides that if any person is dispossessed without his consent, of immovable property otherwise than in due course of Law, he or any person claiming through him may by suit recover possession thereof, notwithstanding any other title that may be set up in such suit. There are two restrictions; no suit under Section 6 shall be brought (i) after the expiry of 6 months from the date of dispossession, or (ii) against the Government. Under Sub-section (3) no appeal or review is allowed of any order of decree passed under this Section. Sub-section (4) allows a person to file a suit to establish his title to such property and recover possession thereof.

The object of these provisions is to discourage people from taking the law into their own hands. The Sections provide a speedy and summary remedy through a medium of Civil Court for restoration of possession to the dispossessed. Section 5 thus provides for a suit for ejectment on the basis of title and Section 6 gives a remedy without establishing title provided the suit is brought within 6 months of the date of possession. The object of Section 6 is to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely providing previous possession and wrongful dispossession without proving title (*Lachman* v. *Shambu Narain,* ILR (1911) 33 ALL 174). A suit under Section 6 is maintainable between landlords and tenants. Heirs are also entitled to sue for recovery of possession.

Recovery of specific movable property

A person is entitled to recover the possession of specific movable property in the manner provided by the Code of Civil Procedure, 1908. (Section 7)

Explanation 1: A trustee may sue for possession of movable property of which he is a trustee. The term 'trustee' includes every person holding property in trust.

Explanation 2: A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Illustrations

(a) A bequeaths land to B for his life, with remainder to C. A dies, B enters on the land, but C, without B's consent, obtains possession of the title deeds, B may recover them from C.

(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody (See *Donald* v. *Suckling* (1866) L.R. 1 Q.B. 585).

(c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B (*Oliver* v. *Oliver* (1861) 11 C.B.N.S. 139).

(d) A deposits books and papers for safe custody with B. B losses them and C finds

them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under Section 168 of the Indian Contract Act, 1872.

(e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

An action in detinue would lie only for some specific article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party. Section 7 lays down that a person entitled to the possession of specific movable propety may recover the same in the manner prescribed by the Civil Procedure Code. A trustee or a person having a special or a temporary right to the present possession may also file a suit under this section.

Test your knowledge

Which of the following Sections deal with the recovery of possession of movable property?

(a) Sections 1 and 2
(b) Sections 3 and 4
(c) Sections 7 and 8
(d) Sections 9 and 10

Correct answer: (c)

Liability of person in possession, not as owner to deliver to persons entitled to immediate possession

Section 8 lays down that any person having the possession or control of a particular article of movable property of which he is not the owner, may be compelled specifically, to deliver it to the person entitled to its immediate possession in any of the following four cases:

(a) When the thing claimed is held by the defendant as the agent or trustee of the plaintiff, (b) when the compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, (c) when it would be extremely difficult to ascertain the actual damage caused by its loss, (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff. Unless and until the contrary is proved, the Court shall, in respect of any article of movable property claimed under clause (b) or (c) of this section presume that (i) compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed or as the case may be, and (ii) it would be extremely difficult to ascertain the actual damage caused by its loss.

Thus under this part of the Act, if a person, who has been dispossessed, does not bring a suit under Section 6 of the Specific Relief Act within 6 months, he may still bring a suit for recovery alleging any title to the property. But in this case, the suit may be defeated by the defendant by proving a better title.

Illustrations

(a) A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B, without A's authority, pledges the furniture to C, and C knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to 'A' for he holds it as A's trustee.

(b) Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

(c) 'A' is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of special character to bear an ascertainable market value. B may be compelled to deliver them to A.

5. PERSONS AGAINST WHOM SPECIFIC PERFORMANCE AVAILABLE

Section 15 lays down the parties who can bring an action for specific performance.

According to Section 19, specific performance of a contract may be enforced against (a) either party thereto, (b) any person claiming under him, by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract, (c) any person claiming under a title which though prior to the contract, and known to the plaintiff, might have been displaced by the defendant, (d) when a company has entered into a contract and subsequently becomes amalgamated with another company — the new company which arises out of the amalgamation, (e) when the promoters of a company have before its incorporation entered into a contract, for the purpose of the company and such contract is warranted by the terms of the incorporation of the company; provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Clauses (a) and (b) embody the principle that Court will enforce specific performance of a contract not only against either party, thereto, but also against any person claiming under either of the parties, a title arising subsequently to the contract, except a transferee for value who has paid money in good faith and without notice of the original contract.

Examples to clause (c) are voluntary alienness, joint tenants claiming survivorship and remainder man.

6. PERSONS AGAINST WHOM SPECIFIC PERFORMANCE CANNOT BE ENFORCED

Under Section 16, specific performance of a contract cannot be enforced in favour of a person — (a) who would not be entitled to recover compensation for its breach, or (b) who has became incapable of performing, or violates any essential term of the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract, or (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. The obligation imposed by Section 16 of the Act is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of clause (a), (b) and (c) thereof.

Thus in a suit for specific performance the plaintiff should not only plead and prove the terms of the agreement but should also plead and prove his readiness and

willingness to perform his obligations under the contract in terms of the contract.

To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. Right from the date of the execution till the date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. *N.P. Thirgnanam* v. *Dr. R Jagan Mohan Rao*, AIR 1996 SC 116, (1995) 5 SCC 115.

The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. The circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either ever or prove the same he must fail.

A Court may not, therefore, grant to a plaintiff who has failed to to prove that he has performed or has always been ready and willing to perform his part of the agreement, the specific performance whereof he seeks (See *Ram Awadh* v. *Achhaibar Dubey*, AIR 2000 SC 860).

The explanation states that for the purpose of clause (c), (i) where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court (ii) the plaintiff must ever performance of, or readiness and willingness to perform, the contract according to its construction.

Section 17 sets out two more cases where specific performance cannot be enforced in favour of a vendor or lessor. It states that a contract to sell or let any immovable property cannot be specifically enforced in favour of vendor or lessor (a) who knowing himself not to have any title to the property, has contracted to sell or let the property; (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt Sub-section (2) lays down that the provisions of Sub-section (1) shall also apply as far as may be, to contracts for the sale or hire of movable property.

According to this Section, a contract to sell or hire property cannot be specifically enforced in favour of a seller or lessor if he had no title to the property. A person who knows that he has no title to the property but still enters into a contract with regard to that property, he cannot have the remedy of specific performance. It is the duty of the vendor to make a reasonable, clear and marketable title about which there must not be any rational doubt.

Illustration

A without C's authority contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract even though C is willing to confirm it.

Non-enforcement except with variation

According to Section 18, where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up in the following cases, namely: (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract; (b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce, (c) where the parties have subsequently to the execution of the contract, varied its terms.

Illustration

A contracts in writing to let a house to B for a certain term, at the rent of Rs. 100/- per month, putting it first into tenantable repair. The house turns out to be not worth repairing. So with B's consent, A pulls it down and erects a new house in its place. B contracting orally to pay rent at Rs. 120/- per month. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

7. DISCRETION OF THE COURT

Sub-section (1) of Section 20 lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary but based on sound and reasonable grounds guided by judicial principles and capable of correction by a Court of appeal. Sub-section (2) lays down that the following are cases in which the Court may properly exercise discretion not to decree specific performance — (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would involve no such hardship on the plaintiff;
(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. *Explanation 1* appended to the Section states that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b) *Explanation 2* to the Section says that the question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

Sub-section (3) lays down that Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance. Sub-section (4) says that the court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Specific performance is a discretionary remedy. The Court is not bound to decree specific performance merely because it is lawful to do so. Courts can take into consideration the conduct of the parties and the circumstances attending its execution and may exercise a discretion in granting or withholding a decree for specific performance (*Jethalal* v. *Bachu,* 47 Bom. 46). However, this discretion is not an arbitrary discretion but one governed by sound principles of equity. It has been held that the court is not bound to grant relief of specific performance even if it is lawful to do so. [*Yellapa Sastri* v. *Gunda Shankara*, AIR 2010 (NOC) 731 A.P. See also AIR 2008 SC 1786].

Illustration

In *Dennev-light* (1857) 8 D M & G 774, the Court refused specific performance against a buyer where the land contracted to be purchased was wholly surrounded by land belonging to others over which there was no right of way.

It is to be noted that the word 'mere' has to be given due weight. Specific performance may be refused where inadequacy of consideration is coupled with some other factor not necessarily amounting to fraud, e.g. mistake, or surprise, or unfair advantage taken by the plaintiff of his superior knowledge or bargaining position even though the circumstances do not justify rescission of the contract.

The hardship to be considered is at the time of the contract, unless the hardship has been brought on by the action of the plaintiff. Mere rise in price of the property agreed to be sold is not a ground for refusing a discretionary relief in favour of the purchaser. What has to be considered is the fairness of the contract at the time it was made and the subsequent rise in price is not a matter to be taken into consideration.

Court's power to award damages in certain cases

Under Section 21 of the Specific Relief Act, the Court is empowered to award compensation in certain cases. Sub-section (1) states that in a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of such performance, Sub-section (2) states that if, in any suit the Court decides that specific performance ought not to be granted but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly. Sub-section 3 lays down that if, in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. Sub-section (4) states that in determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872. Sub-section 5 lays down that no compensation shall be awarded under this Section unless the plaintiff has claimed such compensation in his plaint provided that where the plaintiff has not claimed any such compensation in the plaint, the Court shall at any stage at the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such compensation. Even if the contract has become incapable of specific performance that does not preclude the Court from exercising the jurisdiction conferred by this section.

The conditions according to which damages may be awarded by the Court in addition to specific performance are:

(i) the Court decides that specific performance ought to be granted but,

(ii) the justice of the case requires that not only specific performance but also some compensation for the breach of the contract should also be given to the plaintiff.

In a suit for specific performance, the plaintiff may ask for damages in the alternative or in addition to specific performance of the contract. The Court's power to award damages in a suit for specific performance is laid down in Section 21.

The circumstances in which a court would award damages in lieu of specific performance:

(a) Specific performance could have been granted but in the circumstances of the case the Court in its discretion considers that it would be better to award damages instead of specific performance.

(b) Though specific performance is refused, plaintiff is entitled to compensation for breach of the contract.

(c) If the circumstances are such that specific performance would not be granted; for example, where the plaintiff has disentitled himself to the specific performance, damages cannot be awarded under Section 21 in lieu of specific performance.

Section 22 gives power to the Court to grant relief for possession, partitions, refund of earnest money. Under Section 22 any person, suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case ask for (a) possession or partition and separate possession, of the property in addition to any such performance; or (b) any other relief to which he may be entitled in case his claim for specific performance is refused.

The power of the Court to grant relief under clause (b) shall be without prejudice to its power to award compensation under Section 21.

Illustrations

(a) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(b) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument dated the 1st January 1877. Soon after that day, A fraudulently grants to C a lease of part of the land, and procures the lease dated the 1st October, 1876 to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

On such cancellation, the Court may require the party to whom such relief is granted to restore as far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

In a case defendant and plaintiff were real brothers residing jointly in a house. The defendant executed agreement to sell the property of his share in favour of plaintiff. Subsequently he sold the same property to another purchaser. The subsequent purchaser had no knowledge about the earlier agreement. It was held

that he is the *bona-fide* purchaser of the property. The plaintiff can recover back earnest money paid by him to defendant (*Jagtar Singh* v*. Gurmit Singh,* AIR 2006 P&H 62).

Test your knowledge

State whether the following statement is" true" or "false".

Under the Specific Relief Act, a Court can give either specific relief or compensatory relief and not both.

- True
- False

Correct Answer: True

Section 23 lays down that even if the parties have agreed for liquidated damages, in the contract itself, specific performance of that contract may be decreed by the Court in proper cases but in that case the payment of the sum named in the contract will not be decreed.

Section 24 imposes a bar on suit for compensation for breach of a contract after dismissal of the suit for specific performance.

8. RECTIFICATION OF INSTRUMENTS

Section 26 of the Specific Relief Act, 1963 contains the law as to rectification of instruments.

Rectification means correction of an error in an instrument in order to give effect to the real intention of the parties. Where a contract reduced into writing in pursuance of a previous agreement, fails to express the real intention of the parties, the court will rectify the instrument in accordance with their true intention. Here, there must be in existence as between the parties, a complete and perfectly unobjectionable contract; but the writing designed to embody it, either from fraud or mutual mistake, is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into confirmity with the true intention. In such a case, if such instrument is enforced, one party will suffer and if it is rescinded altogether both the parties will suffer but if it is rectified and enforced neither party will suffer. The principle on which the courts act in correcting instruments is that the parties are to be placed in the same position as that in which they would have stood if no error had been committed (*Sudha Singh* v. *Munshi Ram,* A.I.R. 1927 Cal. 605). There must have been a complete agreement prior to the instrument. It should be in writing and there must be clear evidence of mutual mistake or of fraud.

In order to obtain rectification the conditions mentioned in Section 26 must be present. Thus:

(i) Rectification would be granted where, though there was a consensus between the parties as to the contract through fraud of one of the parties, the instrument did not correctly express the real intention.

(ii) It will also be granted, at the instance of third party, where both the parties are equally innocent, but owing to a common mistake, the instrument does not express their intention.

(iii) Sub-section (2) makes it clear that rectification would not be allowed so as to prejudice rights acquired by third party in good faith and for value.

For example, A intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B in which through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and let the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C, but it cannot be rectified so as to affect D's lease.

(iv) The only limitation placed on the Courts discretion is that the rectification can be done without prejudice to the rights acquired by third persons in good faith and for value.

9. RESCISSION OF CONTRACTS

Section 27 deals with Rescission of Contracts. "Rescission" means putting an end to a contract which is still operative and making it null and void *ab initio.* It does not apply to void contracts. Section 27 states the principle upon which rescission can be ordered. A person suing for rescission cannot, in the alternative sue for specific performance but a person suing for specific performance can sue for rescission. Sub-section (1) lays down that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely – (a) where the contract is voidable or terminable by the plaintiff; (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff. Sub-section (2) lays down that notwithstanding anything contained in Sub-section (1), the Court may refuse to rescind the contract – (a) where the plaintiff has expressly or impliedly ratified the contract; or (b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or (c) where third-parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract. The explanation provides that in this Section, "contract" in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

"This specie of specific relief is the reverse of specific performance. In one case the relief is granted by enforcing the performance of a contract which binds the parties, and the other by discharging him when it is not just to bind him" (Banerjee). So the equitable relief by way of rescission is exactly opposite of specific performance. Here, the contract is put to an end and is made null and void where by the contractual obligations also come to an end. Section 27 provides ground to the aggrieved party to rescind a contract without obtaining consent of the other party.

Under clause (a) where a contract is voidable or terminable by the plaintiff, he may rescind it. The contract may become voidable or terminable due to fraud, undue

influence, misrepresentation or coercion.

Any person interested in a contract may sue to have it rescinded. Hence a suit may be brought by a third party whose interests are affected by the contract.

In case of a rescission of a contract, the Court may, in its discretion, require the party to whom such relief is granted to make any compensation to the other party. The main object of this relief is to put both the parties in their original positions. If a plaintiff fails to get specific performance of a contract in writing, he may get it rescinded and delivered up to be cancelled.

Doctrine of part performance

The doctrine of part performance has been applied in India to the contracts of transfer of immovable property which though required to be registered have not been registered. The doctrine has been given statutory recognition in 1929 adding two new sections to Section 53A of the Transfer of Property Act and Section 27A to the Specific Relief Act, and a proviso to Section 49 of the Indian Registration Act.

Test your knowledge

Which of the following are required for rectification of instruments?

(a) Existence of a complete agreement prior to the instrument
(b) In writing form
(c) A clear evidence of mutual mistake or fraud
(d) A verbal agreement

Correct answer: (a), (b) and (c)

10. CANCELLATION OF INSTRUMENTS

Sub-section (1) of Section 31 provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion, so adjudge it and order it to be delivered up and cancelled. Sub-section (2) lays down that if the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

The relief of cancellation of instruments is founded upon the administration of protective justice which is technically known as "*Quia time*". It is based upon the administration of protective justice for fear that the instrument may be vexatiously, or

injuriously used by the defendant against the plaintiff when the evidence to impeach it may be lost or that it may throw a cloud of suspicion over the title or interest (*Jekadula* v. *Bai Jini,* 39 B T R.,1072).

Relief of cancellation under Section 31 would be available when (i) an instrument is void or voidable against the plaintiff; (ii) where the plaintiff may apprehend serious injury if the instrument is left outstanding and (iii) where it is proper under the circumstances of the case to grant the relief.

Illustrations

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A agrees to sell and deliver a ship to B, to be paid for by B's acceptance of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills (*Anglo Danubian Co.* v. *Rogerson* (1867) L.R. 4 Eq. 3).

Section 32 lays down that where an instrument is evidence of different rights or different obligations, the Court may, in proper case, cancel it in part and allow it to stand for the residue. The Court is not bound to cancel the whole of the instrument but may, in its discretion, when necessary, cancel it in part and allow rest of it to stand.

A executes a deed of mortgage in favour of B. A gets back the deed from B by fraud and endorses on it a receipt for Rs. 1,200 purporting to be signed by B. B's signature is forged. B is entitled to have the endorsement cancelled, leaving the deed to stand in other respects (*Ram Chandar* v. *Ganga Saran,* (1917) 39 All. 103).

Section 33(1) provides that on adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require. The provisions of this Section are almost similar to the provisions of Section 30 of this Act. Under both the Sections, the plaintiff must make such compensation to the defendant as the justice may require.

11. DECLARATORY DECREES

A declaratory decree is a decree whereby any right as to any property or the legal character of a person is judicially ascertained.

The Supreme Court in *State of Madhya Pradesh* v. *Mangilal Sharma,* 1997 (7) SCALE 783, held that a declaratory decree merely declares the right of the decreehoder *vis-a-vis* the judgement debtor and does not in terms direct the judgement debtor to do or refrain from doing any particular act or thing. It cannot be executed as it only declares the rights of the decree-holder qua the judgement debtor and does not, in terms, direct him to do or refrain from doing any particular act or thing.

Section 34 lays down that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a

declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The explanation provides that a trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

The object of declaratory decree is to remove doubt by having legal status of any rights declared by the Court, and to perpertuate and strengthen testimony regarding title and protect it from adverse attacks. One of the objects of the legislature was to allow the right to enjoy the property rightfully belonging to the plaintiff. In case of declaratory decree, neither specific performance nor any compensation is awarded but only a declaration of the rights of the parties is made without any consequential relief being granted. The declaration does not confer any new rights upon the plaintiff but it merely declares what he had before. It only clears the mist that has gathered round the plaintiff’s title or status. The Court is being asked to put an end to the dispute and uncertainty by determining the legal character in issue. By that way the property may be put to better use, enjoyment and improvement. To maintain a suit under this Section following conditions must be fulfilled:

(a) the plaintiff must be a person entitled to any legal character or to any right as to any property;

(b) the defendant must be a person denying or interested to deny the plaintiff’s title to such legal character or, right;

(c) the declaration issued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property; and

(d) where the plaintiff is able to seek further relief than a mere declaration he must seek such relief.

Illustration

A is properly in possession of certain lands. The inhabitants of a neighbouring village claim a right of way across the land. A may use for a declaration that they are not entitled to the right so claimed.

The relief by way of declaration is purely discretionary. Instances of legal characters are —

(1) Divorce on the ground of impotency

(2) Legal character by marriage

(3) Legitimacy or illegitimacy

(4) Status of an adopted son

(5) Priest of temple

Effect of Declaration

Section 35 lays down that a declaration is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Such a declaration is not *judgement in rem* and as such it cannot bind strangers.

Illustration

A, a Hindu, in a suit to which B, his alleged wife is the defendant's seeks a declaration that his marriage was duly solemnised and prays for an order of restitution of conjugal rights. The Court makes the declaration and order of restitution of conjugal rights. C, a third-party claiming that B is his wife, sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

12. PREVENTIVE RELIEFS

Part III of the Specific Relief Act, 1963 grants specific relief called Preventive Relief i.e., preventing a party from doing that which he is under an obligation not to do. Preventive relief is granted at the discretion of the court by way of an injunction.

An injunction is a specific order of the Court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases (when it is called a 'mandatory injunction') commanding active restitution of the former state of things.

Lord Halsbury defines injunction as "a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing".

The main difference between an injunction and specific performance is that the remedy in case of an injunction is generally directed to prevent the violation of a negative act and therefore deals not only with contracts but also with torts and many other subjects of purely equitable one, whereas specific performance is directed to compelling performance of an active duty.

It is known as a "judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another is restrained from continuing or commencing such wrongful act. Injunction is the most ordinary form of preventive relief. For the effective administration of justice, this power to prevent and to restrain is absolutely necessary.

Characteristics of an injunction

An injunction has three characteristic features;

(a) It is a judicial process.

(b) The object of this judicial process is to restrain or to prevent.

(c) The act restrained or prevented is a wrongful act. An injuction acts or operates always in *personam*.

If the wrongful act has already taken place, the injunction prevents its repetition. If it is merely threatened, the threat is prevented from being executed.

Temporary and perpetual injunctions

Section 36 states that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

The temporary injunctions are granted under Order 39 Rules 1-2 of the Civil Procedure Code while perpetual injunctions are dealt within Section 38 of the Specific Relief Act.

The temporary injunction may be dissolved at any time under Civil Procedure Code by the defendant showing specific cause to the satisfaction of the Court against the order granting the injunction, or it automatically terminate with the disposal of the suit. The general principles governing temporary and permanent injunctions are mainly the same except that a temporary injunction is granted before the plaintiff establishes his case at the trial.

Sub-section (1) of Section 37 lays down that temporary injunctions are such as are to continue until a specified time, or until the further order of the Court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

Sub-section (2) states that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the Plaintiff. It may be pointed out that:

(i) While Section 37(1) of the Act gives the meaning of a perpetual injunction, Sections 37 to 62 lay down the principles according to which the perpetual injunction would be granted.

(ii) The cases in which the perpetual injunction may be granted are of two classes. The object is to prevent the breach of an obligation existing in favour of the applicant, but such obligation may either arise out of a contract or otherwise. In case of contractual agreement principles governing specific performance will apply and in other cases, the injunction would be granted if the plaintiff can show that the defendant has a legal duty or obligation towards him and that by the non-performance of such duty the right to enjoyment of property has been materially affected. Such cases are where the defendant is trustee of the property of the plaintiff or where the injunction is necessary to prevent multiplicity of judicial proceedings, etc.

Section 38 deals with granting of perpetual injunction. Sub-section (1) states that subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour whether express or by implication.

Sub-section (2) provides that when any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II, i.e., the chapter on specific performance of contracts. Sub-section (3) lays down that when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in the following cases, namely: (a) where the defendant is a trustee of the property for the plaintiff; (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion; (c) where the invasion is such that compensation in money would not afford adequate relief; (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Test your knowledge

Which of the following are 'instances of legal character'?

(a) Divorce on the ground of impotency
(b) Legal character by marriage
(c) Status of an adopted son
(d) Status of a relative

Correct answer: (a), (b) and (c)

Difference between the remedies of specific performance and injunction

Specific performance is decreed to compel the performance of an active duty, while injunction is decreed to prevent the violation of a negative duty. Normally, the former deals with contracts, while the latter with torts and other subjects of equitable nature. If a contract is positive in its nature, it calls for the relief of specific performance, on the other hand, if it is negative in its nature, it calls for relief of injunction.

The principle governing the award of injunction as a mode of enforcement of contracts is similar to that of specific performance. This is clearly borne out by Section 38(2) of the Act. Thus, the enforcement of a contract is governed by both specific relief and injunction. "The jurisdiction of equity to grant such injunction is substantially coexistent with its jurisdiction to compel a specific performance". But still their fields of operation are separate from each other. While a promise to do is enforced by specific performance, a promise to forbear is enforced by injunction. Section 41(e) further provides that contract which will not be affirmatively enforced by a decree of specific performance, will not be negatively enforced by issuing an injunction. The only exception to this rule is found in Section 42.

Mandatory injunction

Section 39 dealing with mandatory injunctions states that when to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts. For example, A builds a house with eaves projecting over B's land, B may sue for an injunction to pull down so much of the eaves as so projecting over his land.

According to Section 40, the plaintiff in a suit for perpetual injunction under Section 38 or mandatory injunction under Section 39, may claim damages either in addition to, or in substitution for such injunction and the Court, may, if it thinks fit, award such damages.

Injunction when refused

Section 41 gives a list of cases in which a perpetual injunction cannot be granted. It says that an injunction cannot be granted — (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings; (b) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought; (c) to restrain any person from applying to any legislative body; (d) to restrain any person from instituting or prosecuting any proceeding

in a criminal matter; (e) to prevent the breach of a contract the performance of which would not be specifically enforced; (f) to prevent on the ground of nuisance, an act of which it is not reasonably clear that it will be nuisance; (g) to prevent a continuing breach in which the plaintiff has acquiesced; (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust; (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court; (j) when the plaintiff has no interest in the matter.

It may be noted that this relief also is a discretionary remedy. It may be refused even if the case is not covered by Section 41.

Injunction to perform negative agreement

Section 42 provides that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

This Section is based upon an English case viz., *Lumley* v. *Wagner* (21) L.J. CH. 898. In this case Miss W, a singer agreed to sing at L's theatre for a certain period and not to sing anywhere else during that period. Afterwards, she entered into a contract to sing at another theatre and refused to perform her contract with L. The Court refused to enforce her positive agreement to sing at L's theatre (by specific performance since it is based on personal volition) but granted an injunction restraining her from singing at any other theatre thereby preventing breach of the negative part of the agreement though the positive part of it, being a contract for the personal service, could not be specifically enforced.

Conditions necessary for the applicability of this Section are:

(1) The contract should comprise of two agreements, one affirmative and another negative.

(2) Both the agreements must be divisible.

(3) The negative agreement must relate to a specific act.

(4) The Court should be unable to compel specific performace of the affirmative agreement.

(5) The plaintiff must not have failed to perform the contract, so far as it is binding upon him.

A negative stipulation may be express or implied. An express negative stipulation in one where the negative stipulation is put expressly. The Section does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is therefore a question of interpretation in each case to find whether a particular contract can be said to have a negative stipulation, express or implied, contained in it, e.g., the mere use of word "exclusively" does not imply a negative

stipulation to refrain from service of other people.

The provisions of this Section are based on the equitable principle that “he who seeks equity must do equity”.

The principle as laid down in Section 42 was followed in the cases of *Burn Mcdonald* (1907) 36 Cal 354; *Metropolitan Electric Supply* v. *Ginder,* (1901) 2 Ch. 799; *Subba Naidu* v. *Hari Badshah,* (13 M.L.J. 13); and *Madras Rly Co.* v. *Rust,* (1891) 14 Mad 18.

II. LAW RELATING TO ARBITRATION AND CONCILIATION

Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a court of law. The settlement of dispute is arrived by the judgement of the third person (or more persons) who are called Arbitrators. The parties repose confidence in the judgement of the arbitrator and show their willingness to abide by his decision. The essence of arbitration is thus based upon the principle of keeping away the dispute from the ordinary Courts enabling the parties to substitute by a domestic tribunal. It is, therefore, a reference of the matter of disputes to the decision of one or more persons between the disputing parties.

1. INTRODUCTION

The history of the law of arbitration in India commences with Act VIII of 1859 which codified the procedure of Civil Courts. Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between the parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. These provisions were in operation when the Indian Contract Act, 1872, came into force which permitted settlement of disputes by arbitration under Section 28 thereof. Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely, Act X of 1877 and Act XIV of 1882 but not much change was brought about by the law relating to arbitration proceedings. It was in the year 1899 that an Indian Act entitled the Arbitration Act of 1899 came to be passed. It was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matter submitted to the arbitration was the subject of a suit, the suit could whether with leave or otherwise, be instituted in a Presidency town. Then came the Code of Civil Procedure of 1908. Schedule II to the said Code contained the provisions relating to the law of arbitration which extended to the other parts of British India.

The Civil Justice Committee in 1925 recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee, the Indian Legislature passed the Act, i.e., the Arbitration Act of 1940. This Act as its preamble indicates is a consolidating and amending Act and is an exhaustive code insofar as the law relating to arbitration is concerned. An arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or it may be an arbitration in a suit.

With the passage of time the 1940 Act became outmoded, and need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment so as to be more responsive to the contemporary requirements, and to render Indian economic reforms more effective. Besides, arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms.

2. ARBITRATION AND CONCILIATION ACT, 1996

With a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and also to provide for a law relating to conciliation and related matters, a new law called Arbitration and Conciliation Act, 1996 has been passed. The new Law is based on United Nations Commission on International Trade Law (UNCITRAL), model law on International Commercial Arbitration.

The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters. The Act recognizes the autonomy of parties in the conduct of arbitral proceedings by the arbitral tribunal and abolishes the scope of judicial review of the award and minimizes the supervisory role of Courts. A significant feature of the Act is the appointment of arbitrators by the Chief Justice of India or Chief Justice of High Court. The Chief Justice may either appoint the arbitrator himself or nominate a person or Institution to nominate the arbitrator. The autonomy of the arbitral tribunal has further been strengthened by empowering them to decide on jurisdiction and to consider objections regarding the existence or validity of the arbitration agreement.

The Act has been divided into four Parts and contains three Schedules. Part one deals with Arbitration (Sections 2 to 43); Part two deals with enforcement of certain Foreign Awards (Sections 44 to 60); Part three deals with conciliation (Sections 61 to 81); and Part four contains supplementary provisions (Sections 82 to 86). Similarly schedule one contains provisions relating to convention on the Recognition and Enforcement of Foreign Arbitral Awards; Schedule two deals with Protocol on Arbitration Clauses and Schedule three contains provisions relating to Execution of Foreign Arbitral Awards.

Test your knowledge

State whether the following statement is "True" or "False"

With the passage of time the 1940 Act became outmoded, and need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment so as to be more responsive to the contemporary requirements, and to render Indian economic reforms more effective.

- True
- False

Correct answer: True

3. IMPORTANT DEFINITIONS

Arbitration

Section 2(1) (a) of the Act, defines the term "arbitration" as to mean any arbitration whether or not administered by a permanent arbitral institution.

Arbitrator

The term "arbitrator" is not defined in the Arbitration and Conciliation Act. But

“arbitrator” is a person who is appointed to determine differences and disputes between two or more parties by their mutual consent. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference. The arbitrator must be absolutely disinterested and impartial. He is an extra-judicial tribunal whose decision is binding on the parties.

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either of the parties or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. If the arbitrator has an interest in the subject-matter of reference well-known to the parties before they sign the submission, the award is good notwithstanding his own interest. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of considering whether the reference to arbitration to that particular individual should or should not be made.

The parties may appoint whomsoever they please to arbitrate on their dispute. Usually the parties themselves appoint the arbitrator or arbitrators. In certain cases, the Court can appoint an arbitrator or umpire. The parties to an arbitration agreement may agree that any reference thereunder shall be referred to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment. For example, the parties may agree that the arbitrator shall be appointed by Mr. X or the head of a certain institution.

Arbitral Award

As per Section 2(1)(c), "arbitral award" includes an interim award. The definition does not give much details of the ingredients of an arbitral award. However, taking into account other provisions of the Act, the following features are noticed:

1. An arbitration agreement is required to be in writing. Similarly, a reference to arbitration and award is also required to be made in writing. The arbitral award is required to be made on stamp paper of prescribed value (as applicable at the place of making the award) and in writing. An oral decision is not an award under the law.
2. The award is to be signed by the members of the arbitral tribunal. However, the signature of majority of the members of the tribunal is sufficient if the reason for any omitted signature is stated.
3. The making of an award is a rational process which is accentuated by recording the reasons. The award should contain reasons. However, there are two exceptions where an award without reasons is valid i.e.
   (a) Where the arbitration agreement expressly provides that no reasons are to be given, or
   (b) Where the award has been made under Section 30 of the Act i.e. where the parties settled the dispute and the arbitral tribunal has recorded the settlement in the form of an arbitral award on agreed terms.

The formulation of reasons is a powerful discipline and it may lead the arbitrator to change his initial view on the matter. Recording of reasons involves, analysis of the dispute to reach a logical conclusion. Award can be divided into four parts i.e. general, findings of fact, submissions of the parties and conclusions of the tribunal. The tribunal should explain its view of the evidence and reasons of its conclusions. The preamble of the award may contain reference to the arbitration agreement, constitution of the tribunal, procedure adopted by the tribunal etc. and the second part of the award may contain points at issue, argument for the claimant, argument for the respondent and findings of the tribunal. The points at issue may be divided into two heads i.e. issue of fact and issue of law.

4. The award should be dated i.e. the date of making of the award should be mentioned in the award.
5. Place of arbitration is important for the determination of rules applicable to substance of dispute, and recourse against the award. The arbitral tribunal is under obligation to state the place of arbitration as determined in accordance with Section 20. Place of arbitration refers to the jurisdiction of the Court of a particular city or State.
6. The arbitral tribunal may include in the sum for which award is made, interest upto the date of award and also a direction regarding future interest.
7. The award may also include decisions and directions of the arbitrator regarding the cost of the arbitration.
8. After the award is made, a signed copy should be delivered to each party for appropriate action like implementation or recourse against arbitral award.

Arbitral Tribunal

"Arbitral tribunal" means a sole arbitrator or a panel of arbitrators. [Section 2(1)(d)].

Court

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

International Commercial Arbitration

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

(i) an individual who is a national of, or habitual resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country. [Section 2(1)(f)]

Legal Representative

The definition of "legal representative" given under Section 2(1)(g) has been taken verbatim from the definition in Section 2(11) of the Code of Civil Procedure.

The following are the persons who are legal representatives:

(a) A person who in law represents the estate of a deceased person.

(b) A person who intermeddles with the estate of the deceased.

(c) A person on whom the estate of a deceased person devolves on the death of the party acting in a representative's capacity.

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

(i) Executors and administrators properly appointed.

(ii) Person who has taken on himself duties and responsibilities which belong to the executor or administrator though only in respect of a part of the estate.

(iii) Heirs-at-law whether they take succession or by survivorship.

(iv) Revisioners when the action has been brought by or against the widow representing her husband's estate.

(v) Universal legatee.

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

(i) An assignee from a deceased zamindar or to whom the holding reverts on the death of a tenant.

(ii) A trespasser or a person who claims adversely the estate of the deceased.

(iii) A new trustee appointed or elected on the death of the deceased trustee.

Arbitration Agreement

"Arbitration agreement" means an agreement referred to in Section 7 [Section 2(1)(b)]. Under Section 7, the "Arbitration agreement" has been defined to mean an agreement by parties to submit the arbitration or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not. Sub-section (2) says that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) specifically states that an arbitration agreement shall be in writing. Sub-section (4) spells out that an arbitration agreement is in writing if it is contained in

(a) a document signed by the parties, or

(b) an exchange of letters, telex, telegrams or other means of telecommuni-cation, which provide a record of the agreement, or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Thus, arbitration agreement stands on the same footing as any other agreement. It is binding upon the parties unless it is influenced by fraud or

coercion or undue influence, etc. As per Section 7, one of the essential ingredients of an arbitration agreement is that such an agreement should be in writing. An oral arbitration agreement is not recognised as an arbitration agreement according to this Section.

Sub-section (5) states that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Sub-section (3) only requires that an agreement by the parties should be in writing. It is not necessary that the words arbitration, arbitrator or arbitration agreement should appear in the arbitration clause so long as the parties have valid agreement to allow the matter of dispute to be decided by persons of their own choice.

Under the present law, certain disputes such as matrimonial disputes, criminal prosecutions, questions relating to guardianship about the validity of a will, etc. are treated as not suitable for arbitration. Subject to this qualification Section 7(1) of the Act makes it permissible to enter into an arbitration agreement "in respect of a defined legal relationship, whether contractual or not".

Under the old law, it was not clear whether an arbitrator can decide questions about the validity of the arbitration agreement itself or about the existence and validity of the arbitration clause proper. The new law expressly recognizes that the arbitrator will have such a power to commence or continue the arbitral proceedings though the objecting party can obtain a ruling of the court at the appropriate time.

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

In *Mahesh Kumar* v. *Rajasthan State Road Corporation*, AIR 2006 Raj 56, the Rajasthan High Court has held that mere existence of arbitration clause in agreement does not bar jurisdiction of Civil Court automatically. The objection of a party to the jurisdiction of the arbitrator must be raised not later than the submission of its first statement of defence on the substance of the dispute [Section 8(1) and 8(3)].

Test your knowledge

Choose the correct answer

Which of the following is not a feature of an arbitral agreement?

(a) Oral
(b) Mention of place
(b) Bearing a date
(c) Written

Correct answer: (a)

4. APPOINTMENT OF ARBITRATORS

Section 11 of the Act deals with appointment of arbitrators. According to this Section, parties can agree to any procedure for appointment of arbitrators. But provisions have been made to ensure timely appointments

as under:

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

  (i) Arbitrator could be of any nationality. [Section 11(1)]

  (ii) In case of an arbitration with three arbitrators, each party shall appoint its own arbitrator, and the two appointed arbitrators shall appoint a third arbitrator, who shall be the presiding arbitrator [Section 11(3)].

  (iii) If, within 30 days, the parties fail to appoint their arbitrators, or the two appointed arbitrators fail to agree on the third arbitrator, the arbitrator shall be appointed by the Chief Justice or any person or institution designated by him at the request of a party. [Section 11(4)]

  (iv) Similar procedure is also applicable for appointment of a sole arbitrator. If parties fail to agree on the appointment of a sole arbitrator within 30 days, the appointment shall be done by the Chief Justice or a person/institution designated by him.

(b) Similar procedure also applies, when the procedure agreed by the parties is not acted upon in time. [Section 11(6)]

(c) Decision on appointment of arbitrators by the Chief Justice or persons/ institution designated by him, is final [Section 11(7)].

(d) Chief Justice or the persons/Institution designated by him would have due regard to qualifications of arbitrators agreed between the parties, and considerations likely to secure an independent and impartial arbitrator. [Section 11(8)]

(e) In case of appointment of a sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or a person/Institution designed by him, may appoint a person of a nationality, other than that of the parties, where the parties are of different nationalities. [Section 11(9)]

(f) The Chief Justice can make any Scheme, he considers appropriate for appointment of arbitrators under Sub-section (4), (5) or (6).

In a case original agreement was given a go-by and a new procedure for appointment of arbitrator was agreed upon by the parties. However, respondent failed to appoint an arbitrator according to new method also. Calcutta High Court held that the other party can very well approach the court for appointment of an arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 (*Manoranjan Mandal and others* v. *Union of India and others,* AIR 1999 Cal. 117).

It has been held by the Supreme Court in *M/s S.B. P. & Co.* v. *M/s Patel Engg. Ltd.,* AIR 2006 SC 450 that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a Judicial power. The power under Section 11(6) of the Act in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court. Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the Scheme of the Act.

The mode of appointment of arbitrator may not always work very smoothly in actual practice. But this may provide further opportunities for the organisations like Indian Council of Arbitration, International Centre for Alternate Dispute Resolution etc. Under the Act, an arbitrator before accepting his appointment is required to disclose to the parties in writing about such matters which may create doubts about his impartiality or independence. Where such doubts exist, his appointment can be challenged. Similarly, where the arbitrator does not possess the required or the agreed qualification for the appointment, his appointment can be challenged as per Sections 12 and 13 of the Act.

Number of arbitrators

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

There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus, the validity of an arbitration agreement would not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of the machinery provision for the working of the arbitration agreement. It is therefore, clear that an arbitration agreement specifying an even number of arbitrators could not be a ground to render the arbitration agreement invalid under the Act (*MMTC Ltd.* v. *Sterlite Industries (India) Ltd.,* (1996) 8 Scale 305).

Grounds for challenge

The appointment of arbitrators made under Section 11 of the Act, can be challenged on the grounds as specified in Section 12 of the Act. For that purpose, Section 13 contains the procedure. According to Section 12 of the Act when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Some examples of such circumstances may be blood relationship or pecuniary relationship with either party to the dispute. Moreover, an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay, disclose to the parties in writing any circumstances referred to above unless they have already been informed of them by him. An arbitrator may be challenged by a party only if

(1) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (2) he does not possess the qualifications agreed to by the parties. Sub-section 4 of Section 12 makes it clear that a challenge is also permitted, if a party becomes aware of these grounds after an appointment is made.

Challenge procedure

Section 13 of the Act contains detailed provisions regarding challenge procedure. Sub-section (1) provides that subject to provisions of Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. Sub-Section (4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. But at that stage, the challenging party has the right to make an application in the Court to set aside the award in accordance with Section 34 of the Act.

Sub-section (2) provides that failing any agreement referred to in Sub-section (1) of Section 13, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. The tribunal shall decide on the challenge unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge. It is also provided that where an award is set aside on an application made under Sub-section (5) of Section 13 of the Act, the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

Failure or impossibility to act as an arbitrator

As per Section 14(1), the mandate of an arbitrator shall terminate, if he becomes *de jure* or *de facto* unable to perform his functions, or fails to act without undue delay due to some other reasons. Mandate is also terminated, if he withdraws from his office, or the parties agree to the termination of his mandate.

Further, if there is a controversy about an arbitrator's inability to function or occurrence of undue delay, a party may seek intervention of the Court under Section 14(2).

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

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

Substitution of Arbitrator

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

  (a) where he withdraws from office for any reasons; or

  (b) by or pursuant to agreement of the parties.

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

replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this Section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal [Section 15].

5. ARBITRAL PROCEEDINGS

Place and commencement of arbitration

As per Section 20 of the Act, the parties are free to agree on the place of arbitration and if they fail to reach an agreement, the place of arbitration is determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties. Section 20(3) introduces an option by providing that the arbitrator/tribunal may, unless otherwise agreed by the parties, may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property. Section 31(4) makes it mandatory for the arbitral tribunal to state in the arbitral award the date and the place of arbitration as determined in accordance with Section 20 and the award is then deemed to have been made at that place. Part-II of the Act deals with foreign awards and is applicable to those awards made outside the territory of India. Hence, place of arbitration has far reaching effect in terms of law applicable to arbitration and also enforcement of the arbitral award in international commercial arbitration.Place of arbitration in an arbitration other than international commercial arbitration i.e. in domestic arbitration, does not pose any problem. Parties may agree on the place of arbitration anywhere in India. But in international commercial arbitration, place of arbitration has legal implications in terms of law applicable to arbitration. In domestic arbitration, the arbitral tribunal has to decide the dispute in accordance with the Indian law, but in international commercial arbitration, parties have been given freedom to designate law applicable to the substance of the dispute and the arbitral tribunal may apply the rules of law agreed by the parties.

The old Act did not explain in clear terms the point of commencement of arbitration. This difficulty is removed by Section 21 of the new Act stating that the arbitral proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. No time limit has been prescribed under the Act. However, where the arbitrator is guilty of undue delay, his proceedings can be put to a stop as per Section 14(1) of the Act.

Language of arbitration

Section 22 gives freedom to parties to agree upon the language or languages to be used in the arbitral proceedings. The arbitral tribunal, subject to agreement of parties, has power to determine the language or languages to be used in the arbitral proceedings. Generally, the language of arbitration is English. It being the international language, the same is agreed in most of the arbitrations by the parties and the arbitral tribunal. The arbitral tribunal may ask for translation of documentary evidence into the or languages agreed upon by the parties or determined by the arbitral tribunal.

Test your knowledge

Choose the correct answer

Which of the following circumstances lead to a termination of the mandate of an arbitrator?

(a) If he becomes unable to perform his functions
(b) If the parties agree to the termination of his mandate
(c) If he withdraws from his office
(d) If he performs all duties in an appropriate and timely manner

Correct Answer: a, b and c

Arbitration procedure

Sections 23 to 27 stipulate the procedure to be followed in arbitration proceedings. Under the old law the practice adopted by the Arbitrator regulated the different stages of arbitration. The new law gives a comprehensive guidance regarding the procedure such as filing of a claim, submission of difference, amendment of claim/deferences etc. Sections 23 and 24 of the Act set out the stages of arbitration proceedings in an orderly manner. Section 23 of the Act provides that:

(1) Within the period of time agreed upon by the parties as determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Section 18 lays down two obligations on the arbitral tribunal i.e. to treat the party with equality and to give full opportunity to each party to present his case. Section 18 which is one of the most significant Sections, constitutes a fundamental principle which is applicable to entire proceedings. The principle of equality and full opportunity to present the case should be observed by the parties also, when laying down any rules of procedure. An agreed procedure which violates the fundamental principle of equality and granting of an opportunity of being heard, is null and void and an award passed in violation of this principle can be set aside. Section 34(2) provides that an award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law from which parties cannot derogate, or, failing such agreement, was not in accordance with law. Hence, an agreement cannot be in conflict with a mandatory provision of the law. If

procedure agreed by the parties violates the fundamental principles, it cannot be enforced by the arbitral tribunal. The principle enshrined in Section 18 should be observed during the entire arbitral proceedings. The principle does not entitle a party to adopt delaying tactics to obstruct the proceedings. The general principle is, however, subject to other provisions contained in Sections 23, 24 and 25, wherein the right can be curtailed or limited by the parties or by the arbitral tribunal in certain cases. The parties may agree that arbitration be conducted on the basis of documents only under Section 23(1). Hence, Section 18 is influenced by Sections 23, 24 and 25 and at the same time Section 18 must also influence these Sections. The arbitral tribunal has to maintain a balance for smooth conduct of the proceedings and has to make the parties feel that the arbitral tribunal is giving them full opportunity to present documents, witnesses and arguments. The parties are entitled to legal representation by the person of their choice and if disallowed, it could be violation of the principle of giving a full opportunity of presenting the case.

Section 24 of the Act deals with hearings and written proceedings. There is no restriction upon the parties to agree for holding oral hearings for presentation of evidence and for oral arguments or, alternatively, for conducting the proceedings on the basis of documents. Otherwise the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials, provided that arbitral tribunal shall hold hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties agreed that no oral hearings shall be held.

Sub-section 2 of Section 24 requires that the parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property. Further Section 24 provides that all documents/statements/other information received from one party must be communicated to the other parties.

Statements of claims and defence

Within the period of time agreed upon by the parties or determined by the tribunal, the claimant has to state the facts in supporting his claim, the points at issue and the relief or remedy sought. Similarly, the respondent shall also state his defence in respect of these particulars.

Submission of documents

Sub-section (2) of Section 23 provides that the parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence which they will submit later on.

Amendments

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

(1) Parties have agreed otherwise, or

(2) Arbitral tribunal considers it inappropriate to allow the amendment or supplement, due to delay in making it.

Determination of rules of arbitral procedure

According to Section 19(1) the arbitral tribunal is neither bound by the Code of Civil Procedure 1908, nor by the Indian Evidence Act, 1872. The Code of Civil Procedure is the Code of Civil Judicature and provides rules relating to suits, place of suing, summons and discovery, judgement and decree, interest, costs etc. The Evidence Act makes the law relating to evidence and applies to all judicial proceedings in or before the Court but not to proceedings before any arbitral tribunal. The arbitral tribunal is not bound to follow the procedure as followed by a Court. However, the arbitral tribunal is to observe fundamental principles envisaged under the Code of Civil Procedure and the Evidence Act. The procedure adopted by the arbitral tribunal should be according to the principles of natural justice.

Section 19(2) provides that subject to provisions of the Part I, the parties are free to agree on a procedure to be followed by the arbitral tribunal in conducting its proceedings. Rules of permanent arbitral Institutions usually deal with procedural matters in detail and are generally well tested in practice and are revised after consultation with experts to take into account fresh development in the law and practice of arbitration. Parties generally incorporate arbitration rules of a particular institution by reference to the same in the agreement. The arbitral tribunal does not have any discretion where any such rule has been provided for in the agreement itself.

The arbitral tribunal may conduct the proceedings in the manner it considers appropriate, but such power is subject to two exceptions mentioned below:

(1) The arbitral tribunal cannot conduct the proceedings in a manner which is in violation of the mandatory provisions of the law.

(2) The arbitral tribunal cannot conduct proceedings in a manner which is in violation of the procedure agreed by the parties, if any. Where parties have agreed on the procedure to be followed by the arbitral tribunal in conducting its proceedings the arbitral is bound to follow that procedure.

There is no mandatory provision in the Act as to how to determine the admissibility, relevance, materiality and weight of evidence. The parties may agree on the rules relating to this important aspect of the matter. However, if there are no agreed rules by the parties, the arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence and make decision in the manner it considers appropriate. Section 19 recognizes the freedom of the parties to lay down as to how to conduct the proceedings subject to agreement of the parties. Freedom to lay down rules of procedure is, subject to following restrictions (mandatory provisions) laid down by law:

(1) Submission of a statement of a claim and defence under Section 23.

(2) The parties should be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for purposes of inspection of documents, goods or other property under Section 24(2).

(3) All statements, documents or other information supplied to or applications made to the arbitral tribunal by one party should be communicated to the other party and any expert report or evidentiary document on which arbitral tribunal may rely in making its decision should be communicated to the parties, as per Section 24(3).

(4) The arbitral tribunal, or a party with the approval of the arbitral tribunal, is allowed to request the Court in taking evidence under Section 27.

(5) An award in agreed terms must state that it is an award and should be in accordance with Section 30.

(6) An arbitral award must be in writing an signed by the majority of all the members of the arbitral tribunal as per Section 31(1).

(7) The arbitral award must state its date and place of arbitration under Section 31(4).

(8) A copy of the award duly signed by the arbitral tribunal should be delivered to each party under Section 31(5).

(9) The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral award under Section 32(2).

(10) The arbitral tribunal has power to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature and to give interpretation of a specific point or part of the award under Section 33.

Judges are bound by the Code of Civil Procedure and also by the Rules of the Court while conducting proceedings in the Court. There is no corresponding arbitration procedure and rules. Permanent arbitral institutions have their own sets of arbitration rules, but those rules do not regulate the procedure in detail. The arbitral tribunal is master of the procedure of arbitration, subject, of course, to restrictions imposed by law, agreement of parties and natural matter for a quick and cheap resolution of disputes.

Power to terminate/continue the proceedings

Section 25 of the Act provides that subject to agreement between the parties, where, without showing sufficient cause, the claimant fails to communicate his statement of claim within the agreed period, the arbitration proceedings shall be terminated by the arbitrator. Similarly, where the respondent fails to communicate his statement of defence within the predetermined period, the arbitrator shall continue the proceedings without treating such failure, in itself, as an admission of the claimant's allegations. Further, when a party fails to appear at an oral hearing or to produce documentary evidence in support of its averment, the arbitrator can proceed and pronounce the award on the basis of evidence available before it. Thus, the general principles of ex party proceedings will apply to arbitration proceedings also.

Appointment of experts by Arbitral Tribunal

Section 26(1) of the Act, provides for appointment of experts subject to agreement between the parties. Clause (b) of Sub-section (1) of the Section obligates the parties to provide the expert access to necessary information and documents.

The provisions stipulated under Section 26(3) imposes a duty on the expert to make available to the parties on their request the various documents etc. on which the expert has based his report.

Decision by majority

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

Court assistance

Provisions are also made under the Act relating to Court assistance in taking evidence. Section 27 of the Act provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence. For this purpose the application must specify the names and addresses of the parties and the arbitrators, general nature of the claim and the relief sought and the evidence to be obtained particularly (1) the name and address of any person to be heard as witness or expert witness and a statement of the subject matter of the testimony required; (2) the description of any document to be produced or property to be inspected. According to Sub-section (3), the Court may execute the request by ordering that the evidence be provided directly to the arbitral tribunal. Parties shall be subject to the same disadvantage, punishments and penalties by order of the Court, as they would incur for the like offences in suits tried by the Court when persons fail to attend, or make a default, or refuse to give evidence or guilty of contempt of the tribunal during the conduct of the proceedings.

Jurisdiction of Arbitral Tribunals

The arbitral tribunal is empowered to rule its own jurisdiction including any objections in relation to existence and validity of the arbitration agreement. Secton 16 of the Act relates to competence of arbitral tribunal to rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. For this purpose:

(1) an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract; and

(2) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Section 16 also contains in its ambit pleas of non-jurisdiction or excess of authority. Sub-section (2) of Section 16 provides that a plea can be raised not later than the submission of the statement of defence where the arbitral tribunal does not have jurisdiction. It is further provided that a party shall not be precluded from raising such a plea merely because he has appointment or participated in the appointment of an arbitrator. Likewise, Sub-section (3) of Section 16 provides that a plea that the arbitral tribunal is exceeding the scope of its authority, could be raised by the party during the arbitral proceedings, if the matter alleged, is beyond the scope of its authority. Sub-section (4) of Section 16 gives discretionary power to arbitral tribunal to admit a later plea. It provides that the tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3) admit a later plea if it considers the delay justified. The arbitral tribunal shall decide on a plea referred to it in Sub-section (2) or Sub-section (3) and where the tribunal takes a decision rejecting the plea, it shall continue with the arbitral proceedings and make an arbitral award. [Section 16(5)]

An application for setting aside the award may be made in the Court by a party

aggrieved by such an arbitral award. The application should be made in accordance with Section 34 of the Act.

It is important to note that under the Arbitration Act, 1940 if the contract is perished the arbitration clause also perished with the contract. But under the Act, there is a departure from the old Act in this regard. Under the Act if a contract is declared null or void, it does not mean that arbitration is not valid. In other words, under the Act, the clause or an arbitration agreement is to be treated as a clause or an agreement and independent from the other terms of the contract and therefore the validity of the arbitration clause or arbitration agreement is not affected by the modification or recession, invalidity or revocation of the contract.

Interim measures ordered by Arbitral Tribunal

Interim measures are made in the interest of justice and the jurisdiction of the tribunal for interim measures is limited to the subject matter of dispute. Section 17 of the Act relates to interim measures ordered by the tribunal whereas Section 9 of the Act authorises a court to order interim measures. Section 17 provides that unless the parties have specifically agreed, the tribunal may order a party for taking any interim measure of protection as the tribunal may consider necessary in respect of subject matter of the dispute. For obtaining an order, an application must be made by a party. As per Sub-section (2) of Section 17 the tribunal may ask a party to provide appropriate security in connection with the protective measures ordered by it under sub-section (1) of Section 17.

Interim measures are temporary and provisional. They are operative till the dispute is resolved by an award to protect the interest of a party.

Arbitral award

Section 31 of the Act lays down the requirements as to form and contents of an arbitration award. An award must be a speaking order i.e. it must state the reasons, unless the parties have specifically agreed that reasons need not be given or the award is based on agreed terms. The award should state the reasons upon which it is based. In other words, unless (a) the parties have agreed that no reasons are to be given or (b) the award is an arbitral award on agreed terms under Section 30 of the Act, the award should state the reasons in support of determination of the liability/non-liability. The legislature has not accepted the ratio of Constitution Bench in the *Chokhamal Contractor's case* (AIR 1990 SC 1426), that the award, being in the private law field, need not be a speaking award even where the award relates to the contract of private parties or between person and the Government or public sector undertakings (*Tamil Nadu Electricity Board* v. *Bridge Tunnel Constructions & Others,* AIR 1997 SC 1376). Date and Place are to be mentioned in the award in accordance with Section 20 of the Act and the award should be deemed to have been made at that place.

Section 31(1) requires that the award shall be made in writing and shall be signed by the members of the arbitral tribunal. According to Sub-section (5) of Section 31 of the Act, a signed copy of the same is to be delivered to each party.

Interim award

The arbitral tribunal can make an interim award on any matter with respect to which it

may make a final award (See also Section 2(1)(c) of the Act).

Award of interest

Section 31(7) of the Act provides as under:

(a) Unless otherwise agreed by the parties, where and in sofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum from the date of the award to the date of payment.

Finality of arbitral awards

Section 35 of the Act corresponds to the Article 35(1) of UNCITRAL Model Law. The Section 35 of the Act provides that subject to the provisions of Part-I of the Act the award shall be final and binding on the parties and persons claiming under it. In other words an arbitral award is final and binding on the parties and the persons claiming under the same, subject to time limit prescribed under Sections 33 and 34 of the Act.

Test your knowledge

Choose the correct answer

Which Section of the Act authorises a court to order interim measures?

(a) Section 5

(b) Section 9

(c) Section 11

(d) Section 12

Correct answer: (b)

Correction and interpretation of an award

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

The award may be corrected by the arbitral tribunal within 30 days of the receipt of the award. For that purpose, a party, with notice to the other party, may request the tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award. If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. Sub-section (1) of Section 33 also provides that the parties may agree upon a period of time other than 30 days for the request.

If the tribunal finds that the request is reasonable, it shall make a correction or give an interpretation, within 30 days of the receipt of the request. However, the tribunal may extend if necessary, the period of time within which it shall make a correction, give an interpretation of arbitral award under the provisions of Sub-section (6) of Section 33 of the Act. The interpretation shall be treated as part of the award. Likewise, the arbitral tribunal may also correct any errors, on its own within 30 days from the date of the award. That time cannot be extended by the tribunal.

Additional award

Sub-section (4) of Section 33 contains provisions for making additional award. It provides that unless otherwise agreed by the parties, a party with notice to the other party, may request the tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award. Such request may be made within 30 days from the receipt of the arbitral award. If the arbitral tribunal considers the above request reasonable, the tribunal shall make the additional arbitral award within 60 days of the request. The time period of 60 days may be extended by the tribunal if necessary.

The provisions of Section 31 of the Act shall be applicable to a correction or an interpretation of the award or to an additional award.

Enforcement of award

Section 36 of the Act provides that if the time for making an application to set aside the award has expired or the application has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as it were a decree of the Court.

6. PROVISIONS REGARDING SETTING ASIDE AN AWARD

The parties can approach the Court for setting aside the Award. Section 2(e) specifically provides that "Court" means the principal Civil Court of original jurisdiction in a district, including High Court and excludes any Civil Court of grade inferior to such principal Civil Court or any Court of small causes.

An application may be made in accordance with Sub-section (2) and Sub-section (3) of Section 34 of the Act for setting aside an arbitral award.

Sub-section (2) of Section 34, stipulates the following grounds on which the award may be challenged before the Court:

(i) incapacity of a party;

(ii) invalidity of the arbitration agreement;

(iii) party applying was not given proper notice of the apointement of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) award not in accordance with the terms of submission to arbitration in regard to the dispute;

(v) arbitral tribunal not properly constituted or the arbitral procedure was not in accordance with the agreement of the parties;

(vi) subject matter of the dispute not capable of settlement by arbitration under the

law for the time being in force;

(vii) award being in conflict with 'the public policy of India'.

Explanation to Sub-section (2)(b) provides that an award would be in conflict with public policy if it is induced or affected by fraud or corruption or violates Section 75 or Section 81 of the Act relating to confidentiality and admissibility of evidence in other proceedings.

Section 34(3) of the Act prescribes the time limit for making an application for setting aside an arbitral award. The application cannot be made after three months have elapsed from the date on which the party making that application had received the arbitral award or if a request had been made under Section 33 from the date on which that request had been disposed of by the arbitral tribunal. It is further provided that the period of three months could be extended to a maximum of 30 days by the Court but not thereafter if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period.

Interim measures by the Court

Section 9 of the Act relates to interim measures by the Court. These measures can be ordered by the Court, on an application by a party before or during the arbitral proceedings or at any time before the enforcement of an award. It is based on Section 9 of the UNICITRAL Model Law on International Commercial arbitration. The intention of the legislators in incorporating Section 9 is quite explicit that the party before arbitral proceedings or at any time after making of the award but before its enforcement can apply to the Court for interim relief. **In *Ashok Chawla* v. *Rakesh Gupta,* (1996) 2 Arb. L-J. 255, it has been held that in the absence of any prayer for substantive relief, the prayer for issuing any directions by way of interim measures cannot be entertained.** Section 9 contains various interim measures such as appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings or taking measures for protection of assets, issue of interim injunctions or appointment of a receiver etc. In a case, petitioner contractor entered into an agreement to execute work of building construction. The work could not be completed within time as stipulated in the agreement. Therefore, the petitioner sought injunction restraining respondents from getting construction work executed by other agency or contractors. Delhi High Court held that such building contract can not be specifically enforced by in favour of petitioner granting interim relief under Section 9 of the Act (See *BSM Contractors Pvt. Ltd.* v. *Rajasthan State Bridge and Construction Corporation Ltd. and another,* AIR 1999 Delhi 117).

The order of the Court is appealable under Section 37 of the Act of 1996.

Appeals

Section 37 of the Act provides that an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely;

(a) granting or refusing to grant any measures under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34.

An appeal may also lie against the decision of the arbitral tribunal (a) accepting the plea referred in Sub-section (2) or Sub-section (3) of Section 16 or (b) under Section 17 of the Act relating to granting or refusing to grant any interim measures. [Section 37(2)]

Section 37(3) prohibits making of second appeal from an order passed in appeal under Section 37(1) and (2) of the Act but the right to appeal to the Supreme Court is always open to a party aggrieved. The Supreme Court may in its discretion grant special leave to appeal where the needs of justice demand an interference by the highest court of the land. The power conferred upon the Supreme Court is a residuary and extraordinary. However, it shall be exercised by the Court in accordance with the well-established judicial principles or the well established norms of procedure which have been recognised for long as precedents.

7. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Chapters I and II of Part II of the Arbitration and Conciliation Act, 1996 deal with the enforcement of certain foreign awards made under the New York Convention and the Geneva Convention, respectively. Sections 44 and 53 of the Act define the foreign awards as to mean an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered commercial under the law in force in India made on or after the 11th day of October 1960 in the case of New York Convention awards and after the 28th day of July 1924 in the case of Geneva Convention awards.

8. AWARDS MADE UNDER NEW YORK CONVENTION OR GENEVA CONVENTION

Any foreign award whether made under New York Convention or Geneva Convention, which would be enforceable under the Act have been treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India.

Conditions for Enforcement of Foreign Awards

Section 57 of the Act enumerates the conditions for enforcement of foreign awards and provides that the party, against whom the award is invoked, may use any of the following grounds as defence before the Court for the purpose of refusal of enforcement of the foreign awards, namely:

(i) the parties were under some incapacity under the law applicable to them or the arbitration agreement is not valid under that law; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a difference not falling within the terms of submission to arbitration. However, if the award can be separated, the decision on the matters beyond the scope of the arbitration agreement shall not be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or in the law of the country where the arbitration took place; or

(v) the award has not yet become binding, or has been set aside or suspended by a

competent authority of the country in which or under the law of which, the award was made; or

(vi) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(vii) the enforcement of award would be contrary to the public policy of India. In this context, it has been clarified that an award is in conflict with the public policy of India if the making of the award is induced or effected by fraud or corruption.

The provisions regarding conditions for enforcement of foreign awards made under the New York Convention or the Geneva Convention are almost the same. It is obligatory on the party applying for the enforcement of a foreign award to produce before the Court:

(a) the original award or a duly authenticated copy thereof;

(b) the original agreement for arbitration or a duly-certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

Where the award or agreement is in a foreign language, the party seeking to enforce the award is required to produce a certified translated copy in English. Where the Court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that Court.

Appealable Orders

An appeal to the Court authorized by law to hear appeals from such order, may lie on the following two counts:

(i) Where the judicial authority in India has ordered refusing to refer the parties to arbitration under Section 45 in case the New York Convention is applicable to them under Section 54 in case the Geneva Convention is applicable to them.

The aforesaid sections i.e. Section 45 and Section 54 provide that a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred in Section 44 or Section 53, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

(ii) Where the Court has refused to enforce a foreign award either under Section 48 or Section 57 of the Act.

Section 50(2) prohibits a second appeal from an order passed in appeal. However, any right of the parties to appeal to the Supreme Court shall not be affected or taken away by virtue of these provisions.

Both the Chapters of Part II dealing with New York Convention awards and Geneva Convention awards contain a similar saving provision which provides that nothing in this chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this chapter had not been enacted.

9. CONCILIATION

Conciliation is an informal process in which the conciliator (the third party)

tries to bring the disputants to agreement. He does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Mediation is a structured process in which the mediator assists the disputants to reach a negotiated settlement of their differences. Mediation is usually a voluntary process that results in a signed agreement which defines the future behaviour of the parties. The mediator uses a variety of skills and techniques to help the parties reach the settlement, but is not empowered to render a decision.

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

Differences between Arbitration and Conciliation

Arbitration and conciliation differ in some major ways:

— In arbitration, the decision is known as arbitral award and is signed by the arbitral tribunal members; while under conciliation, it is known as settlement and is signed by the parties concerned.

— In arbitration, parties cannot appoint even number of arbitrators; while in conciliation, the number of conciliators can be even.

Arbitrators can be appointed even before the dispute arises; while a conciliator is appointed only after the dispute has arisen.

Provisions relating to conciliation

Under the old law, there are no special provisions to deal with the award based on compromise. As against, the new law facilitates the arbitrator to promote efforts to arrive at settlement of dispute through conciliation.

Part III of the Act contains following provisions in this regard.

Application and scope of conciliation

(1) Save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, this Part shall apply to conciliation of disputes arising out of legal relationship, whether contractural or not and to all proceedings relating thereto.

(2) This Part shall not apply where by virtue of any law for the time being in force certain disputes may not be submitted to conciliation. (Section 61)

Commencement of conciliation proceedings

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified

in the invitation he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly. (Section 62)

Number of conciliators

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

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly. (Section 63)

Appointment of Conciliators

(1) Subject to Sub-section (2):

(a) in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

(b) in conciliation proceedings with two conciliators, each party may appoint one conciliator;

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

(2) Parties may enlist the assistance of a suitable institution, or person in connection with the appointment of conciliators, and in particular:

(a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties. (Section 64)

Submission of statements to conciliator

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit such additional information as he deems appropriate. (Section 65)

Explanation: In this Section and all the following Sections of this part, the term “conciliator” applies to a sole conciliator, two or three conciliators as the case may be.

Conciliator not bound by certain enactments

The conciliator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. (Section 66)

Conciliator is vested with wide powers to decide the procedure to be followed by him untrammeled by the procedural laws like the Code of Civil Procedure or the Indian Evidence Act 1872 (See *Haresh Dayaram* v. *State of Maharashtra,* AIR 2000 SC 2285).

Role of conciliator

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

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

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

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor. (Section 67)

Administrative assistance

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person. (Section 68)

Communication between conciliator and parties

(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings. (Section 69)

Disclosure of Information

When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that

information to the other party. (Section 70)

Co-operation of parties with Conciliator

The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings. (Section 71)

Suggestions by parties for settlement of dispute

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute. (Section 72)

Settlement agreement

(1) When it appears to the conciliator that there exists elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, and assist in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties. (Section 73)

Status and effect of settlement agreement

The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30. (Section 74)

Under Sub-section (3) of Section 73, a successful conciliation proceedings comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement which has the status and effect of legal sanctity of an arbitral award under Section 74 of the Act (*Haresh Dayaram Thakur* v. *State of Maharashtra*, AIR 2000 SC 2281).

Confidentiality

Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement. (Section 75)

Termination of conciliation proceedings

The conciliation proceedings shall be terminated:

(a) by the signing of the settlement agreement by the parties on the date of the

agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration. (Section 76)

Resort to arbitral or judicial proceedings

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights. (Section 77)

Costs

(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of Sub-section (1), “costs” means reasonable costs relating to:

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

(b) any expert advice requested by the conciliator with the consent of the parties;

(c) any assistance provided pursuant to clause (b) of Sub-section (2) of Section 64 and Section 68;

(d) any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party. (Section 78)

Deposits

(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in Sub-section (2) of Section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under Sub-sections (1) and (2) are not paid in full by both the parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, that conciliator shall render an accounting to the parties of the deposits received and shall return any unexpected balance to the parties. (Section 79)

Role of Conciliator in other proceedings

Unless otherwise agreed by the parties:

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings. (Section 80)

Admissibility of evidence in other proceedings

The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator. (Section 81)

Test your knowledge

How can the conciliation proceedings be terminated?

(a) By the signing of the settlement agreement by the parties on the date of the agreement

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration

(d) By oral agreement

Correct answer: (a), (b) and (c)

10. ALTERNATIVE DISPUTE RESOLUTION (ADR)

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

At present, ADR services are offered in India in very rudimentary form. There is,

therefore, an urgent need to establish and promote ADR services for resolution of both domestic and international disputes in India. These services need to be nourished on sound conceptions, expertise in their implementation and comprehensive and modern facilities.

The International Centre for Alternative Dispute Resolution (ICADR) is a unique centre in this part of the world that makes provision for promoting teaching and research in the field of ADR as also for offering ADR services to parties not only in India but also to parties all over the world. The ICADR is a Society registered under Societies Registration Act, 1860, it is an independent non-profit making organisation. It maintains panels of independent experts in the implementation of ADR processes.

Areas in which ADR works

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

III. LAW RELATING TO TORTS

1. INTRODUCTION

The word 'tort' is a French equivalent of English word 'wrong'. The word tort is derived from Latin language from the word *Tortum.* Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.

Broadly speaking, public wrongs are the violations of 'public law and hence amount to be offences against the State, while private wrongs are the breaches of private law, i.e., wrongs against individuals. Public wrongs or crimes are those wrongs which are made punishable under the penal law which belong to the public law group.

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

Salmond defines it as "a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."

Fraser describes it as "an infringement of a right *in rem* of a private individual giving a right of compensation at the suit of the injured party."

Winfield says : "Tortious liability arises from the breach of duty, primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages".

Two important elements can be derived from all these definitions, namely: (i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and (ii) that every civil wrong is not a tort. Accordingly, it is now possible to distinguish tort from a crime and from a contract, a trust and a quasi-contract. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

2. GENERAL CONDITIONS OF LIABILITY FOR A TORT

As stated earlier, there is no fixed catalogue of circumstances, which along and for all time mark the limit of what are torts. Certain situations have been held to be torts and will continue to be so in the absence of statutory repeal, and others have been held not to be torts. However, certain general conditions for tortuous liability can be laid down.

In general, a tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be:

(i) a wrongful act or omission of the defendant;

(ii) the wrongful act must result in causing legal damage to another; and

(iii) the wrongful act must be of such a nature as to give rise to a legal remedy.

(i) *Wrongful act:* The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. In other words, it should prejudicially affect any of the above mentioned interests, and protected by law. Thus, every person whose legal rights, e.g., right of reputation, right of bodily safety and freedom, and right to property are violated without legal excuse, has a right of action against the person who violated them, whether loss results from such violation or not.

(ii) *Legal damages:* it is not every damage that is a damage in the eye of the law. It must be a damage which the law recognizes as such. In other words, there should be legal injury or invasion of the legal right. In the absence of an infringement of a legal right, an action does not lie. Also, where there is infringement of a legal right, an action lies even though no damage may have been caused.

As was stated in *Ashby* v. *White*, (1703) 2 Ld. Raym. 938 legal damage is neither identical with actual damage nor is it necessarily pecuniary. Two maxims, namely : (i) *Damnum sine injuria*, and (ii) *injuria sine damnum*, explain this proposition.

Damnum Sine Injuria

Damnum means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Common examples are, where the damage results from an act done in the exercise of legal rights. **Thus, if I own a shop and you open a shop in the neighbourhood, as a result of which I lose some customers and my profits fall off, I cannot sue you for the lose in profits, because you are exercising your legal right. [*Gloucester Grammer School* case, (1410) Y.B. Hill. 11 Hen, 4, of. 47, pp. 21,36]**

Injuria Sine Damno

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

but plaintiff can still sue in tort.

Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus when there is an invasion of an "absolute" private right of an individual, there is an *injuria* and the plaintiff's action will succeed even if there is no *Damnum* or damages. In simple terms, it means that if some one else's legal rights are infringed upon, it is actionable, even if no damage has resulted to the other person. The leading example is the case of *Ashby v White* referred to above where a person was wrongfully not allowed to vote and even though it has not caused him any damage, since his legal right to vote was denied, he was entitled to compensation. An absolute right is one, the violation of which is actionable *per se*, i.e., without the proof of any damage. *Injuria sine damno* covers such cases and action lies when the right is violated even though no damage has occurred. Thus the act of trespassing upon another's land is actionable even though it has not caused the plaintiff even the slightest harm.

(iii) *Legal remedy:* The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages, although some other remedies, e.g., injunction, may be obtained in addition to damages or specific restitution may be claimed in an action for the detention of a chattel. Self-help is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land. For example, if "A" finds a drunken stranger in his room who has no business to be there in it, and is thus a trespass, he (A) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

Mens Rea

How far a guilty mind of persons is required for liability for tort?

The General principle lies in the maxim "*actus non facit reum nisi mens sit rea"* i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence. For example, under criminal law, *mens rea* must be proved. However, to this principle cases of absolute or strict liability are exceptions.

Test your knowledge

State whether the following statement is "True" or "False"

The act of trespassing upon another's land is not actionable if it has not caused the plaintiff the slightest harm.

- True
- False

Correct answer: False

3. KINDS OF TORTIOUS LIABILITY

The following types of tortuous liability may be noted:

(A) STRICT OR ABSOLUTE LIABILITY

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

(i) *Liability for Inevitable Accident* – Such liability arises in cases where damage is done by the escape of dangerous substances brought or kept by anyone upon his land. Such cases are where a man is made by law an insurer of other against the result of his activities.

(ii) *Liability for Inevitable Mistake* – Such cases are where a person interferes with the property or reputation of another.

(iii) *Vicarious Liability for Wrongs committed by others* – Responsibility in such cases is imputed by law on grounds of social policy or expediency. These case involve liability of master for the acts of his servant.

Rule in Rylands v. Fletcher

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

The facts of this case were as follows: B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursted through the shafts and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed; "We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, *prima facie* answerable for all the damage which is the natural consequence of its escape."

Later in the case of *Read* v. *Lyons* [(1946) 2 All. E.R. 471 (H.L.)], it has been explained that two conditions are necessary in order to apply the rule in *Ryland* v. *Fletcher*, these are:

(i) *Escape:* from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and

(ii) *Non-natural use of Land:* The defendant is liable if he makes a non-natural use of land.

If either of these conditions is absent, the rule of strict liability will not apply.

(a) Exceptions to the Rule of Strict Liability

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

(i) *Damage due to Natural Use of the Land*

In *Ryland* v. *Fletcher* water collected in the reservoir in such large quantity, was held to be non-natural use of land. Keeping water for ordinary domestic purpose is 'natural use'. Things not essentially dangerous which is not unusual for a person to have on his own land, such as water pipe installations in buildings, the working of mines and minerals on land, the lighting of fire in a fire-place of a house, and necessary wiring for supplying electric light, fall under the category of "natural use" of land.

(ii) *Consent of the plaintiff*

Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, the liability under the rule in *Ryland* v. *Flethcher* does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

(iii) *Act of Third Party*

If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable. Thus, in *Box* v. *Jubh* (1879) 4 Ex. D. 76, the overflow from the defendant's reservoir was caused by the blocking of a drain by stranger, the defendant was held not liable. But if the act of the stranger, is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care prevent the damage. Failure on his part to avoid such damage will make him liable.

(iv) *Statutory Authority*

Sometimes, public bodies storing water, gas, electricity and the like are by statute, exempted from liability so long as they have taken reasonable care. This is based on the principle that they act in public interest.

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

(v) *Act of God*

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

(vi) *Escape due to plaintiff's own Default*

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

Applicability of the rule in Rylands v. *Fletcher in cases of enterprises engaged in a hazardous or inherently dangerous industry*

The Supreme Court has discussed the applicability of the rule of *Reylands* v. *Fletcher* in the case of *M.C. Mehta* v. *Union of India and Others* (1987) 1. Comp. L.J. p. 99 S.C. while determining the principles on which the liability of an enterprise engaged in a hazardous or inherently dangerous industry depended if an accident occurred in such industry.

> "We have to evolve new principle and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that, in any other foreign country".

On the question of the nature of liability for a hazardous enterprise the court while noting that the above rule as developed in England recognizes certain limitations and responsibilities recorded it's final view as follows:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part."

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under *Rylands* v. *Fletcher*, need not be proved in India.

Test your knowledge

Which of the following are different kinds of strict or absolute liability?

(a) Liability for inevitable accident
(b) Liability for evitable accident
(c) Liability for inevitable mistake
(d) Vicarious liability for wrongs committed by others.

Correct answer: (a), (c) and (d)

(B) VICARIOUS LIABILITY

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

(a) Principal and Agent [Specific authority]

Qui facit per alium facit per se – he who acts through another is acting himself, so that the act of the agent is the act of the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same. **In *Lloyd* v. *Grace, Smith & Co.* (1912) A.C. 716, the managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign documents transferring her property to him. He had done so without the knowledge of his principal who was liable because the fraud was committed in the course of employment.**

(b) Partners

For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable therefore to the same extent as the guilty partner. The liability of the partners is joint and several. **In *Hamlyn* v. *Houston & Co.* (1903) 1 K.B. 81, one of the two partners bribed the plaintiff's clerk and induced him to divulge secrets relating to his employer's business. It was held that both the partners were liable for the tort committed by only one of them.**

(c) *Master and Servant [Authority by relation]*

A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several.

In such cases (1) liability of a person is independent of his own wrongful intention or negligence (2) liability is joint as well several (3) In case of vicarious liability the liability arises because of the relationship between the principal and the wrongdoer but in case of absolute or strict liability the liability arises out of the wrong itself.

A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim *Respondeat*

Superior (Let the principal be liable) or on the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself).

The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

(d) Employer and Independent Contractor

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

A servant is a person who is employed by another (the employer) to perform services in connection with the affairs of the employer, and over whom the employer has control in the performance of these services. An *independent contractor* is one who works for another but who is not controlled by that other in his conduct in the performance of that work. These definitions show that a person is a servant where the employer "retains the control of the actual performance" of the work.

(e) Where Employer is Liable for the acts of Independent Contractor

The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:

(i) When employer authorizes him to commit a tort.

(ii) In torts of strict liability

(iii) Negligence of independent contractor

(f) Where Employer is not Liable for the acts of an Independent Contractor

An employer is not liable for the tort of an independent contractor if he has taken care in the appointment of the contractor. **In *Philips* v. *Britania Hygienic Laundry Co.* (1923), the owner of lorry was held not liable when a third-party's vehicle was damaged, in consequence of the negligent repair of his lorry by a garage proprietor.**

Employers of independent contractors are liable for the "collateral negligence" of their contractors in the course of his employment. Where A employed B to fit casement windows into certain premises. B's servant negligently put a tool on the still of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off the still on to a passer by. The employer was held to be liable, because the harm was caused by the work on a highway and duty lies upon the employer to avoid harm.

(g) Liability for the acts of Servants

An employer is liable whenever his servant commits a tort *in the course of his employment.* An act is deemed to be done in the course of employment if it is either:

(i) a wrongful act authorized by the employer, or

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

So for as the first alternative is concerned there is no difficulty in holding the master liable for the tort of his servant. A few examples, however, are necessary to explain the working of the rule in the second. These are as follows:

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

Similarly, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rly. Co.* (1873) L.R. 7 C.P. 415, erroneously thinking that the plaintiff was in the wrong train, a porter of the defendants forcibly removed him. The defendants were held liable.

(C) VICARIOUS LIABILITY OF THE STATE

(a) The Position in England

At Common Law the Crown could not be sued in tort, either for wrongs actually authorized by it or committed by its servants, in the course of their employment. With the passing of the Crown Proceeding Act, 1947, the Crown is liable for the torts committed by its servants just like a private individual. Thus, in England, the Crown is now vicariously liable for the torts of its servants.

(b) The Position in India

Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India.

When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or non-sovereign function. If it is a sovereign function, it could claim immunity from the tortuous liability, otherwise not. A sovereign function denotes the activity of the State which can be done only by the State like defence, police, etc. The State is not liable vicariously for any breach by its employees. A non sovereign function covers generally the activities of commercial nature or those which can be carried out by a private individual like transport, hospitals etc. in which the State is equally liable similar to a private person.

Test your knowledge

Which of the following are common examples of vicarious liability?

(a) Principal and agent
(b) Partners
(c) Master and servant
(d) Employer and employed contractor

Correct answer: (a), (b) and (c)

4. TORTS OR WRONGS TO PERSONAL SAFETY AND FREEDOM

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

(a) Battery

Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery. To constitute a tort of battery, therefore, two things are necessary: (i) use of force, however, trivial it may be without the plaintiff's consent, and (ii) without any lawful justification.

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

(b) Assault

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed. The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established. Usually when there is a battery, there will also be assault, but not for instance, when a person is hit from behind. To point a loaded gun at the plaintiff, or to shake fist under his nose, or to curse him in a threatening manner, or to aim a blow at him which is intercepted, or to surround him with a display of force is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it, is an assault.

(c) *Bodily Harm*

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

(d) False Imprisonment

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body. What happens in false imprisonment is that a person is confined within certain limits so that he cannot move about and so his personal liberty is infringed. It is a serious violation of a person's right and liberty whether being confined within the four walls or by being prevented from leaving place where he is. If a man is restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

(e) Malicious Prosecution

Malicious prosecution consists in instigating judicial proceedings (usually criminal)

against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property.

The following are the essential elements of this tort:

(i) There must have been a *prosecution* of the plaintiff by the defendant.

(ii) There must have been *want of reasonable and probable cause* for that prosecution.

(iii) The defendant must have *acted maliciously* (i.e. with an improper motive and not to further the end of justice).

(iv) The plaintiff must have suffered *damages* as a result of the prosecution.

(v) The prosecution must have terminated *in favour of the plaintiff.*

To be actionable, the proceedings must have been instigated actually by the defendant. If he merely states the fact as he believes them to a policeman or a magistrate he is not responsible for any proceedings which might ensue as a result of action by such policeman or magistrate on his/her own initiative.

This is because there is no malice involved in it. Malicious prosecution thus actually refers to the case of initial prosecution with malice and as a remedy for it, the other party who had won the case, may institute, under the law of torts, a suit for malicious prosecution.

(f) Nervous Shock

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard. Causing of nervous shock itself is not enough to make it an actionable tort, some injury or illness must take place as a result of the emotional disturbance, fear or sorrow.

(g) Defamation

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

"Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally; or which tends to make them shun or avoid that person."

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

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

Generally, the punishment for libel is more severe than for slander.

Defamation is tort as well as a crime in India.

In India both libel and slander are treated as a crime. Section 499 of the Indian Penal Code recognizes both libel and slander as an offence. However, torts in criminal law are stricter than in law of tort.

5. REMEDIES IN TORTS

(1) Judicial Remedies

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

Extra Judicial Remedies

In certain cases it is lawful to redress one's injuries by means of self help without recourse to the court. These remedies are:

(a) Self Defence

It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

(b) Prevention of Trespass

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

(c) Re-entry on Land

A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

(d) Re-caption of Goods

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

(e) Abatement of Nuisance

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

(f) Distress Damage Feasant

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

Test your knowledge

Which of the following situations are considered as assault?

(a) Point a loaded gun at the plaintiff
(b) Curse him in a threatening manner
(c) Use force
(d) Aim a blow at him which is intercepted

Correct answer: (a), (b) and (d)

IV. LAW RELATING TO LIMITATION

1. INTRODUCTION

The law relating to limitation is incorporated in the Limitation Act of 1963, which prescribes different periods of limitation for suits, petitions or applications.

The Act applies to all civil proceedings and some special criminal proceedings which can be taken in a Court of law unless its application is excluded by any enactment. The Act extends to whole of India except the State of Jammu and Kashmir.

Limitation Bars Remedy, But Does Not Extinguish Rights

The Law of limitation bars the remedy in a Court of law only when the period of limitation has expired, but it does not extinguish the right that it cannot be enforced by judicial process (*Bombay Dying & Mfg. Co. Ltd.* v. *State of Bombay*, AIR 1958 SC 328). Thus if a claim is satisfied outside the Court of law after the expiry of period of limitation, that is not illegal as the right to cause of action always remains. Similarly, even if the defence of limitation is not set by the other party, the Court cannot accept any suit, appeal or application beyond the period of limitation.

2. COMPUTATION OF THE PERIOD OF LIMITATION FOR DIFFERENT TYPES OF SUITS

The Courts in India are bound by the specific provisions of the Limitation Act and are not permitted to move outside the ambit of these provisions. The Act prescribes the period of limitation in Articles in Schedule to the Act. In the Articles of the Schedule to the Limitation Act, Columns 1, 2, and 3 must be read together to give harmonious meaning and construction.

The Schedule containing the table showing the relevant Articles prescribing limitation period for a specified suit and also time from which such period commences is given at the end of this Lesson.

3. BAR OF LIMITATION

Section 3 of the Act provides that any suit, appeal or application if made beyond the prescribed period of limitation, it is the duty of the Court not to proceed with such suits

irrespective of the fact whether the plea of limitation has been set up in defence or not. The provisions of Section 3 are mandatory. The Court can suo motu take note of question of limitation. The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of presentation of the plaint. It is a vital section upon which the whole limitation Act depends for its efficacy.

The effect of Section 3 is not to deprive the Court of its jurisdiction. Therefore, decision of a Court allowing a suit which had been instituted after the period prescribed is not vitiated for want of jurisdiction. A decree passed in a time barred suit is not a nullity.

Test your knowledge

Choose the correct answer

Which of the following States does not come under the purview of the Act of Limitation?

(a) Punjab
(b) Jammu & Kashmir
(c) Uttar Pradesh
(d) Bihar

Correct answer: (b)

4. EXTENSION OF TIME IN CERTAIN CASES

Doctrine of sufficient cause

Section 5 allows the extension of prescribed period in certain cases on sufficient cause being shown for the delay. This is known as doctrine of "sufficient cause" for condonation of delay which is embodied in Section 5 of the Limitation Act, 1963. Section 5 provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

It is clarified by the explanation appended to the Section 5 that the fact that the appellant or applicant was misled by any order, practice or judgement of the High Court in ascertaining or computing the prescribed period may be a sufficient cause within the meaning of this section.

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

The Section is not applicable to applications made under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 and also to suits. The Court has no power to admit a time barred suit even if there is a sufficient cause for the delay. It applies only to appeals or applications as specified therein. The reason for non-applicability of the Section to suits is that, the period of limitation allowed in most of the suits extends from 3 to 12 years whereas in appeals and application it does not exceed 6 months. For the applicability

of Section 5, the “prescribed period” should be over. The prescribed period means any period prescribed by any law for the time being in force.

The party applying for condonation of delay should satisfy the Court for not making an appeal or application within the prescribed period for sufficient cause. The term sufficient cause has not been defined in the Limitation Act. It depends on the circumstances of each case.

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

It is the Court’s discretion to extend or not to extend the period of limitation even after the sufficient cause has been shown and other conditions are also specified. However, the Court should exercise its discretion judicially and not arbitrarily.

What is sufficient cause and what is not may be explained by the following Judicial observations:

1. Wrong practice of High Court which misled the appellant or his counsel in not filing the appeal should be regarded as sufficient cause under Section 5;
2. In certain cases, mistake of counsel may be taken into consideration in condonation of delay. But such mistake must be *bona fide;*
3. Wrong advice given by advocate can give rise to sufficient cause in certain cases;
4. Mistake of law in establishing or exercising the right given by law may be considered as sufficient cause. However, ignorance of law is not excuse, nor the negligence of the party or the legal adviser constitutes a sufficient cause;
5. Imprisonment of the party or serious illness of the party may be considered for condonation of delay;
6. Time taken for obtaining certified copies of the decree of the judgment necessary to accompany the appeal or application was considered for condoning the delay.
7. Non-availability of the file of the case to the State counsel or Panel lawyer is no ground for condonation of inordinate delay (*Collector and Authorised Chief Settlement Commissioner* v. *Darshan Singh and others,* AIR 1999 Raj. 84).
8. Ailment of father during which period the defendant was looking after him has been held to be a sufficient and genuine cause (*Mahendra Yadav* v. *Ratna Devi & others,* AIR 2006 (NOC) 339 Pat.

The test of "sufficient course" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of sufficient cause' delightfully undefined thereby leaving to the court a well-intended discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such. [*R B Ramlingam* v. *R B Bhvansewari* (2009) 2 SCC 689.]

The quasi-judicial tribunals, labour courts or executive authorities have no power to extend the period under this Section.

There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the court as such.

Persons under legal disability

Section 6 is an enabling section to enable persons under disability to exercise their legal rights within a certain time. Section 7 supplements Section 6, Section 8 controls these sections, which serves as an exception to Sections 6 and 7. The combined effect of Sections 6 and 8 is that where the prescribed period of limitation expires before the cessation of disability, for instance, before the attainment of majority, the minor will no doubt be entitled to a fresh period of limitation from the attainment of his majority subject to the condition that in no case the period extended by Section 6 shall by virtue of Section 8 exceeds three years from cessation of disability, i.e. attainment of majority.

Sections 6, 7 and 8 must be read together. Section 8 imposes a limitation on concession provided under Sections 6 and 7 to a person under disability up to a maximum of three years after the cessation of disability. The Section applies to all suits except suits to enforce rights of pre-emption.

The period of three years under Section 6 of this Act has to be counted, not from the date of attainment of majority by the person under disability, but from the date of cessation of minority or disability.

Both Sections 6 and 7 go together. Section 7 is an extension of Section 6, where the point of time at which the existence of disability is to be recognized i.e. *"the time from which the period of limitation is to be reckoned".*

Section 7 is only an application of the principle in Section 6 to a joint-right inherited by a group of persons wherein some or all of whom are under the disability. The disability of all except one does not prevent the running of time, if the discharge can be given without the concurrence of the other. Otherwise the time will run only when the disability is removed.

To apply Section 7, disability must exist when the right to apply accrued, i.e., at the time from which period of limitation is to be reckoned.

In other words, Section 8 provides that in those cases where the application of Section 6 or 7 of the Act results in an extension of the period prescribed by Schedule, that extension is not to be more than three years after the cessation of the disability.

Test your knowledge

Which of the following authorities do not have the power to extend the period as per Section 5?

(a) Labour courts
(b) Quasi-judicial tribunals
(c) High Court
(d) Executive authorities

Correct answer: a, b and d

5. CONTINUOUS RUNNING OF TIME

According to Section 9 of the Act where once time has begun to run, no subsequent disability or inability to institute a suit or make an application can stop it provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues.

The rule of this Section is based on the English dictum. “Time when once it has commenced to run in any case will not cease to be so by reason of any subsequent event”. Thus, when any of the statutes of limitation is begun to run, no subsequent disability or inability will stop this running.

The applicability of this Section is limited to suits and applications only and does not apply to appeals unless the case fell within any of the exceptions provided in the Act itself.

For the applicability of Section 9 it is essential that the cause of action or the right to move the application must continue to exist and subsisting on the date on which a particular application is made. If a right itself had been taken away by some subsequent event, no question of bar of limitation will arise as the starting point of limitation for that particular application will be deemed not to have been commenced.

Thus, time runs when the cause of action accrues. True test to determine when a cause of action has accrued is to ascertain the time, when plaintiff could have maintained his action to a successful result first if there is an infringement of a right at a particular time, the whole cause of action will be said to have arisen then and there.

Section 9 contemplates only cases where the cause of action continues to exist. Section 10 excludes suits against trustees and their representatives from the purview of the Act. In order to invoke the application of Section 10 the property must be vested in a trustee or trustees for a specific-purpose.

6. COMPUTATION OF PERIOD OF LIMITATION

(i) Exclusion of certain days or exclusion of time in legal proceedings

While computing Period of Limitation certain day/days are to be excluded.

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

Computation of period of limitation for a suit, appeal or application: According to Section 12(1), the day which is to be excluded in computing period of limitation is the day from which the period of limitation is to be reckoned. In case of any suit, appeal or application, the period of limitation is to be computed exclusive of the day on which the time begins to run.

Computation of period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgement. The day on which the judgement complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded [Section 12(2)].

Computation of period for an application made for leave to appeal from a decree or order. The time requisite for obtaining a copy of the judgement shall also be excluded [Section 12(3)].

Computation of Limitation period for an application to set aside an award: The time required for obtaining a copy of the award shall be excluded [Section 12(4)].

Thus, the time required for getting copies of certain decisions, mentioned under Section 12 is also to be excluded in computing the period of limitation as per Sub-sections (2), (3) and (4).

The term “time requisite for obtaining a copy” means the time which is reasonably required for obtaining such a copy, On the explanation to Section 12, the Supreme Court in the case of *Udayan China Bhai* v. *R.C. Bali,* AIR 1977 SC 2319, held that by reading Section 12(2) with explanation it is not possible to accept the submission that in computing the time requisite for obtaining copy of a decree by an application made after preparation of the decree, the time that elapsed between the pronouncement of the judgement and the signing of the decree should be excluded.

However, the time taken by the Court to prepare the decree or order before an application for a copy is made shall not be excluded in computing the time for obtaining a copy of a decree or an order. (Explanation to Section 12)

(ii) Exclusion of time during which leave to sue or appeal as a pauper is applied for (Section 13).

(iii) Exclusion of time bona fide taken in a court without jurisdiction. (Section 14)

The relief to a person is given by Section 14 of the Act when the period of limitation is over, because another civil proceedings relating to the matter in issue had been initiated in a court which is unable to entertain it, by lack of jurisdiction or by any other like cause.

The following conditions must co-exist for the applicability of this Section:

(a) that the plaintiff or the applicant was prosecuting another civil proceedings against the defendant with due diligence;

(b) that the previous suit or application related to the same matter in issue;

(c) that the plaintiff or the applicant prosecuted in good-faith in that court; and

(d) that the court was unable to entertain a suit or application on account of defect of jurisdiction or other like cause.

(iv) Exclusion of time in certain other cases

(a) When a suit or application for the execution of a decree has been stayed by an injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded. [Section 15(1)]

(b) The time required to obtain the sanction or consent of the Govt. required, or a notice period shall also be excluded in case of suits. [Section 15(2)]

(c) In a suit or an application for execution of a decree by any receiver or interim receiver or any liquidator, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of their appointment shall be excluded. [Section 15(3)]

(d) The time during which a proceeding to set aside the sale has been prosecuted shall be excluded in case of a suit for possession by a purchaser at a sale in execution of a decree. [Section 15(4)]

(e) The time during which the defendant has been absent from India and from the territories outside India administered by the Central Government, shall also be excluded. [Section 15(5)]

(f) In case of death of a person before the right to institute a suit accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application. The same rule applies in case if defendant dies. [Sections 16(1) and (2)]

However, the above rule does not apply to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office. [Section 16(3)]

(g) Where the suit or application is based upon the fraud or mistake of the defendant or respondent or his agent or in other cases as mentioned in Section 17, the period of limitation shall not begin to run until the plaintiff or applicant has discovered fraud or mistake subject to certain exceptions. (Section 17)

7. EFFECT OF ACKNOWLEDGEMENT ON THE PERIOD OF LIMITATION

Section 18 of the Act deals with the effect of acknowledgement of liability in respect of property or right on the period of limitation. The following requirements should be present for a valid acknowledgement as per Section 18:

1. There must be an admission or acknowledgement;
2. Such acknowledgement must be in respect of any property or right;
3. It must be made before the expiry of period of limitation; and
4. It must be in writing and signed by the party against whom such property or right is claimed.

If all the above requirements are satisfied, a fresh period of limitation shall be computed from the time when the acknowledgement was signed.

8. EFFECT OF PAYMENT ON ACCOUNT OF DEBT OR OF INTEREST ON LEGACY

As per Section 19 of the Act where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. The proviso says that, save in the case of payment of interest made before the 1st day of January, 1928 an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment.

According to the explanation appended to this Section:

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment;

(b) 'debt' does not include money payable under a decree or order of a court for the purpose of this Section.

Thus, according to this section a fresh period of limitation becomes available to the creditor from the date of part payment when part-payment of debt is made by the debtor before the expiration of the period of limitation.

9. COMPUTATION OF TIME MENTIONED IN INSTRUMENTS

All instruments shall for the purposes of this Act be deemed to be made with reference to the Gregorian Calendar. (Section 24)

Test your knowledge

Choose the correct answer

Which of the following Sections states the time which shall be excluded in computing the time of limitation in legal proceedings?

(a) Section 10
(b) Section 11
(c) Section 12
(d) Section 13

Correct answer: (c)

10. ACQUISITION OF OWNERSHIP BY POSSESSION

Section 25 applies to acquisition of easements. It provides that the right to access and use of light or air, way, watercourse, use of water, or any other easement which have been peaceably enjoyed without interruption and for twenty years (thirty years if property belongs to Government) shall be absolute and indefeasible. Such period of twenty years shall be a period ending within two years next before the institution of the suit.

11. LIMITATION AND WRITS UNDER THE CONSTITUTION

The subject of limitation is dealt with in entry 13, List III of the Constitution of India. The Legislature may, without violating the fundamental rights, enact statutes prescribing limitation within which actions may be brought or varying or changing the existing rules of limitation either by shortening or extending time provided a reasonable time is allowed for enforcement of the existing right of action which would become barred under the amended Statute.

The Statute of Limitation is not unconstitutional since it applies to right of action in future. It is a shield and not a weapon of offence (34 American Jurisprudence, P. 16).

The State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India under Article 32 of the Constitution. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well be questioned under Article 13(2) of the Constitution. It is against the State action that Fundamental Rights are claimed (*Tilokchand Motichand* v. *H.P. Munshi,* AIR 1970 SC 898).

The Limitation Act does not in terms apply to a proceeding under Article 32 or Article 226 of the Constitution. But the Courts act on the analogy of the statute of limitation and refuse relief if the delay is more than the statutory period of limitation (*State of M.P.* v. *Bhai Lal Bhai*, AIR 1964 SC 1006). Where the remedy in a writ petition corresponds to a remedy in an ordinary suit and latter remedy is subject to bar of a statute of limitation, the Court in its writ jurisdiction adopts in the statute its own rule of procedure and in absence of special circumstances imposes the same limitation in the writ jurisdiction.

If the right to property is extinguished by prescription under Section 27 of the Limitation Act, 1963, there is no subsisting right to be enforced under Article 32 of the Constitution. In other case where the remedy only, not the right, is extinguished by limitation the Court will refuse to entertain stale claims on the ground of public policy (*Tilokchand Motichand* v. *H.P. Munshi,* AIR 1970 SC 898).

ANNEXURE

THE SCHEDULE

(Periods of Limitation)

[Sections 2(j) and 3]

	Description of suit	*Period of limitation*	*Time from which period begins to run*
	(1)	*(2)*	*(3)*
	First Division — SUITS		
	PART I — SUITS RELATING TO ACCOUNTS		
1.	For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last time admitted or proved is entered in the account, such year to be computed as in the account.
2.	Against a factor for an account.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
3.	By a principal against his agent for movable property received by the latter and not accounted for.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
4.	Other suits by principals against agents for neglect or misconduct.	Three years	When the neglect or misconduct becomes known to the plaintiff.
5.	For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution.
	PART II — SUITS RELATING TO CONTRACTS		
6.	For a seaman's wages.	Three years	The end of the voyage during which the wages are earned.
7.	For wages in the case of any other person.	Three years	When the wages accrue due.
8.	For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	Three years	When the food or drink is delivered.
9.	For the price of lodging.	Three years	When the price becomes payable.

	(1)	(2)	(3)
10.	Against a carrier for compensation for losing or injuring goods.	Three years	When the loss of injury occurs.
11.	Against a carrier for compensation for non-delivery of, or delay in delivering goods.	Three years	When the goods sought to be delivered.
12.	For the hire of animals, vehicles, boats or household furniture.	Three years	When the hire becomes payable.
13.	For the balance of money advanced in payment of goods to be delivered.	Three years	When the goods ought to be delivered.
14.	For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years	The date of delivery of the goods.
15.	For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years	When the period of credit expires.
16.	For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years	When the period of the proposed bill elapses.
17.	For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years	The date of the sale.
18.	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
19.	For money payable for money lent.	Three years	When the loan is made.
20.	Like suit when the lender has given a cheque for the money.	Three years	When the cheque is paid.
21.	For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.

	(1)	(2)	(3)
22.	For money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable.	Three years	When the demand is made.
23.	For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.
24.	For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use.	Three years	When the money is received.
25.	For money payable for interest upon money due form the defendant to the plaintiff.	Three years	When the interest becomes due.
26.	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
27.	For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
28.	On a single bond, where a day is specified for payment.	Three years	The day so specified.
29.	On a single bond, where no such day is specified.	Three years	The date of executing the bond.
30.	On a bond subject to a condition.	Three years	When the condition is broken.
31.	On a bill of exchange or promissory note payable at a fixed time after date.	Three years	When the bill or note falls due.

	(1)	(2)	(3)
32.	On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years	When the bill is presented.
33.	On a bill of exchange accepted payable at a particular place.	Three years	When the bill is presented at that place.
34.	On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years	When the fixed time expires.
35.	On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years	The date of the bill or note.
36.	On a promissory note or bond payable by instalments.	Three years	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.
37.	On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made unless where the payee or obligee waives the benefit of the provision and than when fresh default is made in respect of which there is no such waiver.
38.	On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years	The date of the delivery to the payee.
39.	On a dishonoured foreign bill where protest has been made and notice given.	Three years	When the notice is given.
40.	By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance.	Three years	The date of the refusal to accept.
41.	By the acceptor of an accommodation – bill against the drawer.	Three years	When the acceptor pays the amount of the bill.

	(1)	(2)	(3)
42.	By a surety against the principal debtor.	Three years	When the surety pays the creditor.
43.	By a surely against a co-surety.	Three years	When the surety pays anything in excess of his own share.
44.	(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	The date of the death of the deceased or where the claim on the policy is denied, either partly or wholly, the date of such denial.
	(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
45.	By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years	When the insurers elect to avoid the policy.
46.	Under the Indian Succession Act, 1925, Section 360 or Section 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years	The date of the payment or distribution.
47.	For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure.
48.	For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-shares.	Three years	The date of the payment in excess of the plaintiff's own share.
49.	By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	When the right to contribution accrues.

	(1)	(2)	(3)
50.	By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years	The date of the payment.
51.	For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years	When the profits are received.
52.	For arrears of rent.	Three years	When the arrears become due.
53.	By a vendor of immovable property for personal payment of unpaid purchase-money.	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
54.	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused.
55.	For compensation for the breach of any contract, express or implied not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
	PART III — SUITS RELATING TO DECLARATIONS		
56.	To declare the forgery of an instrument issued or registered.	Three years	When the issue or registration becomes known to the plaintiff.
57.	To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Three years	When the alleged adoption becomes known to the plaintiff.
58.	To obtain any other declaration.	Three years	When the right to sue first accrues.

	(1)	(2)	(3)
	PART IV — SUITS RELATING TO DECREES AND INSTRUMENTS		
59.	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
60.	To set aside a transfer of property made by the guardian of a ward —		
	(a) by the ward who has attained majority;	Three years	When the ward attains majority.
	(b) by the ward's legal representative —		
	(i) When the ward dies within three years from the date of attaining majority;	Three years	When the ward attains majority.
	(ii) when the ward dies before attaining majority.	Three years	When the ward dies.
	PART V — SUITS RELATING TO IMMOVABLE PROPERTY		
61.	By a mortgagor —		
	(a) to redeem or recover the possession of immovable property mortgaged;	Thirty years	When the right to redeem or to recover possession accrues.
	(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
	(c) to recover surplus collection received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.
62.	To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.

	(1)	(2)	(3)
63.	By a mortgagee:		
	(a) for foreclosure;	Thirty years	When the money secured by the mortgagee becomes due.
	(b) for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.
64.	For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.
65.	For possession of immovable property or any interest herein based on title. *Explanation* — For the purposes of this article— (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

	(1)	(2)	(3)
	(c) where the suit is by a purchaser at a sale in execution of a decree when the judgement debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgement debtor who was out of possession.		
66.	For possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition.	Twelve years	When the forfeiture is incurred or the condition is broken.
67.	By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.
	PART VI — SUITS RELATING TO MOVABLE PROPERTY		
68.	For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
69.	For other specific movable property.	Three years	When the property is wrongfully taken.
70.	To recover movable property deposited or pawned from a depository or pawnee.	Three years	The date of refusal after demand.
71.	To recover movable property deposited or pawned, and afterwards bought from the depository or pawnee for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.

(1)	(2)	(3)
PART VII — SUITS RELATING TO TORT		
72. For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year	When the act or omission takes place.
73. For compensation for false imprisonment.	One year	When the imprisonment ends.
74. For compensation for a malicious prosecution.	One year	When the plaintiff is acquitted or the prosecution is otherwise terminated.
75. For compensation for libel.	One year	When the libel is published.
76. For compensation for slander.	One year	When the words are spoken, or if the words are not actionable in themselves, when the special damage complained of results.
77. For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year	When the loss occurs.
78. For compensation for inducing a person to break a contract with the plaintiff.	One year	The date of the breach.
79. For compensation for an illegal, irregular or excessive distress.	One year	The date of the distress.
80. For compensation for wrongful seizure of movable property under legal process.	One year	The date of the seizure.
81. By executors, administrators or representatives' under the Legal Representatives' Suits Act, 1855.	One year	The date of the death of the person wronged.

	(1)	(2)	(3)
82.	By executors' administrators or representatives under the Indian Fatal Accidents Act, 1855.	Two years	The date of the death of the person killed.
83.	Under the Legal Representatives' Suits Act, 1855, against an executor, an administrator or any other representative.	Two years	When the wrong complained of is done.
84.	Against one who having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the perversion first becomes known to the person injured thereby.
85.	For compensation for obstructing a way or a water-course.	Three years	The date of the obstruction.
86.	For compensation for diverting a water-course.	Three years	The date of the diversion.
87.	For compensation for trespass upon immovable property.	Three years	The date of the trespass.
88.	For compensation for infringing copyright or any other exclusive privilege.	Three years	The date of the infringement.
89.	To restrain waste.	Three years	When the waste begins.
90.	For compensation for injury caused by an injunction wrongfully obtained.	Three years	When the injunction ceases.
91.	For compensation —		
	(a) for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion;	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
	(b) for wrongfully taking or injuring or wrongfully detaining any other specific movable property.	Three years	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.

	(1)	(2)	(3)
	PART VIII — SUITS RELATING TO TRUSTS AND TRUST PROPERTY		
92.	To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
93.	To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
94.	To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
95.	A set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
96.	By the manager of a Hindu, Muslim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment whichever is later.
	PART IX — SUITS RELATING TO MISCELLANEOUS MATTERS		
97.	To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale

	(1)	(2)	(3)
			does not admit of physical possession of the whole or part of the property when the instrument of sale is registered.
98.	By a person against whom (an order referred to in Rule 63 or Rule 103) of Order XXI of the Code of Civil Procedure, 1908 or an order under Section 28 of the Presidency Small Cause Courts Act, 1882, has been made, to establish the right which he claims to the property comprised in the order.	One year	The date of the final order.
99.	To set aside a sale by a Civil or Revenue Court or a sale for arrears of Government revenue or for any demand recoverable as such arrears.	One year	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.
100.	To alter or set aside any decision or order of a Civil Court in any proceeding other than a suit or any act or order or an officer of Government in his official capacity.	One year	The date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be.
101.	Upon a judgement including a foreign judgement, or a recognisance.	Three years	The date of the judgement or recognisance.
102.	For property which the plaintiff has conveyed while insane.	Three years	When the plaintiff is restored to sanity and has knowledge of the conveyance.
103.	To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	The date of the trustee's death or if the loss has not then resulted, the date of the loss.
104.	To establish a periodically recurring right.	Three years	When the plaintiff is first refused the enjoyment of the right.
105.	By a Hindu for arrears of maintenance.	Three years	When the arrears are payable.

	(1)	(2)	(3)
106.	For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an interstate against an executor or an administrator or some other person legally charged with the duty of distributing the estate.	Twelve years	When the legacy or share becomes payable or deliverable.
107.	For possession of a hereditary office. Explanation — A hereditary office is possessed when the properties thereof are usually received or if there are no properties when the duties thereof are usually performed.	Twelve years	When the defendant takes possession of the office adversely to the plaintiff.
108.	Suit during the life of a Hindu or Muslim female by a Hindu or Muslim who if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years	The date of the alienation.
109.	By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.
110.	By a person excluded from a joint family property to enforce a right to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.
111.	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.

	(1)	(2)	(3)
112.	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu & Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.
	PART X — SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD		
113.	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.
	Second Division — Appeals		
114.	Appeal from an order of Acquittal —		
	(a) under Sub-section (1) or Sub-section (2) of Section 417 of the Code of Criminal Procedure, 1898;	Ninety days	The date of the order appealed from.
	(b) under Sub-section (3) of Section 417 of that Code.	Thirty days	The date of the grant of special leave.
115.	Under the Code of Criminal Procedure, 1898.		
	(a) from a sentence of death passed by a Court of Session or by a High Court in exercise of its Original Criminal Jurisdiction;	Thirty days	The date of the sentence.
	(b) from any other sentence or any order not being an order of acquittal –		
	(i) to the High Court;	Sixty days	The date of the sentence or order.
	(ii) to any other Court.	Thirty days	The date of the sentence or order.
116.	Under the Code of Civil Procedure, 1908 –		

	(1)	(2)	(3)
	(a) to a High Court from any decree or order;	Ninety days	The date of the decree or order.
	(b) to any other Court from any decree or order.	Thirty days	The date of the decree or order.
117.	From a decree or order of any High Court to the same Court.	Thirty days	The date of the decree or order.
	Third Division — Applications		
118.	For leave to appear and defend a suit under summary procedure.	Ten days	When the summons is served.
119.	Under the Arbitration Act, 1940.		
	(a) for the filing in Court of an award.	Thirty days	The date of service of the notice of the making of the award.
	(b) for setting aside an award or getting an award remitted for reconsideration.	Thirty days	The date of service of the notice of the filing of the award.
120.	Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days	The date of death of the plaintiff, appellant, defendant or respondent as the case may be.
121.	Under the same Code for an order to set aside an abatement.	Sixty days	The date of abatement.
122.	To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs.	Thirty days	The date of dismissal.
123.	To set aside a decree passed *ex parte* or to re-hear an appeal decreed or	Thirty days	The date of the decree or where the summons or notice was not duly served, when

	(1)	(2)	(3)
	heard *ex parte.* *Explanation:* For the purpose of this article, substituted service under rule 20 of Order V of the Code of Civil Procedure, 1908, shall not be deemed to be due service.		the applicant had knowledge of the decree.
124.	For a review of judgement by a Court other than the Supreme Court.	Thirty days	The date of the decree or order.
125.	To record an adjustment or satisfaction of a decree.	Thirty days	When the payment or adjustment is made.
126.	For the payment of the amount of a decree by instalments.	Thirty days	The date of the decree.
127.	To set aside a sale in execution of a decree, including any such application by a judgement-debtor.	Sixty days	The date of the sale.
128.	For possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree.	Thirty days	The date of the dispossession.
129.	For possession after removing resistance or obstruction to delivery of possession of immovable property decree or sold in execution of a decree.	Thirty days	The date of resistance or obstruction.
130.	For leave to appeal as a Pauper —		
	(a) to the High Court;	Sixty days	The date of decree appealed from.
	(b) to any other Court.	Thirty days	The date of decree appealed from.
131.	To any Court for the exercise of its powers of revision under the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973.	Ninety days	The date of the decree or order or sentence sought to be revised.

	(1)	(2)	(3)
132.	To the High Court for a certificate of fitness to appeal to the Supreme Court under Clause (1) of Article 132, Article 133 or sub-clause (c) of clause (1) of Article 134 of the Constitution or under any other law for the time being in force.	Sixty days	The date of the decree, order or sentence.
133.	To the Supreme Court for special leave to appeal—		
	(a) in a case involving death sentence;	Sixty days	The date of the judgement, final order or sentence.
	(b) in a case where leave to appeal was refused by the High Court;	Sixty days	The date of the order of refusal.
	(c) in any other case.	Ninety days	The date of the judgement or order.
134.	For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year	When the sale becomes absolute.
135.	For the enforcement of a decree granting a mandatory injunction.	Three years	The date of the decree or where a date is fixed for performance, such date.
136.	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

	(1)	(2)	(3)
137.	Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.

Test your knowledge

Which Article of the Indian Constitution states that the State cannot place any hindrance by prescribing a period of limitation in the way of an aggrieved person seeking to approach the Supreme Court of India?

(a) Article 30
(b) Article 32
(c) Article 34
(d) Article 36

Correct answer: (b)

13. CLASSIFICATION OF PERIOD OF LIMITATION

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

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

1. Suits by mortgagors for the redemption or recovery of possession of immovable property mortgaged;
2. Suits by mortgagee for foreclosure;
3. Suits by or on behalf of the Central Government or any State Government including the State of Jammu and Kashmir.

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

Period of 3 years: A period of three years has been prescribed for suits relating to accounts, contracts, declaratory suits, suits relating to decrees and instruments and suits relating to movable property.

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

Period in days varying between 90 to 10 days: The minimum period of limitation of 10 days is prescribed for application for leave to appear and defend a suit under summary procedure from the date of service of the summons. For appeals against a sentence of death passed by a court of session or a High Court in the exercise of its original

jurisdiction the limitation period is 30 days. For appeal against any sentence other than a sentence of death or any other not being an order of acquittal, the period of 60 days for the appeal to High Court and 30 days for appeal to any other Court is prescribed.

For appeal against acquittal by State Government from the date of the order of acquittal is 90 to 30 days for appeals against acquittal by a complainant in a complaint case from the date of grant of special leave. Period of leave to appeal as a pauper from the date of the decree is 60 days when application for leave to appeal is made to the High Court and 30 days to any other Court.

V. LAW RELATING TO EVIDENCE

1. INTRODUCTION

The "Law of Evidence" may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the Court, is regulated by a set of rules and principles known as “Law of Evidence”.

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

The Act extends to the whole of India except the State of Jammu and Kashmir and *applies to all judicial proceedings in or before any Court,* including Court-martial (other than the Court-martial convened unde the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act) but not to affidavits presented to any Court or officer, or to proceedings before an arbitrator.

Judicial Proceedings

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

However, the proceedings under the Income Tax are not "judicial proceedings" under this Act. That apart, the Act is also not applicable to the proceedings before an arbitrator.

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

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

“Evidence” means and includes:

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents (including electronic records) produced for the inspection of the

Court; such documents are called documentary evidence.

The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

Evidence under Section 3 of the Indian Evidence Act, 1872 may be either oral or personal (i.e. all statements which the Court permits or requires to be made before it by witnesses, and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue. There must be an open and visible connection between the principal fact and the evidentially facts. Facts are which form part of the same transaction, though not in issue, place or at different times and places.

In general the rules of evidence are same in civil and criminal proceedings but there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, specially when the offence charged amounts to felony or treason, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt. In other words, in civil proceedings it is sufficient if the evidence shows that in all probability the accused would have committed the wrong; but in criminal proceedings, evidences must show beyond all doubts that the accused alone would have committed the crime.

Scheme of the Act: The Act is divided into three parts:

Part I Relevancy of Facts-Chapter I containing Sections 1 to 4 deals with preliminary points and relevancy of facts is dealt with in Chapter II containing Sections 5 to 55.

Part II On proof (Chapters III to VI) containing Sections 56 to 100.

Part III Production and effect of evidence (Chapters VII to XI containing Sections 101 to 167).

Relevancy of Facts: Sections 6 to 55 of the Act deal with relevancy of facts. A fact is also known as Factum Prolans or a fact that proves. The question arises what then the term "fact" signifies?

Fact

According to Section 3, *"fact"* means and includes:

(a) anything, state of things, or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious.

Thus facts are classified into physical and psychological facts.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at the specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

Illustrations (a), (b) and (c), are the examples of physical facts whereas the illustrations (d) and (e) are the examples of psychological bids.

Evidence may be given of facts in issue and relevant facts

According to Section 5, evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

The Explanation appended to Section 5, however, makes it clear that this section shall not enable any person to give evidence of a fact to which he is disentitled to prove by any provision of the law.

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:-

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

It is evident that only facts in issue and relevant facts may be given in evidence. To understand their relevancy it is necessary to know their meanings. These terms are defined in Section 3. It is explained as follows:-

Relevant Fact

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. (Section 3)

Where in a case direct evidence is not available to prove a fact in issue then it may be proved by any circumstantial evidence and in such a case every piece of circumstantial evidence would be an instance of a "relevant fact".

Logical relevancy and legal relevancy

A fact is said to be logically relevant to another when it bears such casual relation with the other as to render probably the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant. Relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant. Of course every fact legally relevant will be found to be logically relevant; but every fact logically relevant is not necessarily relevant under the Act as common sense or logical relevancy is wider than legal relevancy. A judge might in ordinary transaction, take one fact as evidence of another and act upon it himself, when in Court, he may rule that it was legally irrelevant. And he may exclude facts, although logically relevant, if they appear to him too remote to be really material to the issue.

Test your knowledge

State whether the following statement is "True" or "False"

All facts logically relevant are not, however, legally relevant.

- True
- False

Correct answer: True

Legal relevancy and admissibility

Relevancy and admissibility are not co-extensive or interchangeable terms. A fact may be legally relevant, yet its reception in evidence may be prohibited on the grounds of public policy, or on some other ground. Similarly every admissible fact is not necessarily relevant. The tenth Chapter of the Act makes a number of facts receivable in evidence, but these facts are not "relevant" under the second Chapter which alone defines relevancy.

Facts in issue

According to Section 3 the expression "facts in issue" means and includes-any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, necessarily follows.

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustration

A is accused of the murder of B.

At his trial the following facts may be in issue:

that A caused B's death;

that A intended to cause B's death;

that A had received grave and sudden provocation from B;

that A at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

A fact in issue is called as the principal fact to be proved or *factum probandum* and the relevant fact the evidentiary fact or *factum probans* from which the principal fact follows. The fact which constitute the right or liability called "fact in issue" and in a particular case the question of determining the "facts in issue" depends upon the rule of the substantive law which defines the rights and liabilities claimed.

Facts in issue and issues of fact

Under Civil Procedure Code, the Court has to frame issues on all disputed facts which are necessary in the case. These are called issues of fact but the subject matter of an issue of fact is always a fact in issue. Thus when described in the context of Civil Procedure Code, it is an 'issue of fact' and when described in the language of Evidence Act it is a 'fact in issue'. Thus as discussed above, distinction between facts in issue and relevant facts is of fundamental importance.

Classification of relevant facts

Principles of Sections relating to relevancy of facts are mere rules of logic. Relevant facts may be classified in the following form:

(a) facts connected with the facts to be proved; (Sections 6 to 16)

(b) statement about the facts to be proved e.g. admission, confession; (Sections 17 to 31)

(c) statements by persons who cannot be called as witnesses; (Sections 32 to 33)

(d) statements made under special circumstances; (Sections 34 to 38)

(e) how much of a statement is to be proved; (Section 39)

(f) judgements of Courts of justice, when relevant; (Sections 40 to 44)

(g) opinions of third persons, when relevant; (Sections 45 to 51)

(h) character of parties in Civil cases and of the accussed in criminal cases. (Sections 52 to 55)

Two fundamental rules on which the law of evidence is based are: (a) no facts other than those having rational probative value should be admitted in evidence and, (b) all facts having rational probative value are admissible in evidence unless excluded by a positive rule of paramount importance.

The Court 'may presume' a fact as may be provided by the Act, unless and until it is disproved or may call for proof of it. The court shall presume a fact whenever it is directed by this Act, and shall regard such fact as proved unless and until it is disproved (Section 4). Presumption has been defined as an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a proces of probable reasoning from some matter of fact, either judicially noticed, admitted or established by legal evidence to the satisfaction of the tribunal. It is an inference of the existence of some fact, which is drawn, without evidence, from some other fact already proved or assumed to exist (wills). Presumption is either of a fact or law. These presumptions which are inference are always rebuttable. Presumption of law is either conclusive or rebuttable.

The Act also provides that when one fact is declared by this Act to be conclusive proof of another, the court shall on the proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.

2. RELEVANCY OF FACTS CONNECTED WITH THE FACT TO BE PROVED

The facts coming under this category are as follows:

(1) *Res gestae or facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction.*

Section 6 embodies the rule of admission of evidence relating to what is commonly known as res gestae. Acts or declarations accompanying the transaction or the facts in issue are treated as part of the res gestae and admitted as evidence. The obvious ground for admission of such evidence is the spontaneity and immediacy of the act or declaration in question.

Illustration

A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

The word ‘by-standers’ means the persons who are present at the time of the beating and not the persons who gather on the spot after the beating (46 P.L.R. 353); (1945) Lah. 146).

(b) A is accused of waging war against the ‘Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, although A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Thus, the evidence about the fact which is also connected with the same transaction, cannot be said to be inadmissible.

The above section lays down the rule which in English text books is treated under the head of res gestae. It may be broadly defined as matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the same transaction.

The essence of the doctrine of res gestae is that the facts which, though not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue (AIR 1957 Cal. 709).

(2) *Facts constituting the occasion, or effect of, or opportunity or state of things for*

the occurrence of the fact to be proved whether it be a fact or another relevant fact. (Section 7)

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place whether the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B known to A, which afforded an opportunity for the administration of poison, are relevant facts.

The above transaction provides that, though they are not part of the same transaction, are relevant if they are the occasions caused or effects of facts of an issue.

(3) *Motive, preparation and previous or subsequent conduct.*

According to Section 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive means which moves a person to act in a particular way. It is different from intention. The substantive law is rarely concerned with motive, but the existence of a motive, from the point of view of evidence would be a relevant fact, in every criminal case. That is the first step in every investigation. Motive is a psychological fact and the accused's motive, will have to be proved by circumstantial evidence. When the question is as to whether a person did a particular act, the fact that he made preparations to do it, would certainly be relevant for the purpose of showing that he did it.

The Section makes the conduct of certain persons relevant. Conduct means behaviour. The conduct of the parties is relevant. The conduct to be relevant must be closely connected with the suit, proceeding, a fact in issue or a relevant fact, i.e., if the Court believes such conduct to exist, it must assist the Court in coming to a conclusion on the matter in controversy. It must influence the decision. If these conditions are satisfied it is immaterial whether the conduct was previous to or subsequent to the happening of the fact in issue.

Illustrations

(a) A is tried for the murder of B.

The fact that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence - "the police is coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of properly acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint she said that she had been ravished is not relevant as conduct under this Section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

(k) the question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

What is relevant under Section 8 is the particular act upon the statement and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved.

(4) *Facts necessary to explain or introduce relevant facts.*

According to Section 9, such facts are -

(i) which are necessary to explain or introduce a fact in issue or relevant fact, or

(ii) which support or rebut an inference suggested by a fact in issue or relevant fact, or

(iii) which establish the identity of a person or thing whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or

(iv) which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts which establish the identity of an accused person are relevant under Section 9.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left house, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that the left home suddenly.

The details of the business on which he left are not relevant, except in so far as they

are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer". This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it - "A says you are to hide this". B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Test your knowledge

Choose the correct answer

Which of the following are facts not necessary to explain or introduce relevant facts?

(a) Facts necessary to explain or introduce a fact
(b) Facts which do not support an inference
(c) Facts which establishes the identity of a person or thing
(d) Facts which show the relation of parties by whom any such fact was transacted

Correct answer: b

3. STATEMENTS ABOUT THE FACTS TO BE PROVED

The general rule known as the hearsay rule is that what is stated about the fact in question is irrelevant. To this general rule there are three exceptions which are :

(i) Admissions and confessions;

(ii) Statements as to certain matters under certain circumstances by persons who are not witnesses; and

(iii) Statements made under special circumstances.

(i) Admissions and Confessions

Sections 17 to 31 lay down the first exception to the general rule known as admissions and confessions.

Admissions

An admission is defined in Section 17 as a statement, oral or documentary or *contained in electronic form* which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances mentioned under Sections 18 to 20. Thus, whether a statement amounts to an admission or not depends upon the question whether it was made by any of the persons and in any of the circumstances described in Sections 18-20 and whether it suggests an inference as to a fact in issue or a relevant fact in the case. Thus admission may be verbal or contained in documents as maps, bills, receipts, letters, books etc.

(However, the word 'statement' has not been defined in the Act. Therefore the ordinary dictionary meaning is to be followed which is "something that is stated.")

An admission may be made by a party, by the agent or predecessor-in-interest of a party, by a person having joint propriety of pecuniary interest in the subject matter (Section 18) or by a "reference" (Section 20).

An admission is the best evidence against the party making the same unless it is untrue and made under the circumstances which does not make it binding on him.

An admission by the Government is merely relevant and non conclusive, unless the party to whom they are made has acted upon and thus altered his detriment.

An admission must be clear, precise, not vague or ambiguous. In *Basant Singh* v. *Janky Singh*, (1967) 1 SCR 1, The Supreme Court held:

"(1) Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admission. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true.

(2) All the statements made in the plaint are admissible as evidence. The Court is, however, not bound to accept all the statements as correct. The Court may accept some of the statements and reject the rest."

Admission means conceding something against the person making the admission. That is why it is stated as a general rule (the exceptions are in Section 21), that admissions must be self-harming; and because a person is unlikely to make a statement which is self-harming unless it is true evidence of such admissions as received in Court.

These Sections deal only with admissions oral and written. Admissions by conduct are not covered by these sections. The relevancy of such admissions by conduct depends upon Section 8 and its explanations.

Oral admissions as to the contents of electronic records are not relevant unless the

genuineness of the record produced is in question. (Section 22A)

Confessions

Sections 24 to 30 deal with confessions. However, the Act does not define a confession but includes in it admissions of which it is a species. Thus confessions are special form of admissions. Whereas every confession must be an admission but every admission may not amount to a confession. Sections 27 to 30 deal with confessions which the Court will take into account. A confession is relevant as an admission unless it is made:

(i) to a person in authority in consequence of some inducement, threat or promise held out by him in reference to the charge against the accused;

(ii) to a Police Officer; or

(iii) to any one at a time when the accused is in the custody of a Police Officer and no Magistrate is present.

Thus, a statement made by an accused person if it is an admission, is admissible in evidence. The confession is an evidence only against its maker and against another person who is being jointly tried with him for an offence.

Section 30 is an exception to the general rule that confession is only an evidence against the confessor and not against the others.

The confession made in front of magistrate in a native state recorded is admissible against its maker is also admissible against co-accused under Section 30.

The Privy Council in *Pakala Narayanaswami* v. *Emperor,* (1929) PC 47, observed that:

No statement that contains self exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. All confessions are admissions but not *vice versa.*

A confession must, either admit, in terms the offence, or substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, is not of itself a confession. For example, an admission that the accused was the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession of the knife or revolver. A confession cannot be construed as meaning a statement by the accused suggesting the inference that he committed the crime.

According to Section 24, confession caused by inducement, threat or promise is irrelevant. To attract the prohibition contained in Section 24 of the Evidence Act the following six facts must be established:

(i) that the statement in question is a confession;

(ii) that such confession has been made by an accused person;

(iii) that it has been made to a person in authority;

(iv) that the confession has been obtained by reason of any inducement, threat or promise proceeded from a person in authority;

(v) such inducement, threat or promise, must have reference to the charge against the accused person;

(vi) the inducement, threat or promise must in the opinion of the Court be sufficient to give the accused person grounds, which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

To exclude the confession it is not always necessary to prove that it was the result of inducement, threat or promise. It is sufficient if a legitimate doubt is created in the mind of the Court or it appears to the Court that the confession was not voluntary. It is however for the accused to create this doubt and not for the prosecution to prove that it was voluntarily made. A confession if voluntary and truthfully made is an efficacious proof of guilt.

Test your knowledge

What are the main characteristics of an admission?

(a) It must be clear

(b) It must be vague

(c) It must be precise

(d) It must be ambiguous

Correct answer: (a) and (c)

Confessions vs. Admissions

A confession, however, is received in evidence for the same reason as an admission, and like an admission it must be considered as a whole. Further there can be an admission either in a civil or a criminal proceedings, whereas there can be a confession only in criminal proceedings. An admission need not be voluntary to be relevant, though it may effect its weight; but a confession to be relevant, must be voluntary. There can be relevant admission made by an agent or even a stranger, but, a confession to be relevant must be made by the accused himself. A confession of a co-accused is not strictly relevant, though it may be taken into consideration, under Section 30 in special circumstances.

Confessions are classified as: (a) judicial, and (b) extra-judicial. Judicial confessions are those made before a Court or recorded by a Magistrate under Section 164 of the Criminal Procedure Code after following the prescribed procedure such as warning the accused that he need not to make the confession and that if he made it, it would be used against him. Extra-judicial confessions are those which are made either to the police or to any person other than Judges and Magistrates as such.

An extra-judicial confession, if voluntary, can be relied upon by the Court along with

other evidence. It will have to be proved just like any other fact. The value of the evidence depends upon the truthfulness of the witness to whom it is made.

In *Ram Khilari* v. *State of Rajasthan*, AIR 1999 SC 1002, the Supreme Court held that where an extra-judicial confession was made before a witness who was a close relative of the accused and the testimony of said witness was reliable and truthful, the conviction on the basis of extra judicial confession is proper.

In another case, the Supreme Court has further held that the law does not require that the evidence of an extra-judicial confession should be corroborated in all cases. When such confession was proved by an independent witness who was a responsible officer and one who bore no animus against the accused, there is hardly any justification to disbelieve it. Also, where the Court finds that the confession made by the accused to his friend was unambiguous and unmistakably conveyed that the accused was the perpetrator of the crime and the testimony of the friend was truthful, reliable and trustworthy, a conviction based on such extra-judicial confession is proper and no corroboration is necessary. Much importance could not be given to minor discrepancies and technical errors (*Vinayak Shivajirao Pol* v. *State of Maharashtra,* 1998 (1) Scale 159).

Illustrations

1. A undertakes to collect rents from C on behalf of B. B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B. A statement by C that he owed rent to B, is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

2. The question is, whether a horse sold by A to B is sound.

A says to B—"Go and ask C, C knows all about it". C's statement is an admission.

3. The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B holds that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

4. A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because if A were dead, it would be admissible under Section 32, clause (2).

5. A and B are jointly tried for the murder of C. It is proved that A said-"B and I murdered C". The Court may consider the effect of this confession as against B.

6. A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried. (If there is joint trial Section 30 applies)

Illustrations 5 and 6 are exceptions to the general rule that a confession is only evidence against the person who makes the confession. These are based on Section 30 of the Act.

(ii) Statements by persons who cannot be called as witnesses

Certain statements made by persons who are dead, or cannot be found or produced without unreasonable delay or expense, makes the second exception to the general rule. However, the following conditions must be fulfilled for the relevancy of the statements:

(a) That the statement must relate to a fact in issue or relevant fact,

(b) That the statement must fall under any of following categories:

(i) the statement is made by a person as to the cause of this death or as to any of the circumstances resulting in his death;

(ii) statement made in the course of business;

(iii) Statement which is against the interest of the maker;

(iv) a statement giving the opinion as to the public right or custom or matters of general interest;

(v) a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject;

(vi) a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belong;

(vii) a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc.;

(viii) a statement made by a number of persons expressing their feelings or impression;

(ix) evidence given in a judicial proceeding or before a person authorised by law to take it, provided that the proceeding was between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross examine and the questions in issue were substantially the same as in the first proceeding.

Illustrations

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the course of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business,

stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(d) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his own son, is a relevant fact.

(e) A sues B for libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

(iii) Statements made under special circumstances

The following statements become relevant on account of their having been made under special circumstances:

(i) Entries made in books of account, including those maintained in an electronic form regularly kept in the course of business. Such entries, though relevant, cannot, alone, be sufficient to charge a person with liability; (Section 34)

(ii) Entries made in public or official records or an *electronic record* made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by the law; (Section 35)

(iii) Statements made in published maps or charts generally offered for the public sale, or in maps or plans made under the authority of the Central Government or any State government; (Section 36)

(iv) Statement as to fact of public nature contained in certain Acts or notification; (Section 37)

(v) Statement as to any foreign law contained in books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country. (Section 38)

When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, *electronic record,* book or of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. (Section 39)

Test your knowledge

Choose the correct answer

Which of the following are judicial confessions?

(a) Confessions made to the police
(b) Confessions made before a Court
(c) Confessions made to a Judge
(d) Confessions made to a Magistrate

Correct answer: (b), (c) and (d)

OPINION OF THIRD PERSONS WHEN RELEVANT

The general rule is that opinion of a witness on a question whether of fact or law, is irrelevant. However, there are some exceptions to this general rule. These are:

(i) Opinions of experts. (Section 45)

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant. Similarly the opinions of experts on typewritten documents as to whether a given document is typed on a particular typewriter is relevant.

As a general rule the opinion of a witness on a question whether of fact, or of law, is irrelevant. Witness has to state the facts which he has seen, heard or perceived, and noted the conclusion, form of observations. The functions of drawing inferences from facts is a judicial function and must be performed by the Court. However, to this general rule, there are some exceptions as indicated in Section 45. Opinions of experts are relevant upon a point of (a) foreign law (b) science (c) art (d) identity of hand writing (e) finger impression special knowledge of the subject matter of enquiry become relevant.

(ii) *Facts which support or are inconsistent with the opinions of experts are also made relevant.* (Section 46)

(iii) *Others:* In addition to the opinions of experts, opinion of any other person is also relevant in the following cases :

(a) Opinion as to the handwriting of a person if the person giving the opinion is acquainted with the handwriting of the person in question; (Section 47)

(b) Opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate; (Section 47A)

(c) Opinion as to the existence of any general right or custom if the person giving the opinion is likely to be aware of the existence of such right or custom; (Section 48)

(d) Opinion as to usages etc. words and terms used in particular districts, if the person has special means of knowledge on the subject; (Section 49)

(e) Opinion expressed by conduct as the existence of any relationship by persons having special means of knowledge on the subject. (Section 50)

5. FACTS OF WHICH EVIDENCE CANNOT BE GIVEN (PRIVILIGED COMMUNICATIONS)

There are some facts of which evidence cannot be given though they are relevant. Such facts are stated under **Sections 122, 123, 126 and 127,** where evidence is prohibited under those Sections. They are also referred to as 'privileged communications'

A witness though compellable to give evidence is privileged in respect of particular matters within the limits of which he is not bound to answer questions while giving evidence. These are based on public policy and are as follows:

(i) Evidence of a Judge or Magistrate in regard to certain matters; (Section 121)

(ii) Communications during marriage; (Section 122)

(iii) Affairs of State; (Section 123)

(iv) Official communications; (Section 124)

(v) Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime; (Section 125)

(vi) In the case of professional communication between a client and his barrister, attorney or other professional or legal advisor (Sections 126 and 129). But this privilege is not absolute and the client is entitled to waive it.

Under Section 122 of the Act, communication between the husband and the wife during marriage is privileged and its disclosure cannot be enforced. This provision is based on the principle of domestic peace and confidence between the spouses. The Section contains two parts; the first part deals with the privilege of the witness while the second part of the Section deals with the privilege of the husband or wife of the witness.

Evidence as to affairs of State

Section 123 applies only to evidence derived from unpublished official record relating to affairs of State. According to Section 123, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Professional communications

Section 126 to 129 deal with the professional communications between a legal adviser and a client, which are protected from disclosure. A client cannot be compelled and a legal adviser cannot be allowed without the express consent of his client to disclose oral or documentary communications passing between them in professional confidence. The rule is founded on the impossibility of conducting legal business without

professional assistance and securing full and unreserved communication between the two. Under Sections 126 and 127 neither a legal adviser i.e. a barrister, attorney, pleader or vakil (Section 126) nor his interpreter, clerk or servant (Section 128) can be permitted to disclose any communication made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any document with which any such person has become acquainted in the course and for the purpose of such employment.

In general it is not open to a party to test the credit or impeach the "truthfulness of a witness offered by him. But the Court can in its discretion allow a party to cross examine his witness" if the witness unexpectedly turns hostile. (Section 154)

Test your knowledge

What are the matters in respect of which a witness is not bound to answer questions while giving evidence?

(a) Evidence of an individual in regard to certain matters

(b) Communications during marriage

(c) Affairs of State

(d) Source of information of a Magistrate or Police officer or Revenue officer as to commission of an offence or crime

Correct answer: (b), (c) and (d)

6. ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

As discussed above, all facts (except two Sections 56 and 58) which are neither admitted nor are subject to judicial notice must be proved. The Act divides the subject of proof into two parts: (i) proof of facts other than the contents of documents; (ii) proof of documents including proof of execution of documents and proof of existence, condition and contents of documents.

However, all facts except contents of documents or *electronic records* may be proved by oral evidence (Section 59) which must in all cases be "direct" (Section 60). The direct evidence means the evidence of the person who perceived the fact to which he deposes.

Thus, the two broad rules regarding oral evidence are:

(i) all facts except the contents of documents may be proved by oral evidence;

(ii) oral evidence must in all cases be "direct".

Oral evidence means statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. But, if a witness is unable to speak he may give his evidence in any manner in which he can make it intelligible as by writing or by signs. (Section 119)

Direct evidence

In Section 60 of the Evidence Act, expression "oral evidence" has an altogether

different meaning. It is used in the sense of "original evidence" as distinguished from "hearsay" evidence and it is not used in contradicition to "circumstantial" or "presumptive evidence". According to Section 60 oral evidence must in all cases whatever, be direct; that is to say:

- if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
- if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
- if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Thus, if the fact to be proved is one that could be seen, the person who saw the fact must appear in the Court to depose it, and if the fact to be proved is one that could be heard, the person who heard it must appear in the Court to depose before it and so on. In defining the direct evidence in Section 60, the Act impliedly enacts what is called the rule against hearsay. Since the evidence as to a fact which could be seen, by a person who did not see it, is not direct but hearsay and so is the evidence as to a statement, by a person who did hear it.

Documentary evidence

A *"document"* means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter. Documents produced for the inspection of the Court is called Documentary Evidence. Section 60 provides that the contents of a document must be proved either by primary or by secondary evidence.

Primary evidence

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

Secondary evidence

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

(1) certified copies given under the provisions hereafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

Section 65 stipulates the cases in which secondary evidence relating to documents may be given. As already stated, documents must be proved by primary evidence but in certain cases for example, where the document is lost or destroyed or the original is of such a nature as not to be easily, movable, or consists of numerous documents, or is a public document or under some law by a certified copy, the existence, condition or contents of the document may be proved by secondary evidence.

Special Provisions as to Evidence Relating to Electronic Record

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B.

Under Section 65B(1) any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. The conditions in respect of a computer output related above, have been stipulated under Section 65B(2) of the Evidence Act.

Circumstantial evidence

In English law the expression direct evidence is used to signify evidence relating to the ‘fact in issue’ (*factum probandum*) whereas the terms circumstantial evidence, presumptive evidence and indirect evidence are used to signify evidence which relates only to "relevant fact" (*facta probandum*). However, under Section 60 of the Evidence Act, the expression "direct evidence" has altogether a different meaning and it is not intended to exclude circumstantial evidence of things which could be seen, heard or felt. Thus, evidence whether direct or circumstantial under English law is "direct" evidence under Section 60. Before acting on circumstances put forward are satisfactorily proved and whether the proved circumstances are sufficient to bring the guilt to the accused the Court should not view in isolation the circumstantial evidence but it must take an overall view of the matter.

Test your knowledge

What are the two broad rules regarding oral evidence?

(a) It must be direct in all cases.

(b) All facts except the contents of documents may be proved by oral evidence.

(c) The contents of documents must be stated orally.

(d) It can be indirect.

Correct answer: (a) and (b)

7. PRESUMPTIONS

The Act recognises some rules as to presumptions. Rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances. A presumption is not in itself an evidence but only makes a prima facie case for the party in whose favour it exists. A presumption is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence unless and untill the truth of such inference is disproved. There are three categories of presumptions:

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

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

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

The terms presumption of law and presumption of fact are not defined by the Act. Section 4 only refers to the terms "conclusive proof", "shall presume" and "may presume". The term "conclusive proof" specifies those presumptions which in English Law are called irrebuttable presumptions of law; the term "shall presume" indicates rebuttable presumptions of law; the term "may presume" indicates presumptions of fact. When we see a man knocked down by a speeding car and a few yards away, there is a car going, there is a presumption of fact that the car has knocked down the man.

8. ESTOPPEL

The general rule of estoppel is when one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing (Section 115). However, there is no estoppel against the Statute. Where the Statute prescribes a particular way of doing something, it has to be done in that manner only. Other relevant Sections are Sections 116 and 117.

Principle of Estoppel

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

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

Estoppel is a rule of evidence and does not give rise to a cause of action. Estoppel by record results from the judgement of a competent Court (Section 40, 41). It was laid down by the Privy Council in *Mohori Bibee* v. *Dharmodas Ghosh,* (1930) 30 Cal. 530 PC, that the rule of estoppel does not apply where the statement is made to a person who knows the real facts represented and is not accordingly misled by it. The principle is that in such a case the conduct of the person seeking to invoke rule of estoppel is in no sense the effect of the representation made to him. The main determining element is not the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.

In *Biju Patnaik University of Tech. Orissa* v. *Sairam College*, AIR 2010 (NOC) 691 (Orissa), one private university permitted to conduct special examination of students prosecuting studies under one time approval policy. After inspection, 67 students were permitted to appear in the examination and their results declared. However, university declined to issue degree certificates to the students on the ground that they had to appear for further examination for another condensed course as per syllabus of university. It was held that once students appeared in an examination and their results declared, the university is estopped from taking decision withholding degree certificate after declaration of results.

There are different kinds of estoppel by conduct or estoppel in pais. They are: (a) estoppel by attestation (b) estoppel by contract (c) constructive estoppel (d) estoppel by election (e) equitable estoppel (f) estoppel by negligence, and (g) estoppel by silence.

Test your knowledge

State whether the following statement is "True" or "False"

A presumption is in itself evidence, but only makes a prima facie case for the party in whose favour it exists.

- True
- False

Correct answer: False

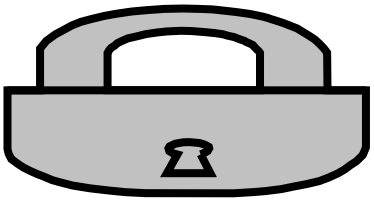
LESSON ROUND-UP

- The expression ‘specific relief’ means a relief in specie. It is a remedy which aims at the exact fulfillment of an obligation.
- The specific Relief Act applies both to movable and immovable property. The Act applies in cases where court can order specific performance of a contract or act. As per the Act, specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a civil law.
- Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (or more persons) but without recourse to a court of law.
- The purpose of Arbitration Act is to provide quick redressal to commercial disputes by private arbitration. The Arbitration and Conciliation Act, 1996 aims at streamlining the process of arbitration and facilitating conciliation in business matters.
- The Act has been divided into four parts and contains three Schedules. Part one deals with Arbitration; Part two deals with enforcement of certain Foreign Awards; Part three deals with conciliation; and Part four contains supplementary provisions.
- Similarly schedule one contains provisions relating to convention on the Recognition and Enforcement of Foreign Arbitral Awards; Schedule two deals with Protocol on Arbitration Clauses and Schedule three contains provisions relating to Execution of Foreign Arbitral Awards.
- The present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.

- The essential purpose of a limitation period is to place a time limit on the period within which a party can commence legal proceedings.
- Limitation periods are imposed by statute, primarily the Limitation Act 1963. The Limitation Act provides different limitation periods for different types of suits.
- If a limitation period has expired for a particular claim, the claim will be "statute-barred". This means that it will no longer be possible for the claimant to effect recovery for that claim against the alleged wrongdoer.
- The law of Evidence may be defined as a system of rules for ascertaining controverted questions of fact in judicial inquiries. This system of ascertaining the facts, which are the essential elements of a right or liability and is the primary and perhaps the most difficult function of the court, is regulated by a set of rules and principles known as law of Evidence”.
- The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

- Evidence under the Act may be either oral or personal (i.e. all statements which the court permits or requires to be made before it by witnesses), and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue.
- 'Tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.
- A tort consists of some act or omission done by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be: (i) a wrongful act or omission of the defendant; (ii) the wrongful act must result in causing legal damage to another; and (iii) the wrongful act must be of such a nature as to give rise to a legal remedy.

SELF-TEST QUESTIONS



1. Explain whether specific performance of part of a contract is allowed. Is there any exception to this rule?
2. What is a declaratory decree? When is such a decree granted?
3. Discuss the discretion of the Court in relation to the relief of specific performance of contracts.
4. What are the grounds to challenge the appointment of an Arbitrator under the Arbitration and Conciliation Act, 1996? Discuss.
5. What do you understand by an arbitration agreement? What are its essentials?
6. What are the grounds for setting aside of an arbitral award under the Arbitration and Conciliation Act, 1996?
7. What are the provisions relating to settlement of the dispute under the Arbitration and Conciliation Act, 1996?
8. "Period of Limitation once starts cannot be stopped" Comment.
9. Does the Limitation Act apply to a proceeding under Articles 232 and 226 of the Constitution?
10. Explain the doctrine of "Sufficient-Cause" for condonation of delay.
11. What is oral, documentary and circumstantial evidence.
12. Discuss relevant fact and facts of which evidence need not be given.
13. Briefly describe confessions and admissions.

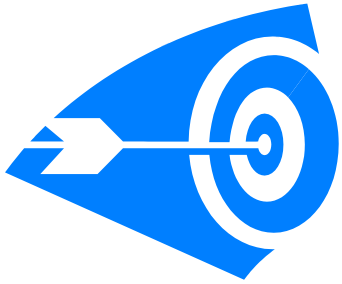
14. What do you understand by privileged communications? Discuss.
15. Explain the *maxim volenti non fit injuria.* Are there any limitations of this maxim?
16. What is a tort? Explain the general conditions of liability for a tort.
17. Discuss the rule laid down in *Rylands v. Fletcher*. What are the exceptions to this rule?
18. Write short notes on
    (i) Finality of arbitral award
    (ii) Jurisdiction of Arbitral Tribunal.
    (iii) Presumptions
    (iv) Documentary evidence
    (v) Preventive reliefs
    (vi) Injuria sine damno.

References and Suggested Readings:

(1) General and Commercial Laws — *Taxmann*
(2) New Arbitration Law—*H.V. Mirchandani and V.K. Sharma*
(4) The New Arbitration and Conciliation Law—*G.K. Kwatra*
(5) New Law of Arbitration ADR and Contract—*D.P. Mittal*
(6) Law of Limitation—*V.G. Ramachandran*
(7) Desai's Limitation Act.
(8) The Elements of the Law of Evidence — *V.P. Sarathi*
(9) Law of Evidence — *A.N. Saha*
(10) Law of Evidence — Dr. Avtar Singh
(11) Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition—*Jeevan Lal Kapur*
(12) The Law of Specific Relief — *Dr. S.C. Banerjee*

STUDY IV

LAW RELATING TO TRANSFER OF PROPERTY



LEARNING OBJECTIVES

Property has, always, been on the fundamental elements of socio economic life of an individual. Consequently, the law relating to transfer of property is not only an important branch of civil law but also one that demands proper elucidation due to its complexity. Therefore, students should be well versed in this subject so as to understand the intricacies involved in the transfer of property.

At the end of the Study Lesson you should be able to understand:

- Important Definitions
- Distinction between Moveable and Immoveable Property
- Rules relating to Transfer of Property
- Who can transfer the Property
- Subject matter of Transfer
- Rules against Inalienability
- Transfer for benefit of Unborn Person
- Conditional Transfer
- Doctrine of Election
- Doctrine of Holding Out
- Doctrine of Feeding the Grant by Estoppel
- Doctrine of Fraudulent Transfer
- Doctrine of Part-Performance
- Properties which cannot be Transferred
- Rule against Perpetuity
- Accumulation of Income
- Doctrine of Lis Pendens
- Provisions relating to Specific Transfers
- Actionable Claims
- Charges

1. INTRODUCTION

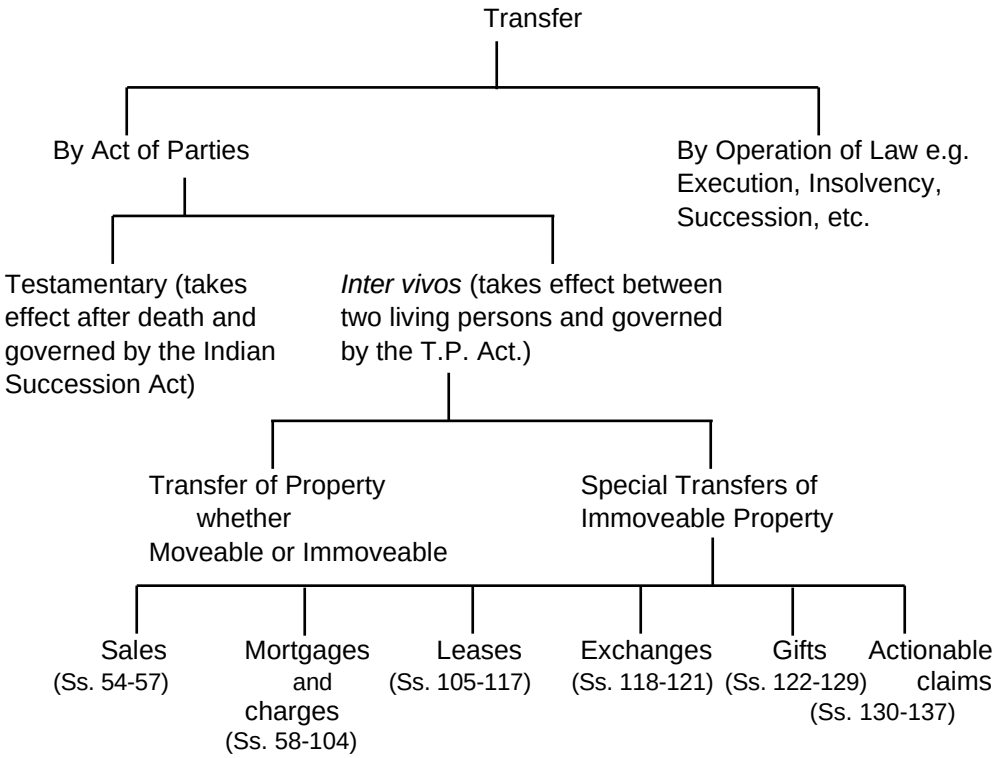
The law relating to transfer of property is governed by the Transfer of Property Act,

1882. Before this Act came into force there was practically no law as to real property in India. Barring few points which were covered by certain Regulations and Acts, the Courts in India in the absence of any statutory provisions, applied rules of English law as the rule of *justice, equity* and *good conscience*.

The Act was enacted with the object to *amend the law relating to the transfer of property by act of parties.* The Act excludes from its purview the transfers by operation of law, i.e. by sale in execution, forfeiture, insolvency or intestate succession. The scope of the Act is limited, as it is confined to transfers *inter vivos* and excludes testamentary succession, i.e. transfers *by will.*

The very preamble to the Act suggests that it simply defines and amends certain parts of the law relating to transfer of property by act of parties, and it does not at all profess to be an exhaustive enactment as is revealed by the omission of the word *"consolidate".* Therefore, the Act leaves the scope for applying rules of *justice, equity* and *good conscience* if a particular case is not covered by any of the provisions of the Act. But if it is covered, the Act must be applied.

SCHEME OF THE ACT



2. IMPORTANT DEFINITIONS

However, while explaining the provisions of the Act, the terms used are defined there itself, yet some of the important terms used under the Act are as follows:

Instrument

"Instrument" means a non-testamentary instrument.

Attached to the earth

It means :

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

Absolute Interest

When a person owns property, he has an "absolute interest" in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property. If A is the owner of a land, he has an absolute interest in the land. If A sells his land to B, then B becomes the owner and he acquires an absolute interest in the land he has purchased from A. Likewise if A makes a gift of his property to B, there again B gets an absolute interest in the property which is gifted to him. These are instances where persons may have an absolute interest.

Reversion and Remainder

Some interests in the property are called in English Law, reversion and remainders. A "reversion" is the residue of an original interest which is left after the grantor has granted the lessee a small estate. For example, A, the owner of a land may lease it to B for a period of five years. The person who grants the lease is the lessor and the person who takes the lease is called the lessee. Here, after the period of 5 years the lease will come to an end and the property reverts back to the lessor. The property which reverts back to him is called the reversion or the reversionery interest. The grantor has a larger and an absolute interest out of which he carves out a smaller estate and gives to the grantee, i.e. the lessee.

When the owner of the property grants a limited interst in favour of a person or persons and gives the remaining to others, it is called a "remainder". For instance, A the owner of a land transfers property to B for life and then to C absolutely. Here the interest in favour of B is a limited interest, i.e., it is only for life. So long as A is alive he enjoys the property. He has a limited right since he cannot sell away the property. His right is only to enjoy the property. If he sells this interest it will be valid so long as he is alive. So after B’s death the property will go to C, interest is called a remainder. In the case of a "remainder", the property will not come back to the owner, but it goes over to the other person.

Vested and Contingent Interests

The word "vested" is used in two different senses. It may mean "vested in possession" or "vested in interest". A right is said to be "vested in possession" when it is a right to present possession of property and it is said to be "vested in interest" when it is not a right to present possession but a present right to future possession. For instance, if a land is given to A for life with a remainder to B, A's right is vested in possession, B's right is vested in interest. In the above example, the interest of B is not subject to any uncertain condition. It will come into his possession after A's life comes to an end. Therefore, an interest is said to be vested when it is not subject to any condition, precedent, i.e., when it is to take effect on the happening of an event which is certain, whereas an estate is contingent when the right to enjoyment depends upon the happening of an event which may or may not happen. Thus, a gift to A on the death of B creates a vested interest in A even during the life time of B for there is nothing more certain than death. But a gift to A on the marriage of B creates a contingent interest, for B may never marry at all but that contingent interest becomes vested if and when B marries.

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

A contingent interest, as said above, is an interest which takes effect after the condition is satisfied. It is subject to a condition precedent, i.e., unless A marries B's daughter, he will not get the property. The following example will illustrate this point. Property is given to A for life and then to B if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent. The contingent interest is not heritable although it is transferable. In a vested interest the transfer is complete, but when the interest is contingent the transfer depends upon a condition precedent. In a condition precedent the estate is not vested in the grantee until the condition is fulfilled.

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

1. When an interest is vested the transfer is complete. It creates an immediate proprietory interest in the property though the enjoyment may be postponed to a future date. A contingent interest on the other hand is dependant upon the fulfilment of some conditions which may or may not happen. In other words, in case of vested interest, the owner's title is already prefect; in case of a contingent interest, the title is as yet imperfect but may become perfect on the fulfilment of a stipulated condition.

2. A vested interest takes effect from the date of transfer. A contingent interest in order to become vested is conditioned by a contingency which may not occur.

3. A vested interest cannot be defeated by the death of the transferee before he obtains possession. A contingent interest may fail in case of the death of transferee before the fulfilment of condition.

4. Since vested interest is not circumscribed by any limitation which derogates from

the completeness of the grant, it logically follows that a vested interest is transferable as well as heritable. If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs. A contingent interest, on the other hand, cannot be inherited though it may be transferred coupled with limitation regarding fulfilment of a condition.

Test your knowledge

State the following as "True" or "False"

A right is said to be ‘vested in interest’ when it is a right to present possession of property

- True
- False

Correct Answer: False

3. MOVEABLE AND IMMOVEABLE PROPERTY

The term “property” signifies the subject matter over which the right of ownership or any less right carved out of ownership (e.g. mortgage right) is exercised. The Act deals with (i) various specific transfers relating to Immoveable property and (ii) lays down general principles relating to transfer of both moveable and immoveable property. Chapter II of the Act is divided into two parts. Parts A deals with the rules pertaining to both moveable and immoveable property (Section 5 to 37), Part B embodies the rules relating to immoveable property (Section 38 to 53A). The other chapters of the Act deal with transfers such as sales, mortgages, leases, gifts, exchanges and actionable claims. The rules relating to these transactions are referred to as rules governing special transfers to immoveable property. The fundamental rule relating to all transfers is that a transfer cannot be effected in any other way except as prescribed under the Act. Furthermore, the Act states that certain kinds of property cannot be transferred at all.

The first task is to define and distinguish between moveable and immoveable property.

Moveable property

The Transfer of Property Act does not defines the term "moveable property". Therefore, it is to be defined with the help of other statutes. For e.g., it has been defined in the General Clauses Act, 1897 as to mean “property of every description except immoveable property”. The Registration Act defines "moveable property" to include property of every description excluding immoveable property but including standing timber, growing crops and grass.

For the purpose of law, moveable property is sometimes regarded as immoveable property. This may happen when a thing of chattel is attached or embedded in earth. For instance, if a machinery or a plant is installed on the land, the question arises whether the machinery or the plant is moveable property or immoveable property. In order to find out whether such a thing or chattel is an immoveable property or not, it is to find out the

mode of annexation of the thing and the object or purpose of such annexation. If the machinery is fixed on the land permanently then it becomes immoveable property, whereas if the machinery or engine or any other thing is fixed on a temporary basis, then it will be regarded as moveable property. Thus, where the owner of a piece of land installed a bone mill along with machinery being held by iron bars which have been dug to a considerable depth then it is a permanent fixture and this will become immoveable property. Similarly, the machinery installed on a cement platform and held in position by being attached to iron pillars fixed in the ground was held to be immoveable property as the annexation was made by the person who owned the buildings as well as the machinery (*Mohamed Ibrahim* v. *Northern Circars Fibre Trading Company,* A.I.R. 1944 Mad. 492).

Immoveable property

The term “immoveable property” is also not defined under the Act. However, it is defined in the negative sense as “the immoveable property *does not include standing timber, growing crops, or grass”* (S. 3 Para 2). Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that growing trees are immoveable property.

Growing crops: It includes all vegetable growths which have no existence apart form their produce such as pan leaves, sugar cane etc.

Grass: Grass is moveable property, but if it is a right to cut grass it would be an interest in land and hence forms immoveable property.

The General Clauses Act defines the term "immoveable property" but not exhaustively. It states: “immoveable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to any thing attached to the earth” [Section 3(25)]. The Indian Registration Act expressly includes under to immoveable property the benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

If the definitions of "immoveable property" as given in the Transfer of Property Act, the General Clauses Act and the Registration Act are viewed together, it is evident that they do not say what immoveable property is. They only say what is either included or excluded therein. Still, reading the definition in the Act with one in the General Clauses Act, *immoveable property will be found to include land, benefit to arise out of land such as rent,* and *things attached to the earth* like trees and buildings *but not standing timber, growing crops and grass.* The last three things are regarded as severable from the land on which they stand and, therefore, they are not included in the term "immoveable property".

Thus, the meaning of immoveable property is as under:

"Immoveable property" means land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

“Attached to the earth” means (a) rooted in the earth, as in the case of trees and

shrubs; (b) embedded in the earth, as in the case of walls or buildings; or (c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached (S. 3 Para 6 of the Act).

Things rooted in the earth: Trees and Shrubs are immoveable property according to this definition subject to the exception as to standing timber.

Things embedded in the earth: A house being embedded in the earth is immoveable property and this is so even if it is sold for enjoyment as a house with an option to pull it down. The mode of annexation and object of annexation are the two tests to determine whether it is immoveable property or not.

Attached to what is so...: The attachment must be as the Section says for the permanent beneficial enjoyment of that to which it is attached e.g. the doors, windows of a house or moveable parts of fixed machinery. But the attachment must be intended to be permanent.

A orally grants to B for Rs. 700/- the rights to catch and carry away fish from his lake. Is the grant valid? The Supreme Court in *Ananda Behra* v. *State of Orissa,* (1956) SCJ p. 96, that such a right is a benefit arising out of immoveable property namely the lake. So under General Clauses Act it is immoveable property. The sale requires a registered instrument for its validity under Section 54 of the Transfer of Property Act. Therefore, the oral grant is invalid and cannot pass away any title in favour of B.

Distinction between moveable and immoveable property

The distinction between moveable and immoveable property was explained in the case of *Sukry Kurdepa* v. *Goondakull,* (1872) 6 Mad. H.C. 71, by Holloway J. as moveability may be defined to be a capacity in a thing of suffering alteration. Immoveablity for such alteration e.g., a piece of land in all circumstances is immoveable. If a thing cannot change its place without injury to the quality it is immoveable. Certain things e.g. trees attached to the ground are so long as they are so attached, immoveable when the severance has been effected they become moveable.

The following have been recognised as immoveable property:

(a) right to collect rents of immoveable property;
(b) a right to way;
(c) a right to collect dues from fair on a piece of land;
(d) hereditary offices;
(e) the equity of redemption;
(f) the interest of mortgagee;
(g) right to collect lac from trees;
(h) a right of ferry;

(i) a right of fishery;
(j) right to receive future rents and profits of land;
(k) reversion in property leased;
(l) a factory.

The following have been held not to be immoveable property:

(a) right of worship;
(b) government promissory notes;
(c) royalty;
(d) a right to recover maintenance allowance;
(e) copyright;
(f) a decree for sale on a mortgage-deed;
(g) a decree for arrears of rent;
(h) a machinery which is not permanently attached to earth;
(i) standing timber, growing crop and grass.

Test your knowledge

Which of the following properties cannot be considered as immovable?

(a) Growing trees
(b) Standing timber
(c) Growing crops
(d) Grass

Correct Answer: (b), (c) and (d)

4. RULES RELATING TO TRANSFER OF PROPERTY (WHETHER MOVEABLE OR IMMOVEABLE)

According to Section 5 of the Transfer of Property Act, the term “transfer of property” means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself, and one or more other living persons and "to transfer property" is to perform such an act. In this section, "living person" includes a company or association or body of individuals whether incorporated or not. But the general provisions of the Act as to transfer do not effect the special provisions of the Companies Act, 1956.

To effect a transfer, property must be in existence. The word “transfer” is defined with reference to the word “convey”. The fundamental rule is that a transfer cannot be affected in any way not prescribed by the Act.

The first point to note is that transfer *inter vivos* (i.e., between living persons) alone is contemplated by the Act. A transfer by means of a will is not a transfer according to the Act, because it is not a transfer between two living persons. Section 5 also says that the transfer may be “in present or in future”. The words in present or in future qualify the words ‘conveys’, and not the word ‘property’. **A transfer of property not in existence**

operates as a contract to be performed in future which may be specially enforced as soon as the property comes into existence (*Jugalkishore* v. *Ram Cotton Company,* (1955) I SCR 1369).

Further Section 6 (h) provides that no transfer can be made in so far as it is opposed to the nature of the interest attached thereby or for an unlawful object or consideration or to a person legally disqualified to be a transferee.

5. WHO CAN TRANSFER THE PROPERTY?

According to Section 7 of the Transfer of Property Act, every person who is competent to contract and entitled to transferable property, or authorised to dispose of property is competent to transfer such property. Hence, every person competent to contract and having ownership can trasnfer property. According to Indian Contract Act, a person is competent to contract when he is a major and of sound mind and is not disqualified from contracting by any law to which he is subject. But a minor can be a transferee as there is nothing in the Transfer of Property Act to disqualify a person, who is a minor to be a transferee. Thus, a mortgage can be validly executed in favour of a minor who has paid the consideration (*Hari Mohan* v. *Mohini,* 22 C.W.C. 130, *Raghava* v. *Srinivasa,* (1917) 60 Mad. 308). Persons who are authorised to transfer property can also transfer property validly. Although a minor is not competent to be a transferor yet a transfer to a minor is valid. However, there are exceptions to this:

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

6. SUBJECT MATTER OF TRANSFER

Section 6 of the Transfer of Property Act says that property of any kind may be transferred except as provided by this Act or any other law for the time being in force. The words “property of any kind” indicate that transferability is the general rule and the right to property includes the right to transfer the property to another person. Property of any kind excludes from its purview the future property. A transfer of future property can only operate as a contract which may be specifically performed when the property comes into existence.

Exceptions to the general rule of transferability made by other laws

Certain restrictions are placed by Hindu law and Mohammedan law on the transfer of property.

7. FORMALITIES OF TRANSFER

Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. Section 54 lays down the mode of transfer of immoveable property. Such transfer, in the case of *tangible* immoveable property of the value of one hundred rupees and upwards, or in the case of a *reversion* or other *intangible* thing, can be made only by a registered instrument.

In the case of *tangible* immoveable property of a value less than one hundred rupees, such transfer may be made either by a registred instrument or by delivery of the property.

The *tangible* property means a property which can be touched physically and hence, capable of physical dealing.

The *intangible* property means something in abstract, either capable of being touched or perceived and yet standing in relation to a certain thing.

'Reversion' means the bundle of rights remaining with the lessor after the execution of a lease of a certain immoveable property.

When a transfer is effected in writing, the person who signs the document professing to transfer the property is called the executant. Execution consists in affixing his signature to the document to the effect that he is transferring the property. An illiterate person who cannot write may direct some literate person to sign it on his behalf and in his presence and the illiterate person may put his thumb impression.

(i) Attestation

Attestation is an important formality in connection with the execution of transfer. "Attest" means to testify a factor, to bear witness to a fact. Attestation, in relation to a document, signifies the fact of authentication of the signature of the executant of that document by the attestator by putting down his own signature on the document in testimony of the fact of its execution. All transfers do not require attestation. For example, a sale or a lease does not require attestation. But a mortgage or a gift requires that a mortgage deed or a gift deed must be attested by two or more witnesses.

Attestation is valid and complete when two witnesses sign the instrument. According to the definition given in the Transfer of Property Act (Section 3), the following essentials are required for a valid attestation:

(a) There must be at least two or more witnesses;

(b) Each witness must see (a) the executant's sign or affix his mark to the instrument, or (b) some other person sign the instrument in the presence and by the direction of the executant, or (c) receive from the executant a personal acknowledgement of his signature or mark or of the signature of such other person; and

(c) Each witness must sign the instrument, (i.e. document), in the presence of the executant.

It is not necessary that both attesting witnesses should be present at the same time. The instrument may be attested after its execution by each of the attestators at different times. Attestation cannot take place before the execution of the deed. The Act does not insist on any particular form of attestation. The attesting witness may not be described as such on the face of the document (*Yakub* v. *Kalzurkan*, 52 Bombay 203). However, the attesting witness must have put his signature *antmus attestandi*, i.e., with intention to attest. Thus, where a Register or an identifying witness puts his signature on the document he cannot be regarded as an attesting witness unless it is duly proved that he signed with the necessary intention to attest.

(ii) Registration

Registration is an essential legal formality to effect a valid transfer in certain cases. The advantage of registering a document is that any person who deals with the property

would be bound by the rights that are created in earlier registered document.

Illustration

A executes a mortgage on property X and gets it registered. Subsequently he sells property X to B, B is bound by the right of the mortgagee over the property X. Thus, whether B knows actually or not that there was a mortgage the fact that the earlier document was registered is a notice to B and B takes property, subject to the rights of the mortgagee. Therefore, if a document of transfer relating to immoveable property is required by the law to be and has been effected by registered instrument, the persons who deal with the property subsequently are deemed in the eye of law as having knowledge of the such registered instrument from the date of its registration.

(iii) Notice

Notice, may be actual or constructive. If a person knows about a fact, he has an actual notice. But, in certain circumstances law treats a man who ought to have known a fact even though he did not in fact know it. This is called constructive notice.

The equitable doctrine of notice is recognised in various Sections of this Act. For instance in Section 39 of the Act, where a transfer is made of property out of which a person has a right to receive maintenance, the transferee takes subject to that right if he had notice of it, but not otherwise. Similarly under Section 40 if A conveys to C property, which he had by a previous contract agreed to sell to B, then B can enforce the contract against C, if C had notice of it, but not otherwise. If C had notice of the prior contract, he purchases with knowledge that it was unconscionable of A to sell to him, and it is therefore, unconscionable of him to buy.

A person is deemed in the eye of law to have constructive notice of a fact when (i) but for willful absentation from an enquiry or search which he ought reasonably to have made; or (ii) gross negligence on his part, he would have known it. Constructive notice arises from an irrefutable presumption of notice. In law such a presumption will arise when (i) there is a willful absentation on the part of a person to make necessary enquiries regarding the existence of certain facts, or (ii) he showed gross negligence in the matter.

The words "wilful absentation" suggest want of *bona fide* in respect of particular transaction (*Joshua* v. *Alliance Bank*, 22 Cal. 185). Thus, a person who refuses to receive a registered letter is, deemed to have constructive notice of its contents.

Similarly, if a person proposes to sell his property to X who, at the same time knows that rents due in respect of the property are paid by the tenants to a third person Y, X will be fixed with notice of the rights of Y (*Mernt* v. *Luck* (1902) 1 Ch. 429).

In so far as gross negligence is concerned, it does not mean a mere carelessness but means carelessness of such an aggravated nature as to indicate mental indifference to obvious risks. For example, if A buys property from B and does not care to ask whether any amount by way of municipal tax is due on that property and if the municipal corporation asks him to pay the arrears of tax, then B is responsible, and if he does not pay, then the arrears of tax may be made a charge on the property.

Other Illustrations

(a) Where a purchaser was informed that the title deeds were in the possession of a

bank for safe custody and yet failed to make any enquiry in the bank. It was held that he was guilty of gross negligence and must be deemed to have notice of the rights of the bank which has the custody of the title needs (*Imperial Bank of India* v. *Rai Gyand,* I A 283).

(b) Where a person abstained from making further enquiries about the right of a person and did not cause a search, to be made in the office of the Sub-Registrar to ascertain if there was any encumbrance over the property, his omission must be held to be wilful or grossly negligent and he would be said to have notice of the prior encumbrances (*Rangappa Goundan* v. *Marapa Goundan,* AIR (1958) Madras 515).

The three Explanations to the definition of notice in Section 3, further mention certain circumstances wherein statutorily presumption of knowledge arises. These circumstances relate to the fact of registration (Explanation-I, Explanation-II) actual possession and notice to an agent (Explanation-III).

Test your knowledge

State the following as "True" or "False"

According to general legal system of India, a minor cannot be a beneficiary under a contract.

Correct Answer: False

8. RESTRAINT ON TRANSFERS OR RULE AGAINST INALIENABILITY

Section 10 of the Act says that when property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. Suppose, B gives property to A and his heirs adding a condition that if the property is alienated it should revert to B. This condition is invalid and the transferee can ignore such condition. The transfer takes effect and is valid, and the condition not to alienate the property is void.

Examples of absolute restraint

Suppose, A gives to B property worth only 2,000 rupees and adds a condition that B should sell property for Rs. 50,000 and not below that amount, this condition will at once become invalid for no one will buy the property which is only worth Rs. 2,000 for Rs. 50,000. Similarly, A gives to B property worth Rs. 50,000 and stipulates that if B wants to sell the property he should sell it to C only for Rs. 1,000. This again will operate as an absolute restraint. In *Rosher* v. *Rosher*, (1884) 26, Ch. D. 801, the testator gave his estate to his son and added a condition that if his son wanted to sell the property he should first give an option to the testator's wife who should be able to buy for £ 3,000. The market value of the property when the testator died was £ 15,000. It was held by the

Court that the condition which compelled the son to sell the property for £ 3,000 was void. **In *Trichinpoly Varthaga Sangum* v. *Shunmoga Sunderam,* (1939) Madras 954, there was a partition between a Hindu father and his five sons. The deed of partition provided that if any one of the sons wanted to sell his share, he should not sell it to a stranger but to one of his brothers who should have the option to buy for a sum not exceeding Rs. 1,000. It was held by the Court that the condition absolutely prevented the son from selling the property to any one for good value. In this case the market value of the property of the son was far greater than Rs. 1,000. Hence, the condition was declared invalid.**

Partial restraint valid

Though absolute restraints are bad in law, partial restraints are valid. If there are conditions which restrain the transferee not to alienate the property outside the family, it has been held by the Courts that they are partial restraints. For example, whenever there are conditions in a family settlement whereby the members are not allowed to sell their shares to a stranger, such conditions are valid.

But it is not permissible to restrict the alienation to a particular time. Such a restriction is not partial but an absolute restraint and as such invalid.

When absolute restraint valid?

There are two exceptions to the rule that absolute restraints are void. Firstly, in the case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such conditions are valid. The reason why such an exception is made in the case of a lease is that the lessor may have confidence in the lessee but may not have the same confidence in some other person. So, if the lessor puts a condition restraining the lessee from transferring the property to someone, the condition is valid.

The second exception is made in respect of a woman who is not a Hindu, Buddhist or Muslim. In such a case, a condition to the effect that she shall not have power during her marriage to transfer the property is valid.

Restraint on enjoyment

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor should not impose conditions as to how and in what manner the transferee should enjoy the property.

Illustrations

(a) A sells his house to B and adds a condition that B only should reside in that house, the condition is invalid. This is subject to the exception that, if a person transfers a plot of land keeping another plot for himself, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

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

Thus, it is clear in the above illustration that the condition which is imposed by A is for the benefit of another property which he retains. Such a condition is valid.

Section 12 also makes the transfer void if a property is transferred to any person adding a condition that if such person becomes insolvent he ceases to hold that property. Such a condition is not recognised as valid in law. Again, this is subject to the exception that if a landlord leases his property he can impose a condition on the lessee that if the lessee becomes insolvent the lease should come to an end.

9. TRANSFER FOR BENEFIT OF UNBORN PERSON

Section 13 of the Transfer of Property Act lays down that where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property. Thus if a property is given to an unborn person, two conditions should be satisfied:

(i) it should be preceded by a life estate in favour of a living person, and

(ii) it should comprise the whole of the remaining interest of the transferor so that there can be no further interest in favour of others.

Illustration

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

Test your knowledge

Choose the correct answer

Which Section of the Transfer of Property Act provides that when a property is transferred, the transferee should not be restrained absolutely from alienating the property?

(a) Section 2

(b) Section 4

(c) Section 8

(d) Section 10

Correct Answer: (d)

10. CONDITIONAL TRANSFER

When an interest is created on the transfer of property but is made to depend on the fulfillment of a condition by the transferee, the transfer is known as a conditional transfer. Such a transfer may be subject to a condition precedent or a condition subsequent. If the interest is made to accrue on the fulfilment of a condition, the condition is said to be condition precedent. For instance, A agrees to sell his land to B if B marries C. This is a condition precedent. The condition precedent will be allowed to operate only if it is not hit by the provisions of Section 25 of the Act. Section 25 in the first place, says that, the condition must not be impossible to fulfil. For example, A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void. Secondly, the condition must not be forbidden by law. Thirdly, it should not be of such a nature that if permitted it would defeat the provisions of any law. For instance, A transfers Rs. 500 to B on condition that he shall murder C. The transfer is void. Fourthly, it should not be fraudulent. For example, X gives a false receipt to Y on behalf of his principal in consideration of transfer of land. The transfer would be void. Fifthly, the condition should not be such as to cause injury to the person or property of another. And lastly the condition should not be immoral or opposed to public policy. Thus, an agreement to give a son or daughter in adoption for a consideration is opposed to public policy as trafficking in children is forbidden by law.

If the condition is not hit by any of the above provisions, it is valid. Still the law does not insist on its literal fulfilment. It is sufficient if it is substantially complied with. Thus, where A transfers, Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries with the consent of C and D only as E has died earlier. B is deemed to have fulfilled the condition.

A transfer may also be made subject to a contingency which may or may not occur. Thus, an interest may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event. For example, A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm. Similarly, if A transfers a farm to B provided that B shall not go to England within three years after the date of transfer, the interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Now you will notice the distinction between condition precedent and condition subsequent. In condition precedent, the condition comes before the interest; whereas in condition subsequent, the interest is created before the condition. The one precedes the vesting of right and the other follows the vesting. In condition precedent, the vesting of right is delayed until the happening of an event. In condition subsequent, there is no postponement of vesting of right though it is to be destroyed or divested by reason of non-fulfilment of condition. There are certain situations where the law says that either the transfer will take effect on the fulfillment of a condition or will not take effect at all.

Again, if a transfer is made to defeat or delay the rights of a creditor, the transfer may be declared invalid by the creditor. In some cases, if property is transferred during the period when parties are litigating in a Court over a piece of property, then the transfer is

not valid, or even if there is a transfer, it is subject to the rights that are created in the Court's decree. All these circumstances are given in the Transfer of Property Act e.g., doctrine of election, doctrine of fraudulent transfers and doctrine of *Lis pendens.*

11. DOCTRINE OF ELECTION

Section 35 of the Transfer of Property Act deals with what is called doctrine of election. Suppose, a property is given to you and in the same deed of gift you are asked to transfer something belonging to you to another person. If you want to take the property you should transfer your property to someone else, otherwise you cannot take the property which is transferred to you by some one. Election may be defined as "the choosing between two rights where there is a clear intention that both were not intended to be enjoyed".

The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument. It is, therefore, a branch of a general rule that no one may approbate and reprobate (*Copper* v. *Copper* (1874) H.L. 53). However doctrine of election could not be applied to deprive a person of his statutory right to appear invoking extraordinary jurisdiction of the Supreme Court under Article 136, (*PR Deshpande* v. *MB Haribatti* (1995 (2) Scale 804 SC).

Illustration

A transfers to you his paddy field and in the same deed of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election. You must elect either to take under the instrument, in which case you will have to fulfil the condition and bear the burden imposed upon you or you must elect against the instrument, in which case neither the benefit nor the burden will come to you. The doctrine is based on the principle that "a donee shall not be allowed to approbate and reprobate and that if he approbates, he shall do all in his power to confirm the instrument which he approbates" (*Cavendish* v. *Decre* 31 C.D. 466).

In case, the person upon whom benefit is conferred rejects it, the property which was attempted to be transferred to him will revert to the transferor and it is he who will compensate the disappointed person. If the transferor dies before the person upon whom the benefit is conferred and he rejects the transfer, then the representatives of the transferor will have to satisfy the disappointed person out of the property which was the subject of transfer.

Explanation of the above principle

A transfers his property worth Rs. 1,000 and by the same instrument asks B to transfer his property worth Rs. 500 to C. Here, if B does not accept, he will not take A's property and the property will revert to A. If A is alive, it is for him to give some property to C. But if A dies before B has made his election then the heirs of A have to compensate C from A's property to the extent of Rs. 500. (You will note that B's property worth Rs. 500 was intended by A to be transferred to C).

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

Illustration

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

Further, the doctrine of election is applicable if the benefit is given directly. A person taking no benefit directly under a transaction but deriving a benefit under it indirectly need not elect.

Illustration

A transfers his property to B's son and by the same instrument transfer B's property to C. In this case B need not to elect and can keep his property. His son can have his gift.

There is, however, an exception to the doctrine of election. That is, if the transferor gives two benefits to a person and one particular benefit is in lieu of an item of property belonging to that person which the transferor has asked to transfer to a third-party then if the person elects to retain his property, he can retain the other benefit.

Illustration

Under A's marriage settlement, his wife is entitled, if she survives him to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of Rs. 200 p.m. during her life, in lieu of her interest in the estate of Sultanpur, which estates he bequeaths to his son. A also gives his wife a legacy of Rs. 1,000. After the death of A, his widow elects to take what she is entitled to take under the marriage settlement (i.e., the enjoyment of estate of Sultanpur). In this case, the wife has to forfeit the claim of Rs. 200 which her husband has given to her. But she can claim other benefit i.e., Rs. 1,000.

Election may be express or implied by conduct.

Illustration

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer.

In case of disability, the condition shall be postponed until the disability ceases, or until the election is made by some competent authority.

Test your knowledge

State the following as "True" or "False"

If the interest is made to accrue on the fulfilment of a condition, the condition is said to be condition precedent.

Correct Answer: True

12. TRANSFER BY OSTENSIBLE OWNER OR DOCTRINE OF HOLDING OUT

Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. (Section 41)

The following conditions are necessary for the application of Section 41:

(i) the transferor is the ostensible owner;

(ii) he is so by the consent, express or implied, of the real owner;

(iii) the transfer is for consideration, and

(iv) the transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer.

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

This Section is a statutory application of the law of estoppel. The section makes an exception to the rule that a person cannot confer a better title than he has. An ostensible owner is one who has all the *indicia* of ownership without being the real owner.

Illustrations

(a) A made a gift of property to B but continued in possession of the gifted property. He purported to exercise a power of revocation and then transferred the property to the defendant. The gift, however, was not revocable as it was an unconditional gift. B seeks to recover possession from the defendant. The defendant invoked protection under Section 41.

In the given example, the donor is not an 'ostensible owner' holding the property with the consent of the real owner. The defendant cannot, therefore, invoke the protection of Section 41.

(b) The manager of a joint Hindu family consisting of some minor members alienated the ancestral house to P without any necessity and the alienee transferred it to the defendants. The minors challenged the alienation. The defendants sought protection under Section 41.

Here Section 41 has no application for "P was not the ostensible owner of the ancestral family house with the consent, express or, implied, of the persons interested in the said ancestral house in as much as the plaintiff, who had an interest in the said house, did not and could not by reason of the disability of infancy give their consent".

13. DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL

Where, a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. (Section 43)

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

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

1. there was a representation, fraudulent or erroneous;
2. it was to the effect that the transferor is entitled to transfer the immoveable property;
3. the transferor is found to have subsequently acquired the interest which he professed to transfer;
4. the transfer of property was for consideration;
5. the transferee has not rescinded the contract;
6. the transferee acted in good-faith for consideration and without notice of the rights under the prior transfer.

Illustration

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition, but on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale may require A to deliver Z to him. Thus, where a grantor has purported to grant an interest in land which he did not at that time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee or as it usually expressed, feeds the estoppel.

14. DOCTRINE OF FRAUDULENT TRANSFER

Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor in order to defeat or delay the rights of a creditor, may transfer his property to some person, who may be his relative or a friend. The law does not allow this. Section 53 embodies the principle. It states :

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

Thus, where an owner of the property contracts a debt and then transfers his property to someone so that the creditor cannot proceed against the property to realise his debt, such a transfer is voidable at the option of the creditor. The transfer is valid so long as the creditor does not challenge it in a Court of law and gets a declaration that the transfer is invalid. A suit instituted by a creditor to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transfer or shall be instituted on behalf of, or for the benefit of all the creditors. Once the creditor sues the debtor and says that the debtor has the intention to deceive him, the transfer can be declared invalid by the Court. The creditor has to satisfy the Court that there was an intention on the part of the debtor to defeat his rights. If he does not prove this, then the creditor will fail and the transfer is valid. The question arises as to when we can say that the transferor has the necessary intention to defeat the claim of the creditor. This can be gathered from the surrounding circumstances. Suppose a man takes a loan from the creditor. He does not pay the loan. Then the creditor sues him in a Court to get back his

debt. On seeing this the debtor transfers his property to a friend of his or some other person who simply holds the property on behalf of the transferor. Again, the debtor may make a gift of his property to his wife or sell it to a friend who will afterwards retransfer the same to the transferor. Under these circumstances, we can easily say that the debtor's intention was to prevent the creditor from taking the property by a suit in the Court and to realise his debt.

But suppose the debtor has several creditors and he transfers his property to one of his creditors in satisfaction of his whole debt to him. Is this also a fraudulent transfer? The answer is No. For a mere preference of one creditor over the others is not fraudulent under the Section, even if the whole property is so transferred and nothing is left for the other creditors. But the other creditors may file a petition in the Court within three months of the transfer praying that the debtor be declared insolvent. If the debtor is adjudicated an insolvent, their interest will be protected and the transfer will be declared as fraudulent preference. The transfer will be set aside and the property will be distributed among all the creditors.

However, under Section 53(2) the rights of a transferee in good-faith and for consideration are protected. It says nothing shall affect or impair the rights of a transferee in good-faith and for consideration.

15. DOCTRINE OF PART-PERFORMANCE

Lastly, we may also discuss briefly the doctrine of part-performance which is embodied in Section 53A of the Transfer of Property Act.

A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected A, the transferor, seeks to evict B from the land. Can he do so? No, B will not be allowed to suffer simply because the formality of registration has not been through. The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.

The rule did not exist on the statute book before 1929. Section 53A, was inserted by an amendment to the Act in 1929. Followings are the essential conditions for the operation of the doctrine of part-performance according to Section 53A.

1. There must be a contract to transfer immoveable property.
2. It must be for consideration.
3. The contract should be in writing and signed by the transferor himself or on his behalf.
4. The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
5. The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
6. The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

If all the abovementioned conditions are satisfied, then, the transferor and the persons claiming under him are debarred form exercising any right in relation to the property other than the rights expressly provided by the terms of the contract notwithstanding the fact that the instrument of transfer has not been registered or complete in the manner prescribed therefor by the law for time being in force. It should be noted that Section 53A does not confer any positive right on the transferee. It only prohibits exercise of the right of ownership in relation to the property in order to evict the transferee from the property because legal requirements have not been satisfied.

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

The right conferred by this section is a right only available to a defendant to protect his possession. This section does not create a title on the defendant. It merely operates as a bar to the plaintiff asserting his title. It is limited to cases where the transferee had taken possession, and against whom the transferor is debarred from enforcing any right other than that expressly provided by the contract. The section imposes a bar on the transferor. When the conditions mentioned in the sections are fulfilled, it debars him from enforcing against the transferee any right or interest expressly provided by the contract. So far as the tranferee is concerned, the section confers a right on him to the extent it imposes a bar on the transferor (*Delhi Motor Co.* v. *Basurkas,* (1968) SCR 720).

The English rules as to what acts constitute part-performance have been generally followed in India. These rules are as follows:

(1) An act of part-performance must be an act done in performance of the contract. An act introductory to and previous to the agreement, cannot therefore, be act of part-performance.

(2) The acts relied upon must be unequivocally and referable to no other contract than that alleged.

(3) An act of part-performance must be the act of the party seeking to avail himself of the equity.

Test your knowledge

State the following as "True" or "False"

In a fraudulent transfer a person transfers his/her property so that his/her creditors shall not have anything out of the property.

Correct Answer: True

16. PROPERTIES WHICH CANNOT BE TRANSFERRED

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

(a) the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transfered apart from the dominant heritage.

(d) An interest is property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred.

(f) A mere right to sue cannot be transferred.

(g) A public office cannot be transferred nor can the salary of a public officer, whether before or after it has become payable.

(h) Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

(a) Chance of an heir apparent or 'Spes Successionis'

In this clause possibilities referred are bare or naked possibilities and not coupled with an interest such as contingent remainders or future interest-also known as right of *spes successionis* which cannot be the subject to transfer.

When a person is the owner of property, the property is in existence and it is in his possession. This he may transfer. But if property is neither in existence nor is the person the owner of the property then it cannot be transferred. For example, if a person is intending to buy certain property but, he has no interest in that property, he cannot transfer it unless the property comes to his hands, i.e., unless he becomes the owner of the property after buying it. But if a person obtains certain consideration and agrees to sell the property of which he is not the owner, then on becoming the actual owner of the property he has to transfer the property as there was a contract between him and the person who has agreed to buy the property. This transfer operates on a contract to be performed when the property comes into the hands of the person who has agreed to transfer. But where a person wants to make a gift of the property which is to come in his hands in future, he cannot transfer it because a gift is voluntary transfer without any consideration. Thus a gift of future property is void. Similarly, the chance of a heir apparent succeeding to the estate of a deceased person cannot be transferred. Suppose A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has only a hope expectancy that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

Illustrations:

(a) Suppose A, a Hindu who has separate property, dies leaving a widow W and a brother L, L's succession to the property is dependent upon two factors, viz., (i) his surviving the widow, W, and (ii) W leaving the property intact. L has only a bare chance of succession to the property left by A. This is *spes successionis,* and therefore, cannot be transferred (*Amrit Narayana* v. *Gyan Singh,* (1918) 45 Cal. 690).

(b) A transfers to B for valuable consideration his reversionary interest in a property. When A succeeds to the property, B sues him for possession of the same. B will not succeed as the reversionary interest is a *spes successionis* and non-transferable. So the transfer is void and B's suit for possession fails.

(b) Right of re-entry

The right which the lessor has against the lessee for breach of an express condition which provides that on its breach the lessor may re-enter is called the right of re-entry. For instance, if A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person. Thus, right of re-entry being a right for the personal benefit of any party cannot exist for the benefit of a person who has no personal interest in the land. For example, A grants his land by way of lease to B, a limited liability company on condition that the land should revert to A from B if the company goes into liquidation. This is a mere right in favour of A and this right A cannot transfer to anyone as this is a personal right which can be exercised by A only. But if A transfers the whole of his interest in the land including the right of re-entry to C, there the right to re-entry is a legal incident of property and can be validly transferred along with the property.

(c) Transfer of easement

An easement is a right enjoyed by the owner of land over the land of another: such as, right of way, right of light, right of support, right to a flow of air or water. Section 4 of the Easements Act defines an easement as a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of the land, to do and continue to do something or to prevent and to continue to prevent something being done in or upon or in respect of certain other and not his own land. An easement includes a right to enjoy a profit out of the land of another. An easement exists for the accommodation and better enjoyment of the land to which it is annexed. The land owned by the possessor of the land is known as *dominant tenement* and the land over which the right is enjoyed is known as the *servient* tenement. As an easement confers no proprietory right on its owner, it cannot be transferred apart from the land itself. For example, the right of certain villagers to bath in another's tank cannot be transferred. Similarly if A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

It may be noted, however, that the prohibition is only with regard to transfer of an existing easement. The law does not prohibit the grant or creation of new easement (*Bhagwan Sahai* v. *Narsing.* (1909) 31 ALL. 612; *Satyanarayana* v. *Lakshamaya* 5 H.L.J. 56 or the extension of an easement by release in favour of the owner of servient tenement).

(d) Restricted interest or personal interest

An interest restricted in enjoyment to the owner personally is by its very nature not transferable unless the restriction is void under Section 10. Examples of such restricted interest or property are the following:

(i) The right of pre-emption given under the Mohammedan Law.

(ii) The office of a Shebait of a Temple or mohunt of a mutt or mutuwalli of a wakf.

(iii) Emoluments attached to a priestly office.

(iv) Service tenures.

(e) Right to future maintenance

This again is a personal right in the property which the law says that it cannot be transferred. The right of a Hindu widow to maintenance is a personal right which cannot be transferred. Under the law the arrears of past maintenance can be transferred, but not the right to future maintenance.

(f) Mere right to sue and actionable claim

A ‘mere right to sue’ apart from the interest from which such right accrues cannot be assigned. The ‘right to sue’ is a personal right annexed to the ownership of property and cannot be *severed*, from it. It is based on the principle of public policy to prevent multiplicity of suits; the object is mainly to prevent the abuse resulting from trafficking in litigation.

The use of the word "mere" is significant. The question in every case is whether the subject-matter of transfer is property with an incidental remedy for its recovery or is a ‘mere’ right to ‘sue’. Where property is transferred along with a right to recover damages or compensation in respect of the property, the assignment is not hit by clause (4) of Section 6 of the T.P. Act.

A mere right to sue cannot be transferred. The right refers to a right to damages arising both out of contracts as well as torts. For example, A commits an assault on B, B can file a suit to obtain damages; but B cannot assign the right to C and allow him to obtain damages. In contract also, the rule is the same. If A breaks a contract which he has entered into with B, B can bring action for damages, but B cannot transfer this right to C to recover damages.

There is clear distinction between an actionable claim and a mere right to sue. An actionable claim is property and the assignee has a right to sue to enforce the claim.

As already noted a right to recover an unascertained amount of damages resulting from breach of contract or tort is a mere right to sue. If, however, one has a right to recover an ascertained and definite debt, he may transfer it because it is an actionable claim. Thus, suppose A is indebted to B for Rs. 2,000 and B transfers the right to recover the debt of C, the transfer is void. A beneficial interest in specific moveable property is also an actionable claim. It has been held that the right to claim the benefit of an

executory contract constitutes a beneficial interst in moveable property (*Jaffer Meher Ali* v. *Budge Budge Jute Mills,* (1900) 33 Cal. 702).

After breach of a contract for the sale of goods nothing is left but a right to sue for damages which cannot be transferred. But before breach the benefit of an executing contract for the sale of goods may generally be transferred and the buyer has the right to sue for the goods.

(g) Transfer of public office and salaries, stipends, etc.

It is against public policy for a public officer to transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the proper performance of its duties. Civil and military pensions are not transferable. A pension retains its character as long as it is unpaid and is in the hands of Government, but as soon as it is paid to the pensioner or his legal representatives, it can be transferred. Since these allowances, pensions and stipends are given on personal basis, the law does not allow these types of property to be transferred.

17. RULE AGAINST PERPETUITY

Section 14 of the Act provides that no transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration for that period, and to whom, if he attains full age, the interest created is to belong.

The rule against perpetuity is based on the general principle that the liberty of alienation shall not be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property forever out of the reach of the exercise of the power of alienation. Perpetuity has been described as “exemptions from intermission or ceasing”. This has been said to be “odious in law, destructive to the commonwealth, and an impediment to commence, but preventing the wholesome circulation of property”.

A perpetuity in the primary sense of the word, “is a disposition which makes property inalienable for an indefinite period” (Jarman on Wills, 8th ed., vol. 1, P. 284). Section 14 of the Act adopted with certain modifications the English rule against perpetuities which is enunciated by Jarman as “Subject to the exceptions to be presently mentioned, no Contingent or executory interest in property can be validity created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards”. Section 14 of the Act fixes the perpetuity period as: Life (or Lives) living at the time of transfer and actual minority of the then unborn ultimate transferee.

Any number of successive estates can be created between the transferees who are living persons e.g. A transfer may be made to A for life and then to B for life and then to C for life and so on, provided that A, B and C are all living persons at the date of the transfer. But if the ultimate beneficiary is some one who is not in existence at the date of the transfer, the whole residue of the estate should be transferred to him. If he is born before the termination of the last prior estate, he takes a vested interest at birth and takes possession on the termination of the last prior estate but if he is not born till the termination of the last prior estate, the transfer to him fails.

Further, the rule is not that vested interest is created at the birth of the beneficiary but that vested interest cannot be delayed in any case beyond his minority. Therefore, the

rule against perpetuity is that the minority of the ultimate beneficiary is the latest period at which an estate can be made to vest.

In India minority terminates at the end of 18 years.

The rule against perpetuities applies to both moveable and immoveable property.

Thus, the rule against perpetuity contains two propositions, i.e.:

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

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

The rule against perpetuities is also called the rule against remoteness because it is directed against limitations which are too remote and are expressed to take effect beyond the maximum period permitted by law.

However, Section 18 provides an exception to the above rule of perpetuity, where the transfer of property is for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Effect of a transfer on failure of prior interest

Further, where by reason of any rules or the rules contained in Sections 13 and 14, interest created for the benefit of a person or class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect or upon failure of such prior intersts also fail (Section 16). For example, property is transferred to A for life then to his unborn son B for life and then to C, who is living at the date of transfer, absolutely. Here B is given only a life interest. So the transfer to B is invalid under Section 13. The subsequent transfer to C absolutely is also invalid, because according to Section 16, if a prior transfer fails, the subsequent transfer will also fail.

No transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at date on such transfer, and the minority of some person who shall be in existence on the expiration of that period, to whom, if he attains full age, the interest created is to belong.

The policy of the law has been to prevent property being tied up for ever. The vesting cannot be postponed beyond the life time of any person living at the date of transfer. For example, if an estate is given to a living person A for life and then to the unborn son of A, the son of A must be in existence on or before the date of the expiry of the life estate in favour of A. The vesting of absolute interest in favour of an unborn person may be postponed until he attains majority. For example, an estate may be transferred to A, living person, and after his death to his unborn son when he attains the age of 18. Such transfer would not be violative of the rule against perpetuity.

18. ACCUMULATION OF INCOME

Section 17 does not allow accumulation of income from the land for an unlimited period without the income-being enjoyed by owner of the property. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is :

(a) the life of the transferor, or

(b) eighteen years from the date of transfer.

Any direction to accumulate the income beyond the period mentioned above is void except where it is for:

(i) the payment of the debts of the transferor or any other person taking any interest under the transferor,

(ii) portions for children or any other person taking any interest in the property under the transfer, and

(iii) for the preservation and maintenance of the property transferred.

Test your knowledge

State the following as "True" or "False"

A public office cannot be transferred nor can the salary of a public officer.

Correct Answer: True

19. DOCTRINE OF *LIS PENDENS*

Lis means dispute, *Lis pendens* means a pending suit, action, petition or the like. Section 52 of the T.P. Act incorporates the doctrine of *Lis pendens.* It states that during the pendency of a suit in a Court of Law, property which is subject to a litigation cannot be transferred. When we say that property cannot be transferred what we mean in this context is that property may be transferred but this transfer is subject to the rights that are created by a Court's decree. For example, A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

Section 52 lays down the Indian rule of *Lis pendens* being the legislative expression of the Maxim- "*ut lite pendente nihil innovetur"* 'During litigation nothing new should be introduced'.

Essentials

In order to constitute a *Lis pendens,* the following elements must be present:

1. There must be a suit or proceeding in a Court of competent jurisdiction.

2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immoveable property is directly and specifically in question.
4. There must be transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must effect the rights of the other party that may ultimately accrue under the terms of the decree or order.

The rule is based on the doctrine of expediency i.e., the necessity for final adjudication. A plea of *lis pendens* will be allowed to be raised even though the point is not taken in the pleadings or raised as an issue.

When an application to sue in *forma pauperies* is admitted, the suit is pending from the time of presentation of the application to the Court but not if it is rejected.

A suit in foreign Court cannot operate as *lis pendens.* The doctrine of *lis pendens* does not apply to moveables. It is the essence of the rule that a right to immoveable property is directly and specifically in question in the suit. The doctrine is not applicable in favour of a third-party.

Effect

If the parties to the litigation, are completely prevented from transferring the property in litigation, it would cause unnecessary delay and hardship, as they would have to wait till the final disposal of the case. So, Section 53 creates a limitation over the transfer by making it subject to the result of the litigation. The effect of this doctrine is not to invalidate or avoid the transfer, or to prevent the vesting of title in the transfer, but to make it subject to the decision of the case, and the rule would operate even if the transferee *pendente lite* had no notice of the pending suit or proceeding at the time of the transfer.

20. PROVISIONS RELATING TO SPECIFIC TRANSFERS

The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease.

These are as follows:

In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immoveable property and lease is a transfer of the right to enjoy immoveable property.

1. Sale

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

Essentials

(a) The seller must be a person competent to transfer. The buyer must be any person who is not disqualified to be the transferee under Section 6(h)(3).

(b) The subject matter is transferable property.

(c) There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.

(d) It must be an exchange for a price paid or promised or part paid and part promised.

(e) There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

Mode of transfer by sale

Sale of an immoveable property can be effected,

(a) Where such property is tangible (i) by a registered instrument if it is of the value of Rs. 100 and upwards, and (ii) by a registered instrument or by delivery of property when it is less than Rs. 100 in value, and

(b) Where the property is tangible or a reversion, only by a registered instrument.

Contract for sale

A contract for the sale of immoveable property differs from a contract for the sale of goods in that the Court will grant specific performance of it unless special reasons to the contrary are shown.

The rights and liabilities of a seller and buyer are dealt with in Section 55 of the Transfer of Property Act.

2. Exchange

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

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

Essentials

(i) The person making the exchange must be competent to contract.

(ii) There must be mutual consent.

(iii) There is a mutual transfer of ownership though things and interests may not be identical.

(iv) Neither party must have paid money only.

This Section applies to both moveable and immoveable property.

Mode of exchange

A transfer of property in completion of an exchange can be made only in the matter

provided for the transfer of such property by sale.

3. Gift

The provisions relating to "Gifts" have been stipulated under Sections 122 to 128 of the Act.

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

> “Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee.
>
> Such acceptance must be made during the life time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Essentials

1. There must be a transfer of ownership.
2. The subject matter of gift must be a certain existing moveable or immoveable property.
3. The transfer must be made voluntarily.
4. It must be done without consideration.
5. There must be acceptance by or on behalf of the donee, and such acceptance must be made during the lifetime of the donor and while he is capable of giving.

There are two parties to the gift: donor and donee. The donor must be a person competent to transfer; whereas the donee may be any person. The gift can be made to any one, to an incompetent person or even to a juridicial person. The essence of a gift is that it is a gratuitous transfer.

Formalities

According to Section 123, a gift of immoveable property must be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. A gift of moveable property may be made by a registred instrument or by delivery of property. Where the donee is already in possession of the moveable property, as no future delivery is possible, the donor may make a declaration of the gift in his favour. For example, where a piece of furniture or a television set belonging to the donor is lying with a friend of his, the donor may simply declare that he makes a gift of the furniture or the television set and the gift is complete. The declaration must be clear and the donee must accept the gift.

A gift of immoveable property, as said above, must be effected by registration. Where a gift in favour of someone is registered but it is not accepted by the donee, the gift is incomplete. Suppose, a document is executed by the donor who makes a gift of immoveable property and the deeds are delivered to donee, and the donee accepts the gifts but the document is not registered. Will the gift by valid? It has been held by the Courts that the gift is valid. While registration is a necessary formality for the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. The donee in such a case can ask the donor to complete the gift by registration. Thus, the most essential thing for the validity of a gift is its acceptance. If the

gift is accepted but not registred it is a valid gift. **The Privy Council in *Kalyan Sundram* v. *Kumarappa,* A.I.R. 1925 P.C. 42, decided that after acceptance of the deed of gift and before registration, the donor cannot revoke the gift. The gift which is accepted by the donee, will take effect from the date of the execution of the document by the donor, even though it is registered at a later date.**

If the deed of gift is executed but never communicated to the intended donee and remains in the possession of the donor undelivered, it cannot be compulsory registered at the instance of the donee. The reason is that the donee did not accept the gift, the donor can at any time before such acceptance revoke the gift. But once a gift is accepted by the donee, the donor cannot revoke it. A gift may, however, be revoked if it is brought about by a fraud or misrepresentation or undue influence.

The other essential characteristic of a gift is that it cannot be revoked at the will and pleasure of the grantor. A revocable gift is one which may be revoked by the donor at any time. Its revocation would depend upon the mere will or pleasure of the donor. Such a gift is void. But on the other hand, if the condition is one which does not depend on the will or pleasure of the donor, the gift can be revoked on the happening of such condition.

Illustrations

(a) A gives a field to B, reserving to himself, with B's assent, the rights to take back the field in case B and his descendents die before A, B dies without descendents during A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself with B's assent the right to take back at leisure Rs. 10,000 out of one lakh. The gift holds goods as to Rs. 90,000 but is void as to Rs. 10,000 which continues to belong to A.

A gift which comes into existence on the fulfilment of a condition, that is to say, a gift which is subject to a condition precedent is also valid. A condition precedent, as already explained in this study dealing with vested interest and contingent interest, is one which must be fulfilled before the transfer takes effect. But the condition attached to the gift should not be illegal or immoral. For instance, a gift to A on condition that he murders B is not valid.

A gift comprising both of existing property and future property is void as to the latter. For example, A makes a gift of his house and also makes a gift of the additions that he is likely to make in future. Here the gift of the house is valid but the gift of the additions that are yet to be made is invalid.

Onerous gift: Lastly reference may also be made to what is known as an onerous gift. It may be that several things are transferred as a gift by single transaction. Whereas some of them are really beneficial the others convey burdensome obligations. The result is that the benefit which it confers is more than counter balanced by the burden it places. For instance, A makes a gift of shares in the companies X and Y. X is prosperous but heavy calls are expected in respect of shares in Y company. The gift is onerous.The rule as laid down in Section 127 is that the donee takes nothing by the gift unless he accepts it fully. Where the gift is in the form of two or more independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the other.

The rules pertaining to gifts in the Transfer of Property Act do not apply to the gifts by Mohammedans. If a gift is made by a Mohammedan, its validity has to be judged according to Muslim law and not according to the Transfer of Property Act.

Test your knowledge

State whether the following statement is "True" or "False"

If the donee dies before acceptance, the gift is void.

- True
- False

Correct Answer: True

4. Leases

(i) *Meaning and nature of lease:* According to Section 105, a "lease" of immoveable property is a transfer of a right to enjoy property. Since it is a transfer to enjoy and use the property, possession is always given to the transferee. The lease of immoveable property must be made for a certain period. For example, you may give a lease of property for a definite number of years, or for life, or even permanently.

Essentials

The essentials of a lease are:

(1) It is a transfer of a right to enjoy immoveable property;

(2) Such transfer is for a certain time or perpetuity;

(3) It is made for consideration which is either premium or rent or both;

(4) The transfer must be accepted by the transferee.

The transferor is called the lessor, the transferee is called the lessee, the price is called premium and the money, share, service or any other thing of value to be so rendered is called the rent.

The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively.

(ii) *Lease and licence:* A lease should be distinguished from a licence. A licence is a right to do or continue to do in or upon the immoveable property of the grantor, something which would, in the absence of such a right, be unlawful.

A licence does not transfer any interest in the property and the licencee has no right to possession. A licence can be revoked by the grantor at any time, whereas a lease cannot be revoked. If, I sell the fruits of my garden to you, you are given permission or licence to enter my garden and take away the fruits. A lease involves a transfer of interest

followed by possession of the property for a specified period. The real test is the intention of the parties**.**

If the document creates an interest in the property, it is a lease but if it only permits another to make use of the property of which the legal possession continues with the owner, it is a licence because it does not create any interest in that property (*Associated Hotel of India* v. *R.N. Kapoor,* A.I.R. (1956) S.C. 1962).

The question is not of words but of substance and the label which the parties choose to put upon the transaction though relevant is not decisive.

(iii) *Formalities:* According to Section 107, a lease from year to year or for any term exceeding one year can be made only by a registered document. If a lease is for a term below one year, it can be made by an oral agreement. If a lease is created by oral agreement, it must be accompanied by delivery of possession. If the lease is for a year or more, it must be effected by a registered document. If after the registration, the lessor does not give possession, the lessee can sue for possession.

(iv) *Types of tenancies:* Following are the various types of tenancies:

(a) *Tenancy from year to year:* A tenancy from year to year may be made by a grant of land from year to year. If the tenancy is for a year to start with but after the expiration of one year the lessee continues to be in possession and pays the rent to the landlord, the tenancy is regarded as a year-to-year tenancy. If, in case of a tenancy for a period more than a year the landlord wants to terminate or end the lease, he has to give a six-month's notice to the lessee to quit. In case of a tenancy from month to month, a fifteen days notice to quit is necessary. The monthly tenancy may be created either by contract or may be presumed from the nature of the tenancy to be one, from month to month.

Illustration

A lets a house to B for 5 years, B sublets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) *Tenancy-at-will:* Tenancy-at-will is a tenancy recognised by law. This comes into existence where a tenant holds over with the consent is let into occupation. We have stated above that if the tenant continues to be in possession after the expiration of tenancy and pays the rent to the landlord, the tenancy may be one from year to year or from month to month. During a period when the tenant is in possession after expiry of the period, if the tenant stays with the consent of the landlord till such time as further period is fixed or a fresh contract is made, the tenant is called a tenant-at-will. The landlord will decide for what further period shall the tenancy be given. 'A tenancy-at-will is implied when a person is in possession by the consent of the owner and is not held in view of any tenancy for a certain time. The tenancy-at-will does not mean that the landlord has to give a proper notice to quit. The tenant-at-will cannot sublet during that period because no valid contract for further extension in his favour has been made. The death of

the landlord or tenant determines the tenancy, i.e., the tenancy comes to an end.

(c) *A tenancy by sufferance:* This is a tenancy which is created by fiction of law. If a tenant continues to be in possession after the determination of the period of the lease without the consent of the landlord, he becomes a tenant by sufferance. A tenant-at-will is in possession with the consent of the landlord, whereas a tenant by sufferance is in possession without his permission after the term of the lease comes to an end. This type of tenant is not regarded as a trespasser because the tenant had in his favour a valid lease to start with. No notice is necessary to such a tenant for eviction. This tenant is not responsible for rent. He is liable to pay compensation for use and occupation of the land.

(v) *Requirements of a valid notice:* In order that a notice to quit is valid it must be a proper notice. The notice must convey the intention to terminate the tenancy as a whole and must specify the date on which the tenancy would expire. As mentioned earlier, if the lease is a lease from month to month, 15 days, notice is required. If it is from year to year 6 months' notice is required. A lease of the moveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year. The notice should expire with the end of the period of the tenancy. If it is a lease from month to month and the notice is given by the landlord, the tenant should be asked to quit at the end of the month of the tenancy. The landlord cannot ask his tenant to quit at any time before the expiry of a month or a year of the tenancy.

Illustration

A grants lease for 4 years commencing form 1-6-1961. (This day should be excluded for counting the duration of lease). The lease will end at the midnight of 1-6-1965, i.e., the lease commenced from 2-6-1961, therefore, a notice to quit given *on* 1-2-1968 *for leaving the premises on* 1-3-1968 *is a notice expiring* with the end of month of tenancy and it is a valid notice.

Note that in the above illustration, the lease after 4 years is continued on a monthly tenancy basis till the landlord gives notice in the year 1968.

(vi) *Determination of leases:* Section 111 of the Transfer of Property Act spells out the various contingencies in which a lease comes to an end. A lease is determined, i.e., comes to an end in the following ways:

(1) *By efflux of time or lapse of time:* A lease for a definite period, such as a lease for a year, or for a term of years, expires on the last day of the term and the lessor or any person entitled to get back the property may enter without notice or any other formality. Since a lease is a transfer of interest in the property, if during the period for which a lease is valid, the lessee dies, the heirs of the lessee can continue the lease till the expiry of the period.

(2) *By the happening of a special event:* When a lease is granted subject to the happening of an event, it comes to an end when the event takes place. Thus, if B grants lease to A for life, it comes to an end on the death of A. Similarly, if a lease is granted for the duration of the war, it comes to an end when the war ends. Where the interest of the lessor is limited, the lease comes, to an end when he loses the interest or where he does not have any power to grant a

lease. For example, a tenant for life can grant a lease only to last during his life time. It comes to an end on his death.

(3) *Merger:* A lease comes to an end when the lessee buys the property of the lessor or when the lessee takes the lessor's interest by succession. Here the right of the lessee merges in that of the lessor. Naturally, the lessee becomes the owner of the property after he acquires it. So there will be no more a lease.

(4) *By surrender:* A lease may come to an end by surrender. Surrender may be either express or implied. Express surrender arises when the lessee yields up his interst under a lease by mutual consent. Implied surrender occurs, as follows :- if during the subsistence of the lease, a new lease is granted to the tenant to commence at once in substitution for the existing lease, it operates as a surrender of the old lease. For example, a lessee, accepts to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease comes to an end. Similarly, when the landlord reserves possession without any objection on the tenant's part, there is a surrender by implication. Mere non-payment of rent does not amount to surrender.

(5) *By forfeiture:* A lease also comes to an end by forfeiture. A forfeiture occurs when there is breach of a condition in a lease contract by the lessee. Under the Transfer of Property Act, forfeiture occurs in the following circumstances—the first case in which forfeiture occurs is the case when the lessee breaks an express condition which may be of various types such as, if the lessee does not pay the rent regularly, or if the lessee becomes insolvent, or where the lessee sublets the property to another person. In all such cases there will be a forfeiture. But the condition that the lessee breaks must be an express condition which must have been incorporated in the contract of lease. Then only the lessor can re-enter the leased property and claim that the lease shall be forfeited.

In the case of a forfeiture due to default in payment of the rent, if the lessor sues the lessee to quit, the Court can direct the lessee to pay the rent or arrears of rent and continue the lease. But in a breach of any other condition, such as the breach of a condition preventing the lessee from subletting the property, the Court will not help the lessee if he breaks the condition. He will incur forfeiture. A breach of condition by the lessee gives an option to the lessor to bring the lease to an end. But if he does not exercise the option the lease will continue validly. The lessee, however, cannot on breaking the condition, take advantage of his wrong and terminate the lease.

The second case of forfeiture occurs when the tenant denies the title of the landlord and claims that somebody else or he himself is the owner of the property. In order that a denial of the landlord's title should work as a forfeiture of the lease, three things are necessary:

(a) the tenant must set up title either in himself or in a third-party;

(b) the denial must be direct and not casual;

(c) it must be made known to the landlord.

Illustration

A is a tenant of B, but C claims to be the landlord. B sues A for rent and A in his written statement states. "I have never paid rent to B. C now claims rent. I am ready to

pay whosoever is the rightful owner. There is no forfeiture and B cannot evict A in a subsequent suit.

The third case where forfeiture occurs is where the lessee is adjudged an insolvent and the lease provides that the lessor may re-enter on the happening of such event. It may, however, be noted, that the effect of these provisions has been considerably diluted by various Rent Control and Eviction Acts passed by various legislatures.

Test your knowledge

State whether the following statement is "True" or "False"

If after the registration, the lessor does not give possession, the lessee is free to sue for possession.

- True
- False

Correct Answer: True

Duties of the Lessor and Rights of the Lessee

(vii) *Duties of the Lessor:* Following are some of the duties of the lessor:

(a) The lessor is bound to disclose to the lessee any material defect in the property with reference to its intended use of which the lessor is and the lessee is not aware. This rule applies only to physical defects of the property such as the condition and the nature of the property leased. You will note that the lessor is not bound to disclose whether or not he has title to the property.

(b) The next duty of the lessor is to put the lessee in possession of the property. A lease is a transfer of possession the consideration being rent and, therefore, it follows that the landlord cannot recover the rent unless he has delivered possession to the tenant. If a contract of lease has been executed and the lessor does not give possession of the property to the lessee, the lessee can sue the lessor for possession.

(c) The next duty that is cast on the lessor is what is usually called convenant for quiet enjoyment. The covenant, that is the right to undisturbed possession, so long as the lessee pays the rent, presupposes possession and, therefore, no action can be brought on this convenant unless the lessee has first obtained possession. The covenant for possession gives the lessee the right to obtain possession; the covenant for quiet enjoyment gives the lessee a right to continue in such possession. If the lessee's possession is disturbed, he can sue for damages or, in case a part of the leased property is taken possession of either by the lessor or by any third-party; the lessee can hold a part of the leased property and pay a proportionate rent.

(viii) *Duties of the lessee:* The lessee has the following duties:

(a) The lessee is bound to disclose to the lessor any fact as to nature or extent of the interest that the lessee is about to take, of which the lessee is, and the lessor is not aware and which materially increases the value of such interest.

(b) The lessee is bound to pay or tender at the proper time and place, the premium or rent to the lessor or his agent in this behalf. We have already seen that in case the lessee does not pay the rent, he may incur forfeiture of the tenancy. The liability to pay the rent commences from the date the tenant is put into possession.

(c) The next duty of the lessee is that he uses the property as a person of ordinary prudence would make use of. But he shall not permit another person to use the property for purposes other than that for which it was leased.

(d) He should not do any act which is destructive of or permanently injurious to the property.

(e) The lessee must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purpose. If he wants to erect certain fixtures or chattel on the leased property, it must be done without causing any damage to the property. Before the termination of the lease, he can remove all the things attached to the earth. If permanent fixtures are to be made, the lessee must obtain the consent of the landlord.

(f) If the lessee comes to know of any proceedings by way of suit to recover the property of the lessor, the lessee should immediately inform the lessor. Since, the tenant is in possession of the property he is the person who is not likely to know of any encroachment on the landlord's property and he should therefore inform the landlord.

(g) The lessee should hand over the property at the end of the lease.

(ix) *Rights of the lessee:* The lessee enjoys the following rights:

(a) If during the continuance of the lease any accession is made to the property, such accession is deemed to be comprised in the lease, the lessee has a right to enjoy the accretions of the leased property.

(b) Where, under the contract, the landlord has agreed to repair the property, the lessee can carry out the repairs and deduct the expenses from the rent if the landlord fails to do so.

(c) If the lessee has made payment which the lessor is bound by law to pay such as payment of Government revenues or municipal taxes on the property, the lessee can deduct the amount from the rent and pay the balance to the lessor. He can even take interest on the amount he has paid.

(d) The lessee has a right to remove the fixtures he has erected-during the term of the lease.

(e) If, due to no fault of his, the lease comes to an end (i.e., when the lease is of uncertain duration), the lessee or his legal representatives are entitled to all the crops planted or grown by the lessee. The lessee or his representatives have got a right to come and carry away the crops, etc., which are growing on the land. If the lease is of a definite period, such a right cannot be claimed, particularly, when lessee has committed a fault, e.g., where he has committed a breach of a condition entailing forfeiture.

(f) The lessee may avoid the lease, if property is wholly or partly destroyed by tempest, flood, or fire so as to make it impossible to continue the lease for the purpose for which it was let.

(g) The lessee has right to transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property. We have also noticed that the lessee's rights are transferable.

Test your knowledge

Choose the correct answer

Which section of the Transfer of Property Act deals with the various contingencies in which a lease comes to an end?

(a) Section 121
(b) Section 112
(c) Section 111
(d) Section 222

Correct Answer: c

5. Actionable Claims

"Actionable claim" has been dealt with under Sections 130 to 137 of the Act.

(i) *Definition:* "Actionable claim" is defined in Section 3 of the Transfer of Property Act as follows:

A claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Actionable claims are claims, to unsecured debts. If a debt is secured by the mortgage of immoveable property it is not an actionable claim, because the Section clearly excludes such a debt. A debt is a liquidated money obligation which is usually recoverable by a suit. To create a debt, first of all, there must be a liquidated or definite sum which is actually due. For example, arrears of rent due. The term debt may also include a sum of money which is due in the sense that it exists, but is not actually payable until a later date. For example, A borrows money from B on the 1st of January and promises to rapay on March 15, the amount is not payable till the 15th of March, but certainly it is a debt and it is an accruing debt. Another essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.

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

Illustrations of actionable claims:

(i) Arrears of rent accrual constitute a 'debt' so it is an actionable claim (*Sheu Gobind Singh* v. *Gauri Prasad,* AIR 1925 Pat. 310).

(ii) Provident Fund that is standing to the credit of a member of the Provident Fund.

(iii) Money due under the Insurance Policy.

(iv) A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (*Thakardas* v. *Vishindas*).

Non-actionable claims

(i) Debentures are secured debts and therefore not regarded as actionable claims.

(ii) Copy right though a beneficial interest in immoveable property is not an actionable claim since the owner has actual or constructive possession of the same (*Savitri Devi* v. *Dwarka Bhatya*, (1939) All 305).

Again, an actionable claim includes a beneficial interest in the moveable property not in possession. Now, a benefit of a contract for the purchase of goods is a beneficial interest in moveable property.

Illustration

A agrees on 1.2.1985 to deliver 1,000 gunny bags to B on 1.3.1985. On 1.2.1985 B assigns interest in the contract to C. A fails to deliver the bags on 1.3.1985. C can sue A because a beneficial interest in a subsisting contract which relates to moveable property is an actionable claim which can be validly transferred.

Suppose in the above Illustration B has assigned the right to C to claim damages after the contract was broken. That is B transfers his right to sue A on, say, 1.4.1985, (i.e., one month after the contract was broken). In this case what B has assigned to C is a mere right to sue A and get damages. B cannot transfer this right. You will recall that a mere right to sue cannot be transferred. After the breach of the contract, B has a mere right to sue A which he cannot assign or transfer. To repeat *an actionable claim is a claim to any debt other than a debt secured by a mortgage and it includes a beneficial interest in the moveable property.*

(ii) *How actionable claims are transferred:* Actionable claims can be transferred by the execution of an instrument in writing signed by the transferor or his duly authorised agent.

Not much formality is required for the transfer of an actionable claim. It can validly be transferred, in writing and signed by the transferor or his agent. After a valid transfer, the transferee of an actionable claim must give notice to the debtor to complete his title. Thereafter he can sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings.

Illustration

A owes money to B, who transfers it to C. B then demands the debt from A who not having received notice of transfer, pays to B. The payment is valid and C cannot sue A for the debt.

Some problems and their Answers:

(a) *A owed money to B. B transferred the debt by deed of gift to C. Subsequently, he*

transferred it for value to D. Who is entitled to the amount?

Answer: The first transfer is in favour of C. The transfer of an actionable claim may be even without consideration. So the assignment in favour of C is valid. The subsequent transfer to D for consideration cannot deprive C of the rights which he has already acquired. C is, therefore, entitled to the money.

(b) *A effects a policy on his own life with the Life Insurance Corporation and deposits it with a bank for securing payment of an existing debt. A dies and the bank claims the amount from the L.I.C., against A's heirs. Is the transfer to the Bank valid?*

Answer: The amount due under a policy of insurance is an actionable claim. The assignment of an actionable claim should be made in writing and by the transferor. The deposit of the policy by the transferor as security without written document in favour of the bank is not a valid assignement. The bank cannot have any claim as against the heirs of A.

6. Mortgages

Sections 58 to 104 of the Act deal with "Mortgages".

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

The transferor is called a mortgagor, the transferee a mortgagee. The principal money and interest the payment of which is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called a mortgage deed.

(ii) *Essentials of a mortgage:*

(1) *Transfer of interest:* The first thing to note is that a mortgage is a transfer of interest in the specific immoveable property. The mortgagor as an owner of the property is possessed of all the interests in it, and when he mortgages the property to secure a loan, he only parts with an interest in that property in favour of the mortgagor. After mortgage, the interest of the mortgagor is reduced by the interest which has been transferred to the mortgagee. His ownership has become less for the time being by the interest which he has parted with in favour of the mortgagee. If the mortgagor transfers this property, the transferee gets it subject to the right of the mortgagor to recover from it what is due to him, i.e., the principal plus interest.

(2) *Specific immoveable property:* The second point is that the property must be specifically mentioned in the mortgage deed. Where, for instance, the mortgagor stated "all of my property" in the mortgage deed, it was held by the Court that this was not a mortgage. The reason why the immoveable property must be distinctly and specifically mentioned in the mortgage deed is that, in case the mortgagor fails to repay the loan the Court is in a position to grant a decree for the sale of any particular property in a suit by the mortgagee.

(3) *To secure the payment of a loan:* Another characteristic of a mortgage is that the transaction is for the purpose of securing the payment of a loan for the performance of an obligation which may give rise to pecuniary liability. It may be for the purpose of obtaining a loan, or if a loan has already been granted to secure the repayment of such loan. There is thus a debt and the relationship between the mortgagor and the mortgagee is that of debtor and creditor. When A borrows 100 bags of paddy and further quantity by way of interest, it is mortgage transaction for the performance of an obligation.

Where, however, a person borrows money and agrees with the creditor that till the debt is repaid he will not alienate his property, the transaction does not amount to a mortgage. Here the person merely says that he will not transfer his property till he has repaid the debt; he does not transfer any interest in the property to the creditor. In sale as distinguished from a mortgage, all the interest or rights of ownership are transferred to the purchaser. In a mortgage, as stated earlier, only part of the interests are transferred to the mortgagee, some of them remaining vested in the mortgagor.

To sum up, it may be stated that there are three outstanding characteristics of a mortgage:

(a) the mortgagee's interest in the property mortgaged terminates upon the performance of the obligation secured by the Mortgage.

(b) the mortgagor has a right of foreclosure upon the mortgagor's failure to perform.

(c) the mortgagor has a right to redeem or regain the property on repayment of the debt or performance of the obligation.

(iii) *Form of a mortgage contract:* According to Section 59, where the principal money secured is Rs. 100 or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument or by delivery of property. It should be noted that a mortgage is not a mere contract but it is the *Conveyance of Interest* in the mortgaged property and as soon as the mortgage deed is registered an interest in the property vests in the mortgagee.

(iv) *Kinds of mortgages:* There are in all six kinds of mortgages in immoveable property, namely

(a) Simple mortgage.

(b) Mortgage by conditional sale.

(c) Usufractuary mortgage.

(d) English mortgage.

(e) Mortgage by deposit of title-deeds or equitable mortgage.

(f) Anomalous mortgage.

(a) Simple mortgage

In a simple mortgage, the mortgagor binds himself personally to pay the debt and agrees in the event of his failure to pay the mortgage money, the mortgagee shall have the right to cause the property to be applied so far as may be necessary by means of a decree for the sale of property. If the mortgaged property is not sufficient to discharge the

debt, the mortgagee can bring a personal action against the mortgagor and obtain a decree which, like any other money decree, can be executed against other properties of the mortgagor. In simple mortgage, no right of possession or foreclosure is available to the mortgagee.

(b) Mortgage by conditional sale

In this type of mortgage, the property is mortgaged with a condition super added that in the event of a failure by the debtor to repay the debt at the stipulated time, the transaction should be regarded a sale, and in case the loan is repaid at the stipulated time, the sale shall be invalid, or on condition that on such payment being made the buyer shall transfer the property to the seller.

Thus, for all practical purposes, this type of mortgage is ostensible sale of the mortgaged property with a condition for re-purchase by the mortgagor by repaying the loan. It will be noted that the mortgagor transfers the property with the following three conditions:

(a) If the loan is repaid, the sale becomes void.

(b) If the loan is not repaid at the stipulated time, the sale will become absolute and binding.

(c) When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.

In case of mortgage by conditional sale, there is no personal covenant. That is unlike in the case of a simple mortgage, the mortgagor in this case does not bind himself personally to repay the debt. The mortgagee is not given the possession of the property in this type of mortgage. This is also the position in the case of a simple mortgage. Again, in a mortgage by conditional sale, the mortgagee's remedy is 'foreclosure', that is he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage. To "foreclose" means to debar the mortgagor from redeeming the property forever.

(c) Usufractuary mortgage

Section 58(d) defines a "usufructuary mortgage" as "where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufractuary mortgage. It is also called a mortgage with possession.

Thus is this type of mortgage the mortgagor has to deliver possession of the property to the mortgagee. If the possession is not given, the mortgagee can sue for possession. The mere fact that possession has not been delivered will not alter the nature of the transaction. **In *Pratap Bahadur* v. *Gajadhar,* 24 All 521, it was agreed that the mortgagee will put the mortgagor in possession of a village on a certain date and to pay interest till possession was delivered. It was held that mortgage was an usufructuary mortgage.** The mortgagee is authorised to retain possession and receive rents, etc., until he recovers the whole debt and the interest. The usufractuary mortgagee

has to look only to the profits that arise out of the property for realising his debt; there is no personal liability on the part of the mortgagor. Similarly, the mortgagee has no right to foreclose the mortgage or to sue for sale.

A mortgage may be regarded as usufructuary even though the entire debt is not to be paid out of the profits of the property. Therefore, a usufractuary mortgage may be either (i) where the entire mortgage money is to be paid from the profit of the land; or (ii) where only part of the mortgage money is principal or interest amount is to be paid from the profit of the land.

If in a usufractuary mortgage a time is mentioned during which the mortgagee should recover the debt, etc., then after the time is over, the mortgagee should deliver back the property to the mortgagor. He cannot refuse to give back the property, if he has not been able to recover the debt and the interest, etc. A usufractuary mortgagee is supposed to remain in possession of the mortgaged property and manage the same as a person of ordinary prudence would manage subject to the conditions of mortgage agreement. Any loss due to failure on his part would be debited to his account (*Panchanan Sharma* v. *B.P. Jagnani,* SCALE 1995 (2) 641).

Thus, a usufractuary mortgage has the following characteristics:

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

(d) English mortgage

Section 58(e) states that: “where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will retransfer it to the mortgagor upon payment of the money as agreed, the transaction is called an English mortgage”.

Here the mortgagor transfers the ownership of the property as security and the mortgagee promises to re-transfer the ownership, if the money is paid within a definite time. There is also a personal covenant as the mortgagor promises to repay within a certain date. In this type of mortgage, there is proviso that if money is repaid the property would be reconveyed. The remedy of the mortgagee is sale of the property to recover the debt. Thus, the essential features of an English mortgage are as under:

1. The mortgagor binds himself to repay the mortgage money on a certain day. In other words, there should be a personal undertaking to pay.
2. The mortgaged property is absolutely transferred to the mortgagee.
3. Such absolute transfer is subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the fixed day.

Distinction between English mortgage and mortgage by conditional sale

An English mortgage looks like a mortgage by conditional sale but there are obvious

differences between the two:

1. In English mortgage there is a personal liability undertaken by the mortgagor to pay the debt. In a mortgage by conditional sale there is no personal covenant (agreement for payment of the mortgage money and mortgagee has his remedy against the mortgaged property only;
2. In English mortgage the ownership in the mortgaged property is absolutely transferred to the creditor (i.e. mortgagee) which however, may be divested on repayment of the loan on the fixed day.

In a mortgage by conditional sale, the mortgagee gets only a qualified ownership which may, however, ripen into an absolute ownership in default of payment of the mortgage money.

Test your knowledge

Choose the correct answer

In which of the following mortgages, the ownership in the mortgaged property is absolutely transferred to the creditor?

(a) Simple mortgage
(b) English mortgage
(c) Anomalous mortgage
(d) Usufructuary mortgage

Correct Answer: (b)

(e) Mortgage by deposit of title deeds

This type of mortgage is called *equitable mortgage* in English law. In this transaction, a person delivers to the creditor or his agent documents of title of his immoveable property with an intention to create a security, and obtains a loan. The requisites of such a mortgage are (i) a debt, (ii) deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt.

In order that a valid mortgage on an immoveable property should be effected, it must be in writing and attested by two witnesses and the document must be registered. But in case of a mortgage by deposit of title deeds, it need not be registered and an oral agreement between the person and the creditor followed by the delivery of the documents of title to the property is enough. The creditor will have the possession of the documents and he will advance the money at the stipulated rate of interest. In case the mortgagor does not repay the loan, the creditor on the basis of having the title deeds in his possession can sue the debtor to recover the money. This type of mortgage has been recognized due to expediency. Many persons, specially the business people, may need money urgently and they cannot wait till a formal document is written, signed, attested and then registered. So they will simply approach the creditor and hand over the title deeds of their property and borrow money. This avoids delay and other formalities for effecting a valid mortgage.

There must be a clear intention on the part of the person who hands over the title

deeds to effect a valid mortgage. In the absence of any intention, the mere holding in possession of the title deeds will not create a valid mortgage.

The term ‘documents of title’ or title deeds means such documents as will show *prima facie* or apparent title to the property of the person who is borrowing money. Accordingly, in one case it was held that tax receipt was not a document of title to the property on which the tax was paid. What is necessary to deposit is a document which gives him his right to the property and the creditor should insist on the production of this document before he gives money on a pledge of documents.

It should be noted that this type of mortgage can be created only in certain towns and not everywhere in India. The facility to create a valid mortgage is available in the following towns in India: Calcutta, Madras, Bombay, Adoni, Ajmer, Allahabad, Alwar, Bangalore, Bellary, Cochin, Coimbatore, Delhi, Jaipur, Jodhpur, Kanpur, Rajahmundry, Udaipur, Vellor, Ellora, Pali, Bhilwara, Bikaner, Kakinada, Narayanganj, Mysore, and Madurai. Though this type of mortgage is limited to specific cities it is at par with any other legal mortgage (*K.J. Nathan* v. *S.V. Maruthi Rao*, A.I.R. 1965 S.C. 443).

Title deeds should be delivered in these areas, the property of the person may be situated elsewhere. If the deposit of title deeds has taken place in *any other town*, it will not be a valid mortgage. Similarly, if the property is situated in any one of the towns mentioned above, but the deposit of title deeds is made in other towns or areas then again it will not be a valid mortgage.

(f) Anomalous mortgage

Section 58(g) of the Transfer of Property Act provides that “a mortgage which is not a simple mortgage, a mortgage by conditional sale, usufrauctuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage”.

Thus, an anomalous mortgage is a combination of various other mortgages, for example, a usufractuary mortgage may be created and the mortgagee shall have the right of sale. You have already noticed that in a usufractuary mortgage only possession is given to the mortgagee and there is no right of sale. But in an anomalous mortgage the right of sale along with the possession of the property may be given. You have also seen that in the case of usufractuary mortgage, there is no personal liability on the part of a mortgagor but if the mortgagor assumes personal liability to pay the mortgage money, it will be an anomalous mortgage.

Again, a mortgagee may be given possession of the property for a fixed period with a condition that in case the debt is not discharged at the expiry of the period mentioned, the mortgage shall be regarded as a mortgage by conditional sale. In this case, the mortgage has got a right of "foreclosure" and after the expiry of the period if the debt is not paid, the mortgagee will become the owner of the property.

Two other terms in common use in connection with mortgage may be considered here. These terms are (i) Sub-mortgage; and (ii) Puisne mortgage.

(v) *Sub-mortgage:* Where the mortgagee transfers by mortgage his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage. For example, where A mortgages his house to B for Rs. 10,000 and B mortgage his mortgagee right to C for Rs. 8,000. B creates a sub-mortgage.

(vi) *Puisne mortgage:* Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a puisne mortgage. For example, where A mortgages his house worth Rs. one lakh to B for Rs. 40,000 and mortgages the same house to C for a further sum of Rs. 30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of Rs. 40,000 plus interest.

Test your knowledge

Choose the correct answer

Which of the following mortgages is called equitable mortgage in English law?

(a) Simple mortgage
(b) English mortgage
(c) Anomalous mortgage
(d) Mortgage by deposit of title deeds

Correct Answer: (d)

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

(a) *Right of redemption:* The first and the most important right of the mortgagor is the right to redeem i.e., take back the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment. Section 60 of the Act provides that any time after the principal amount has become due, the mortgagor has a right to redeem the property. Although the Act gives him the right to redeem "any time" after their debt has become due, it enjoins upon the mortgagor the obligation to exercise this right (i) before the right is extinguished by the Act of parties or by a decree of Court, or (ii) before it is barred by the Limitation Act. According to the Law of Limitation the, mortgagor can redeem the property within 60 years after the money has become due. This right to redeem the property even after the time of payment has elapsed is called the Right or Equity or Redemption. But the *mortgagor is not entitled to redeem before the mortgage money becomes due on the date fixed for repayment of the loan.* His right to redeem arises only when mortgage money becomes due and not before.

Let us take an example to illustrate this point. A borrows money on a mortgage and agrees to pay it back after 5 years. A has won a lottery and wants to pay the loan at the end of 3 years and redeem his property. He cannot do so, because the right to redeem arises only when the money has become due at the end of 5 years. This is so because the mortgagee cannot file a suit against the mortgagor for the repayment of the loan. That is why it is said that the rights of the mortgagor and the mortgagee are co-extensive.

(b) *Right against clog on equity of redemption:* Right of redemption or equity of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void. Any condition which prevents the mortgagor from redeeming the property is called a "clog" on the equity or right of redemption and is void. The rule of equity that *once a mortgage always a mortgage* prohibits a clog on the right of redemption. In other words, once a transaction is found to be a mortgage, the Court would not permit any condition in a mortgage deed which would prevent or impede redemption or repayment of the loan for which the security was given. For example, A borrows money on a mortgage from B and agrees to pay back the loan after 5 years. In the mortgage deed it is also stipulated that in default of redemption on a particular day the mortgage would be renewed for another period of 5 years, that is to say, that mortgagor shall not redeem the property before the expiry of 10 years. This stipulation is a clog on redemption and is void as the provision gave a right of redemption for one day only in 10 years. A condition requiring payment at higher rate of interest in the event of mortgagor's failure to pay at the expiry of the stipulated time is invalid being a clog on equity of redemption; (*Sunder Kaur* v. *Sham Krishan,* (64 I.A. 9).

Other Illustrations

(a) A stipulation that the mortgagor shall not alienate the mortgaged property and that he could redeem that mortgage only by paying money out of his own pocket and not by money raised by transfer of property was held to be a clog (*Ram Saran Lal* v. *Amrit Kaur,* 3 All. 369).

(b) A mortgage deed provided that if the mortgage money was not paid at a certain time, the mortgagee might enter into possession for a period of twelve years and that mortgagors right to redeem would remain suspended for that period. It was held the condition was a clog and therefore unenforceable (*Mohd. Sher Khan* v. *Seth Swami Dayal,* 49 I.A. 60).

(c) A deed of mortgage of shares of a company contained a clause whereby the mortgagee was to have the exclusive right of selling the company's tea as its broker. It was held as a clog on the equity of redemption (*Bradley* v. *Carrit* (1903) A.C. 253).

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

Where, however, the condition is reasonable and does not prevent the mortgagor to redeem the property it will be recognised as valid and binding. For example, A mortgages his paddy field and borrows money from B, the mortgage being with possession (usufructuary mortgage). There is a condition in the mortgage deed that the mortgagor shall not redeem in the harvesting or cultivating season. The condition is reasonable, because if the mortgagor is allowed to redeem during harvesting season, it will cause some difficulty to the mortgagee.

Similarly, **a condition that the mortgagor cannot redeem the mortgage for a certain number of years is valid and enforceable. Thus, in**

***Knightbridge Estate Trust Limited* v. *Bysue,* 1929 Ch. 441, it was agreed that the mortgagor could pay off the debt in 40 years. It was held that such contract was not a clog on the equity of redemption.**

(c) *Right of partial redemption:* A mortgage, as a rule, being one and indivisible for the debt and every part of it, the mortgagor cannot redeem piecemeal; he must redeem the whole property. But Section 61 of the Act gives a right of partial redemption stating that "a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately or any two or more of such mortgages together."

Illustrations

(a) A mortgages property X to B and obtains a loan of Rs. 2,000. A again mortgages the same property to B and obtains a further loan of Rs. 1,000. A can redeem the first mortgage of Rs. 2,000 or he can redeem both together.

(b) A mortgages property X to B and obtains a loan of Rs. 10,000. He then mortgages his property Y and obtains a loan of Rs. 10,000. He may redeem either property X or Y by paying the loan. The mortgagee cannot insist that A should redeem both mortgages together.

(viii) *Implied contract by mortgagor.* The parties are free to enter into any terms they like. Where, however, the contract does not contain all the terms, Section 65 provides for implied terms as follows:

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

(a) mortgagor is entitled to transfer the interest (covenant for title);

(b) mortgagor will assist the mortgagee to enjoy quiet possession;

(c) mortgagor will pay public charges in respect of the mortgaged property;

(d) mortgagor covenants as to payment of the rent due on lease where, the mortgaged property is leased;

(e) mortgagor covenants as to payments of interest and principal on prior encumbrances, where the mortgage is a second or subsequent encumbrance on the property.

Illustration

(a) A mortgagor fails to pay the Government revenue in respect of mortgaged property in time. The property had to be sold for arrears in Government revenue and the mortgagor himself purchases the property as a revenue sale. Thereafter, he executes another mortgage of the same property. *Held* that the original mortgage is not extinguished and he is liable to the first mortgagee. A mortgagor cannot take advantage of the breach of his obligation (*Sonogopally* v. *Intoory,* 26 Mad. 385).

(ix) *Rights of mortgagee and his remedies:* If the mortgagor does not pay the mortgage money, the mortgagee may proceed to recover (i) from the mortgaged

property, or (ii) sue for recovery from the mortgagor personally. Thus the mortgagor has two remedies: one against the property and the other against the mortgagor personally.

(a) *Remedies against the property:* The remedies of the mortgagee against the property are:

(i) Right to bring property to sale.

(ii) Right to foreclose.

(iii) Right to the possession of the property.

(i) *Remedy by sale:* In case of a simple mortgage or a mortgage by deposit of title deeds or equitable mortgage, or an English mortgage, sale is the only remedy available to the mortgagee. He has to file a suit for sale of the mortgaged property and if the Court is satisfied, it would give 6 months time to the mortgagor to pay the decretal amount. If he fails to pay, the mortgagee will get a final decree under which he can have the property sold. If the proceeds are more than the decretal amount, the balance, after payment to the mortgagee, will be paid to the mortgagor, and if the proceeds fall short, then a personal decree for the balance will be given against the mortgagor.

(ii) *Foreclosure:* The second remedy is foreclosure, by means of a suit to get a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, if the mortgagor does not pay within the period directed by the Court. After a foreclosure decree is passed the mortgagee becomes the owner of the property. This remedy is available only in the case of mortgage by conditional sale, or in any anomalous mortgage.

(iii) *Possession:* A usufructuary mortgagee has a right to file a suit for possession and by use of the property he can repay himself the debt due on him. He can retain possession until his debt is discharged out of the income of the property. Hence, where possession is not given by the mortgagor, the mortgagee sues for possession.

(iv) *Right to sue for mortgage money:* According to Section 68, the mortgagee has a right to sue for the mortgage money in the following cases and not others:

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgage property is destroyed or the security is rendered insufficient;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(v) where the mortgagee, being entitled to the possession of the property (usufructuary mortgage), is not put in possession of it, or where having been put in possession, is dispossessed by the mortgagor or any other person claiming under a superior title, e.g., a buyer by a registered deed.

(vi) *Right of private sale:* By virture of Section 69, a mortgagee can sell the property without the intervention of the Court if, the loan is not paid on a certain date, in the following cases:

(a) where the mortgage is an English mortgage and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist; or

(b) where the mortgagee is the Government and the mortgage deed confers an express power of sale; or

(c) where the mortgage property was on the date of execution of the mortgage situated within the towns of Bombay, Calcutta and Madras, or in any other town or area which the State Government may specify in this behalf and the mortgage-deed confers an express power of sale.

Section 69(2) prescribes certain conditions to be observed before the power can be exercised. These conditions are imperative and cannot be varied even by agreement between the parties to the mortgage.

This right of private sale shall not be exercised unless and until:

(a) notice in writing requiring payment of the principal money has been served on the mortgagor and default has been made in payment of the principal money or of part thereof, for three months after such service or

(b) some interest under the mortgage amounting at least to five hundred rupees in arrear and unpaid for three months after becoming due.

The sale proceeds under a private sale must be utilised, *first* in discharging prior encumbrances, if any, *secondly,* on payment of all costs, charges and expenses of the sale; *thirdly,* the non-payment of the debt; and *finally,* the surplus to be paid to the person entitled to the mortgage property.

(x) *Liabilities of the mortgagee in possession:* According to Section 76, a mortgagee in possession is bound:

(a) to manage the property as a person of ordinary prudence would manage his own;

(b) to use his best endeavours to collect the rents and profits thereof;

(c) to pay out of the income all Government revenue or other charges of a public nature;

(d) not to commit any act which is destructive to the property;

(e) to keep full and accurate accounts of all income and expenditure; and

(f) when the mortgagor tenders or deposits the mortgage money, to account for his receipts from the property from the date of tender or deposited etc.

(xi) *Priority:* The general rule of priority of different mortgages on the same property is that the successive mortgage is paid after the prior mortgage has been satisfied. Thus, if two successive mortgages are created by mortgagor on the same property, and both cannot be satisfied out of the mortgaged property, the prior mortgagee will have the first right to satisfy his whole debt and the balance, if any, will go to the subsequent mortgagee. But where the prior mortgages suffers from fraud, misrepresentation or gross neglect, the subsequent mortgage shall have priority over prior mortgagee, or of any

other person who has for consideration acquired an interest in any of the properties.

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

Illustration

A mortgages properties X and Y to B. Then he mortgages property Y to C. Suppose B obtains a decree on his mortgage for the sale of properties X and Y which form security for his mortgage. Suppose further that B apples in execution to the Court for sale of property Y which is also mortgaged to C, C would be entitled to have the prior debt of B satisfied out of property X, and if the whole debt is not satisfied out of property X then and then alone, the property Y should be proceeded against B.

(xiii) *Subrogation:* Section 91 of the T.P. Act, enumerates the persons who may sue for redemption. The primary right to redemption is given to the mortgagor under Section 60, but in addition to the mortgagor certain other persons are also entitled to redeem or institute a suit for redemption of the mortgaged property, namely :

(a) any person who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage-debt; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

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

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

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

7. Charges

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

As is evident from the above definition, a charge comes into existence either by the act of parties or by operation of law.

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

Illustrations

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

(b) In a suit by A against B on the basis of a promissory note, the amount decreed was to be paid by instalments and B was not to dispose of his share in a company until the satisfaction of the decretal amount. *Held*, a charge was on B's share in the company and A was entitled to have the amount from the property even though B had sold his share to a third person.

(c) Hypothecation of property though not necessarily accompanied by possession of the property, does create a charge in favour of the creditor bank (*HMT* v. *Nedungadi Bank Ltd. & Anr.,* AIR 1995 Kant 185).

Charge by operation of law: Charges created by law are those which arise on account of some statutory provisions. They are not created by the voluntary action of the parties but arise as a result of some legal obligation.

Illustrations

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

(b) An unpaid vendor has a charge on the property sold.

(c) A co-mortgagor redeeming the mortgage is entitled to claim contribution and acquires a charge in respect thereof.

Floating charge: A charge may be floating as well as fixed. A fixed charge is a charge on specific property but a floating charge is an equitable charge on the assets for time being of a going concern. It is peculiar to companies which are able to borrow money without any interference with their assets so long as they are going concern. In other words, it is a charge on a class of the assets of the company, present as well as future. The assets of the company are constantly undergoing a change but the creditors will not normally interfere with the assets of the company unless there is breach of some condition. As Professor Gower says, the assets are liquid and the charge is floating. It is ambulatory and shifting in its nature hovering over and so to speak floating with the property which it is intended to effect. As it does not attach to any specific property, it remains document until it crystallises.

A floating charge has the following characteristics:

1. It is a charge on class of assets both present and future.

2. The class of assets charged is one which in the ordinary course of business would be changing from time to time.

3. It is contemplated by the charge that until some future step is taken by those who are interested in the charge the company may carry on its business in the ordinary way, i.e., it may use its assets charged in the ordinary course of its business. (Per Roman L.J. in *Reyork Shive Wool Combers Associated Limited,* (1903) 2 Ch. 284) **A floating charge is created by debentures on the company's undertaking or its estate, property and effects. It is not necessary that the charge should be on all company's assets. Thus a mortgage of a cinema and of the chattels used in the cinema premises was held to be a floating charge as to the chattles (*National Provisional Bank of England Limited* v. *Charteb Electric Theatres Limited,* (1916) Ch. 132).** Similarly, a floating charge was created by a mortgage of book and other debts which shall become due during the continuance of this security (*Reyork Shive Wool Combers Association, Supra*).

Crystallisation of floating charge

A floating charge becomes fixed or crystallises in the following cases:

1. When the money becomes payable under a condition in the debenture and the debenture holder, (i.e., the creditor) takes some steps to enforce the security;
2. When the company ceases to carry on business; and
3. When the company is being wound-up.

Test your knowledge

State whether the following statement is "True" or "False"

A floating charge becomes fixed or crystallises when the company ceases to carry on business.

- True
- False

Correct Answer: True

8. Distinction between Mortgage and Charge

Although in a charge, the property is made a security for the payment of the loan, yet the transaction does not amount to mortgage. It is important, therefore to distinguish between a charge and mortgage.

(a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.

(b) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties.

(c) A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.

(d) In certain types of mortgage (viz., mortgage by conditional sale and anomalous mortgage) the mortgagor can foreclose the mortgaged property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.

(e) From the very nature of it, a charge as a general rule, cannot be enforced against a transferee for consideration without notice. But in a mortgage, the transferee of mortgaged property from the mortgagor, can only acquire the remaining interest of the mortgagor, and is therefore, only bound by the mortgage.

(f) In a charge created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the charge-holder is against the property only. In a mortgage, there can be security as well as personal liability. In fact, the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage.

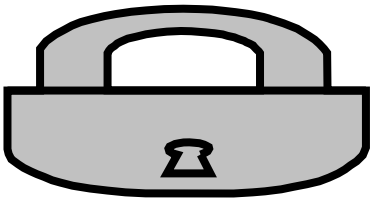
LESSON ROUND-UP

- The law relating to transfer of property is governed by the Transfer of Property Act, 1882. 'Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more other living persons, or to himself, and one or more other living persons. 'living person' includes a company or association or body of individuals, whether incorporated or not.
- Every person who is competent to contract and entitled to transferable property, or authorized to dispose of property is competent to transfer such property. Property can be transferred either orally or by writing. Moveable property can be transferred by delivery of possession or by registration. In the case of *tangible* immoveable property of the value of one hundred rupees and upwards, or in the case of a *reversion* or other *intangible* thing, transfer can be made only by a registered instrument. In the case of *tangible* immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
- When property is transferred, the transferee should not be restrained absolutely from alienating the property. One may give property to another subject to a condition, but the condition should not be one which absolutely prevents the transferee from alienating the property. A transfer may also be made subject to a contingency which may or may not occur. This is known as condition subsequent. Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event.
- Section 35 of the Transfer of Property Act deals with what is called doctrine of election. Election may be defined as "the choosing between two rights where there is

a clear intention that both were not intended to be enjoyed". The foundation of doctrine of election is that a person taking the benefit of an instrument must also bear the burden, and he must not take under and against the same instrument.

- Where, with the consent, express of implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. This is called doctrine of Holding Out.
- Doctrine of Feeding the Grant by Estoppel means where, a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
- Doctrine of Feeding the Grant by Estoppel means where, a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
- Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor in order to defeat or delay the rights of a creditor, may transfer his property to some person, who may be his relative or a friend. The law does not allow this.
- The Act does not allow accumulation of income from the land for an unlimited period without the income-being enjoyed by owner of the property. The law allows accumulation of income for a certain period only. The period for which such accumulation is valid is : (a) the life of the transferor, or (b) eighteen years from the date of transfer. Any direction to accumulate the income beyond the period mentioned above is void. However, this is subject to certain exceptions.
- *Lis pendens* means a pending suit, action, petition or the like. Section 52 of the T.P. Act incorporates the doctrine of *Lis pendens.* It states that during the pendency of a suit in a court of law, property which is subject to a litigation cannot be transferred.
- The Act expressly provides for special types of transfers such as sale, exchange, gift, mortgage and lease. In a sale, exchange and gift, there is a transfer of the ownership of property but mortgage is a transfer of an interest in specific immovable property and lease is a transfer of the right to enjoy immoveable property.
- Actionable claims are claims, to unsecured debts. If a debt is secured by the mortgage of immoveable property it is not an actionable claim, because the Section clearly excludes such a debt.
- Charge under the Act has been defined as "where immoveable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property".
- As is evident from the above definition, a charge comes into existence either by the act of parties or by operation of law. A charge may be floating as well as fixed. A fixed charge is a charge on specific property but a floating charge is an equitable charge on the assets for time being of a going concern. It is peculiar to companies which are able to borrow money without any interference with their assets so long as they are going concerns.

SELF-TEST QUESTIONS



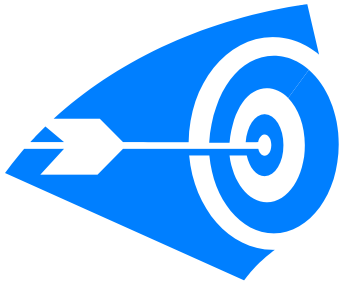
1. Discuss the object of the Transfer of Property Act. Distinguish between immoveable and moveable property.
2. What is the subject matter of transfer under the T.P. Act? Discuss properties which cannot be transferred.
3. Define a mortgage. Discuss various types of mortgages.
4. What is the rule against perpetuity?
5. Write short notes on
   (i) Puisne mortgage;
   (ii) Charges under the T.P. Act;
   (iii) Vested and contingent interest;
   (iv) Actionable claims.
6. Discuss the doctrine of *Lis pendens.*
7. Write a note on the doctrine of election.
8. What is a lease? Discuss the rights and duties of lessor and lessee.
9. Explain the doctrine of part performance.
10. Explain right against clog on equity of redemption.
11. What do you understand by the doctrine of feeding the grant by estoppel?

Suggested Readings:

(1) Desai's Law of Transfer—*T.R. Desai*
(2) Principles of the Law of Transfer—*S.M. Shah*
(3) The Transfer of Property Act, 1882—*Bare Act*
(4) The Transfer of Property Act, 1882—*Mulla*

STUDY V

LAW RELATING TO STAMPS



LEARNING OBJECTIVES

The Indian Stamp Act, 1899 is a fiscal legislation dealing with tax on transactions. The tax is levied on in the shape of stamps recording the transactions. In our country, documents are often executed without proper legal advice and lawyers are faced with a difficult situation when they find that the document to be put in the court is not properly stamped. Sometimes people are unduly taxed by over zealous officers. Therefore, it is essential for the students to be familiar with the law relating to stamp duties.

At the end of the Study Lesson you should be able to understand:

- Important Definitions
- Instruments chargeable with Duty
- Extent of liability of Instruments to Duty
- Valuation for Duty under the Act
- Apportionment
- Persons liable to pay Duty
- Methods of Stamping
- Use of Adhesive Stamps
- Mode of cancellation of Adhesive Stamps
- Denoting Duty
- Time of Stamping Instruments
- Adjudication as to Stamps
- Instruments not duly Stamped – Treatment and Consequences
- Admission of Instruments
- Admission of Improperly Stamped Instruments
- Dealing with Instruments Impounded
- Prosecution for offences against Stamp Law
- Allowance and Refund
- Criminal Offences, etc.

1. INTRODUCTION

The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments. The Act is divided into eight Chapters and there is a schedule which contains the rates of stamp duties on various instruments.

(a) Union List

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

(b) The State Legislature

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

(c) Amendments, entry 44

The amendments to the Central Act effected by the States are in the shape of amendment of sections of the Central Act, adding new sections, adding separate schedules, modifying in schedules, etc. Some States, for their convenience, have passed separate legislation to cover the matters coming under State's domain. As a result, the rates of stamp duties in different States on other instruments category differ from State to State for the same instrument.

2. IMPORTANT DEFINITIONS

Section 2 of the Act contains definitions of various terms used in the Act. Some important definitions are discussed below:

Banker

"Banker" includes a bank and any person acting as a banker [Section 3 of the Negotiable Instruments Act defines a banker as including persons or a corporation or company acting as bankers]. [Section 2(1)]

Bill of Lading

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

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

When goods are delivered on board a ship, the receipt is given by the person

incharge at that time. This receipt is known as the mate's receipt. The shipper of the goods returns this receipt to the master before the ship leaves and receives from him bill of lading for the goods, signed by the master.

Conveyance

The term "conveyance" includes a conveyance on sale and every instrument by which property (whether movable or immovable) is transferred *inter vivos*[1] and which is not otherwise specifically provided for by Schedule. It does not include a will. [Section 2(10)]

Thus, all transfers of property whether movable or immovable, on sale (which are not otherwise specially provided for by the Schedule), are chargeable as conveyances. Transfers which are otherwise provided for in the Schedule are Composition Deed, Exchange of Property, Gift, Lease, Mortgage, Reconveyance, Release, Settlement, Transfer, Transfer of Lease and (Declaration of) Trust.

Instrument

Section 2(14) defines an "instrument" to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. The definition is an inclusive definition, and is not necessarily restricted to those documents which are specifically mentioned in the definition. Briefly stated, an instrument includes conveyances, leases, mortgages, promissory notes and wills, but not ordinary letters or memoranda or accounts.

Following instances may be noted:

(i) An unsigned draft document is not an "instrument" (because it does not create or purport to create any right, etc).

(ii) An entry in a register, containing the terms of hiring of machinery is an "instrument", where it is authenticated by the thumb impression of the hirer. (Reason is, that it purports to create, a liability etc.)

(iii) A letter which acknowledges receipt of a certain sum as having been borrowed at a particular rate of interest and for a *particular period and that it will be repaid with interest on the due date* is an "instrument".

[These examples show, that the law looks to the substance and effect (or intended effect) of the text of the instrument and not the physical *medium* through which it is recorded.]

(iv) Photocopy of an agreement is not an instrument as defined under Section 2(14) of the Act. *Ashok Kalam Capital Builders* v. *State & Anr.,* AIR 2010 (NOC) 736 (Del).

Executed / Execution

Under Section 1(12), the words "executed" and "execution" (used with reference to instruments), mean "signed" and "signature" respectively.

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

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[1]. *The expression "inter vivos" means during lifetime.*

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

The Collector can receive the stamp duty without penalty and certify an instrument as duly stamped, as from the date of execution. (Sections 37 and 40)

Impressed Stamp

According to Section 2(13), "impressed stamp" includes:

(a) labels affixed and impressed by the proper officer; and

(b) stamps embossed or engraved on stamp paper.

The rules framed under the Act invariably prescribe to what documents impressed stamps are to be used. The term includes both a stamp impressed by the Collector and also a stamp embossed on stamp paper. Special adhesive stamps are labels (*Ganga Devi* v. *State of Bihar*, 1 LR 45 Pat. 198).

The instrument is duly stamped if it has been duly stamped at the time of execution and is admissible in evidence, though the stamp is subsequently removed or lost (*Mt. Mewa Kunwari* v. *Bourey*, AIR 1934 All. 388).

Bill of Exchange

According to Section 2(2), "bill of exchange" means a bill of exchange as defined in the Negotiable Instruments Act, 1881 and includes also a *Hundi* and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money. The Negotiable Instruments Act, defines a "bill of exchange" as an instrument in writing, containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

Bill of exchange payable on demand

Under Section 2(3) of the Stamp Act, a "bill of exchange on demand" includes:

(a) an order for the payment of any sum of money by a bill of exchange or promissory note or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or in the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;

(b) an order for the payment of any sum of money weekly, monthly or at any other said period; and

(c) a letter of credit, that is to say, any instrument by which one person authorises any other person to give credit to the person in whose favour it is drawn.

It may be noted that a bill of exchange payable on demand includes even a letter of credit, as per above definition.

Thus, the definition in the Stamp Act includes many instruments which could not be

classed as ‘bills of exchange’ within the definition given by the Negotiable Instruments Act, 1881.

Cheque

Under Section 2(7) of the Stamp Act, “cheque” means a bill of exchange drawn on specified banker, not expressed to be payable otherwise than on demand. This definition follows the definition given in the Negotiable Instruments Act, 1881.

It should be mentioned that in India, cheques are no longer subject to stamp duty. Entry 21 in the Schedule levying duty on cheque was deleted by Act 5 of 1927.

Bond

Under Section 2(5), a “bond” includes –

(a) any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another.

The word “oblige” has been used in all sub-clauses in the definition. Therefore, no document can be a bond unless it is one which, by itself, creates the obligation to pay the money. The words “obliges himself to pay money” make it very clear, that the obligation is not a pre-existing one. Where the liability already exists it cannot be said that under a subsequent document (merely reproducing the nature of the obligation) an obligation has been created.

Test your knowledge

Choose the correct answer

Which of the following is the instrument in writing, containing an unconditional order signed by the maker?

(a) Bill of Exchange
(b) Cheque
(c) Impressed Stamp
(d) Marketable Security

Correct answer: (a)

Chargeable

Under Section 2(6) “chargeable” as applied to an instrument executed or first executed after the commencement of the Act means chargeable under the Act and as

applied to any other instrument, chargeable under the law in force in India when such instrument was executed or where several persons executed the instrument at different times, first executed.

Lease

"Lease" means a lease of immovable property and includes also:

(a) a *patta*;

(b) a *kabuliyat* or other undertaking in writing, not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property;

(c) any instrument by which tolls of any description are let;

(d) any writing on an application for a lease intended to signify that the application is granted. [Section 2(16)]

Section 105 of the Transfer of Property Act defines lease as a transfer of a right to enjoy such property, made for a certain time, expressed or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

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

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

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

Promissory Note

It means a promissory note as defined by the Negotiable Instruments Act, 1881. It also includes a note promising the payment of any sum of money out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. [Section 2(22)]

Requisities of a promissory note as per the Negotiable Instruments Act, 1881 are the following:

(a) the document must contain an unconditional undertaking to pay;

(b) the undertaking must be to pay money only;

(c) the money to be paid must be certain;

(d) it must be payable to or to the order of a certain person or to bearer;

(e) the document must be signed by the maker.

Illustrations

An instrument in the form:

"I do acknowledge myself to be indebted to B in Rs. 1,000 to be paid on demand for value received" is a promissory note.

"I have received a sum of £20 which I borrowed from you and I have to be accountable for the sum with interest" held not to be a promissory note.

"On demand I promise to pay to the trustees of W&C or their treasurer for the time being £100" was held a good promissory note.

Receipt

"Receipt" includes any note, memorandum or writing:

(a) whereby any money or any bill of exchange, cheque or promissory note is acknowledged to have been received; or

(b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt; or

(c) whereby any debt or demand, or any part of a debt or demand is acknowledged to have been satisfied or discharged; or

(d) which signifies or imports any such acknowledgement, and whether the same is or is not signed with the name of any person. [Section 2(23)]

A mere acknowledgement in writing of the receipt of *immovable* property will not attract sub-clause (b). Under sub-clause (c), any acknowledgement in satisfaction or discharge of any debt or demand or any part thereof is covered; for instance, a receipt given by the secretary or other manager of a club acknowledging payment of the club dues comes within the sub-clause.

An ordinary cash memo issued by a shopkeeper or another person selling the goods or other merchandise is not a receipt, unless it contains an acknowledgement of receipt of the money.

A letter acknowledging the receipt of money or cheque is a receipt. A document merely saying that the signatory has received a sum of Rs. 500 is a receipt.

Settlement

"Settlement" means any non-testamentary disposition, in writing, of movable or immovable property made:

(a) in consideration of marriage;

(b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or

(c) for any religious or charitable purpose;

and includes an agreement in writing to make such disposition. [Section 2(24)]

The definition of "settlement" excludes a will. A will is intended to operate only on death, while a settlement operates immediately.

Marketable Security

Under Section 2(16A), "marketable security" means a security of such a description

as to be capable of being sold in stock market in India or in the United Kingdom.

Stamp

"Stamp" means any mark, seal or endorsement by any agency or person duly authorized by the State Government and includes an adhesive or impressed stamp for the purposes of duty chargeable under this Act. This definition of the stamp has been inserted by the Finance (No. 2) Act, 2004.

Test your knowledge

Choose the correct answer

Which of the following is a note promising the payment of any sum of money out of a particular fund which may or may not be available?

(a) Promissory Note
(b) Chargeable
(c) Lease
(d) None of the above

Correct answer: (a)

3. INSTRUMENTS CHARGEABLE WITH DUTY

Section 3 of the Act is the charging section. It provides that subject to the provisions of the Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with a duty of the amount indicated in that Schedule as the proper duty therefor, namely:

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;
(b) every bill of exchange payable otherwise than on demand or promissory note drawn or made out of India on or after the date and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in India; and
(c) every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day and relates to any property situate, or to any matter or thing done or to be done in India and is received in India.

However, no duty shall be chargeable in respect of:

1. any instrument executed by or on behalf of or in favour of the Government, in cases where, but for this the Government would be liable to pay the duty chargeable in respect of such instrument.
2. any instrument for the sale, transfer or disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel or any part, interest, share of property of or in any ship or vessel registered under the Merchant Shipping Act, 1894 or under Act XIX of 1838 or the Indian Registration of Ships Act, 1841 as amended by subsequent Acts.

   [The references to repealed Acts are now to be read as references to the corresponding re-enacting Act].

3. Any instrument executed by, or, on behalf of, or in favour of, the Developer or Unit or in connection with the carrying out of purposes of the special Economic Zone.

Explanation – For the purposes of this clause, the expressions "Developer" "Special Economic Zone" and "Unit" shall have meanings respectively assigned to them in Clauses (g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005.*

Thus, Section 3 charges certain instruments to be liable to stamp duty.

The Court has observed as under in *Commissioners of Inland Revenue* v. *G. Angus*, 1889) 23 QBD 579, followed in *re Swadeshi Cotton Mills*, AIR 1932 All 291, "the first thing to be noticed is that thing which is made liable to duty is an instrument. If a contract of purchase and sale or a conveyance by way of purchase and sale, can be, or is carried out without an instrument the case is not within the section and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if any one carries through a purchase and sale without an instrument, then the Legislature has not reached that transaction".

In *re Swadeshi Cotton Mills,* AIR 1932 All 291, it was held that if after entry into a contract of sale the parties (in spite of the risk that either party may resile from the contract), refrain from getting an *actual deed of conveyance* prepared, they can successfully evade the payment of higher duty. It is no argument that the Government loses revenue, if such a course is permitted.**

On this point Esher M.R., in *Commissioners of Inland Revenue* v. *G. Angus*, (1889) 23 QBD 579, stated that "goodwill can be sold and conveyed to purchasers without any 'conveyance' being executed and if you treat the document as only an agreement with regard to the goodwill, there will never be any conveyance executed and the property would have been transferred to the purchaser without the Crown getting any *ad valorem* duty upon the transfer. If a vendor can convey the property sold to the purchaser without the execution of any instrument, he can convey it without paying any duty under Section 70. The subject may have the good fortune to escape the stamp duty, if he can get a conveyance of property sold to him without the execution of any instrument….. "The Crown ….. must make out its right to duty and if there be a means of evading the stamp duty, so much the better for those who can evade it".

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* *Clause 3 mentioned above has been inserted by the Special Economic Zones Act, 2005.*

¨ *However, in some States, local amendments have imposed heavy duty on agreements for sale.*

Substance and description

Courts have invariably upheld the principle of substance of the transaction, over the form, in the matter of deciding the nature of the instrument. The substance of the transaction contained in the document may not necessarily embody the description given at the head thereof.

It is the substance of the transaction as contained in the instrument and not the form of the instrument, that determines the stamp duty, though the duty is leviable on the instrument and not on the transaction. In determining whether a document comes within the description of a document upon which a stamp is required by the Act, one has to look at the entire document to find out whether it falls within the description. Where a single instrument contains several purposes, the instrument as a whole should be read to find out its dominant purpose. To determine whether a document is sufficiently stamped the Court must look at the document itself, as it stands.

4. EXTENT OF LIABILITY OF INSTRUMENTS TO DUTY (SEVERAL INSTRUMENTS IN SINGLE TRANSACTION OF SALE, MORTGAGE OR SETTLEMENT)

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

(a) only the principal instrument shall be chargeable with the duty prescribed for the conveyance, mortgage or settlement; and

(b) each of the other instruments shall be chargeable with a duty of one rupee (instead of the duty if any prescribed for the other instruments).

Illustrations (Section 4 held applicable)

(i) *A* executed a conveyance of immovable property. On the same deed his nephew (undivided in status) endorsed his consent to the sale, as such consent was considered to be necessary. It was held that the conveyance was the principal instrument. The consent was chargeable with only one rupee (ILR 13 Bom 281).

(ii) Subsequent to a sale of immovable property, two declarations were executed reciting that the sale was subject to an equitable mortgage created by the vendor. These declarations were held to be chargeable, together with the sale deed, as having completed the conveyance (*Somaiya Organics Ltd.* v. *Chief Controlling Revenue Authority*, AIR 1972 All 252).

(iii) Brother *A* executed in favour of brother *B* a gift of all his property. By another deed, brother *B* made provision for the living expenses of brother*A* and hypothecating in favour of brother *A* a part of the property included in the above mentioned gift deed, in order to secure the payment of the living expenses. It was held that the two documents were part of the same transaction. They amounted to a settlement and Section 4 applied (*Maharaj Someshar Dutt*, ILR 37 All 264).

(iv) *B* conveyed the whole of his property to three persons who undertook to provide for him and to perform his obsequies. By another document, the three donees agreed to provide for *B*. This was mentioned in the deed executed by *A* also. It was held that the two documents had to be construed as part of the same act;

the first was liable to duty as a conveyance while the second was liable to a duty of Rupee 1 only (*Dadoba* v. *Krishna*, ILR 7 Bom. 34).

(v) A company executed, first a deed of trust and mortgage stating that the company was to issue notes for raising loans secured by the sale deed. It was held as under:

(1) The deed was principal or primary security (and not a collateral security). It was chargeable as mortgage under Article 14.

(2) **The notes issued subsequently were debentures and not principal instruments (*Madras Refinery Ltd.* v. *Chief Controlling Revenue Authority*, *Madras*, AIR 1977 SC 500).**

(vi) The Rangoon Gymkhana executed a duly stamped trust deed, mortgaging its assets as security for the repayment of the debenture stock issued by it. In addition, it had issued certificates of debenture stock to the subscribers, but these did not contain any promise to repay any need, but merely stated the amount standing in each stock holder's name. It was held that the certificates were not debentures, but were instruments employed to complete the mortgage [*Rangoon Gymkhana In re*, AIR 1927 Rang. 37 (Section 4 applied)].

5. SECTION 4 NOT APPLICABLE

(i) A lease is executed and got registered. A second document is executed altering the terms of the first document. The second document has to be stamped as a lease. Section 4 does not apply.

(ii) A purchaser of land executes a mortgage of the land in favour of the vendor for a portion of the purchase money. The mortgage is liable to full duty as a separate instrument. Section 4 does not apply.

Instruments relating to several distinct matters

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

The Section deals with multifarious instruments. The expression "distinct matter" means distinct transactions (*Ram Swarup* v. *Joti*, (1933) Allahabad Law Journal 427; *Board of Revenue, Madras* v. *Narasimhan*, AIR 1961 Mad 504).

Section 5 applies even where the two (or more) matters are of the same description.

Illustrations as to "distinct matters"

(i) A document containing both an agreement for the dissolution of a partnership and a bond, is chargeable with the aggregate of the duties with which two such separate instruments would be chargeable. The two are "distinct matters" (*Chinmoyee Basu* v. *Sankare Prasad Singh*, AIR 1955 Cal. 561 (cf. AIR 1936 Lah. 449).

(ii) **An agreement containing two covenants making certain properties**

chargeable in the first instance and creating a charge over certain properties if the first mentioned properties are found insufficient does not fall within Section 5 (*Tek Ram* v. *Maqbul Shah*, AIR 1928 Lah. 370).

(iii) A grant of annuity by several persons requires only one stamp (because there is only one transaction).

(iv) A lease to joint tenants requires only one stamp.

(v) A conveyance by several persons jointly relating to their separate interest in certain shares in an incorporated company requires only one stamp.

(vi) A power of attorney executed by several persons authorising the agent to do similar acts for them in relation to different subject matter is chargeable under Section 5, where they have no common interest.

(vii) Where a person having a representative capacity (as a trustee) and a personal capacity delegates his powers in both the capacities, section 5 applies. In law, a person acting as a trustee is a different entity from the same person acting in his personal capacity.

(viii) **The position is the same where a person is an executive or administrator and signs an instrument containing a disposition by him in his personal capacity and *also* a disposition as executor. The two capacities are different (*Member, Board of Revenue* v. *Archur Paul Benthall*, AIR 1956 SC 35).**

Principal and ancillary

The test is – "What is the leading object? Which is principal and which is ancillary?

If an instrument taken with reference to its primary object is exempted then stamp duty cannot be charged merely because matter ancillary to it is included and that matter is chargeable to stamp duty. A very common example of this is an agreement for sale of goods, which also contains an arbitration clause. The latter clause is incidental to the former agreement. Where a deed of dissolution of partnership contains a clause charging the partnership assets for payment of certain amounts to outgoing parties, the instrument is chargeable separately for the charge and the partnership. The former is not ancillary to the latter.

Where a document contains a transfer of mortgage and *an agreement* to make a loan, the mortgage and the loan are distinct matters and separately chargeable.

If in a lease there is also an agreement to pay a certain sum on account of the balance of previous year, the document is chargeable (I) as a lease and (ii) also as a bond.

A lease reserving *separately* rent for house and rent for furniture is chargeable separately for each of the items.

Where, at an auction, a purchaser purchases several lots and there is only one instrument in respect of all of them the separate purchases are, nevertheless, separate and distinct matters and so, the stamp duty must be determined separately.

Thus, the test usually adopted is the test of "leading object". If there is only one leading object, Section 5 will not apply. But if there are several distinct contracts, each is

taxable.

6. INSTRUMENTS COMING WITHIN SEVERAL DESCRIPTIONS IN SCHEDULE-I

There may be cases where an instrument may come under several descriptions in Schedule-I to the Act. In such a circumstance, Section 6 of the Act provides that the instrument shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties. Section 6 is subject to the provisions of Section 5. However, nothing in the Act shall render chargeable, with duty exceeding one rupee, a counter part or duplicate, of any instrument chargeable with duty, in respect of which the proper duty has been paid.

Section 6 applies only where the instrument contains only one matter, but falls within two or more items in the Schedule. Section 6 covers cases where the instrument does not cover distinct matters but is ambiguous in regard to the various entries given in Schedule-I to the Act. In such cases, Section 6 clearly provides that the highest of the duties mentioned against the various descriptions against which the instrument is likely to fall is to be paid.

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

7. BONDS, DEBENTURES, ETC. ISSUED UNDER THE LOCAL AUTHORITIES LOAN ACT, 1879

Section 8 provides that any local authority raising a loan under the provisions of the Local Authorities Loans Act, 1879 or of any other law for the time being in force by the issue of bonds, debentures or other securities, shall, in respect of such loans, be chargeable with a duty of one percent on the total amount of the bonds, debentures or other securities issued by it. Such bonds, debentures or other securities need not be stamped and shall not be chargeable with any further duty on renewal, consolidation, sub-division or otherwise. This is so notwithstanding anything contained in the Indian Stamp Act: In the event of willful neglect to pay the duty required by this section, the local authority shall be liable to forfeit to the Government, a sum equal to 10 percent of the amount of duty payable and a like penalty for every month after the first, during which the neglect continues.

7A. SECURITIES DEALT IN DEPOSITORY NOT LIABLE TO STAMP DUTY

As per Section 8A of the Act—

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

(b) where an issuer issues certificate of security under sub-section (3) of Section 14 of the Depositories Act, 1996, on such certificate duty shall be payable as is payable on the issue of duplicate certificate under this Act;

(c) the transfer of—

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

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

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

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

Explanation 1 – For the purposes of this section, the expressions "beneficial ownership", "depository" and "issuer" shall have the meanings respectively assigned to them in clauses (a), (e) and (f) of Sub-section (1) of Section 2 of the Depositories Act, 1996.

Explanation 2 – For the purposes of this section, the expression "securities" shall have the meaning assigned to it in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

7B. CORPORATISATION AND DEMUTUALISATION SCHEMES AND RELATED INSTRUMENTS NOT LIABLE TO DUTY

Section 8B has been inserted by the Finance Act, 2005, w.e.f. 13.5.2005. Section 8B sates that

(a) a scheme for corporatisation or demutualisation, or both of a recognized stock exchange; or

(b) any instrument, including an instrument of, or relating to, transfer of any property, business, asset whether movable or immovable, contract, right, liability and obligation, for the purpose of, or in connection with, the corporatisation or demutualisation, or both of a recognized stock exchange pursuant to a scheme,

as approved by the Securities and Exchange Board of India under Sub-section (2) of Section 4B of the Securities Contracts (Regulation) Act, 1956 shall not be liable to duty under this Act or any other law for the time being in force.

Explanation — For the purposes of this Section—

(a) the expressions "corporatisation", "demutualisation" and "scheme" shall have the meanings respectively assigned to them in clauses (aa), (ab) and (ga) of Section 2 of the Securities Contracts (Regulation) Act, 1956;

(b) "Securities and Exchange Board of India" means the Securities and Exchange Board of India established under Section 3 of the Securities and Exchange Board of India Act, 1992.

Test your knowledge

Choose the correct answer

Which of the following sections deals with multifarious instruments?

(a) Section 4
(b) Section 70
(c) Section 3
(d) Section 5

Correct answer: (d)

8. REDUCTION, REMISSION AND COMPOUNDING OF DUTIES

Section 9 empowers the Government, (Central or the State as the case may be), to reduce or remit, whether prospectively, or retrospectively, the duties payable on any instrument or class of instruments or in favour of particular class of persons or members of such class. Section 9 also empowers the Central Government to provide for the composition or consolidation of duties of policies of insurance and in the case of issues by any incorporated company or other body corporate or of transfers where there is single transferee (whether incorporated or not) of debentures, bonds or other marketable securities.

9. VALUATION FOR DUTY UNDER THE ACT

Sections 20 to 28 (Chapter II of the Act) deal with valuation of instruments for duty.

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

(b) Section 21 provides that in the case of an instrument chargeable with *ad valorem* duty in respect of any stock or any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the date of the instrument. The term “marketable security” has been defined in Section 2(16-A) of the Act.

Where the shares are quoted on the stock exchange, it is easy to ascertain the price of the shares or stock. However, where the shares or stocks are not quoted on any stock exchange, the valuation has to be based upon the average of the latest private transactions, which can generally be ascertained from the principal officer of the concerned company or corporation. If, there have been no dealings at all, then unless some other reliable evidence of market value is forthcoming

the value is to be taken at par. Section 22 of the Act, however, provides that if such price or value is mentioned in the instrument for the purpose of calculating duty, it shall be presumed (untill the contrary is proved) to be correct.

(c) Section 23 provides that where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with a duty higher than that with which it would have been chargeable, had no mention of interest been made therein. For instance, a promissory note for Rs. 10,000 is drawn with the recital of interest at the rate of 18 percent per annum, payable by the promissor; stamp is leviable on the basis that the instrument is for Rs. 10,000 only.

(d) Section 23A provides that in the case of an instrument (not being a promissory note or bill of exchange) which -

(i) is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or

(ii) makes redeemable or qualifies a duly stamped transfer, intended as a security, of any marketable security.

It shall be chargeable with duty as if it were an agreement or memorandum of an agreement, chargeable with duty under Article 5(c) of Schedule I to the Act.

(e) A release or discharge of any such instrument shall be chargeable only with the like duty.

(f) According to Section 24, where any property is transferred to any person in consideration (wholly or in part) of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, (whether being or constituting a charge or incumbrance upon the property or not), such debt, money or stock is to be deemed the whole or part, (as the case may be), of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty. However, nothing in this section shall affect such a certificate of sale as is mentioned in Article 18 of the First Schedule to the Act.

The object of this section is that, upon every purchase *ad valorem* duty has to be paid on the entire consideration which either directly or indirectly represents the value of the free and unencumbered corpus of the subject matter of the sale (*Collector of Ahmedabad* v. *Deepak Textile Industries*, AIR 1966 Guj. 227).

What Section 24 means is that where property is sold subject to the payment by the purchaser, discharging a debt charged on the property, then the purchaser is really paying a consideration which includes the amount of that debt also (*Somayya Organics Ltd.* v. *Board of Revenue*, AIR 1986 SC 403).

Proviso to Section 24 operates for the benefit of assignee of the mortgage.

When the mortgaged property is sold to the mortgagee along with other properties, the stamp duty already paid is to be deducted from the duty payable on the deed of sale. In order to entitle the mortgagee to a deduction of the duties payable the entire property mortgaged should be transferred and not merely a portion of it (*In re Mirabai, in re Laxman and Ganpat*, ILR 29 Bom. 203).

Explanation to Section 24 provides that in the case of sale of property subject to mortgage or other encumbrances, any unpaid mortgage money or money charged together with the interest, if any, due on the same shall be deemed to be part of the consideration for the sale provided that where property subject to a mortgage is transferred to the mortgagee he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage. Three illustrations which have been appended to the Section are as under:

(i) *A* owes *B* Rs. 1,000/-. *A* sells a property to *B*, the consideration being Rs. 500/- and the release of the previous debt of Rs. 1,000/-. Stamp duty is payable on Rs. 1,500/-

(ii) *A* sells a property to *B* for Rs. 500 which is subject to a mortgage to *C* for Rs. 1,000/- and unpaid interest Rs. 200/-. Stamp duty is payable on 1,700.

(iii) *A* mortgages a house of the value of Rs. 10,000/- to *B* for Rs. 5,000/-. *B* afterwards buys the house from *A*. Stamp duty is payable on Rs. 10,000/- less the amount of stamp duty already paid for the mortgage.

(g) Section 25 deals with the manner of computation of duty in the case of annuities. Valuation of an annuity will be material, where the payment of annuity or other sum payable periodically is secured by an instrument or where the consideration for a conveyance is an annuity or other sum payable periodically. In such cases, the amount secured by such instrument or the consideration for such conveyance, as the case may be, shall be deemed to be:

(i) where the sum payable is for a definite period so that the total amount to be paid can be previously ascertained such total amount;

(ii) where the sum is payable in perpetuity or for an indefinite time not terminable with any life in being at the date of such instrument or conveyance – the total amount which, according to the terms of such instrument or conveyance will or may be payable during the period of twenty years calculated from the date on which the first payment becomes due, and

(iii) where the sum is payable for an indefinite time terminable with any life in being at the date of such instrument or conveyance – the maximum amount which will be or which may be payable as aforesaid during the period of 12 years calculated from the date on which the first payment becomes due.

Clause (a) mentioned above applies where the sum is payable for a definite period, so that the total amount to be paid can be previously ascertained. According to clause (b), where the payment is in perpetuity or for an indefinite period, then only the amount payable for 20 years would be taken for assessment of the duty.

Illustration

By a document, 'A' binds himself and his posterity on the security of some immovable property for the annual payment to a temple of Rs. 2,200/-. It is a mortgage deed, chargeable with duty calculated on 20 years' payment.

(h) Section 26 deals with cases where the value of the subject matter is indeterminate. The object of this section is to protect the revenue, in cases where an instrument is chargeable with *ad valorem* duty, but such duty cannot be ascertained by reason of the fact that the amount of value of the subject matter of

the instrument cannot be determined at the time of the execution of the instrument. This object is sought to be achieved by providing, that the executant can value the instrument as he pleases, but he shall not be entitled to recover under such document any amount in excess of the amount for which the stamp duty is sufficient.

However, under the combined operation of Sections 26 and 35, a lessee under the mining lease is entitled, upon payment of the proper penalty, to recover the royalty provided for in the stamp originally affixed to the lease. [AIR 1924 PC 221; AIR 1930 Cal. 526]. Section 26 applies only when the instrument is chargeable with *ad valorem* duty. Section 26 has two provisos. Under the first proviso, in the case of mining lease, the stamp duty is to be calculated on the estimated value of the royalty or the share of the produce, as the case may be. If the lease is granted by the Government, stamp duty has to be paid on the amount or value of the royalty as determined by the Collector of Stamps. And, if subsequently any excess is claimed, proper penalty under section 35 may be paid and the claim fully recovered. But when the lease has been granted by a person other than the Government, the valuation has to be at Rs. 20,000/- a year.

The second proviso to Section 26 is intended to cover the case where an instrument has, by accident or mistake, been insufficiently stamped. The deficiency is made up in proceedings under Section 31 or 41 and the Collector having certified the amount paid, it shall be deemed to be the stamp actually used at the date of execution. By reason of this proviso, the amount claimable under the instruments would be the amount for which the duty as certified by the Collector had been paid and not the amount for which duty was originally paid.

10. CONSIDERATION TO BE SET OUT

Section 27 provides that the consideration and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of duty with which it is chargeable shall be fully and truly set forth in the instrument. “Value of any property” would mean that real value of the property in the open market at the time the document was executed and not at the time when the executant acquired it. Where there is no value set forth in the instruments, there would be contravention of Section 27, but the omission does not render the document inadmissible or liable to be impounded and taxed in the manner provided in Section 35 (*Vinayak* v. *Hasan Ali*, AIR 1961 MP 6).

The Collector cannot proceed to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value so ascertained by the Collector. The Act does not provide for any powers to the revenue authority to make an independent enquiry into the value of the property conveyed for determining the duty chargeable. (AIR 1922 All 82)

However, the Collector can direct the prosecution of a person who executed the instrument under Section 64 of the Act. Under Section 64, what is punishable is the omission to set-forth fully and truly the value of the property, with intent to defraud the Government. The Collector, can, if he feels that there is a deliberate under-valuation of

property, hold an independent enquiry to ascertain the true value of the property and to consider whether there was deliberate under-valuation rendering the executant liable to prosecution for defrauding the Government.[1]

11. APPORTIONMENT

Section 28 prescribes certain rules for apportionment of the consideration, in cases of certain conveyances arising out of a property being contracted to be sold and thereafter conveyed in parts etc.

Under Section 28(1) where a person contracts the sale of property *as a whole* and thereafter conveys to the purchaser the property *in separate parts*, the consideration shall be apportioned in such manner as the parties think fit, provided that a distinct consideration is set-forth for each separate part in the conveyance and thereafter the conveyances shall be chargeable with *ad valorem* in respect of such distinct consideration.

Under Section 28(2), where the contract is for the sale of a property as a whole to two or more purchasers jointly or by any person for himself and others, and the property is conveyed to them *in parts* by separate conveyance, then each distinct part of the consideration shall be chargeable with *ad valorem* duty in respect of the distinct part of the consideration so specified.

Section 28(3) covers cases where a person, after contracting to purchase a property from another and before the property has been duly conveyed to him, enters into a contract to sell the property to a third person, and the contract is given effect to only by one conveyance from the owner of the property to the sub-purchaser directly. The stamp duty payable is on the consideration paid by the sub-purchaser. This provision avoids double payment that would otherwise arise.

Section 28(4) provides that where a person contracts for the sale of property and before obtaining a conveyance in his favour, enters into a contract to sell the property in parts to other persons, the conveyances which may be executed directly by the owner to each sub-purchaser would be liable to be charged with duty in respect of the consideration paid by the sub-purchaser, original price for the whole and the aggregate price paid by the sub-purchasers, subject to a minimum duty of Re. 1/-.

Section 28(5) provides that when a person contracts to sell a property to another person and again contracts to sell the same property to a third person and such third person obtains a conveyance first from the seller with whom he had contracted and later gets another conveyance of the same property from original seller, the duty is to be charged on the consideration received by the original seller subject to a maximum of Rs. 5/-.

12. PERSONS LIABLE TO PAY DUTY

Section 29 deals with the persons responsible for payment of duty. Under this section, in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne:

(a) in the case of any instrument described in any of the following articles of

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[1]. *In some States, local amendments have given such powers to the collector.*

Schedule-I, namely, -

No. 2 (Administration Bond),
No. 6 (Agreement relating to Deposit of Title-deeds, Pawn or Pledge),
No. 13 (Bill of Exchange),
No. 15 (Bond),
No. 16 (Bottomry Bond),
No. 26 (Customs Bond),
No. 27 (Debenture),
No. 32 (Further Charge),
No. 34 (Indemnity-bond),
No. 40 (Mortgage-deed),
No. 49 (Promissory-note),
No. 55 (Release),
No. 56 (Respondentia Bond),
No. 57 (Security Bond or Mortgage-deed),
No. 58 (Settlement),
No. 62(a) (Transfer of shares, in an incorporated company or other body corporate),
No. 62(b) (Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by Section 8),
No. 62(c) (Transfer of any interest secured by a bond, mortgage-deed of policy of insurance), -

by the person drawing, making or executing such instrument;

(b) in the case of a policy of insurance other than fire insurance by the person effecting the insurance;

(c) in the case of a policy of fire-insurance – by the person issuing the policy;

(d) in the case of a conveyance including a reconveyance of mortgaged property by the grantee; in the case of a lease or agreement to lease by the lessee or intended lessee;

(e) in the case of a counterpart of a lease – by the lessor;

(f) in the case of an instrument of exchange – by the parties in equal shares;

(g) in the case of a certificate of sale – by the purchaser of the property to which such certificate relates; and

(h) in the case of an instrument of partition – by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue Authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.

13. RECEIPTS

Under Section 30 of the Act any person receiving any money exceeding twenty

rupees in amount or any bill of exchange, cheque or promissory note for an amount exceeding five hundred rupees or receiving in satisfaction of a debt any movable property exceeding five hundred rupees in value, shall on demand by the person paying or delivering such money, bill, cheque, note, or property, give a duly stamped receipt for the same.

14. PARTY LIABLE TO PAY

Section 29 specifies in the case of certain instruments which party should pay, for the stamp. The section is not exhaustive and makes no reference to several instruments. Section 30 contains a special provision as to stamping of receipts. There are several other instruments not mentioned in Section 29, for which there is no express provision as to who should bear the stamp expenses. The primary duty of stamping lies in all cases on the person executing the instrument as Section 17 directs that the instruments chargeable with duty shall be stamped at or before executing an instrument without the same being duly stamped. Section 29 would apply only in the absence of a special agreement between the parties as stated in the opening words of the section. An agreement to bear the cost of preparation of an instrument implies an agreement to pay stamp duty also on it.

Any person receiving or taking credit for any premium or consideration for any renewal of any contract of fire-insurance, shall, within one month after receiving or taking credit for such premium or consideration, give a duly stamped receipt for the same.

15. METHODS OF STAMPING

(a) According to the provisions of the Act and rules made thereunder, the duty with which an instrument is chargeable is to be paid by means of stamps indicated in the Act and the rules. Generally, rules deal with the subject.

Section 10 provides that all duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instrument, by means of stamps according to the provisions contained in the Act, or when no such provision is applicable thereto, as the State Government concerned may by rule, direct. The rules may, among other matters, regulate:

(i) in the case of each kind of instrument, the description of stamps which may be used;

(ii) in the case of instruments stamped with impressed stamps, the number of stamps which may be used;

(iii) in the case of bills of exchange or promissory notes, the size of the paper on which they are written.

(b) There are two types of stamping, namely:

(i) Adhesive stamping, and

(ii) Impressed stamping.

16. USE OF ADHESIVE STAMPS

Section 11 deals with the *use of adhesive stamps*. This Section provides that the following instruments may be stamped with adhesive stamps, namely –

(a) instruments chargeable with a duty not exceeding 10 naya paisa except parts of bills of exchange payable otherwise than on demand and drawn in sets;

(b) bills of exchange and promissory notes drawn or made out of India;

(c) entry as an advocate, vakil or attorney on the roll of a High Court;

(d) notarial acts; and

(e) transfers by endorsement of shares in any incorporated company or other body corporate.

The use of the words 'may be stamped' really connotes 'shall be stamped'. The rules framed under the Stamp Act as well as under the relevant state laws invariably provide that the adhesive stamps shall carry special words, to indicate the use to which the stamps can be put.

17. CANCELLATION OF ADHESIVE STAMPS

Section 12(1)(a) provides that any person affixing any adhesive stamp to any instrument chargeable with duty which has been executed by another person shall, when affixing such stamp cancel the same so that it cannot be used again. Under Sub-section (1)(b), an obligation has been imposed on person executing any instrument on any paper bearing an adhesive stamp, to cancel the stamp, if such cancellation has not been done, at the time of such execution. If a person fails to cancel the stamp, he becomes liable to penalty in accordance with Section 63. The object is to prevent the same stamp from being used again.

Under Sub-section (2) of Section 12, any instrument bearing an adhesive stamp which has not been cancelled is deemed to be unstamped.

18. MODE OF CANCELLATION OF ADHESIVE STAMPS

(a) Section 12(3) deals with the mode of cancellation of stamp. It provides that the cancellation of an adhesive stamp may be done by the person concerned by writing on or across the stamp his name or initials, or the name or initials of his firm with the true date of his so writing, or in any other *effectual manner*. Sub-section (3) merely lays down as a guidance one of the ways in which an adhesive stamp can be cancelled.

(b) In *Mahadeo Koeri* v. *Sheoraj Ram Teli*, ILR 41 All 169; AIR 1919 All 196, it was held that a stamp may be treated as having been effectively cancelled by merely drawing a line across it.

But, in *Hafiz Allah Baksh* v. *Dost Mohammed*, AIR 1935 Lah. 716, it was held that if it is possible to use a stamp a second time, in spite of a line being drawn across it, there is no effectual cancellation. Again, the question whether an adhesive stamp has been cancelled in an effectual manner has to be determined with reference to the facts and circumstances of each case.

In *Melaram* v. *Brij Lal*, AIR 1920 Lah. 374, it was held that a very effective method of cancellation is the drawing of diagonal lines right across the stamps with ends extending on to the paper of the document. A cross marked by an illiterate person indicating his acknowledgement, was held to be an effective cancellation of the stamp in *Kolai Sai* v. *Balai Hajam*, AIR 1925 Rang. 209. Accordingly, where the adhesive stamps on

promissory note were cancelled by drawing lines on them in different directions and stretching beyond the edge of the stamp on the paper on which the promissory note was written, it was held that the stamp had been effectually cancelled. Where one of the four stamps used on an instrument had a single line drawn across the face of the stamp, the second had two parallel lines, the third three parallel lines and the fourth two lines crossing each other, it was held that the stamps must be regarded as having been cancelled in manner so that they could not be used again (*In re Tata Iron Steel Company,* AIR 1928 Bom. 80). Putting two lines crossing each other is effective (AIR 1961 Raj. 43).

(c) However, putting a date across the stamp by a third party *on a date subsequent to the date on which the bill had been drawn*, was held to be not proper cancellation in *Daya Ram* v. *Chandu Lal*, AIR 1925 Bom. 520 Cf. *Rohini* v. *Fernandes*, AIR 1956 Bom. 421, 423. Similarly, crossing by drawing lines and signing on the adjacent stamp was held to be not a cancellation of the first stamp in *U. Kyaw* v. *Hari Dutt*, AIR 1934 Rang. 364. Cross is a good way of cancellation. AIR 1976 Cal. 99.

(d) Where it is alleged that the cancellation was made at later stage than that of execution, the burden of proving it, lies on the party who so alleges. Where an instrument *prima facie* appears to be duly stamped and cancelled by the drawer at the date of execution, the burden of proving the contrary lies on the party who avers that the cancellation was not effected at the time of execution. In the absence of evidence to the contrary, it may be inferred that the stamp was duly affixed and cancelled.

19. INSTRUMENTS STAMPED WITH IMPRESSED STAMPS HOW TO BE WRITTEN (WRITING ON STAMP PAPER)

(a) Section 13 provides that every instrument written upon paper stamped with an *impressed stamp* shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument. The expression, 'face of the instrument' is not to be interpreted as meaning that the document must commence on the side on which the stamp is impressed or that both sides of the paper or parchment may not be written upon. In *Dowlat Ram Harji* v. *Vitho Radhoji*, 5 Bom. 188, it was held when the face of a deed or document is mentioned, no particular side of the parchment or paper, on which the deed or document is written, is thereby indicated. Even the last line may constitute the face (Westroph, CJ.).

(b) Under Section 14, no second instrument chargeable with duty shall be written upon piece of stamp paper upon which an instrument chargeable with duty has already been written. However, this section shall not prevent any endorsement which is duly stamped or is not chargeable with duty, being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of getting the receipt of any money or goods the payment or delivery of which, is secured thereby.

(c) The object of Section 14 is to prevent a stamped paper which has been used for one instrument, from being used for another instrument thereby avoiding payment of duty in respect of second instrument, AIR 1928 Rang 262. Except for an endorsement of the kind referred to earlier, no second instrument shall be engrossed on a stamp paper on which there is already written 'an instrument

chargeable with duty'.

An alteration in the instrument as originally written, if it is of such nature, as to require fresh stamp, would come within the prohibition contained in the section. It is an important question as to what would be a material alteration[1] which converts an instrument written on stamp paper into a second instrument within the meaning of Section 14. A "material alteration" is one which alters (or purports to alter), the character of the instrument itself and which affects (or may affect) the contract which the instrument contains or alters evidence of any charge, or varies the liability under the instrument in any way. An alteration which vitiates the instrument as could cause it to operate differently was also held to be a material alteration. An alteration which *may affect the contract* which the instrument contains is a material alteration.

Section 15 of the Act deems every instrument written in contravention of Section 13 or Section 14 to be unstamped and to be inadmissible in evidence as not being duly stamped.

20. DENOTING DUTY

Section 16 of the Act deals with denoting duty. The object of this section is to spare parties to an instrument, the inconvenience of having to produce (in cases in which the duty payable on an instrument depends upon the duty already paid on another instrument), the original or principal instrument in order to prove that the second instrument has been duly stamped. Section 16 provides that where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last mentioned duty, shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, *be denoted upon such first mentioned instrument*, by endorsement under the hand of the Collector of Stamps or in such other manner as the rules of the State Government may provide.

21. TIME OF STAMPING INSTRUMENTS

(a) *Instruments executed inside India:* Section 17 provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. The scope of Section 17 is restricted to only instruments executed in India. If the executant of a document has already completed the execution of the document and in the eye of law the document, could be said to have been executed, a subsequent stamping, (however close in time) could not render the document as one stamped at the time of execution. Thus, where a promissory note is executed by 'A' and 'B' and a stamp is afterwards affixed and cancelled by 'A' by again signing it, the stamping has taken place subsequent to the execution and hence, the provisions of Section 17 are not complied with (*Rohini* v. *Fernandes*, AIR 1956 Bom 421). A receipt stamped subsequent to its execution, but before being produced in the Court is not stamped in time and accordingly, not admissible in evidence.

(b) Instruments executed outside India: Section 18 relates to foreign instruments (other than bills and notes), received in India; Foreign bills and notes received in India have been dealt with, in Section 19. According to Section 18, every

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[1]. *(1905) ILR 33 Cal 812: ILR 14 Rang 29.*

instrument chargeable with duty executed only out of India and (not being a bill of exchange or promissory note) *may be stamped* within three months after it has been first received in India. Section 18(2) provides that where such instrument cannot with reference to the description of stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector who shall stamp the same in such a manner as the State Government may by rule prescribe, with a stamp of that value as the person so taking such instrument may require and pay for. Where an instrument is brought to the Collector after the expiry of three months, the Collector may, instead of declining to stamp it, validate it under Sections 41 and 42 if he is satisfied that the omission to stamp in time was due to a reasonable cause.

The object of Section 18 is to facilitate the stamping of the documents within a period of three months, in as much as, by the very nature of things, Section 17 relating to instruments executed in India cannot be complied with. Section 18 is intended to mitigate the inconvenience and hardship that will entail if the instrument concerned is required to be stamped before or at the time of execution as laid down in Section 17. Instrument executed in India is not within Section 18 (*Nath Bank* v. *Andhar Mamik Tea Co.*, AIR 1960 Cal 779).

As far as bills of exchange and promissory notes are concerned, Section 19 makes an elaborate provision. Any bill of exchange payable otherwise than on demand or promissory note drawn or made out of India must be stamped and the stamp cancelled, before the first holder in India deals with the instrument, i.e., presents the same for acceptance or payment, or endorses transfers or otherwise negotiates the same in India.

The proviso to Section 19 clarifies that if, (i) at any time any bill of exchange or note comes into the hands of any holder thereof in India, (ii) the proper adhesive stamp is affixed thereto and cancelled in the manner prescribed by Section 12 and (iii) such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person, and at the time required by the Act, then such stamp shall (so far as relates to such holder), be deemed to have been duly affixed and cancelled. However, nothing contained in the proviso shall relieve any person from any penalty incurred by him, for omitting to affix or cancel a stamp.

22. ADJUDICATION AS TO STAMPS

(a) Chapter III, consisting of Sections 31 and 32, deals with adjudication by the Collector, as to the proper stamp that an instrument has to bear. The provisions of this Chapter are intended to assist any party who is in doubt as to the proper stamp to be affixed on an instrument but is nevertheless anxious to stamp the instrument. When the document or any draft of the document is produced to the Collector he shall determine the proper stamp duty on payment of a nominal fee. The relevant provisions of the Act and matters in regard to the performance of this function by the Collector are discussed below.

(b) Under Section 31(1) when (i) an instrument, (whether executed or not and whether previously stamped or not), is brought to the Collector, and (ii) the person bringing it applies to have the opinion of that officer as to the duty if any,

with which it is chargeable, and (iii) pays a fee (not exceeding Rs. 5 and not less than 50 naya paise as the Collector may direct), the Collector shall determine the duty if any with which in his judgment, the instrument is chargeable. Under Section 31 (2), the Collector may require to be furnished with an abstract of the instrument and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of duty with which it is chargeable, are fully and truly set-forth therein, and may refuse to proceed upon accordingly. However, no evidence furnished pursuant to this section shall be used against any person in any civil proceeding, except in an enquiry as to the duty with which the instrument to which it relates is chargeable. Every person by whom such evidence is furnished shall, on payment of the full duty, be relieved from any penalty which he may have incurred under the Act by reason of the omission to state truly in such instrument any of the facts or circumstances.

(c) The duty of the Collector under Section 31 is only to determine the stamp duty payable upon the instrument. He is not authorised to impound the instrument or to impose any penalty if he comes to the conclusion that the instrument is not sufficiently stamped. Where a person has obtained the opinion of the Collector on any *draft instrument*, and thereafter does not want to proceed any further to execute the instrument, no consequences will follow and, after determination of the duty, the Collector becomes *functus officio*. But where the party wants to *proceed with effectuating* the instrument or using it for the purposes of evidence, he has to pay the duty determined by the Collector and obtain from the Collector under Section 32, an endorsement that the full duty with which the instrument is chargeable has been paid. Normally, the determination by the Collector of the duty payable on an instrument under Section 31 is final.

(d) Section 32 deals with certificate by the Collector of Stamps as well as the time limit within which such a certificate can be given by the Collector of Stamps. Sub-section (1) of the section provides that when an instrument is brought to the Collector with an application for having an opinion as to the proper duty chargeable thereon, and the Collector is of the opinion that the instrument is already fully stamped or the duty determined by the Collector under Section 31 or such a sum as (with the duty already paid in respect of the instrument), is equal to the duty so determined, has been paid, the Collector shall certify by endorsement on such instrument, that the full duty (stating the amount) with which it is chargeable has been paid. When the Collector is of opinion that any such instrument brought to him is not chargeable with duty, he shall certify in the same manner that such instrument is not so chargeable. Under Section 32(3), any instrument upon which an endorsement has been made by the Collector shall be deemed to be duly stamped or not chargeable with duty as the case may be, and if chargeable with duty, shall be receivable in evidence or otherwise and may be acted upon and registered as if it had been originally duly stamped.

The proviso to Section 32(3) categorically provides that the Collector shall not make any endorsement on any instrument under Section 32, where –

(a) any instrument is executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;

(b) any instrument is executed or first executed out of India and brought to him after

the expiration of three months after it has been first received in India; or

(c) any instrument chargeable with a duty not exceeding 10 naya paise or any bill of exchange or promissory note, is brought to him after the drawing or execution thereof, on paper not duly stamped.

In effect, the proviso to Section 32(3) lays down the time limit within which the Collector of Stamps can make any endorsement on any instrument brought to him, for his opinion as to the duty chargeable thereon.

23. INSTRUMENTS NOT DULY STAMPED – TREATMENT AND CONSEQUENCES (IMPOUNDING)

(a) The definition of the term "duly stamped" has already been explained. Chapter IV of the Act (consisting of Sections 35 to 48) provides for the consequences that follow where instruments are not duly stamped.

Section 33 contains a mandate on certain officials to impound an instrument which is not duly stamped. Section 33(1) provides that every person having by law or consent of parties, authority to receive evidence and every person in charge of a public office, except an officer of police before whom any instrument, chargeable in his opinion, with duty is produced or comes in the performance of his functions, shall, if it appears to him that the instrument is not duly stamped, impound the same. The object of this Section is to protect the revenue, and the Court or public officer authorised by this Section must, exercise the powers under the Section *suo moto* and the jurisdiction of the Court does not depend upon raising of an objection by the parties. For the purposes of this section, the State Government may determine what offices are public offices. The Section also provides that the instrument must be impounded, before it can be admitted in evidence. Once it is admitted in evidence, the instrument cannot be impounded at a later stage and a court, after it becomes functus officio, cannot rectify an earlier error.

(b) **The word 'produced' has to be properly understood. It means produced in response to a summon or produced voluntarily for some judicial purpose, such as, for supporting an evidence. It does not refer to a document which accidentally or incidentally falls into a judge's hand. The Court is not justified in impounding a document which the witness had not been called upon to produce (*Narayandas* v. *Nathuram*, ILR 1943 Nag. 520; AIR 1943 Nag. 97). Similarly, a Court before which a copy of a document has been produced cannot compel the party to produce the original document with a view to impounding it, having received information that is not sufficiently stamped. It is open to the party to refuse to obey the order of the Court in this respect (*Uttam Chand* v. *Permanand*, AIR 1942 Lah. 265).**

(c) Where a magistrate issued a warrant with a view to discovering registers kept by the accused *containing documents not stamped in accordance with the provisions* of the Stamp Act, and in course of the search, the registers were seized and produced before the magistrate, it was held that the documents thus produced could be impounded as the word 'comes' is sufficiently wide to include documents produced by the search under a search warrant (*Emperor* v. *Balu Kuppayyan*, ILR 25 Mad. 525). This case should be confined to its facts.

(d) An arbitrator has the consent of parties to adjudicate the issues coming before

him and where the parties tender evidence, an arbitrator has a statutory duty under Section 33(1) to check whether the instrument so produced is duly stamped and if not, to impound the same.

(e) However, this shall not compel any magistrate or judge of a Criminal Court to examine or impound (if he does not think it fit to do so) any instrument coming before him in the course of any proceeding other than possession proceedings and maintenance proceedings. Also, a judge of a High Court can delegate the duty of examining and impounding any instrument to any other person appointed by the court in this behalf.

Test your knowledge

State whether the following statement is "True" or "False"

Section 18 facilitates the stamping of the documents within a period of three months.

- True
- False

Correct answer: True

24. UNSTAMPED RECEIPTS

Section 34 provides that where the instrument is an unstamped receipt produced in the course of an audit of any public account, the officer before whom the receipt is produced has a discretion either to impound or to require the receipt to be stamped. This section applies where the receipt is chargeable with a duty not exceeding 10 naya paisa. The officer concerned can, instead of impounding the receipt require a duly stamped receipt to be substituted therefor.

25. INSTRUMENTS NOT DULY STAMPED INADMISSIBLE IN EVIDENCE

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

(i) admitted in evidence *for any purpose* whatsoever by any person authorised by law (such as judges or commissioners) or by the consent of the parties (such as arbitrators) to record evidence; or

(ii) shall be acted upon; or

(iii) registered; or

(iv) authenticated by any such person as aforesaid or by any public officer.

unless such instrument is duly stamped.

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

[See *K. Narasimha Rao* v. *Sai Vishnu*, AIR 2006 AP 80 also at p.302]

Photocopy of an agreement not being an 'instrument' such copy of document which is unstamped can not be validated by payment of stamp duty and penalty. *Ashok Kalam Capital Builders* v. *State & Anr.,* AIR 2010 (NOC) 736 (Del).

(b) The proviso to Section 35 provides as under:

(i) any instrument not being an instrument chargeable with a duty not exceeding 10 naya paisa only, or a bill of exchange, or promissory note, subject to all such expectations, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of Rs. 5/- or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5/-, on a sum equal to ten times such duty or portion;

(ii) where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, on payment of a penalty of Re. 1/- by the person tendering it;

(iii) where a contract or agreement of any kind is affected by the correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(iv) nothing contained in Section 35 shall prevent the admission of any instrument in evidence in any proceeding in a criminal Court other than the proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(v) also nothing contained in Section 35 shall prevent the admission of any instrument in the Court, when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by Section 32 or any other provision of the Act.

(c) The words 'shall not be admissible in evidence' used in this Section only means that the *document* shall not be made the basis of the decision or should not be relied upon to support any finding (*Sheonath Prasad* v. *Sorjoo Nonia*, 1943 ALJ, 189; AIR 1943 All 220 (FB)). There is no embargo upon proving the surrounding circumstances.

(d) The words 'for any purpose' used in this Section would have their natural meaning. Where an unstamped document is admitted in proof of some collateral matter, it is certainly admitted in evidence for that purpose, which the Act prohibits. In *Ram Ratan* v. *Parmanand*, ILR 1946 Lah. 63, it was held that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its term. The words 'for any purpose' would in effect mean 'for each and every purpose whatsoever without any exception'.

(e) It is immaterial whether the purpose is the main purpose or a collateral one. The words 'acted on' means that nothing can be recovered under the instrument unless it has a proper stamp. Similarly, where a suit is brought upon an instrument which is not duly stamped, the admission of the contents of the instrument made by the defendant does not avail the claimant and a decree cannot be based on such instruments. Admitting an instrument in evidence also amounts to acting upon it and an instrument which should have been stamped but is not stamped is not admissible in evidence for any purpose whatsoever.

(f) Where an unstamped instrument is lost, the party relying on it is helpless and no payment of penalty can enable admission of secondary evidence.

26. ADMISSION OF INSTRUMENTS (WHERE NOT TO BE QUESTIONED)

Section 36 provides that where an instrument has been admitted in evidence, such an admission shall not (except as provided in Section 61) be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Section 36 is mandatory (*Guni Ram* v. *Kodar*, AIR 1971 All 434, 437).

If notwithstanding any objection, the trial Court admits the document, the matter ends there and the Court cannot subsequently order the deficiency to be made and levy penalty (*Bhupathi Nath* v. *Basanta Kumar*, AIR 1936 Cal. 556; AIR 1933 Lah. 240).

However, it should be mentioned that Section 61 makes certain important provisions, details of which will be discussed later.

27. ADMISSION OF IMPROPERLY STAMPED INSTRUMENTS

Under Section 37, opportunity is given to a party, of getting a mistake rectified when a stamp of proper amount, but of improper description has been used. Under this section, the State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, the instrument may, on payment of the duty with which the stamp is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

28. DEALING WITH INSTRUMENTS IMPOUNDED

(a) Section 38 deals with instruments impounded under Section 33. A person impounding an instrument under Section 33 and receiving the same in evidence (upon payment of penalty under Section 35 or, of duty under Section 37) shall send, to the Collector of Stamps, an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof and shall send such amount to the Collector or to such person as the Collector may appoint in this behalf. In every other case, the person so impounding an instrument shall send it in original to the Collector.

(b) Section 39 vests the Collector with certain powers to refund penalty recovered by a court on impounding a document not duly stamped when produced before it. Under Section 38, the court so impounding the instrument and realising the penalty has to forward an authenticated copy of the instrument and the amount of penalty recovered to the Collector. The Collector, on examining the instrument so received by him may, in his discretion, refund the whole penalty if it had been imposed for contravention of Section 13 or Section 14 of the Act and in any other case any portion of the penalty in excess of Rs. 5/- in cases where a copy of the instrument under Section 38(1) has been sent to him. The Collector can act *suo motu* without any application in this behalf being made by a party affected.

29. COLLECTOR'S POWER TO STAMP INSTRUMENT IMPOUNDED

Section 40 deals with Collector's powers to stamp an instrument which is impounded. Under Section 40(1), the Collector when impounding any instrument under Section 33, or receiving any instrument under Section 38(2) not being an instrument chargeable with duty not exceeding 10 naya paisa only or a bill of exchange or promissory note, shall adopt the following procedure:

(i) if he is of the opinion that instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable as the case may be;

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

The Collector, however, has the discretion to remit the whole penalty leviable under this Section in a case where the instrument has been impounded only because it has been written in contravention of Section 13 or Section 14.

A certificate given in the situation (i) above, shall, for the purposes of the Act be conclusive evidence of the matters stated therein. Sub-section (3) of Section 40 provides that an instrument which has been sent to the Collector under Section 38(2) shall be returned to the impounding officer after the collector has dealt with the same in the manner provided above.

Test your knowledge

Choose the correct answer

Who can receive the stamp duty without penalty and certify an instrument as duly stamped, as from the date of execution?

(a) Revenue Officer
(b) Magistrate
(c) Collector
(d) None of the above

Correct answer: (c)

30. INSTRUMENTS UNDULY STAMPED BY ACCIDENT

Section 41 deals with cases where a person, of his own motion bring it to the Collector's notice that the instrument is not duly stamped. In such cases, if the Collector is satisfied, that the omission to pay the proper duty was due to accident, mistake or urgent necessity, he may receive the deficit amount and certify by endorsement on the instrument that the proper duty has been levied. In order to avail of the benefit of this section, the instrument must be produced before the Collector within one year of the date of its execution. Where the instrument is brought to the notice of the Collector, beyond the period of one year, Section 47 has no application and the Collector has to proceed under Section 42 read with Section 33 and 40 of the Act. Where the instrument having been brought to the notice of the Collector within the period of one year, the Collector is in doubt regarding the amount of duty chargeable, he may refer the case to the Chief Controlling Revenue Authority and proceed in accordance with the decision of such authority. However, where no such reference is made by the Collector, the Collector's decision would be final, and the Chief Controlling Revenue Authority cannot interfere with his decision.

31. ENDORSEMENT OF INSTRUMENT ON WHICH DUTY HAS BEEN PAID UNDER SECTIONS 35, 40 AND 41

Section 42 deals with cases where duty and penalty, if any, have been levied and realised by the court or any other body or by the Collector. In such cases, the authority refunding and collecting the duty and penalty must make an endorsement on the instrument as to the amount paid and the name and the residence of the person paying the same. Upon such certification, the instrument becomes admissible in evidence and may be registered and acted upon as if it had been duly stamped. The duty and penalty referred to in this Section are those covered by Sections 35, 40 or 41 as the case may be. The proviso to this Section lays down that no instrument which has been admitted in evidence upon payment of duty and a penalty under Section 35, shall be delivered to the person from whom possession of it came into the hands of the officer impounding it, before the expiration of one month from the date of such impounding or if the Collector has certified that its further detention is necessary and has not cancelled such certificate. Again, nothing contained in Section 42 shall affect the provisions of clause (3) of Section 144 of the Code of Civil Procedure, 1889 [under the present Code the corresponding provision is proviso to Order 13, Rule 9(1)].

32. PROSECUTION FOR OFFENCES AGAINST STAMP LAW

Section 43 deals with prosecutions for offences against the Stamp Law. This section provides that a levy of a penalty or payment thereof in respect of an unstamped or insufficiently stamped document (as provided for in Chapter IV) does not necessarily exempt a person from liability for prosecution for such offence. However, the proviso to the section clarifies that no such prosecution shall be instituted in the case of any instrument in respect of which a penalty has been paid, unless it appears to the Collector that the offence was committed with the intention of evading the payment of proper duty. On receipt of copy of the instrument impounded under Section 38, the Collector can initiate criminal proceedings if he sees reasons therefor.

33. RECOVERY OF DUTY OR PENALTY IN CERTAIN CASES

Section 44 deals with the circumstances in which persons paying duty or penalty may recover the same in certain cases. The duty or penalty under this Section refers to the duty or penalty paid/levied under Sections 35, 37, 40 or 41 of the Act. It also includes any duty or penalty under Section 29. The remedy is available to a person who, under the Act, was not bound to bear the expense of providing the proper stamp for such instrument. Such a person shall be entitled to recover, from the person bound to bear such expense, the amount of duty or penalty, if any, paid. For the purpose of such recovery, any certificate granted in respect of such instruments under the Act shall be conclusive evidence of the matters therein certified. Sub-section (3) of Section 44 further provides that the amounts so recoverable may, if the court thinks fit, be included in any order as to cost in any suit or proceedings to which such persons are parties and in which such instrument has been tendered in evidence. If the court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.

34. REFUND OF DUTY OR PENALTY IN CERTAIN CASES BY REVENUE AUTHORITY

Section 45 deals with power of the Revenue Authority to refund the penalty in excess of duty payable on instrument in certain cases. Section 39 of the Act empowers the Collector to refund a part and in some cases, the whole of the penalty paid under the provisions of Section 35. Section 45 further empowers the Chief Controlling Revenue Authority to order refunds. The object of granting such further power to the Chief Controlling Revenue Authority is evidently to set right mistakes or other omissions by the Collector to order refund in deserving cases. The Section provides that where any penalty is paid under Section 35 or Section 40, the Chief Controlling Revenue Authority may, upon application in writing made within one year from the date of payment, order, refund such penalty wholly or in part. Where in the opinion of the Chief Controlling Revenue Authority, stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess.

It is necessary to appreciate the differences between the powers of the Collector under Section 39 and the powers of the Controlling Revenue Authority under Section 45 at this stage. They are:

(i) Section 39 provides for refund of penalty, whereas Section 45 confers powers to refund even duties where they have been paid in excess.

(ii) The Collector's power to refund penalty is restricted only to two cases mentioned in Section 39(3) but the powers under Section 45 are not subject to any such limitation.

(iii) Section 39 does not lay down any time limit for the Collector to exercise his powers to refund, but in the case of Section 45 there is a time limit.

(iv) The power under Section 45 is to be exercised only when an application is made by a party, whereas under Section 39 it is routine function of the Collector.

The power under Section 45 is a purely discretionary one and the Chief Controlling Revenue Authority cannot be compelled to exercise his power by any further proceedings.

35. NON-LIABILITY FOR LOSS OF INSTRUMENTS SENT UNDER SECTION 38

Section 46 provides that where any instrument sent to the Collector under Section 38(2) is lost, destroyed during transmission, the person sending the same, shall not be liable for such loss, destruction or damage.

However, Section 38(2) provides that when any instrument is to be sent, the person from whose possession it came into the hands of the person impounding the same may require a copy thereof to be made at his expense and authenticated by the person impounding such instruments.

36. POWER TO STAMP IN CERTAIN CASES

Under Section 47 when any bill exchange or promissory note chargeable with a duty not exceeding 10 naya paise is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and, upon cancelling the same in the manner provided in the Act, may pay the sum payable upon such bill or note and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid and such bill or note shall, so far as respects the duty, be deemed good and valid. However, nothing contained in this section shall relieve any person from any penalty or proceeding to which he may be liable in relation to such bill or note.

37. RECOVERY OF DUTIES AND PENALTIES

Under Section 48, all duties penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the person or by any other process used for the recovery of the arrears of land revenue. This section provides for the mode of realisation of duty or penalty or other sums not voluntarily paid.

38. ALLOWANCE AND REFUND

Section 49 deals with different circumstances in which refund would be admissible in respect of impressed stamps not used. The section applies only to impressed stamps and not adhesive stamps. Clause (a) of the section refers to cases where the stamp paper is spoiled before any document has been written thereon, or is spoiled in the course of writing and before execution. Clause (b) refers to cases where the document has been written out wholly or in part but not executed. Clause (c) refers to bills of exchange payable otherwise than on demand and promissory notes, when these have not been accepted or made use of. Clause (d) deals with refunds after execution.

Section 49 provides that subject to such rule as may be made by the State Government, as to the evidence to be required, or the enquiry to be made, the Collector may, on application made within the period prescribed in Section 50, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:

(a) the stamp on any paper inadvertently and undesignedly spoiled, obliterated or by error in writing or any other means rendered unfit for the purpose intended before any instrument written thereon is executed by any person;

(b) the stamp on any document which is written out wholly or in part; but which is not signed or executed by any party thereto;

(c) in the case of bills of exchange payable otherwise than on demand or promissory notes:

(1) the stamp on any such bill of exchange signed by or on behalf of the drawer which has not been accepted or made use of in any manner whatever or delivered out of his hands for any purpose other than by way of tender for acceptance provided that the paper on which any such stamp is impressed, does not bear any signature intended as or for the acceptance of any bill of exchange to be afterwards written thereon;

(2) the stamp on any promissory note signed by or in behalf of the maker which has not been made use of in any manner whatever or delivered out of his hands;

(3) the stamp used or intended to be used for any such bill of exchange or promissory note signed by, or on behalf of, the drawer thereof, but which from any omission or error has been spoiled or rendered useless, although the same, being a bill of exchange may have been presented for acceptance or accepted or endorsed, or being a promissory note may have been delivered to the payee: provided that another completed and duly stamped bill of exchange or promissory note is produced identical in every particular, except in the correction of such omission or error as aforesaid, with the spoiled bill, or note;

(d) The stamp used for an instrument executed by any party thereto which–

(1) has been afterwards found to be absolutely void in law from the beginning;

(2) has been afterwards found unfit, by reason of any error or mistake therein, for purpose originally intended;

(3) by reason of the death of any person by whom it is necessary that it should be executed, without having executed the same, or of the refusal of any such person to execute the same, cannot be completed so as to effect the intended transaction in the form proposed;

(4) for want of the execution thereof by some material party, and his inability or refusal to sign the same, is in fact incomplete and insufficient for the purpose for which it was intended;

(5) by reason of the refusal of any person to act under the same or to advance any money intended to be thereby secured or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;

(6) becomes useless in consequence of the transaction intended to be thereby effected being effected by some other instrument between the same parties and bearing a stamp of not less value;

(7) is deficient in value and the transaction intended to be thereby effected has been effected by some other instrument between the same parties and bearing a stamp of not less value;

(8) is inadvertently and undesignedly spoiled, and in lieu whereof another instrument made between the same parties and for the same purpose is

executed and duly stamped.

Provided that, in the case of an executed instrument, no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence and that the instrument is given up to be cancelled.

39. TIME LIMITS

Section 50 prescribes the time limit within which an application for relief in respect of impressed stamps spoiled, can be made; different time limits have been specified for the purpose, namely:

(1) in the cases mentioned in clause (d)(5) of Section 49, within two months of the date of the instrument;

(2) in the case of a stamped paper on which no instrument has been executed by any of the parties thereto, within six months after the stamp has been spoiled;

(3) in the case of a stamped paper in which an instrument has been executed by any of the parties thereto, within six months after the date of the instrument, or if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed:

Provided that –

(a) when the spoiled instrument has been for sufficient reasons sent out of India, the application may be made within six months after it has been received back in India.

(b) when, from unavoidable circumstances, any instrument for which another instrument has been substituted, cannot be given up to be cancelled within the aforesaid period, the application may be made within six months after the date of execution of the substituted instrument.

40. UNUSED FORMS

Section 51 of the Act enables the Chief Controlling Revenue Authority or the Collector if authorised by the Chief Controlling Revenue Authority, for such purpose to allow refunds in cases where refunds of stamps on printed forms used by bankers, incorporated companies/bodies corporate if required. Allowance may be made without limit of time, for stamped papers used for printed forms of instruments any bankers or by any incorporated company or other body corporate, if for any sufficient reasons such forms have ceased to be required by the said banker, company or body corporate: provided that the Chief Controlling Revenue Authority or the Collector, as the case may be, is satisfied that the duty in respect of such stamped papers has been duly paid.

41. MISUSED STAMPS

Section 52 deals with allowance for misused stamps and applies to both impressed and adhesive stamps in the following instances:

(a) When any person has inadvertently used, for an instrument chargeable with duty, a stamp of a description other than that prescribed for such instrument by the rules made under this Act, or a stamp of greater value than was necessary, or has inadvertently used any stamp for an instrument not chargeable with any duty; or

(b) When any stamp used for an instrument has been inadvertently rendered useless under Section 15, owing to such instrument having been written in contravention of the provisions of Section 13.

The Collector may, on application made within six months after the date of instrument or, if it is not dated, within six months after the execution thereof by the person by whom it was first or alone executed, and upon the instrument, if chargeable with duty, being restamped with the proper duty, cancel and allow as spoiled the stamp so misused or rendered useless.

Under Section 53, in any case in which allowance is made for spoiled or misused stamps, the Collector may give in lieu thereof:

(a) other stamps of the same description and value; or

(b) if required and he thinks fit, stamps of any other description to the same amount in value; or

(c) at his discretion, the same value in money, deducting ten naya paisa for each rupee or fraction of a rupee.

Section 54 of the Act enables a person to obtain refund of the value of stamps purchased by him, if he has no immediate use thereof. Under this section, when any person is possessed of a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but for which he has no immediate use, the Collector shall repay to such person the value of such stamp or stamps in money, deducting ten naya paise for each rupee or portion of a rupee, upon such person delivering up the same to be cancelled and proving to the Collector's satisfaction

(a) that such stamp or stamps were purchased by such person with a *bona fide* intention to use them; and

(b) that he has paid the full price thereof; and

(c) that they were so purchased within the period of six months next preceding the date on which they were so delivered.

Provided that, where the person is a licensed vendor of stamps, the Collector may, if he thinks fit, make the repayment of the sum actually paid by the vendor without any such deduction as aforesaid.

Test your knowledge

State whether the following statement is "True" or "False"

Section 44 deals with the power of the Revenue Authority.

- True
- False

Correct answer: False

42. DEBENTURES

Section 55 is intended to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture. As

per this section, when any duly stamped debenture is renewed by the issue of a new debenture in the same terms, the Collector shall, upon application made within one month, repay to the person issuing such debenture, the value of the stamp on the original or on the new debenture whichever shall be less:

Provided that the original debenture is produced before the Collector and cancelled by him in such manner as the State Government may direct.

A debenture shall be deemed to be renewed in the same terms within the meaning of this section notwithstanding the following changes:

(a) the issue of two or more debentures in place of one original debenture, the total amount secured being the same;

(b) the issue of one debenture in place of two or more original debentures, the total amount secured being the same;

(c) the substitution of the name of the holder at the time of renewal for the name of the original holder; and

(d) the alteration of the rate of interest of the date of payment hereof.

43. REFERENCE AND REVISION

Sections 56 to 61 deal with Reference and Revision. Section 56 provides that the powers exercisable by a Collector under Chapter IV and V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority. Further, if any Collector, acting under Sections 31, 40 or 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority [Section 56(2)].

Such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision.

As per Section 57(1), the Chief Controlling Revenue Authority may state any case referred to it under Section 56(2) or otherwise coming to its notice, and refer such case, with its own opinion thereon to the High Court and the same shall be decided by not less than three Judges of the High Court and the majority decision shall prevail.

According to Section 58, if the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the court may refer the case back to the Revenue Authority for further feed back. The High Court shall decide the questions raised and give its judgment to the Authority who shall dispose of the case as per the judgment.

As per Section 60, any subordinate Court can also refer such case to the High Court like the Revenue Authority but should be through proper channel. In Section 61(1) of the Act it is provided that a Court may take into consideration on its own motion or on application of the Collector, an order of the lower Court admitting the instrument as duly stamped or as not requiring stamp duty or on payment of duty and penalty. According to sub-section 2 of Section 61, if such Court is not in agreement with the stand of the lower Court, it may require that the instrument be produced before it and may even impound the same if necessary. While doing so, the Court shall send a copy of its order to the Collector and to the office/Court from which such instrument has been received. [Section 61(3)]

44. PROSECUTION

As per Section 61(4), the Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower Court as to the instrument shall be valid except for the purposes of prosecution in this respect.

45. CRIMINAL OFFENCES

Sections 62 to 72 deal with penalties for offences. The provisions are as under:

(1) As per Section 62(1), any person

(a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of or in any manner negotiating, any bill of exchange (payable otherwise than on demand) or promissory note without the same being duly stamped; or

(b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or

(c) voting or attempting to vote under any proxy not duly stamped shall, for every such offence, be punishable with fine which may extend to five hundred rupees.

Provided that, when any penalty has been paid in respect of any instrument under Sections 35, 40 or 61, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty. In such a case the Collector is to make an enquiry and to give an opportunity to the accused to pay. In such cases the instrument is (i) chargeable with duty, and (ii) there is a dishonest intention not to pay the duty.

Sub-section (2) of Section 62, provides that if a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, its managing director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees.

(2) Any person required by Section 12 to cancel an adhesive stamp, and failing to cancel such stamp in the manner prescribed by that section, shall be punishable with fine which may extend to one hundred rupees (Section 63). The criminal intention is necessary for an offence under this Section.

(3) As per Section 64, any person who, with intent to defraud the Government-

(a) executes any instrument in which all the facts and circumstances required by Section 27 to be set forth in such instrument are not fully and truly set forth; or

(b) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances; or

(c) does any other Act calculated to deprive the Government of any duty or penalty under this Act;

shall be punishable with fine which may extend to five thousand rupees.

Here also, an intention to evade payment of proper stamp duty or intention to defraud the Government of its stamp revenue is necessary.

(4) Any person who (a) being required under Section 30 to give a receipt, refuses or neglects to give the same; or (b) with intent to defraud the Government of any duty, upon a payment of money or delivery of property exceeding twenty rupees in amount or value, gives a receipt for amount or value not exceeding twenty rupees, or separates or divides the money or property paid or delivered shall be punishable with fine which may extend to one hundred rupees (Section 65). To constitute an offence under this section, an intention to defraud the Government is necessary.

(5) As per Section 66, any person shall be punishable with fine which may extend to Rs. 200/- if he –

(a) receives, or takes credit for any premium or consideration for any contract of insurance and does not, within one month after receiving or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance; or

(b) makes, executes or delivers out any policy which is not duly stamped or pays or allows in account, or agees to pay or to allow in account, any money upon, or in respect of, any such policy.

(6) As per Section 67, if any person drawing or executing a bill of exchange (payable otherwise than on demand) or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist, shall be punishable with fine which may extend to one thousand rupees.

(7) Any person who, (a) with intent to defraud the Government, of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made; or (b) knowing that such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note; or in any manner negotiates the same; (c) with the like intent, practices or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force; shall be punishable with fine which may extend to one thousand rupees. Intention to defraud is an essential ingredient for offence under Section 68.

(8) If any person appointed to sell stamps who disobeys any rule made under Section 74, and any person not so appointed who sells or offers for sale any stamp [other than a (ten naya paise or five naya paise) adhesive stamp] shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both (section 69). Before instituting criminal proceedings under this section against any person, sanction of the Collector must be obtained. Otherwise, the proceedings will be vitiated. A criminal court having jurisdiction to try offences under Cr. P.C. can try such offences.

46. TAKING COGNIZANCE

(a) No prosecution in respect of any offence punishable under this Act or any Act

hereby repealed, shall be instituted without the sanction of the Collector or such other officer as the State Government generally or the Collector specially, authorises in that behalf.

(b) The Chief Controlling Revenue Authority, or any officer generally or specially authorised by it in this behalf, may stay any such prosecution or compound any such offence.

(c) The amount of any such composition shall be recoverable in the manner provided by Section 48.

A Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act (Section 71).

Every such offence committed in respect of any instrument may be tried in any district or presidency town in which instrument is found as well as in any district or presidency town in which such offence might be tried under the Code of Criminal Procedure for the time being in force (Section 72).

47. MISCELLANEOUS PROVISIONS

Chapter VIII, containing Sections 73 to 78 deals with supplemental provisions regarding inspection of relevant registers, books, records, etc; to enter the premises for that purpose, powers of Government to frame rules for the sale and supply of stamps and to make rules generally to carry out the provisions of the Act.

Section 77A provides that all stamps in denominations of annas four or multiples thereof shall be deemed to be stamps of the value of 25 naya paise or (as the case may be), multiples thereof and shall accordingly be valid for all the purposes of the Act. From this it can be inferred that whatever the stamp duty is mentioned to be annas in the first Schedule; the instrument concerned has to be treated as leviable with duty of 25 naye paise or in multiples thereof as the case may be.

48. SCHEDULE

The Schedule to the Stamp Act prescribes the rates of stamp duties on instruments. Articles 13, 27, 37, 47, 49, 53 and 62(a) of the Schedule relate to instruments, the rates of duties on which are prescribed by the Central Legislature and have been subject to legislative amendments by that Legislature (See Entry 91 of List I). The other articles relate to instruments in respect of which the Central Legislature has lost its power to regulate rates of duties (except for Union Territories) since the passing of the Government of India Act, 1935. With respect to these instruments, the rates mentioned are fixed by the State Legislatures (See Entry 63 of List II).

LESSON ROUND-UP

- The Indian Stamp Act, 1899 is the law relating to stamps which consolidates and amends the law relating to stamp duty. It is a fiscal legislation envisaging levy of stamp duty on certain instruments.
- Entry 91 of the Union List, gives power to Union Legislature to levy stamp duty with regard to certain instruments (mostly of a commercial character). They are bill of exchange, cheques, promissory notes, bill of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipt. Likewise, entry 63 of the State List confers on the States power to prescribe the rates of stamp duties on other instruments.
- Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule.
- In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Re. 1 is payable. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments.
- Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies.
- The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution. Instrument executed out of India can be stamped within three months after it is first received in India. In some cases, stamp duty is payable on *ad valorem* basis, i.e. on the basis of value of property, etc. In such cases, value is decided on prescribed basis.
- An instrument not 'duly stamped' cannot be accepted as evidence by civil court, an arbitrator or any other authority authorized to receive evidence. However, the document can be accepted as evidence in criminal court. Duly stamped means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India.
- If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid.
- If the company issues securities to one or more depositories, it will have to pay stamp duty on total amount of security issued by it and such securities need not be stamped. If an investor opts out of depository scheme, the securities surrendered to Depository will be issued to him in form of a certificate. Such share certificate should be stamped as if a

'duplicate certificate' has been issued. If securities are purchased or sold under depository scheme, no stamp duty is payable.

- A levy of a penalty or payment in respect of an unstamped or insufficiently stamped document does not necessarily exempt a person from liability for prosecution for such offence. Revenue Authority has been authorized to refund the penalty in excess of duty payable on instrument in certain cases.
- The Collector has got the power notwithstanding anything contained in the order of the lower court, to prosecute a person if any offence against the Stamp Act which he considers that the person has committed in respect of such an instrument. The prosecution is instituted when he is satisfied that the offence is committed with an intention of evading the proper stamp duty. The order of the lower court as to the instrument shall be valid except for the purposes of prosecution in this respect.
- Provisions have been incorporated to relieve companies renewing debentures issued by them from the liability to pay stamp duty on both the original and the renewed debenture

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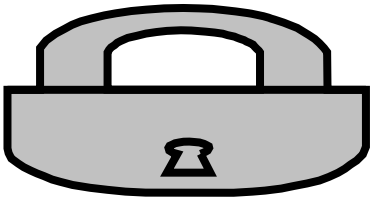
SELF-TEST QUESTIONS



1. Define the expression "bond".
2. D executes an agreement in favour of C, (with witnesses) by which he promises to repay a loan taken by him from C. Discuss whether this is an agreement, a promisory note or a bond.
3. Is an agreement for the sale of goods "conveyance", for the purposes of the Stamp Act? Discuss.
4. A document creates a lease of property *X* and also grants a gift of property *Y*. How is the stamp duty to be calculated, on this document?
5. Can Parliament increase or, decrease, the stamp duty on an agreement?
6. Can the State legislature abolish the stamp duty on gifts?
7. Can Parliament impose by a law, stamp duty on cheques?
8. A document, which is apparently an agreement granting a franchise, is produced in the Court, but is not stamped. Examine whether :-
   (a) The document is void; or
   (b) The document can be admitted, on payment of penalty; or
   (c) The parties are liable to be prosecuted?
9. A receipt for Rs. 100 is produced in the Court without any stamp. What is the legal effect of want of stamp?

10. A receipt for Rs. 2000 is produced in the Court without stamp. Examine the legal effect of want of stamp on the receipt.

Suggested Readings :

(1) The Indian Stamp Act, 1899 — *Bare Act.*

(2) Mulla and Pratt on Indian Stamp Act — *Salil K. Choudhary Roy and H.K. Saharay Roy.*

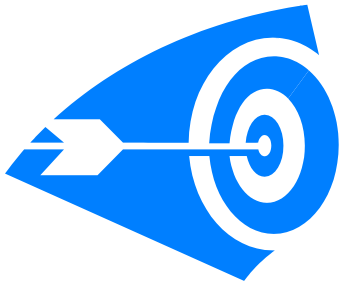
(3) Indian Stamp Act — *M.N. Basu.*

(4) The Indian Stamp Act — *K. Krishnamurthy.*

(5) Commentaries on Indian Stamp Act, 1899 — *Danogh Warter Russel, K.B. Asthana and Gyanendra Kumar.*

STUDY VI

LAW RELATING TO REGISTRATION OF DOCUMENTS



LEARNING OBJECTIVES

Registration means recording of the contents of a document with a Registering Officer and preservation of copies of the original document. The Registration Act, 1908 is the law relating to registration of documents. The object and purpose of the Act among other things is to give information to people regarding legal rights and obligations arising or affecting a particular property, and to perpetuate documents which may afterwards be of legal importance, and also to prevent fraud. It is important for the students to be thoroughly acclimatized with this branch of law to know its practical significance.

At the end of the Study Lesson you should be able to understand:

- Documents whose registration is compulsory
- Documents of which registration is optional
- Time-limit for presentation
- Re-registration of documents
- Documents executed out of India
- Presentation of a will for registration
- Presenting of documents for registration
- Registered document when operative

- Effect of non-registration of documents
- Certificate of registration
- Procedure after registration
- Appeal to registrar

1. INTRODUCTION

Registration of a document *inter alia*, ensures its proper preservation and record. The Registration Act, 1908 is the law relating to registration of documents. Registration is of a *document* and not of a transaction.

2. REGISTRABLE DOCUMENTS

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Documents can be classified int asses:

(i) Those whose registration is sory; (Section 17)

(ii) Those whose registration is optional. (Section 18)

3. DOCUMENTS WHOSE REGISTRATION IS COMPULSORY

According to Section 17 of the Registration Act, 1908, documents whose registration is compulsory are the following:

(a) Instruments of gift of immovable property

In a case where the donor dies before registration, the document may be presented for registration after his death and if registered it will have the same effect as registration in his life time. On registration the deed of gift operates as from the date of execution.

It was held by the Privy Council in *Kalyana Sundram* v. *Karuppa*, AIR 1927 PC 42, that while registration is a necessary solemnity for the enforcement of a gift of immovable property, it does not suspend the gift until registration actually takes place, when the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. And if it is presented by a person having necessary interest within the prescribed period the Registrar must register it. Neither death nor the express revocation by the donor, is a ground for refusing registration, provided other conditions are complied with. (Cf. Mulla Registration Act (1998), page 36)

(b) Other non-testamentary instruments (other than instruments of gift of immovable property) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title of interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property situated in a district in which this Act is in force.

A document which is plainly intended to be operative immediately is non-testamentary (*Umrao Singh* v. *Lachhman*, (1911) 1 LR 33 All 344, 355 (PC); Mulla, Registration Act (1998), page 40).

Description of a document as a will does not make it a will (*Tirugnannpal* v. *Poonamma*, AIR 1921 PC 89).

The expressions “create”, “assign”, “limit” or “extinguish” imply a definite change of legal relation to a property by an expression of will embodied in the document. It implies a declaration of will.

The expression “declare” (as used in Section 17) has also to be interpreted on the same lines. It does not mean a mere declaration of fact, but connotes a writing effectuating a change of relation (*Bageshwari Charan* v. *Jagarnath Kuare*, AIR 1932 PC 55; Mulla, Registration Act (1998), page 41).

Whether an instrument requires registration under Section 17(1)(b) depends upon whether it operates or purports to bring about a change in legal relation in respect of some property. For purposes of Section 17(1)(b) a distinction should be drawn between (i) a right in or to property and (ii) such rights as are merely incidental to the ownership of property and are really in the nature of powers or options which every owner is free to exercise in dealing with his property in a particular way. The latter may be described as rights in relation to the property, but strictly speaking, they are not rights in or to property. Generally, when a right in or to property is assigned, created, declared, limited or extinguished, then there must be a definite change of legal relation to the property.

(c) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest.

This clause requires an acknowledgement in the form of a receipt to be registered, but not an acknowledgement of the fact that a transaction has taken place. To be registrable under this clause a receipt must satisfy the following two conditions:

(i) it must be the receipt of a consideration; and

(ii) it must on the face of it be an acknowledgement of payment or some consideration on account of the creation, declaration, assignment, limitation or extinction of an interest of the value of Rs. 100 or upwards in immovable property.

The receipt must be such as to be linked with the creation etc. of a right. A mere acknowledgement of payment is not compulsorily registrable.

Illustration

In a suit by *A* against *B* for lands, *B* pleads adverse possession. *B* in defence, proves *B's* acknowledgement (in a petition to the Collector) that the gift is in her favour. The petition is not admissible and does not require registration (Mulla, Registration Act (1998), page 69; *Bageshwari* v. *Jagarnath Kuare*, AIR 1932 PC 55).

Delay in registration of a gift does not postpone its operation. Section 123, Transfer of Property Act, 1882 merely requires that donor should have signed the deed of gift. Hence a gift deed can be registered even if the donor does not agree to its registration (*Kalyan Sundaram Pillai* v. *Karuppa Mopanar*, AIR 1927 PC 42; *Venkata Rama Reddy* v. *Pillai Rama Reddy*, AIR 1923 Mad. 282).

A lease for one year containing an option to the tenant to renew for a further period of one year or any other term is not a lease for a term exceeding one year, and does not require registration under this clause. Under Section 107 of the Transfer of Property Act, a lease of one year or reserving a yearly rent can be made only by a registered instrument. But where the lease is only for one year with a reserved rent for the period for which it has been granted, viz. one year, it does not require registration.

Cases under Section 107 of Transfer of Property Act, and Section 17(1)(d) of Registration Act.

A comparison of both these Sections would show that a lease of immovable property is compulsory registrable:

(a) if it is from year to year; or

(b) if it is for a term exceeding one year; or

(c) if it reserves a yearly rent.

If a lease is of a very high value but is neither from year to year, nor for any term exceeding one year, nor reserving a yearly rent, it does not require registration under Section 17(1)(d).

(d) Non-testamentary instruments transferring or assigning any decree or order of a Court or any award in order to create interests as mentioned in Clause (b).

A transfer of a decree or order of a court or of any award when such decree or order or award operates to create, declare, etc. any interest of the value of Rs. 100 and upwards in immovable property, requires registration.

However, the State Government is empowered to exempt any leases executed which do not exceed five years and the annual rents reserved which do not exceed 50 rupees, from the operation of this Sub-section.

(e) It may be pointed out that the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said Section 53A.

Exceptions to Section 17(1)

The registration of the non-testamentary documents mentioned in clauses (b) and (c) of Section 17(1) is subject to the exceptions provided in Sub-section (2) of Section 17. These are as follows:

(i) any composition deed, i.e., every deed the essence of which is composition; or

(ii) any instrument relating to shares in Joint Stock Company; or

(iii) any debentures issued by any such Company; or

(iv) any endorsement upon or transfer of any debenture; or

(v) any document other than the documents specified under clause (e) above creating merely a right to obtain another document which will, when executed create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a court; or

(vii) any grant of immovable property by the Government; or

(viii) any instrument of partition made by Revenue-officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting loan made under the Agriculturists Loans Act, 1884 or instrument for securing the repayment of a loan made under that Act; or

(xi) any order made under the Charitable Endowments Act, 1890 vesting any property in a treasurer of a charitable endowment or divesting any such Treasurer of any property; or

(xii) any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money, due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xiii) any certificate of sale granted to the purchaser of any property sold by public auction by Civil or Revenue Officer.

Explanation

A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require for ever to have required registration by reason only of the fact that such document contains a recital of payment of any earnest money or of the whole or any part of the purchase money.

Test your knowledge

State whether the following statement is "True" or "False"

A mere acknowledgement of payment is always registrable.

- True
- False

Correct Answer: False

4. DOCUMENTS OF WHICH REGISTRATION IS OPTIONAL

Whereas Section 17 of the Act has made registration of certain documents compulsory, Section 18 specifies documents, registration of which is optional. It provides that any of the following documents may be registered under this Act, namely:

(a) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of value less than one hundred rupees, to or in immovable property;

(b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment; limitation or extinction of any such right, title or interest;

(c) leases of immovable property for any term not exceeding one year and leases exempted under Section 17;

(d) instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of a value less than one hundred rupees, to or in immovable property;

(e) instruments (other than wills) which purport or operate to create declare, assign, limit or extinguish any right, title or interest to or in movable property;

(f) wills; and

(g) other documents not required by Section 17 to be registered. (Section 18)

5. TIME LIMIT FOR PRESENTATION

A document other than a will must be presented within four months of its execution. In cases of urgent necessity, etc. the period is eight months, but higher fee has to be paid (Sections 23-26). These limits are mandatory (*Ram Singh* v. *Jasmer Singh*, AIR 1963 Punj. 100). If delay is due to act of Court, it has to be disregarded (*Raj Kumar* v. *Tarapa*, AIR 1987 SC 2195).

Section 23, proviso prescribes a period of four months for presenting a copy of a decree or order. It is counted from the date of the decree.

Unstamped document

If the document is not sufficiently stamped its presentation is still good presentation though penalty under the Stamp Act can be levied (*Mahaliram* v. *Upendra Nath*, AIR 1960 Pat 470).

Test your knowledge

State whether the following statement is "True" or "False"

According to Section 17, registration of instruments of gift of immovable property is compulsory.

- True
- False

Correct Answer: True

6. RE-REGISTRATION

Section 23A provides for the re-registration of certain documents. The section is mainly intended to deal with situations where the original presentation was by a person not duly authorised. It overrides the decision in *Jambu Prasad* v. *Mohammed Aftab Ali Khan*, (1914) ILR 37 All 49).

7. SEVERAL EXECUTANTS

Under Section 24 a document executed by several persons at different times may be presented for registration and re-registration within four months from the date of each execution.

The registration is "partial" in regard to each party. (Mulla, Registration Act (1998), page 163)

8. DOCUMENTS EXECUTED OUT OF INDIA

As per Section 26 Where the registering officer is satisfied that the document was executed outside India and it has been presented for registration within four months after its arrival in India, he may accept such document for registration on payment of proper registration fee. **A document executed outside India is not valid unless it is registered in India (*Nainsukhdas* v. *Gowardhandas*, AIR 1948 Nag. 110).**

Incidentally, Section 26 indicates that the Act applies to ex-India documents relating to property in India. (Mulla, page 166)

8A. PRESENTATION OF A WILL

Section 27 provides that a *will* may be presented for registration at any time or deposited in a manner provided in Sections 40-46. Registration of a will is optional under Section 18(e).

9. PLACE OF REGISTRATION

Section 28 provides that documents affecting immovable property mentioned in Sections 17(1) and (2) and Sections 17(1)(a)(b)(c) and (cc)(d) and (e), Section 17(2), etc. shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole *or some portion* of the relevant property is situated and any other document may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed or in the office of any other Sub-Registrar under the State Government at which all the persons executing desire the

document to be registered. (All these documents relate to immovable property). Registration of a document elsewhere has been held to be void (*Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*, (1914) ILR 41 Cal. 972, 988 (PC); Mulla, Registration Act (1998), page 167 and cases in footnote 2).

There is nothing in law to prohibit a person conveying property in one district and residing and owing property in another district and asking the vendee to accept a conveyance also of some small property in the district in which he resides, so that the sale-deed may be registered there and he may not be put to the trouble and expense of a journey to the other district. It is not correct to say in such a case that the sale-deed is not validly registered at the place where it is got registered.

However, there should be no fraud or collusion. Smallness of the area does not necessarily lead to inference of fraud. (Mulla Registration Act (1998), pages 169-171. See in particular the cases cited in Mulla page 170, footnotes 15-19).

10. COPY OF A DECREE OR ORDER

A copy of a decree or order may be registered with the Sub-Registrar within whose sub-district it was made. If the decree or order does not affect immovable property, it may be presented for registration in the office of any other Sub-Registrar under the State Government at whose office all persons claiming under the decree or order desire it to be registered.

10A. REGISTRATION IN CERTAIN CITIES

In any city comprising a Presidency town or in Delhi, a document relating to property situated any where in India may be registered (Section 30). Delhi was added by Amendment Act 45 of 1969.

Under Section 31, registration is permitted in cases of necessity under extra-ordinary circumstances, at the residence of the executant.

11. PRESENTING OF DOCUMENTS FOR REGISTRATION

Section 32 specifies the persons who can present documents for registration at the proper registration office. Such persons are as follows:

(a) some person executing or claiming under the same, or in the case of a copy of a decree or order, claiming under the decree or order, or

(b) the representative or assign of such person, or

(c) the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in the manner hereinafter mentioned.

It is immaterial whether the registration is compulsory or optional; but, if it is presented for registration by a person other than a party not mentioned in Section 32, such presentation is wholly inoperative and the registration of such a document is void (*Kishore Chandra Singh* v. *Ganesh Prashad Singh*, AIR 1954 SC 316). However, Sections 31, 88 and 89 provide exceptions to this requirement.

For the purpose of Section 32, a special power of attorney is required as provided under Section 33. A general power of attorney will not do. Section 33 requires that a power of attorney, in order to be recognised as giving authority to the agent to get the document registered, should be executed before and then authenticated by the Registrar within whose district or sub-district the principal resides. (Sections 32 to 35)

12. ENQUIRY BEFORE REGISTRATION BY REGISTERING OFFICER

For registering a document the persons executing such document or their representatives, assigns or authorised agents must appear before the registering officer within the time allowed for presentation. (Section 34)

In Section 34, the expression "person executing" not only includes the agent who has signed (with authority), but also the principal who is a party (*Puran Chand* v. *Manmotho Nath*, AIR 1928 PC 38).

It is the compliance with the provisions of Sections 34, 35, 58 and 59 of the Act, which really constitutes registration and not the presence of the certificate. Hence, subsequent acts of the Registrar which are ministerial acts, cannot affect the validity of the registration and the absence of final certificate of registration under section 60 cannot affect its validity.

Test your knowledge

State whether the following statement is "True" or "False"

A document executed outside India can be valid even if it is not registered in India.

- True
- False

Correct Answer: False

13. PRESENTING WILLS AND AUTHORITIES TO ADOPT

(a) Who is entitled to present Wills and authorises to adopt

The testator, or after his death, any person claiming as executor *or otherwise under a will,* may present it to any Registrar or Sub-Registrar for registration. In case of authority for adoption, the donor or (after his death) the donee, or any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration. (Section 40) Thus, even a legatee can present a will (*Venkatapayya* v. *Venkata Ranga,* AIR 1929 PC 24).

(b) Registration of will and authority to adopt

(i) A will, or an authority to adopt, if presented by the testator or the donor, may be registered in the same manner as any other document. [Section 41(1)]

(ii) If presented by any other person entitled to present it, it shall be registered if the registering officer is satisfied about the particulars mentioned in Section 41(2).

13A. DEPOSIT OF WILLS

Any testator may, either personally or by duly authorised agent, deposit with any Registrar his will in a sealed cover superscribed with the name of the testator and that of

his agent, if any, and with a statement of the nature of the document.

On receiving such documents, the Registrar on being satisfied shall transcribe in his Registrar Book No. 5, the superscription and shall note the date, time, month, etc. of such receipt and shall then place and retain the sealed cover in his fire-proof box.

However, the testator may withdraw it by applying for the same and the Registrar shall deliver it accordingly (Sections 42 to 46).

14. REGISTERED DOCUMENT WHEN OPERATIVE

(a) A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. (Section 47)

(b) **As between two registered documents, the date of execution determines the priority. Of the two registered documents, executed by same persons in respect of the same property to two different persons at two different times, the one which is executed first gets priority over the other, although the former deed is registered subsequently to the later one (*K.J. Nathan* v. *S.V. Maruthi Rai*, AIR 1965 SC 430; Mulla page 207).**

In effect[1] Section 47 means that a document operates from the date of execution (as between the parties). (Mulla, Registration Act (1998), pages 207, 209)

15. REGISTERED DOCUMENT RELATING TO PRIORITY WHEN TO TAKE EFFECT AGAINST ORAL AGREEMENT

Generally, priority to rights accorded by different transfers is governed by the principles embodied in the maxim *qui prior tempore potior est jure* that is "he who is first in time is better in law". But this general rule is subject to exceptions created by Sections 48 and 50. Section 48 refers to the priority of the registered agreements over oral agreements and Section 50 refers to the priority of registered agreements over non-registered agreements. (Section 48)

Notice

In spite of the explicit wording of Section 48, it has for long time been held, that a subsequent registered deed will not prevail over a prior unregistered deed or a prior oral transaction if the subsequent transferee had notice of the prior transaction. (Mulla Registration Act (1998), pages 215-216)

16. EFFECT OF NON-REGISTRATION OF DOCUMENTS REQUIRED TO BE REGISTERED

Section 49 of the Act provides that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall:

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1. Section 47 does not affect rules of personal law requiring possession. [Mulla (1998), page 209].

(a) affect any immovable property comprised therein; or

(b) confer any power to adopt; or

(c) be received as evidence of any transaction affecting such property or conferring such power *unless it has been registered.*

Section 49 is mandatory, and a document which is required to be registered cannot be received in evidence as affecting immovable property. (Mulla, pages 223 to 228)

An unregistered document which comes within Section 17 cannot be used in any legal proceeding to bring out indirectly the effect which it would have if registered.

However, as provided in Section 49, proviso, an unregistered document affecting immovable property and required by this Act or the Transfer of property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 or as evidence of any collateral transaction not to be effective by registered instrument. All that the proviso to Section 49 permits is that in a suit for specific performance an unregistered document affecting immovable property may be given in evidence. The purpose is that the document which has not conveyed or passed title may still be used as evidence of the terms. **In *K. Narasimha Rao* v. *Sai Vishnu*, AIR 2006 NOC (A.P.) p. 80, it has been held that:**

It is settled legal principle that an unstamped instrument is not at all admissible in evidence even for collateral purpose. But an unregistered instrument originally unstamped, if duly stamped subsequently can be admitted in evidence even though it continues to be unregistered for collateral purpose but actual terms of transaction cannot be looked into. In instant case, however settlement deed in question produced by defendant was not only unregistered but also insufficiently stamped. That apart on an objection raised by plaintiff, Court had already passed an order directing impounding of document, which was never complied with by defendant. In such circumstances, document in question, which still remained insufficiently stamped could not be admitted in evidence even for collateral purpose. Application filed by defendant seeking to admit said document for collateral purpose is liable to be dismissed.

17. REGISTERED DOCUMENTS RELATING TO PROPERTY WHEN TO TAKE EFFECT AGAINST ORAL AGREEMENT

Registered documents relating to any property whether movable or immovable shall take effect against any oral agreements or declaration relating to such property unless followed by delivery of possession which constitutes a valid transfer under any law for the time being in force. (Section 48)

18. CERTAIN REGISTERED DOCUMENTS RELATING TO LAND WHICH WILL TAKE EFFECT AGAINST UNREGISTERED DOCUMENTS

Section 50 provides as under:

(1) Every document of the kinds mentioned in clause (a), (b), (c) and (d) of Section 17, Sub-section (1) and clauses (a) and (b) of Section 18, shall if duly registered, take effect as regards the property, comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

(2) Nothing in Sub-section (1) applies to leases exempted under the proviso to Sub-section (1) of Section 17 or to any document mentioned in Sub-section (2) of the same section or to any registered document which had no priority under the law in force at the commencement of this Act.

Test your knowledge

Choose the correct answer

Which of the following section mainly deals with situation when the original presentation is made by a person not duly authorized?

(a) Section 27
(b) Section 23A
(c) Section 17(1)
(d) Section 26

Correct Answer: (b)

19. MISCELLANEOUS PROVISIONS

Duties and powers of registering officer

The following books must be kept in the several offices as follows:

A – In all Registration Offices

Book 1 – "Register of non-testamentary documents relating to immovable property";

Book 2 – "Record of reasons for refusal to register";

Book 3 – "Register of wills and authorities to adopt";

Book 4 – "Miscellaneous Register";

B – In the Offices of Registrars

Book 5 – "Register of deposits of Wills".

(2) In Book 1 shall be entered or filed all documents or memorandum registered under Sections 17, 18 and 89 which relate to immovable property, and are not *wills*.

(3) In Book 4 shall be entered all documents registered under clauses (d) and (f) of Section 18 which do not relate to immovable property.

The registering officer should enter the registration in the proper book. However, if by mistake and in good faith the registration was entered in the wrong book, it will not make

the registration invalid.

When the document is presented for registration, the day, hour and place of presentation and signature of every person presenting it shall be endorsed.

The registering officer should give a receipt for such document to the person presenting it and shall make a copy of the document in the appropriate book.

All such books shall be authenticated from time to time as prescribed by the Inspector General. (Sections 51 to 57)

20. PROCEDURE ON ADMISSION TO REGISTRATION

Particulars to be endorsed on documents admitted to registration :

(1) On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under Section 89, there shall be endorsed from time to time the following particulars, namely:

(a) the signature and addition of every person admitting the execution of the document and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(b) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document and any admission of receipt of consideration, whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal. (Sections 58 to 62)

21. CERTIFICATE OF REGISTRATION

(a) After the provisions of Sections 34, 35, 58 and 59 as applicable to the document are complied with, the registering officer shall endorse thereon a certificate containing the word “registered” along with the number, and page of the book in which the document has been copied. The certificate shall be signed, sealed and dated by the registering officer.

(b) The certificate of registration in respect of a document is *prima facie* an evidence that the document has been legally registered and raises a presumption that the registering officer proceeded in accordance with the law. (Section 60) (See Mulla (1998), pages 296, 297)

22. PROCEDURE AFTER REGISTRATION OF DOCUMENTS RELATING TO LAND

(1) On registering any non-testamentary document relating to immovable property the Registrar shall forward a memorandum of such document to each Sub-Registrar subordinate to himself in whose sub-district any part of the property is situate.

(2) The Registrar shall also forward a copy of such document, together with a copy of map or plan (if any) mentioned in Section 21 to every Registrar in whose

district any part of such property is situate.

(3) Such Registrar, on receiving any such copy, shall file it in his Book No. 1 and shall also send a memorandum of the copy to the Sub-Registrar subordinate to him within whose sub-district any part of the property is situate.

(4) Every Sub-Registrar receiving any memorandum under this Section shall file it in his Book No. 1. (Sections 64 to 65)

23. PROCEDURE AFTER REGISTRATION

On any document being registered under Section 30(2), a copy of such document and of the endorsements and certificate thereon shall be forwarded to every Registrar within whose district any part of the property to which the instrument relates is situate, and the Registrar receiving such copy shall follow the procedure as prescribed in Sub-section (1) of Section 66.

24. REFUSAL TO REGISTER BY THE SUB-REGISTRAR

Reasons for refusal to register to be recorded

(1) Every Sub-Registrar refusing to register a document, except on the ground that the property to which it relates is not situate within his sub-district, shall make an order of refusal and record his reasons for such order in his Book No. 2 and endorse the words “Registration refused” on the document; and, on application made by any person executing or claiming under the document, shall without payment and unnecessary delay, give him a copy of the reasons so recorded.

(2) No registering officer shall accept for registration a document so endorsed unless and untill, under the provisions hereinafter contained, the document is directed to be registered. (Section 71)

Registration cannot be refused on the ground of undervaluation for stamp or any other extraneous reason. (Mulla (1998), page 308)

Test your knowledge

Choose the correct answer

Extension of time limit for registration can be authorized by:

(a) Only Registrar
(b) Registrar and Sub Registrar jointly
(c) By Sub Registrar
(d) None of the above

Correct Answer: (a)

24A. APPEAL TO REGISTRAR

According to Section 72(1), an appeal shall lie against an order of a Sub-Registrar

refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order. This does not apply where the refusal is on the ground of denial of execution.

If the order of the Registrar directs the document to be registered and the document is duly presented for registration within thirty days after the making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in Sections 58, 59 and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration. [Section 72(2)]

24B. APPLICATION TO REGISTRAR

Refusal to register on the ground of denial of execution is governed by Section 73, under which the aggrieved party can make an "application" not appeal to the Registrar. (Section 73) (For denial of execution see Section 35)

25. PROCEDURE BEFORE THE REGISTRAR

In the case falling under Section 73 (refusal to register on the ground of denial of execution before the Sub-Registrar) and also where denial of registration is made before the Registrar himself, the Registrar shall inquire:

(a) whether the document has been executed; and

(b) whether the requirements of the law have been satisfied so as to entitle the document to registration. (Section 74)

If a person denies execution, the Sub-Registrar *must* refuse registration leaving the parties to appeal under Section 73 (*Chhotey Lal* v. *Collector of Moradabad*, AIR 1922 PC 279). Ultimate remedy is a suit under Section 77 (*Ka Plinis Mysthong* v. *Ring Pyrbot*, AIR 1965 A.N. 42).

26. ORDER BY REGISTRAR TO REGISTER AND PROCEDURE THEREON

If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered *(Section 75)*.

27. INSTITUTION OF SUIT IN CASE OF ORDER OF REFUSAL BY REGISTRAR

Where the Registrar refuses to order the document to be registered any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree. (Section 77)

Test your knowledge

State whether the following statement is "True" or "False"

Between two registered documents, the date of execution determines the priority.

- True
- False

Correct Answer: True

28. EXEMPTION OF CERTAIN DOCUMENTS EXECUTED BY OR IN FAVOUR OF GOVERNMENT

(1) Nothing contained in this Act in the Indian Registration Act, 1877 or in the Indian Registration Act, 1871 or in any Act thereby repealed, shall be deemed to require, or to have at any time required, the registration of any of the following documents or maps, namely:

(a) documents issued, received or attested by any officer engaged in making a settlement or revision of settlement of land revenue and which form part of the records of such settlement; or

(b) documents and maps issued, received or authenticated by any officer engaged on behalf of Government in making or revising the survey of any land which form part of the record of such survey; or

(c) documents which, under any law for the time being in force are filed periodically in any revenue office by *patwaris* or other officers charged with the preparation of village records; or

(d) *sanads, inam*, title deeds and other documents purporting to be an evidence, grants or assignments by Government of land or of any interest in land; or

(e) *notices* given under section 74 or section 76 of the Bombay Land Revenue Code, 1879 of relinquishment of occupancy by occupants or of land by holders of such land.

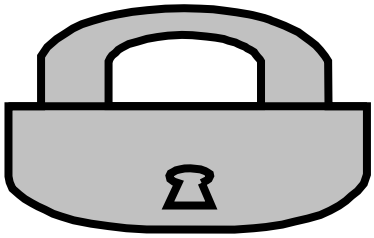
(2) All such documents and maps shall for the purposes of Sections 48 and 49, be deemed to have been, and to be, registered in accordance with the provisions of this Act. (Section 90)

LESSON ROUND-UP

- Registration of documents relating to immovable property is compulsory. Registration of will is optional. Some documents though related to immovable property are not required to be registered. These are given in Section 17(2) of the Act.
- Document should be submitted for registration within four months from date of execution. Decree or order of Court can be submitted within four months from the day it becomes final. If document is executed by several persons at different times, it may be presented for registration within four months from date of each execution. If a document is executed abroad by some of the parties, it can be presented for registration within four months after its arrival in India.
- If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within four months from the date he became aware of the fact that registration of document is invalid.
- Documents relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated. Other documents can be registered in the office of Sub-Registrar. Where all persons executing the document desire it to be registered. Registrar can accept a document which is registrable with Sub-Registrar who is subordinate to him. Document should be presented for registration at the office of Registrar/Sub-Registrar. However, in special case, the officer may attend residence of any person to accept a document or will.
- All persons executing the document or their representatives, assign or agents holding power of attorney must appear before registering officer. They have to admit execution and sign the document in presence of Registrar, as required under Section 58(1)(a). Appearance may be simultaneous or at different times. If some of the persons are unable to appear within four months, further time upto additional four months can be given on payment of fine upto 10 times the proper registration fee.
- If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document. He will make necessary entries in the Register maintained by him.
- After all formalities are complete, the Registering Officer will endorse the document with the word ‘Registered’, and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document.

- A document takes effect from its date of execution and not from date of registration. However, if the document states that it will be effective from a particular date, it will be effective from that date.
- Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property. The only exceptions are: (a) if possession of property (movable or immovable) is delivered on the basis of such oral agreement and such delivery of possession is valid transfer under any law (b) mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered which relates to some property.

SELF-TEST QUESTIONS



1. What is the object of the law of Registration?
2. Discuss the validity of the agreements in the following cases :
   (a) A agrees to sell certain vehicles to *B*, the agreement is oral.
   (b) A agrees to sell a garden to *B*, orally.
   (c) A agrees to sell, to *B*, a health resort by a written agreement. The agreement is not registered.
3. A executes a sale deed of a garden in favour of *B*. The garden is situated in Udaipur. Can the sale deed be registered at Jaipur, which is the capital of Rajasthan?
4. *A* and *B,* residing in Calcutta, execute an agreement by which *A's* running business as a stock broker (carried on in a rental house) is sold by *A* to *B*. Is it necessary to register this document.

5. *A* owns valuable lands in the city of Bombay, two costly cars maintained in the city of Pune, a jewellery shop in the city of Ahmedabad and a textile factory in the city of Surat. *A* executes a will, of all these properties. Is it legally necessary for *A*, to get the will registered?
6. *A* executes a mortgage of a house in favour of a bank, as a simple mortgage. It is not registered. Can the bank sue to enforce this mortgage?
7. *A* grants to *B* a mortgage by deposit of title-deeds. No document is executed or registered. Is the transaction valid?
8. *A* sells to *B* a house by a written document and delivers possession to *B*, but the document is not registered. After a year or so, *A* sues *B* to take back possession of the property, on the ground that because of non-registration, the document has no validity. Will *A* succeed? Which doctrine of law can be invoked by B in his defence?

Suggested Readings :

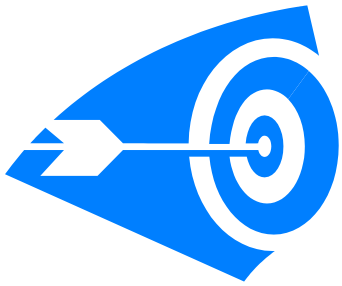
(1) The Registration Act, 1908 — *Bare Act.*

(2) The Indian Registration Act — *Mulla.*

(3) Registration Act — *Sanjiva Row.*

STUDY VII

LAW RELATING TO INFORMATION TECHNOLOGY



LEARNING OBJECTIVES

Information technology is a very fascinating subject. The technological developments in information technology are racing beyond our imagination. With the legislative enactment on the subject, the students will be acclimatized with the legal frame work stipulated under the Information Technology Act. At the end of the Study Lesson you should be able to understand:

- Role of the Information Technology Act
- Main object and General scheme of the Act
- Definitions of basic expressions
- Digital signature
- Legal recognition of electronic records
- Certifying authorities
- Penalties and adjudication
- Cyber regulations appellate tribunal
- Liability of network service providers
- Domain names
- Passing off

1. INTRODUCTION

"Information technology", in a broad sense, connotes that technology which is connected with information. More particularly, it connotes that technology which has taken shape during the last five decades or so, involving electronics. The use of such technology for the storage, retrieval and dissemination of information has given rise to several legal, social and ethical problems. In this context, the word "information" is not to be taken as limited to news or informative material. Rather, it is to be understood as encompassing all matter that is intended to be recorded electronically, whether it be correspondence, Government documents, legal instruments, private exchanges of news and views or any other matter which emanates from man and is transformed into machine-recorded data.

2. LEGAL PROBLEMS - THEIR NATURE AND DIMENSIONS

Information technology gives rise to a variety of legal problems. The problems themselves are not novel, in their essential character. But they deserve special treatment, because of the environment in which they take their birth and the nature of the

machinery used in the environment and the means employed for recording the information in question. Traditional documents are stored and transmitted through the use of visible and tangible letters, figures and marks, while information which is stored and transmitted electronically, has no visible shape or tangible form. It is this peculiarity of the technology, that gives rise to a variety of legal problems. These problems can be generally resolved on *principles* already known to the legal system. But in view of their *subject matter,* they may necessitate some adjustments in, and additions to, the content of the law.

The Machine, the Medium and the Message

The majority of the legal problems that arise in this sphere are relatable to the following components of information technology, namely -

(a) The *machine* (i.e. the instrument used in the technology)

(b) The *medium* used for the purpose (i.e. the symbols and, other means, used for recording and transmitting the information) and

(c) The *message*, i.e. the information which is stored or transmitted, through the above medium.

A few illustrations will make the matter clear.

First, so far as the computers are concerned, they can be tampered with, and made to give out results that were never intended. The law has therefore to concern itself with the question whether any, and if so, what additional provisions, are needed, to deal with this aspect.

Secondly, there is the question of the medium. Communications with the assistance of information technology-particularly through the Internet- cross the borders of various countries. They are transnational in character and raise, *inter alia,* problems of jurisdiction. Besides this, the medium by which information is recorded - i.e. the operational symbols - are radically different, from the means employed in traditional writing or printing. Traditional means, such as letters, numerals or punctuation marks, are not put into the computer in their original form (though they do come out in the final print out, in traditional form).

Finally, as regards the message transmitted through information technology, there are certain special issues that fail to be considered. No doubt, the print-out that issues from the computer is not substantially different from typed matter. But matter put on the internet may, by reason of its content, come into conflict with the law of the country where it emanates or the law of the country where it is received. How far, is each of these countries legally equipped, to deal with such infringement? The answer to this question will depend on the substance of the laws of the country concerned. If the contravention is to be examined from the point of view of the criminal law, the exact text of the penal statute becomes material.

The Legal Response

For dealing with issues of the nature mentioned above (as arising out of the use of information technology), some countries have enacted specific legislation. In India, the Information Technology Act, 2000, is an example of such legislation. However, in the

absence of specific legislation, or in regard to matters not covered by such specific legislation, the legal problems that arise will be governed by general principles of law - which are often referred to as principles of "Common Law".

The Uncodified Law

These principles belong to the uncodified law of India. For example, if, X sends out, on the internet, messages that are defamatory of Y, then (apart from instituting a criminal prosecution) Y has the right to sue for damages for defamation, which is a tort (a species of a civil wrong, independent of contract). Such a remedy is available to Y, under the law of torts, which is mostly based upon judicial decisions dealing with various kinds of civil wrongs. In such matters, the Information Technology Act, 2000, would not supply a complete answer.

3. THE INFORMATION TECHNOLOGY ACT - ITS ROLE

Of course, in regard to matters which are dealt with in the Information Technology Act, 2000, its specific provisions will apply. But a few observations have to be made in this context. The first is, that besides the Information Technology Act, there are other statutory provisions (as contained in certain other Acts), which are also relevant to information technology. In fact, regarding some of these Acts, the Information Technology Act itself has effected specific amendments. These include, the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Book Evidence Act, 1891 and the Reserve Bank of India Act 1934.

Secondly, even before the Information Technology Act, 2000, came into force, Parliament had provided for the maintenance of computerised records, by amending the legislation in force relating to customs, excise and companies.

Thirdly, as pointed out above, many legal issues arising out of the use of information technology will continue to be dealt with, by common law rules. Torts are an outstanding example. Thus, it can be said that a study of Information Technology law has to begin with a study of the Information Technology Act, 2000, but cannot end with it.

Test your knowledge

Name the three main features of information technology that make the legal problems arising out of electronic communications difficult to handle.

(a) Vulnerable machines
(b) Boundary-less communication
(c) Different legal systems
(d) Different cultures

Correct Answer: (a), (b), (c)

4. MAIN OBJECT AND GENERAL SCHEME OF THE ACT

The Information Technology Act, 2000 (Central Act 21 of 2000), was enacted to make, in the main, three kinds of provisions, as under:

(a) It provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, usually referred to, as “electronic Commerce”.

(b) It facilitates the electronic filing of documents with the Government agencies, (and also with the publication of rules etc in the electronic form, see Section 8).

(c) It amends the, Indian Penal Code, the Indian Evidence Act, 1872, the Bankers’ Book Evidence Act, 1891, and the Reserve Bank of India Act, 1934, so as to bring in electronic documentation within the purview of the respective enactments. (see the long title of the Act)

The Act comprises of 94 Sections, spread out amongst 13 Chapters, followed by four Schedules. The topics dealt with in the main Act are as under :

(1) preliminary matters

(2) digital signatures

(3) electronic governance

(4) electronic records

(5) secure electronic records and secure digital signatures

(6) certifying authorities

(7) digital signature certificates

(8) duties of subscriber

(9) penalties and adjudication

(10) the Cyber Regulations Appellate Tribunal

(11) offences

(12) immunity of net work service providers in certain cases

(13) miscellaneous

The four Schedules annexed to the Act set out the amendments made in four Central Acts, so as to weave, into their fabric, the concept of electronic records. The four Acts are -

(a) the Indian Penal Code

(b) the Indian Evidence Act, 1872

(c) the Bankers’ Book Evidence Act, 1891

(d) the Reserve Bank of India Act, 1934.

5. DEFINITIONS OF BASIC EXPRESSIONS

Section 2(1) of the Information Technology Act, 2000, contains definitions of various expressions. Some of the definitions are important, for understanding the detailed provisions of the Act and are quoted below :

(i) “addressee” means a person who is intended by the originator to receive the electronic record, but does not include any intermediary. [Section 2(1)(b)]

(ii) “asymmetric crypto system” means a system of a secure key pair, consisting of a

private key for creating a digital signature and a public key to verify the digital signature. [Section 2(1)(f)]

(iii) “computer” means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions, by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network. [Section 2(1)(i)]

(iv) “computer network” means the interconnection of one or more computers through -

(i) the use of satellite, microwave, terrestrial line or other communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers, whether or not the interconnection is continuously maintained. [Section 2(1)(j)]

(v) “computer resource” means computer, computer system, computer network, data, computer database or software. [Section 2(1)(k)]

(vi) “computer system” means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions. [Section 2(1)(l)]

(vii) “digital signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3. [Section 2(1)(p)]

(viii) “electronic form”, with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated micro fiche or similar device. [Section 2(1)(r)]

(ix) “electronic record” means data, recorded or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche. [Section 2(1)(t)]

(x) “intermediary”, with respect to any particular electronic message, means any person who, on behalf of another person, receives, stores or transmits that message or provides any service with respect to that message. [Section 2(1)(w)]

(xi) “key pair” in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key. [Section 2(1)(x)]

(xii) “originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person, but does not include an intermediary. [Section 2(1)(za)]

(xiii) “prescribed” means prescribed by rules made under this Act. [Section 2(1)(zb)]

(xiv) “private key” means the key of a key pair, used to create a digital signature.

[Section 2(1)(zc)]

(xv) "public key" means the key of a key pair, used to verify a digital signature and listed in the Digital Signature Certificate. [Section 2(1)(zd)]

(xvi) "verify", in relation to a digital signature, or electronic record or its grammatical variations and cognate expressions, means to determine whether -

(a) the initial electronic record was affixed with the digital signature by the use of private key corresponding to the public key of the subscriber;

(b) the initial electronic record is retained intact, or has been altered since such electronic record was so affixed with the digital signature. [Section 2(1)(zh)]

6. DIGITAL SIGNATURE

Digital signature (i.e. authentication of an electronic record by a subscriber, by electronic means) is recognised as a valid method of authentication. The authentication is to be effected by the use of "asymmetric crypto system and hash function", which envelop and transform electronic record into another electronic record. [Sections 3(1), 3(2)]

Verification of the electronic record is done by the use of a public key of the subscriber. [Section 3(3)] The private key and the public key are unique to the subscriber and constitute a functioning "key pair".

Test your knowledge

State whether the following statement is "True" or "False"
Addressee is a person who is supposed to receive the information by the originator of the message through an intermediary.
Correct Answer: False

7. E- GOVERNANCE (LEGAL RECOGNITION OF ELECTRONIC RECORDS)

The Act grants legal recognition to electronic records by laying down that where (by any law) "information" or any other matter is to be in:

(a) writing or

(b) typewritten form or

(c) printed form,

then, such requirement is satisfied, if such information or matter is:

(i) rendered or made available in an electronic form; and

(ii) accessible, so as to be usable for a subsequent reference. (Section 4)

It may be pointed out that "information", as defined in Section 2(1)(v) of the Act, includes data, text, images, sound, voice, codes, computer programmes, software and data-bases or micro-film or computer-generated "micro-fiche".

Private transactions

Thus, Section 4 of the Information Technology Act, practically equates electronic *record* with a manual or typed or printed *record*. The next Section proceeds to achieve the same object in regard to *signature*. Where any law provides that information or any other matter shall be "signed", such requirement is satisfied by authentication through digital signature in the prescribed manner. (Section 5)

Thus, while *the text* of the information is dealt with in section 4, the *signature* thereto, is taken care of, by Section 5.

Public records

Above provisions are primarily intended for *private transactions*. The Act then proceeds to bring in the regime of electronic records and digital signature in public records, by making an analogous provision which grants recognition to electronic records and digital signatures, in cases where any law provides for

(a) the filing of any form, application or any other document with a Governmental office or agency or

(b) the grant of any licence, permit etc. or

(c) the receipt or payment of money in a particular manner. (Section 6)

8. RETENTION OF INFORMATION

The Act also seeks to permit the retention of information in electronic form, where any law provides that certain documents, records or information shall be retained for any specific period. Certain conditions as to accessibility, format etc are also laid down. (Section 7)

9. SUBORDINATE LEGISLATION

Subordinate legislation is also authorised, by the Act, to be published in the Official Gazette or the electronic Gazette, and the date of its first publication in either of the two Gazette shall be deemed to be the date of publication. (Section 8)

But the provisions summarised above shall not confer any right upon any person to insist, that any Government agency shall accept, issue etc. any document in electronic form or effect any monetary transaction in electronic form. (Section 9)

Test your knowledge

State whether the following statement is "True" or "False"

In 'asymmetric crypto system', a public key is used to create a digital signature and a private key to verify the digital signature.

Correct Answer: False

10. ATTRIBUTION AND DISPATCH OF ELECTRONIC RECORDS

Since, in an electronic record, the maker remains behind the curtain, it was considered desirable to make a provision for "attribution" of the record. An electronic record is attributed to the "originator". [defined in Section 2(1)(za)]

Broadly, the "originator" is the person at whose instance it was sent in the following cases -

(a) if it was sent by the originator himself; or

(b) if it was sent by a person authorised to act on behalf of the originator in respect of that electronic record; or

(c) if it was sent by an information system programmed by or on behalf of the originator to operate automatically. (Section 11)

Regarding acknowledgement of receipt of electronic records, the Act provides that where there is no agreement that the acknowledgment be given in a particular form etc. then the acknowledgement may be given by:

(a) any communication by the addressee (automated or otherwise) or

(b) any conduct of the addressee which is sufficient to indicate to the originator that the electronic record has been received. [Section 12(1)]

Special provisions have been made for cases where the originator has stipulated for receipt of acknowledgment, [Section 12(b)] or where the acknowledgement is not received by the originator in time. [Section 12(2), 12(3)]

Time and Place of Dispatch etc.

After these provisions, there follows a provision which is of considerable significance for the law of contracts. The date of offer and the date of acceptance are crucial, in determining whether and which contract has come into existence. The two terminal points - despatch and receipt, are dealt with, in detail. Subject to agreement between the parties, the dispatch of an electronic record occurs, when it enters a "computer resource" outside the control of the originator. [Section 13(1)]

"Computer resource", as defined in Section 2(k), means a computer, computer system, computer network, data, computer database or software.

Time of receipt

As regards the time of receipt of electronic records, two situations are dealt with, separately. Subject to agreement, if the addressee has designated a computer resource for receipt, then receipt occurs when the electronic record enters the designated resource. However, if the record is sent to a computer resource of the addressee which is not the designated resource, then receipt occurs at the time when the electronic record is

retrieved by the addressee. [Section 13(2)(a)]

If the addressee has not designated a computer resource (with or without specified timings), then receipt is deemed to occur, when the electronic record enters the computer resource of the addressee. [Sections 13(1), 13(2)] Above provisions apply, even where the place of location of the computer is different from the deemed place of receipt.

The Act also contains provisions as to the *place* of dispatch and receipt. [Section 13(3)]

Test your knowledge

State whether the following statement is "True" or "False"

Under the Indian law, a person has a right to demand a Government agency to accept an electronic record.

Correct Answer: False

11. SECURE ELECTRONIC RECORDS

The Central Government is required, by the Act, to prescribe the security procedure for electronic records, having regard to the commercial circumstances prevailing at the time when the procedure is used (Section 16). When the procedure has been applied to an electronic record at a specific point of time, then such record is deemed to be a secure electronic record, from such point of time to the time of verification. (Section 14) Suitable provision is also made regarding "secure digital signature".

A digital signature is deemed to be a secure digital signature, if, by the application of an agreed security procedure, it can be verified that a digital signature, at the time it was verified, -

(a) was unique to the subscriber affixing it;

(b) was capable of identifying such subscriber;

(c) was created in a manner or using a means under the exclusive control of the subscriber and is linked to the electronic record to which it relates, in such a manner that if the electronic record was altered, the digital signature would be invalidated. (Section 15)

12. CERTIFYING AUTHORITIES

A system of digital signature of an electronic communication pre-supposes that the sender must create a "public -private key" pair. The private key, which is kept confidential, is used by the signer to create the digital signature. The public key (which is more widely known), is used by the relying party, to verify the digital signature.

To associate a key pair with a certifying prospective signer, the Certifying Authority issues a certificate to the subscriber. (Section 35)

The Act contains detailed provisions as to “Certifying Authorities” (Sections 17-34). A Certifying Authority is expected to reliably identify persons applying for “signature key certificates”, reliably verify their legal capacity and confirm the attribution of a public signature key to an identified physical person by means of a signature key certificate. To regulate the Certifying Authorities, there is a Controller of Certifying Authorities. (Section 17)

Foreign Certifying Authorities may be recognised by the Controller. (Section 19) The Controller acts as the repository of all Digital Signature Certificates, issued under the Act. [Section 20(1)]

“Repositories” are on-line data-bases of certificates and other information, available for retrieval and use in verifying digital signatures. Obligations of Certifying Authorities are also set out, in the Act. (Sections 30-34)

Digital signature certificates

Sections 35-39 of the Act deal with Digital Signature Certificates.

Duties of subscribers

Duties of subscribers are dealt with, in the Information Technology Act, in some detail. (Sections 40-42)

Test your knowledge

A digital signature is:

(a) Unique to the subscriber affixing it

(b) Capable of identifying the subscriber

(c) Capable of identifying the addressee

(d) Created in a manner or using a means under the exclusive control of the subscriber

Correct Answer: (a), (b), (d)

13. PENALTIES AND ADJUDICATIONS

The Act contemplates a dual scheme in regard to wrongful acts concerning computers etc. Certain acts are visited with (so called) “penalties”, which are however, adjudicated, not before courts, but before adjudication officers. (Sections 43-47)

In fact, however, though the heading of Section 43 speaks of “penalty”, the text of Section 43 imposes only a liability “to pay damages by way of compensation not exceeding one crore rupees”, to the person harmed by the tort. The acts so dealt with, include the following –

(a) accessing or securing access to the computer network;

(b) down-loading any data or information from the computer network;

(c) introducing (or causing to be introduced) any computer contaminant or computer virus, into the computer/network;

(d) damaging (or causing to be damaged) the computer/network, data, computer data-base or any other programmes residing in it;

(e) disrupting (or causing the disruption of) the computer/network;

(f) denying access (or causing the denial of access) to any person authorised to access the computer/network, by any means;

(g) providing assistance to any person to facilitate access to the computer network in contravention of the provisions of the Act, rules etc.

(h) charging the service availed of, by a person, to the account of another person, by tampering with or manipulating any computer network (Section 43).

The *Explanation* to the Section sets out definitions of the expressions "computer contaminant", "computer database", "computer virus" and "damages".

A person failing to provide information or failing to file a return etc. (as required by the Act), has to pay a penalty not exceeding ten thousand rupees for every day during which the failure continues. (Section 44)

Contravention of a rule or regulation attracts liability to pay compensation upto 25,000 rupees, to the person affected by such contravention or to pay penalty upto that amount. (Section 45)

Adjudicating officer

An adjudication officer is to be appointed by the Central Government for adjudging (under this Chapter) whether any person has committed a contravention of the Act or of any rule, regulation, direction or order issued under the Act. He may impose penalty or award compensation in accordance with the provisions of the relevant section (Section 46).

The Act takes-care to set out the factors to be taken into account by the Adjudicating officer, in adjudging the quantum of compensation under this Chapter. He has to have due regard to the following factors:

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

(b) the amount of loss caused to any person as a result of the default; and

(c) the repetitive nature of the default.

Test your knowledge

State whether the following statement is "True" or "False"

'A' sent an email to 'B' and 'B' phoned and informed 'A' that he/she has received the email. This will be considered as an 'acknowledgement' under Indian Laws?

Correct Answer: True

14. CYBER REGULATIONS APPELLATE TRIBUNAL

Chapter 10 of the Act provides for the establishment of one or more Cyber Regulations Appellate Tribunal and lays down various provisions regarding its jurisdiction, composition, powers and procedure. (Sections 48-62)

In the same Chapter, there are provisions regarding the compounding of offences and recovery of penalties. (Sections 63 and 64).

Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Cyber Appellate Tribunal, within 45 days. (Section 57)

Each Cyber Appellate Tribunal is to consist of only one person (called the presiding officer). He must be a person who is, or has been or is qualified to be, a High Court Judge or a person who is, or has been a member of the Indian Legal Service and who has held a post in Grade I of the Service for at least 3 years.

The presiding office holds office for 5 years or until he attains the age of 65 years, whichever is earlier.

Any person aggrieved by "any decision or order" of the Tribunal may appeal to the High Court, within 60 days. Jurisdiction of Civil Courts is barred, in respect of any matter which an adjudicating officer or the Cyber Appellate Tribunal has power to determine.

15. OFFENCES

Chapter 11 of the Act, (Sections 65-78) deals with offences relating to computers etc. and connected matters. This Chapter also contains certain provisions empowering the Controller of Certifying Authorities to issue certain directions to certifying Authorities (Section 68) and to subscribers (Section 69). There is also a provision for confiscation. (Section 76)

The offences listed in this Chapter are the following -

(a) Tampering with computer source documents;

(b) "Hacking" with computer systems; (See below)

(c) Publishing of obscene information in electronic form;

(d) Securing access to any computer, computer system or computer network declared by the appropriate Government to be a "protected system";

(e) Misrepresentation about a material fact to, or suppression of a material fact from, the Controller or the Certifying Authority;

(f) Breach of confidentiality and privacy, by a person who has, in the exercise of a power conferred by the Act, secured access to electronic record, book, register etc.;

(g) Publishing a digital signature certificate, which is false in certain particulars;

(h) Knowing, creating, publishing etc. a Digital Signature Certificate, for any fraudulent or unlawful purpose.

Hacking

Regarding hacking, Section 66 of the Information Technology Act, 2000, provides as under -

Hacking with computer system

(i) Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or any person, destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.

(ii) Whoever commits hacking, shall be punished with imprisonment upto three years or with fine which may extend upto two lakh rupees or with both. (Section 66)

Test your knowledge

Choose the correct answer

Section 46 of the Information Technology Act, 2000 provides for:

(a) Hacking

(b) Tampering

(c) Contravention of a rule

(d) The appointment of Adjudicating officer

Correct Answer: d

Investigation

Only a police officer of the rank of Deputy Superintendent of Police is competent to investigate an offence under the Information Technology Act.

Extraterritorial operation

Extra-territorial operation of the Act is provided for, by enacting that the provisions of the Act apply to any offence or contravention committed outside India by any person, irrespective of his nationality, if the act or conduct in question involves a computer, computer system or computer network located in India. (Section 75)

16. LIABILITY OF NETWORK SERVICE PROVIDERS

The Internet system depends, for its working, on network service providers- i.e. intermediaries. An “intermediary”, with respect to any particular electronic message, means any person who, on behalf of another person, receives, stores or transmits that message or provides any service with respect to that message. [Section 2(1)(w)]

In his capacity as an intermediary, a network service provider may have to handle matter which may contravene the Act. To avoid such a consequence, the Act declares that no network service provider shall be liable “under this Act, rule or regulation made thereunder”, for any third party information or data made available by him, if he proves

that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. (Section 79)

17. DOMAIN NAMES

It is vital, that prior to entering into any type of business activity, a company must be traceable relatively easily, on the Internet, i.e. it must have an address in cyber-space. This may be linked to a company having its Registered Office to which all communications are usually directed. This explains the utility of registration under a particular domain name and website. This has been made possible with the emergence of the Domain Name System ("DNS"). Such registration would enable the company to conduct on-line transactions, as well as make it easily traceable by customers, suppliers, etc.

18. PASSING OFF

The Information Technology Act does not contain a specific provision, declaring illegal any fraudulent use, by one person, of other persons domain name. However, even in the absence of specific legislation on the subject, such conduct can become actionable under the law of torts. In fact, judicial decisions, both in India and elsewhere, amply demonstrate the potency of the law of torts in this context. The tort of "passing off" is wide enough to afford legal redress (in damages) to a person who is the holder of a particular domain name and who suffers harm as a result of the fraudulent use of his domain name by another person. Such conduct has been regarded as falling under the tort of "passing off".

The crux of the action of "passing off" lies in actual or possible or probable deception. The principles relating to "passing off" were held to be applicable to domain names in *Rediff Communication Ltd.* v. *Cyberbooth*, (2000) 1 Recent Arbitraton Judgements, 562 (Bombay High Court).

The domain name "Rediff" (of the plaintiff) and the domain name "Rediff" (of the defendant) were held to be deceptively similar and capable of causing deception, as the fields of business activity of both the parties were similar. The grant of a temporary injunction, restraining the defendant from using the name in question, was held to be proper.

A similar view has been taken in *Yahoo Inc.* v. *Akash Arora*, (1999) 2 Recent Arbitration Judgements, 176 (Delhi). The plaintiff's domain name was "Yahoo". The defendant's domain name was "Yahoo India". The two were held to be similar, even though the defendants had suffixed the word "India". It was held that, even if a user of Internet is a sophisticated user, he may be an unsophisticated consumer of information and he may unintentionally find his way to a different Internet size. In this manner, confusion could be created.

Test your knowledge

Choose the correct answer

A person can complain against a certifying authority to the Cyber Appellate Tribunal within:

(a) 30 days
(b) 45 days
(c) 60 days
(d) 90 days

Correct Answer: (b)

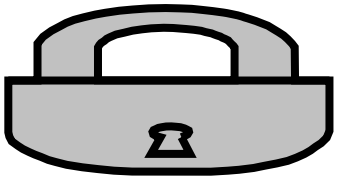
LESSON ROUND-UP

- The Information Technology Act has been passed to give effect to the UN resolution and to promote efficient delivery of Government services by means of reliable electronic records. The Act came into effect on 17.10.2000.
- The purpose of the Act is (a) to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information and (b) to facilitate electronic filing of documents with the Government agencies.
- Any subscriber may authenticate an electronic record by affixing his digital signature.
- "Digital Signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3 of the Act.
- Any person by the use of a public key of the subscriber can verify the electronic record. The private key and the public key are unique to the subscriber and constitute a functioning key pair.

  Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.
- The digital signature will be certified by 'Certifying Authority'. The 'certified authority' will be licensed, supervised and controlled by 'Controller of Certifying Authorities'.
- The Act contemplates a dual scheme in regard to wrongful acts concerning computers, etc. Certain acts are visited with (so called) "penalties", which are however, adjudicated, not before courts, but before adjudication officers.
- The Act provides for the establishment of one or more Cyber Regulations Appellate Tribunal and lays down various provisions regarding its jurisdiction, composition,

- powers and procedure.
- Any person aggrieved by an order of the Controller of Certifying Authorities or of the adjudicator can appeal to the Cyber Appellate Tribunal, within 45 days.
- Any person aggrieved by "any decision or order" of the Tribunal may appeal to the High Court, within 60 days. Jurisdiction of Civil Courts is barred, in respect of any matter which an adjudicating officer or the Cyber Appellate Tribunal has power to determine.
- Chapter 11 of the Act spells out provisions regarding offences relating to computers, etc. This chapter also contains provisions empowering the Controller of Certifying Authorities to issue certain directions to Certifying Authorities and to subscribers. There is also a provision for confiscation.
- The Information Technology Act does not contain any specific provision, declaring illegal any fraudulent use, by one person, of other person's domain name. However, even in the absence of specific legislation on the subject, such conduct can become actionable under the law of torts. In fact, judicial decisions, both in India and elsewhere, amply demonstrate the potency of the law of torts in this context.

SELF-TEST QUESTIONS



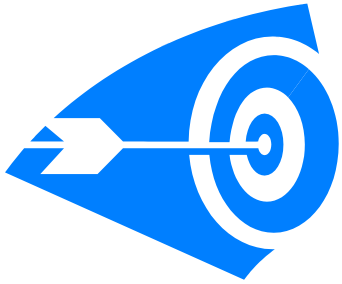
1. State, in brief, the legal problems that may arise, as a result of recourse to Information Technology.
2. Summarise the main provisions contained in the Information Technology Act, 2000, as to the time of despatch and receipt, of electronic messages.
3. What is the significance of electronic records under the Information Technology Act, 2000?
4. State very briefly the gist of the concepts of "computer network", "electronic form" and "key pair", under the Information Technology Act, 2000.
5. What are the civil remedies provided in the Information Technology Act, 2000, for various kinds of misuse of computer?
6. State the gist of the offence of "hacking" under the Information Technology Act, 2000.
7. State, in brief, the composition and functions of the Cyber Appellate Tribunal, under the Information Technology Act, 2000.

References:

(1) Information Technology Act, 2000 — (Bara Act).
(2) Law of Information Technology (Cyber Law) — *D.P. Mittal.*
(3) Salmond Law of Torts (Chapter on Passing Off.)

STUDY VIII

THE CODE OF CIVIL PROCEDURE, 1908 (C.P.C.)



LEARNING OBJECTIVES

Laws can be divided into two groups: (i) substantive law; and (ii) procedural law. Whereas substantive law determines rights and liabilities of parties, procedural or adjective law prescribes practice, procedure and machinery for the enforcement of those rights and liabilities. Procedural law is thus an adjunct or an accessory to substantive law. The Code of Civil Procedure is an adjective law it neither creates nor takes away any right. It is intended to regulate the procedure to be followed by civil courts.

The students need to be familiar with the essentials of the basic procedural laws of the country. It is necessary for them to keep in view the requirement of the procedural law in handling of corporate business, even in initial stages or later, which could have legal implications at some subsequent stage.

At the end of the Study Lesson you should be able to understand:

- Aim and scope of Civil Procedure Code
- Important definitions
- Structure and jurisdiction of civil courts
- Place of suing
- Res judicata
- Temporary injunctions and interlocutory orders
- Institution of suit
- Important stages in proceedings of a suit
- Appeals
- Reference, review and revision
- Summary procedure.

1. INTRODUCTION

The Company Secretary and the Secretarial Staff of a Company need to be familiar with the essentials of the basic procedural laws of the country. While the specific corporate, industrial, taxation, property and urban land laws have direct relevance for the efficient performance of the duties and responsibilities of the Company Secretary, the procedural law also provides the parameters for the pursuance of legal action. It is also therefore necessary to keep in view the requirement of the procedural law, or as such law is often termed "adjective law", in the handling of corporate business, even in initial stages or later, which could have le 338 lications at some subsequent stage. Such

monitoring and guidance is required to be rendered by the Company Secretary and other Secretarial Executives to the line management for safeguarding the interests of the company. It has been endeavoured in this Chapter to summarise one of such aspects of Indian procedural laws which have to be referred to by the Company Secretaries.

2. AIM AND SCOPE OF CIVIL PROCEDURE CODE, 1908 [C.P.C.]

The Civil Procedure Code consolidates and amends the law relating to the procedure of the Courts of Civil jurisdiction. The Code does not affect any special or local laws nor does it supersede any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Code is the general law so that in case of conflict between the Code and the special law the latter prevails over the former. Where the special law is silent on a particular matter the Code applies, but consistent with the special enactment. Thus it is seen for instance, that the Monopolies and Restrictive Trade Practices Act, 1969 and the Monopolies and Restrictive Trade Practices Commission Regulations, 1991 (Regulations 62, 64 etc.) have adopted various relevant provisions of the Code, while the provisions of the Code are not applicable for Regulation 50, 65 etc. Similarly the Companies (Bench) Rules also lay down the special procedure for proceedings of the company law cases.

3. SCHEME OF THE CODE

The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised. Thus the two parts should be read together, and in case of any conflict between the body and the rules, the former must prevail.

Test your knowledge

State whether the following statement is 'True' or 'False'

The Civil Procedure Code consolidates and amends the law relating to the procedure of the courts of civil jurisdiction.

- True
- False

Correct answer: True

4. SOME IMPORTANT TERMS

Cause of Action

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

Judgement, Decree and Order

"Judgement" as defined in Section 2(9) of the Civil Procedure Code means the statement given by the Judge on the grounds of a decree or order. Thus a judgement must set out the grounds and reasons for the Judge to have arrived at the decision. **In other words, a "judgement" is the decision of a Court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination (*State of Tamilnadu* v. *S. Thangaval,* AIR (1997) S.C. 2283).**

"Decree" is defined in Section 2(2) of the Code as (i) the formal expression of an adjudication which, so far as regards the Court expressing it; (ii) conclusively; (iii) determines the rights of the parties; (iv) with regard to all or any of the matters in controversy; (v) in the suit and may be either preliminary (i.e. when further proceedings have to be taken before disposal of the suit) or final.

But decree does not include:

(a) any adjudication from which an appeal lies as an appeal from an Order, or

(b) any order of dismissal for default.

Essentials of a decree are:

(i) There must be a formal expression of adjudication;

(ii) There must be a conclusive determination of the rights of parties;

(iii) The determination must be with regard to or any of the matters in contravention in the suit;

(iv) The adjudication should have been given in the suit.

According to the explanation to the definition, a decree may be partly preliminary and partly final. A decree comes into existence as soon as the judgement is pronounced and not on the date when it is sealed and signed. (Order 20 Rule 7)

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. The preliminary decree is not dependent on the final. On the other hand, final decree is dependent and subordinate to the preliminary decree, and gives effect to it. The preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. If the preliminary decree is set aside the final decree is automatically superseded.

Decree-holder

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

Judgement-debtor

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

Judgement

The *"judgement"* means a statement given by a judge on the grounds of a decree or order [Section 2(9)]. What is ordinarily called as an order is in fact a judgement. Also an

order deciding a primary issue is a judgement.

Order

"*Order*" as set out in Section 2(14) of the Code means the formal expression of any decision of a Civil Court which is not a decree.

According to Section 104 of the Code, no appeal lies against orders other than what is expressly provided in the Code or any other law for the time being in force. Under the Code appealable orders are:

(i) an order under Section 35A, i.e. for compensatory costs in respect of false or vexatious claims within pecuniary jurisdiction of the Court, but only for the limited ground that no order should have been made, or that such order should have been made for a lesser amount.

(ii) an order under Section 91 or Section 92 refusing leave to institute a suit under Section 91 (Public nuisances and other wrongful acts affecting the public) or Section 92 (alleged breach of trust created for public purposes of a charitable or religious nature).

(iii) an order under Section 95, i.e. compensation for obtaining arrest attachment or injunction on insufficient grounds.

(iv) an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.

(v) any order made under rules from which an appeal is expressly allowed by the rules.

No appeal lies from any order passed in appeal under this section.

In the case of other orders, no appeal lies except where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case which is to be set forth as a ground of objection in the memorandum of appeal.

A *decree*, shall be deemed to include the rejection of a plaint but not any adjudication from which an appeal lies or any order of dismissal for default. A preliminary decree decides the rights of parties on all or any of the matters in controversy in the suit but does not completely dispose of the suit. A preliminary decree may be appealed against and does not lose its appellate character by reason of a final decree having been passed before the appeal is presented. The Court may, on the application of any party to a suit, pass orders on different applications and any order which is not the final order in a suit is called an “interlocutory order”. An interlocutory order does not dispose of the suit but is merely a direction to procedure. It reserves some questions for further determination.

The main difference between an order and a decree is that when in an adjudication which is a decree appeal lies and second appeal also lies on the grounds mentioned in Section 100 of CPC. However, no appeal lies from an order unless it is expressly provided under Section 104 and Order 43 Rule 1. No second appeal in any case lies at all even in case of appealable orders. [Section 104(2)] A decree conclusively determines the rights and liabilities of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final but this is not the case in order.

A person in whose favour a decree has been passed not only includes a plaintiff but in cases like decree for specific performance of an agreement executable by either party, also includes a defendant.

Test your knowledge

Choose the correct answer

What are the essentials of a decree?

(a) There must be a formal expression of adjudication

(b) There must be a conclusive determination of the rights of parties

(c) The adjudication should have been given in the suit

(d) All the above

Correct answer: (d)

5. STRUCTURE OF CIVIL COURTS

Section 3 of the Civil Procedure Code lays down that for the purposes of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District and every Court of small causes is subordinate to the High Court and District Court.

6. JURISDICTION OF COURTS AND VENUE OF SUITS

Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication. The limit of this authority is imposed by charter, statute or a commission. If no such limit is imposed or defined, the jurisdiction is said to be unlimited. A limitation on jurisdiction of a Civil Court may be of four kinds. These are as follows :-

(i) jurisdiction over the subject matter

The jurisdiction to try certain matters by certain Court is limited by statute; e.g. a small cause court can try suits for money due under a promissory note or a suit for price of work done.

(ii) Place of suing or territorial jurisdiction

A territorial limit of jurisdiction for each court is fixed by the Government. Thus, it can try matters falling within the territorial limits of its jurisdiction.

(iii) Jurisdiction over persons

All persons of whatever nationality are subject to the jurisdiction of the Civil Courts of the country except a foreign State, it's Ruler or its representative except with the consent of Central Government.

(iv) Pecuniary jurisdiction depending on pecuniary value of the suit

Section 6 deal with *Pecuniary jurisdiction* and lays down that save in so far as is otherwise expressly provided Courts shall only have jurisdiction over suits the amount or

value of which does not exceed the pecuniary limits of any of its ordinary jurisdiction. There is no limit on pecuniary jurisdiction of High Courts and District Courts.

Jurisdiction may be further classified into following categories depending upon their powers:

(i) *Original Jurisdiction* — A Court tries and decides suits filed before it.

(ii) *Appellate Jurisdiction* — A Court hears appeals against decisions or decrees passed by sub-ordinate Courts.

(iii) *Original and appellate Jurisdiction* — The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Courts to try all civil suits unless barred : Section 9 of Civil Procedure Code states that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The explanation appended to the Section provides that a suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision on questions as a religious rites or ceremonies.

Civil Courts have jurisdiction to entertain a suit of civil nature unless barred by law. Every person has an inherent right to bring a suit of a civil nature. Civil Court has jurisdiction to decide the question of its jurisdiction although as a result of the enquiry it may be found that it has no jurisdiction over the matter. Jurisdiction depends not on the truth or falsehood of facts, but upon their nature. Jurisdiction is determinable at the commencement not at the conclusion of the inquiry (*Rex* v. *Boltan,* (1841) 1 QB 66, 74).

A suit is expressly barred if a legislation expressly says so and it is impliedly barred if a statute creates new right or liability and prescribes a particular tribunal or forum for its assertion. When a right is created by a statute and a special tribunal or forum is provided for its assertion and enforcement, the ordinary Civil Court would have no jurisdiction to entertain such disputes.

7. STAY OF SUIT (DOCTRINE OF RES SUB JUDICE)

Section 10 provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court (in India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

However, the pendency of a suit in a foreign court does not preclude the Courts in India from trying a suit founded on the same cause of action.

To prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue, Section 10 is enacted. The purpose is also to avoid conflict of decision. It is really intended to give effect to the rule of *res judicata*. The institution of second suit is not barred by Section 10. It merely says that the trial cannot be proceeded with.

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

Even though if a case is not governed by the provisions of the Section and matters in issue may not be identical, yet the courts have inherent powers to stay suit on principle analogous to Section 10.

Essential conditions for stay of suits

(i) There must be two suits instituted at different times;

(ii) The matter in issue in the later suit should be directly and substantially in issue in the earlier suit;

(iii) Such suit should be between the same parties;

(iv) Such earlier suit is still pending either in the same Court or in any other competent Court but not before a foreign Court.

If these conditions exist, the later suit should be stayed till the disposal of earlier suit, the findings of which operate as *res judicata* on the later suit.

For the applicability of Section 10, the two proceedings must be suits e.g. suit for eviction of tenant in a rent control statute cannot be sought to be stayed under Section 10 of Civil Procedure Code on the ground that tenant has earlier filed a suit for specific performance against the landlord on the basis of agreement of sale of disputed premises in favour of the tenant.

In such a case, it cannot be said that the matter in earlier suit for specific performance is directly and substantially in issue in later suit for eviction. The reason is that a suit for specific performance of contract has got nothing to do with the question regarding the relationship of landlord and tenant.

Regarding the inherent powers under Section 151, these would also not be used for staying the eviction suit as the same would frustrate the very purpose of the legislation. Therefore, invoking the powers of the Court under this Section, on the facts and circumstances of the case amounts to an abuse of the process of the Court and there can be no doubt that such a course cannot be said to subserve the ends of the justice (*N.P. Tripathi* v. *Dayamanti Devi*, AIR 1988 Pat. 123).

Test your knowledge

Choose the correct answer

Which Section is enacted to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue?

(a) Section 9
(b) Section 10
(c) Section 11
(d) Section 12

Correct answer: (b)

8. PLACE OF SUING (TERRITORIAL)

Section 15 lays down that every suit shall be instituted in the Court of the lowest grade to try it.

According to Section 16, subject to the pecuniary or other limitations prescribed by any law, the following suits (relating to property) shall be instituted in the Court within the local limits of whose jurisdiction the property is situated :

(a) for recovery of immovable property with or without rent or profits;
(b) for partition of immovable property;
(c) for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property;
(d) for the determination of any other right to or interest in immovable property;
(e) for compensation for wrong to immovable property;
(f) for the recovery of movable property actually distraint or attachment.

It has also been provided by a *proviso* that where relief could be obtained through personal obedience of the defendant such suit to obtain relief for compensation or respecting immovable property can be instituted either in a local Court within whose local limits of jurisdiction the property is situated or in the Court within whose local limits of jurisdiction the defendant voluntarily resides or carries on business or personally works for gain.

According to the Explanation, "property" means property situated in India.

Where immovable property is situated within the jurisdiction of different Courts: Where the jurisdiction for a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the local limits of jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction the property is situated provided the value of the entire claim is cognisable by such Court. (Section 17)

Where local limits of jurisdiction of Courts are uncertain: Where jurisdiction is alleged to be uncertain as being within the local limits of the jurisdiction of which of two or more Courts, any immovable property is situated, then any of the said Courts may proceed to

entertain the suit after having recorded a statement to the effect that it is satisfied that there is ground for such alleged uncertainty. (Section 18)

Where wrong done to the person or to movable property : Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the Courts. (Section 19)

Other suits: Other suits to be instituted where defendants reside or cause of action arises, subject to the limitations provided by Sections 15, 16, 18 and 19, every suit shall be instituted in a Court within local limits of whose jurisdiction the defendant, or each of the defendants (where there are more than one defendant) actually and voluntarily resides or carries on business or personally works for gain or where such defendants actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the Court is obtained or the defendant(s) who do not reside or carry on business or personally work for gain at such place acquisce in such institution or, where the cause of action arises, wholly or in part. (Section 20)

In the case of a body corporate or company it shall be deemed to carry on business at its sole or principal office in India, or in case of any cause of action arising at any other place, if it has a subordinate office, at such place.

Where there might be two or more competent courts which could entertain a suit consequent upon a part of cause of action having arisen therewith if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute. Such an agreement would be valid (*Angile Insulations* v. *Davy Ashmore India Ltd.,* (1995) 3 SCALE 203).

9. *RES JUDICATA*

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

The doctrine underlines the general principle that no one shall be twice vexed for the same cause (*S.B. Temple* v. *V.V.B. Charyulu,* (1971) 1 SCJ 215). The doctrine of *res judicata* prevails over the doctrine of *lis pendens* where there is a conflict between the two.

It prevents two different decrees on the same subject. Section 11 says that once a *res* is *judicata*, it shall not be adjudged again. The principle applies to suits in Section 11 of the Code; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of giving finality to litigation. For the applicability of the principle of *res judicata* embodied in Section 11, the following requirements are necessary:

(1) The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit.

The expression "directly and substantially in issue" means an issue alleged by

one party and denied or admitted by the another either expressly or by necessary implications (*Lonakutty* v. *Thomman*, AIR 1976 SC 1645).

In the matter of taxation for levy of Municipal taxes, there is no question of *res judicata* as each year's assessment is final for that year and does not govern latter years (*Municipal Corporation* v. *Madan Mohan,* AIR 1976 43).

A suit for eviction on reasonable requirement was compromised and the tenant was allowed to continue as tenant for the subsequent suit for ejectment on the ground of reasonable requirement, it was found that some reasonable requirement had been present during the earlier suit. The second suit was not maintainable.

(2) The former suit has been decided—former suit means which is decided earlier.

(3) The said issue has been heard and finally decided.

The issue or the suit itself is heard and finally decided, then it operates as *res judicata* and is not the reasons leading to the decision (*Mysore State E. Board* v. *Bangalore W.C. & S. Mills,* AIR 1963 SC 1128). However, no *res judicata* operates when the points could not have been raised in earlier suit. (See *Prafulla Chandra* v. *Surat Roit* AIR 1998 Ori. 41). But when a suit has been decided on merits, and the appeal is dismissed on a preliminary point, it amounts to the appeal being heard and finally decided and the decision operates as *res judicata* (*Mukunda Jana* v. *Kanta Mandal,* AIR 1979 NOC 116).

(4) Such former suit and the latter are between the same parties or litigation under the same title or persons claiming under parties above (*Isher Singh* v. *Sarwan Singh,* AIR 1965 SC 948).

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

Supreme Court in *Gouri Naidu* v. *Thandrothu Bodemma and others,* AIR 1997 SC 808, held that the law is well settled that even if erroneous, an inter party judgement binds the party if the court of competent jurisdiction has decided the lis. Thus, a decision that a gift made by a coparceners is invalid under Hindu Law between coparceners, binds the parties when the same question is in issue in a subsequent suit between the same parties for partition.

A consent or compromise decree is not a decision by Court. It is an acceptance of something to which the parties had agreed. The Court does not decide anything. The compromise degree merely has the seal of the Court on the agreement of the parties. As such, the principle of *res judicata* does not generally apply to a consent or compromise decree. But when the court on the facts proved comes to a conclusion that the parties intended that the consent decree should have the effect of deciding the question finally, the principle of *res judicata* may apply to it.

The rule of *res sub judice* relates to a matter which is pending judicial enquiry while *res Judicata* relates to a matter adjudicated upon or a matter on which judgement has

been pronounced. *Res sub judice* bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit, whereas rule of *res judicata* bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title. *Res Judicata* arises out of considerations of public policy viz., that there should be an end to litigation on the same matter. *Res-Judicata* presumes conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case. It is however essential that the matter directly and substantially in issue must be the same as in the former suit and not matters collaterally or incidentally in issue.

An application for amendment of a decree is not a 'suit' and may be entertained. But if such an application is heard and finally decided, then it will debar a subsequent application on general principles of law analogous to *res judicata*. However, dismissal of a suit for default, where there has been no adjudication on the merits of the application, will not operate as *res judicata*. Similarly an application for a review of judgment if refused does not bar a subsequent suit for the same relief on the same grounds. In the case of conflicting decrees, the last decree alone is the effective decree which can operate as *res judicata*.

According to this provision of the Civil Procedure Code, no Court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit (i.e. suit previously decided) either between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised an finally decided by such Court.

According to Explanation to the Section, the expression 'former' suit has been set out as stated above. The competence of a Court to decide an issue or suit is to be determined irrespective of any provisions as to a right of appeal from the decision of such Court. It is stated in Explanation III that the matter must have been alleged by one party and either denied or admitted expressly or impliedly by the other. Explanation IV any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such (former) suit.

Test your knowledge

State whether the following statement is 'True' or 'False'

Res Judicata in Section 11 of the Civil Procedure Code deals with bar or restraint on repetition of litigation of the same issues.

- True
- False

Correct answer: True

Constructive *res judicata* is the doctrine which has been provided for in Explanation IV (viz. matters or issues which could have been taken as ground of defence or attack in a former suit) as earlier referred to. This doctrine is based on the following grounds of public policy:

(i) There should be an end to litigation;

(ii) The parties to a suit should not be harassed to agitate the same issues or matters already decided between them;

(iii) The time of Court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties;

(iv) It is a rule of convenience and not a rule of absolute justice.

Explanation V states that any relief claimed in the plaint but not expressly granted shall be deemed to have been refused. By Explanation VI it is provided that in the case of a representation suit or class of action all persons interested in any public or private right claimed in common for themselves and others are to be deemed to claim under the persons so litigating and *res judicata* shall apply to them.

Explanations VII and VIII have been added by the Amendment Act of 1976. Explanation VII specifically lays down that the principles of *res judicata* apply to execution proceedings. The general pinciples of *res judicata* have been recognised in Explanation VIII. It provides that the decisions of a "Court of limited jurisdiction competent to decide such issue" operates as *res judicata* in a subsequent suit though the former Court had no jurisdiction to try the subsequent suit. The general principle of *res judicata* is wider in scope than Section 11 which is applied when a case does not come within four corners of Section 11. However, when the case falls under Section 11 but the conditions are not fulfilled, the general principles of *res judicata* cannot be resorted to. The conditions may be summarised as follows :

Conditions of res judicata

1. The matter must be directly and substantially in issue in two suits;
2. The prior suit should be between the same parties or persons claiming under them;
3. The parties should have litigated under the same title;
4. The court which determined the earlier suit must be competent to try the latter suit;
5. The same question is directly and substantially in issue in the latter suit.

Bar to further suit

Section 12 puts a bar to every suit where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action. Section comes into force only when a plaintiff is precluded by rules.

Test your knowledge

State whether the following statement is 'True' or 'False'

Res-Judicata does not presume conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case.

- True
- False

Correct answer: False

10. SET-OFF COUNTER-CLAIM AND EQUITABLE SET-OFF

Set-off

Order 8, Rule 6 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim.

Under Order VIII Rule 6 where in a suit for the recovery of money the defendant claims to *set off* against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary jurisdiction of the Court and where both parties fill the same character as in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwords unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Effect of Set-off

Under clause (2) the written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgement in respect both of the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filling of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order 8, Rule 6A)

Equitable set-off

Sometimes, the defendant is permitted to claim set-off in respect of an unascertained sum of money where the claim arises out of the same transaction, or transactions which can be considered as one transaction, or where there is knowledge on both sides of an existing debt due to one party and a credit by the other party found on and trusting to such debt as a means of discharging it. Generally the suits emerge from cross-demands in the same transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross-suit.

In India distinction between legal and equitable set-off is recognised. Order 8, Rule 6 contains provisions as to legal set-off. Order 8, Rule 6A recognises the counter-claim by the defendant still an equitable set-off can be claimed independently of the Code. The Common Law Courts in England do not recognise equitable claims.

11. TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

Temporary injunction

The Court may grant temporary injunction to restrain any such act (as set out below) or make such other order for the purpose of staying and preventing the wasting, damaging, alienation or sale or removal or disposition of the property or dispossession of

the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit; where it is proved by affidavit or otherwise:

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

It would be necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him if such temporary injunction (till the disposal of the suit) is not granted and that such loss or damage or harm cannot be compensated by damages. (Order XXXIX)

Interlocutory orders

Power to order interim sale

The Court may, on the application of any party to a suit order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgement in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to be sold at once. (Rule 6)

Test your knowledge

State whether the following statement is 'True' or 'False'

In order to obtain temporary injunction it is not necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him.

- True
- False

Correct answer: False

12. DETENTION, PRESERVATION, INSPECTION ETC. OF SUBJECT-MATTER OF SUIT

The Court may, on application of any party to a suit, and on such terms as it thinks fit:

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein;

(b) for all or any of the purposes as in (a) above, authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purpose as in (a) above authorise any samples to be taken,

or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (Rule 7)

Application for such order to be after notice—

(1) An application by the plaintiff for an order under Rule 6 or Rule 7 may be made at any time after institution of the suit.

(2) An application by the defendant for such an order may be made at any time after appearance.

(3) Before making an order under Rule 6 or Rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.

Deposit of money etc. in the Court

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security subject to further direction of the Court. Rule (10)

In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like nature arising out of the same contract or relating to the same property or right. The Court may grant an injunction on such terms including keeping of an account and furnishing security etc. as it may think fit.

The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question. In granting injunction, the Court has to see the balance of convenience and inconvenience of both sides. If the object of granting a temporary injunction is liable to be defeated by the delay, the Court while passing an order granting interim or temporary injunction, has a notice served on the defendant to show cause why the order granting the interim injunction should not be confirmed. On hearing the objection of the defendant to such injunction, the Court either confirms the interim injunction or cancels the order of injunction.

13. INSTITUTION OF SUIT

Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

The main essentials of the suit are—

(a) the opposing parties,

(b) the cause of action,

(c) the subject matter of the suit, and

(d) the relief(s) claimed.

The plaint consists of a heading and title, the body of plaint and the relief(s) claimed. Every suit shall be instituted in the Court of the lowest grade competent to try it, as to be determined with regard to the subject matter being either immovable or movable property or to the place of abode or of business or the defendant. A suit for a tort may be brought either where the wrong was committed or where the defendant resides or carries on business. A suit for a breach of contract may be instituted in a Court within the local limits of whose jurisdiction the defendant or each of the defendants (where there are more than one) at the time of commencement of the suit actually or voluntarily resides or carries on business or personally works for gain, or where any of the defendants so resides or works for gain or carries on business provided the leave of the Court is given or that the other defendants acquiesce in such situation. A suit for breach of contract may also be instituted where the cause of action arises that is, where the contract was made or where the breach was committed. A suit for recovery of immovable property can be instituted in a Court within the local limits of whose jurisdiction the property or any property of it is situate. Claim for recovery of any immovable property could be for (a) *mesne* profits or arrear's of rent, (b) damages for breach of contract under which the property or any part thereof is held and (c) claims in which the relief sought is based on the same cause of action.

Where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Regarding other suits, they shall be instituted in a Court within the local limits of whose jurisdiction:

(a) the defendant or each of the defendants if there are more than one at the time of the commencement of the suit actually or voluntarily resides or carries on business or personally works for gain or

(b) any of the defendants, where there are more than one at the time of the commencement of the suit, actually or voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action wholly or in part arises.

Misjoinder of Parties — Where more than one persons joined in one suit as plaintiffs or defendants in whom or against whom any right to relief does not arise or against whom separate suits are brought, no common question of law or fact would arise, it is a case of '*misjoinder of parties*'. To avoid such misjoinder, two factors are essential viz. (i) the right to relief must arise out of the same act or transaction brought by the plaintiffs or against the defendants, (ii) there is a common question of law or fact. The Code does not require that all the questions of law or of fact should be common to all the parties. It is sufficient that if there is one common question.

"*Cause of action*" means every fact which, if traversed, would be necessary for the

plaintiff to prove in order to support his right to the judgement of the Court. Thus, cause of action is a bundle of essential facts which the plaintiff has to prove in order to sustain his action. The cause of action must be antecedent to the institution of the suit. It consists of two factors (a) a right, and (b) an infringement for which relief is claimed.

Every breach of contract gives rise to a cause of action and a suit may be instituted to secure the proper relief in the place—

(a) where the contract was made, or

(b) where the breach has occurred, or

(c) the place where money is payable.

The place of breach is the place where the contract had to be performed or completed.

Where the place of payment is not specified, it is to be ascertained with reference to the intention of the parties and the circumstances of each case.

Misjoinder of Causes of Action — If the plaintiffs are not jointly interested in all the causes of action there is *misjoinder of causes of action*.

All objections regarding misjoinder of parties or of cause of action should be taken at the first hearing of the suit and before the settlement of causes unless the ground for objections had subsequently arisen.

Test your knowledge

Choose the correct answer

What are the main essentials for instituting the suit?

(a) The opposing parties

(b) The cause of action

(c) The subject matter of the suit

(d) All the above

Correct answer: (d)

14. IMPORTANT STAGES IN PROCEEDINGS OF A SUIT

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

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

from the date of service of summons (Order 8, R1). Provision though negatively worded is procedural. It does not deal with power of court or provide consequences of non-extension of time. The provision can therefore be read as directory. (*Shaikh Salim Haji Abdul Khayumsab* v. *Kumar & Ors,* AIR 2006 SC 398.

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

Every summons must be signed by the judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint. (Order 5)

If the requirement of personal appearance of the defendant or plaintiff is felt by the Court, then it has to make an order for such appearance. The summons must contain a direction that it is for the settlement of issues only or for the final disposal of the suit. Every summons must be accompanied by a copy of the plaint. Where no date is fixed for the appearance of the defendant, the Court has no power to dismiss the suit in default. The summons must also state that the defendant is to produce all documents in his possession or power upon which he intends to rely in support of his case.

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

15. DELIVERY OF SUMMONS BY COURT

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

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

(2) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means to transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court.

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(3) Where the defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be

made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgement due), the provisions of rule 21 shall not apply.

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

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

Where the Court is satisfied that there is reason to believe that the person summoned is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way the Court shall order the service of the summons to be served by affixing a copy thereof in some conspicuous place in the Court house and also upon some conspicuous part of the house in which the person summoned is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. (O.5, R.20, ‘substituted service’)

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

The above provisions shall apply to summons to witnesses.

In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the office in which he is employed. In the case of a suit being instituted against a corporation, the summons may be served (a) on the secretary or on any director, or other principal officer of the corporation or (b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business. (O.29, R.2)

Where persons are to be sued as partners in the name of their firm, the summons shall be served either (a) upon one or more of the partners or (b) at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business. Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

Test your knowledge

State whether the following statement is 'True or 'False'

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

- True
- False

Correct answer: True

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

Where the defendant bases his defence upon a document or relies upon any document in his possession in support of his defence or claim for set-off or counter claim, he has to enter such document in a list and produce it in Court while presenting his written statement and deliver the document and a copy thereof to be filed within the written statement.

Any document which ought to be produced in the Court but is not so produced, such document shall not be received in evidence at the time of hearing of the suit without the leave of the Court (O.8, R.1 and 1A). However this rule does not apply to documents produced for the cross-examination of the plaintiff witnesses or handover to a witness merely to refresh his memory.

Besides, particulars of set-off must be given in the written statement. A plea of set-off is set up when the defendant pleads liability of the plaintiff to pay to him, in defence in a suit by the plaintiff for recovery of money. Any right of counter claim must be stated. In the written statement new facts must be specifically pleaded. The defendant must deal specifically with each allegation of fact of which he does not admit the truth. An evasive denial is not permissible and all allegations of facts not denied specifically or by necessary implication shall be taken to be admitted.

Appearance of parties and consequence of non-appearance — If both the parties do not appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed (O.9, R. 3 and 4). If the defendant is absent in spite of service of summons and the plaintiff appears, the Court may proceed *ex-parte*.

In case the defendant is not served with summons, the Court shall order a second summon to be issued. If the summons is served on the defendant without sufficient time to appear, the Court may postpone the hearing to a further date. If the summon was not served on the defendant in sufficient time due to the plaintiff's default, the Court shall order the plaintiff to pay costs of adjournment. Where the hearing of the suit is adjourned *ex-parte* and the defendant appears at or before such hearing and assigns a good cause for his previous non-appearance, the defendant may be heard in answer to the suit on such terms as to costs or otherwise.

The defendant is not precluded from taking part in the proceedings even though he may not be allowed to file a written statement. If the plaintiff is absent and the defendant is present at the hearing of the suit, the Court shall make an order for the dismissal of the suit, unless the defendant admits the claim of the plaintiff or a part thereof in which case the Court shall pass a decree in favour of the plaintiff in accordance with the admission of the defendant and shall dismiss the suit to the extent of the remainder (O.9, R.8).

In any case in which a decree is passed *ex-parte* against a defendant he may apply for setting aside the decree on the ground that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing and the Court shall set aside the decree on such terms as to costs payment into Court or otherwise as it deems proper and shall appoint a day for proceeding with the suit (O.9, R.13).

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

(i) He may file an appeal against the *ex-parte* decree under Section 96 of the C.P.C.

(ii) He may file an application for review of the judgement. (O.47, R.1)

(iii) He may apply for setting aside the *ex-parte* decree.

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

It is open to a party at the trial of a suit to use in evidence any one or more of the answers or any part of the answer of the opposite party to interrogatories without putting in the others or the whole of such answers. But the court may direct that any connected answer should also be put in.

Discovery and interrogatories and production of documents

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

The objects of discovery are to:

(a) ascertain the nature of the case of the adversary or material facts for the adversary's case.

(b) obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.

(c) narrow the points at issue.

(d) avoid expense and effort in proving admitted facts.

Discovery by interrogations — Any party to a suit, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties. But interrogatories will not be allowed for the following purposes :

(i) for obtaining discovery of facts which relates exclusively to the evidence of the adversary's case or title.

(ii) to interrogate any confidential communications between the adversary and his counsel.

(iii) to obtain disclosures injurious to public interests.

(iv) interrogatories that are of a 'fishing' nature i.e. which do not relate to some definite and existing state of circumstances but are resorted to in a speculative manner to discover something which may help a party making the interrogatories.

Discovery by documents — All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents. Any party may apply to the Court for an order directing any other party to the suit to make discovery on oath the documents which are or which have been in his possession or powers relating to any matter in question. The Court may on hearing the application either refuse or adjourn it, if it is satisfied that such discovery is not necessary at all or not necessary at the stage. Or if it thinks fit in its discretion, it may make order for discovery limited to certain classes of documents.

Every party to a suit may give notice to the other party at or before the settlement of issues to produce for his inspection any document referred to in the pleadings or affidavits of the other party. If the other party refuses to comply with this order he shall not be allowed to put any such document in evidence (O.11, R.15), unless he satisfies the Court that such document relates only to his own title, he being a defendant to the suit or any other ground accepted by the Court. Documents not referred to in the pleadings or affidavits may be inspected by a party if the Court allows (O.11, R.18).

A party may refuse to produce the document for inspection on the following grounds:

(i) where it discloses a party's evidence

(ii) when it enjoys a legal professional privilege

(iii) when it is injurious to public interest

(iv) denial of possession of document.

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

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

Issues — Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law.

It is incumbent on the Court at the first hearing of the suit after reading the plaint and the written statement and after ascertaining and examination of the parties if necessary regarding the material propositions of law and facts, to frame the issues thereon for decision of the case. Where the Court is of the opinion that the suit can be disposed off on issues of law only, it shall try those issues first and postpone the framing of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision of that issue.

Issues are to be framed on material proportions of fact or law which are to be gathered from the following—

(i) Allegations made in the plaint and written statement,

(ii) Allegations made by the parties or persons present on their behalf or their pleaders on oath,

(iii) Allegations in answer to interrogatories,

(iv) Contents of documents produced by the parties,

(v) Statements made by parties or their representatives when examined,

(vi) From examination of a witness or any documents ordered to be produced.

Hearing of the suit — The plaintiff has the right to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him and in such a case the defendant has a right to begin (O.18, R.1). Where there are several issues, the burden of proving some of which lies on the other party, the party beginning has an option to produce his evidence on those issues or reserve it by way of an answer to the evidence produced by the other party, and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence. Care must be taken that no part of the evidence should be produced on those issues for which the plaintiff reserves a right to produce evidence after the defence has closed his evidence, otherwise the plaintiff shall lose his right of reserving evidence (O.18, R.3).

Test your knowledge

State whether the following statement is 'True' or 'False'

All documents relating to the matters in issue in the possession or power of any adversary can not be inspected by means of discovery by documents.

- True
- False

Correct answer: False

Affidavit — An affidavit is a written statement of the deponent on oath duly affirmed before any Court or Magistrate or any Oath Commissioner appointed by the Court or before the Notary Public. An affidavit can be used in the following cases:

(i) the Court may at any time of its own motion or on application of any party order that any fact may be proved by affidavits (Section 30).

(ii) the Court may at any time order that the affidavit of any witness may be read at the hearing unless either party bona-fide desires to cross-examine him and he can be produced (O.19, R.1).

(iii) upon application by a party, evidence of a witness may be given on affidavit, but the court may at the instance of either party, order the deponent to attend the court for cross-examination unless he is exempted from personal appearance. Affidavits are confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications. (O.19, R.2&3).

Judgement — The Court after the case has been heard shall pronounce judgement in an open court either at once or on some future day as may be fixed by the court for that purpose of which due notice shall be given to the parties or their pleaders (Order XX, Rule 1). The proper object of a judgement is to support by the most cogent reasons that suggest themselves final conclusion at which the judge has conscientiously arrived.

If the judgement is not pronounced at once every endeavour shall be made by the Court to pronounce the judgement within a period of 30 days from the date on which the hearing of the case was concluded. However, if it is not practicable to do so on the ground of exceptional and extra ordinary circumstances of the case, the Court must fix a future day which should not be a day beyond sixty days for the pronouncement of the judgement giving due notice of the day so fixed to the concerned parties. **In *Kanhaiyalal* v*. Anup Kumar,* AIR 2003 SC 689, where the High Court pronounced the judgment after two years and six months, the judgment was set aside by the Supreme Court observing that it would not be proper for a Court to sit tied over the matter for such a long period.**

Following the decision of the Supreme Court in the above mentioned case, **the Gujarat High Court in *Ramkishan Guru Mandir* v*. Ramavtar Bansraj,* AIR 2006 Guj. 34, set aside the judgment which was passed after two and a half years after conclusion of arguments holding that where a judgment was delivered after two years or more, public at large would have reasons to say bad about the Court and the judges.**

The judgement must be dated and signed by the judge. Once the judgement is signed it can not afterwords be altered or added to except as provided under Section 152 or on review.

It is a substantial objection to a judgement that it does not dispose of the question as it was presented by the parties (*Reghunatha* v. *Sri Brozo Kishoro,* (1876) 3 I.A., 154).

If a judgement is unintelligible, the appellate court may set it aside and remand the case to the lower court for the recording of judgement according to law after hearing afresh the arguments of the pleaders (*Harbhagwan* v*. Ahmad,* AIR 1922 Lah. 122).

Decree

On judgement a decree follows. Every endeavour must be made to ensure that decree is drawn up expeditiously and in any case within a period of 15 days from the date on which the judgement is pronounced. It should contain the:

(i) number of the suit(s);

(ii) names and descriptions of the parties and their registered addresses;

(iii) particulars of the claim;

(iv) relief granted or other determination of the suit;

(v) amount of cost incurred and by whom is to be paid.

Execution

Execution is the enforcement of decrees or orders of the Court. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. (Section 36. For details refer Order 21)

16. APPEALS

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or by rules having the force of statute (*Rangoon Botatoung Company* v. *The Collector, Rangoon*, 39 I.A. 197).

There are four kinds of appeals provided under the Civil Procedure Code:

(i) Appeals from original Decrees (Sections 96-99-Order 41)

(ii) Second Appeals (Sections 100-103-Order 42)

(iii) Appeals from Orders (Sections 104-106, 0.43 r. 1-2)

(iv) Appeals to the Supreme Court (Sections 109 and 112, Order 45)

Appeals from original decrees **may be preferred in the Court superior to the Court passing the decree. An appeal may lie from an original decree passed *ex parte*. Where the decree has been passed with the consent of parties, no appeal lies. The appeal from original decree lies on a question of law. No appeal lies in any suit of the nature cognizable by Courts of small causes when the amount or value of the subject matter of the original suit does not exceed ten thousand rupees.**

Second appeal: As per Section 100 of the Civil Procedure Code, an appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a substantial question of law. Under this Section, an appeal may lie from an appellate decree passed *ex parte*.

The memorandum of appeal must precisely state the substantial question of law involved in the appeal. If the High Court is satisfied that a substantial question of law is involved, such question shall be formulated by it and the appeal is to be heard on the question so formulated. The respondent is allowed to argue that the case does not involve such question. The High Court is empowered to hear the appeal on any other substantial question of law not formulated by it if it is satisfied that the case involves such question.

The High Court is not to vary or reverse any order or decree except the order which if made in favour of the party applying for revision would have finally disposed of the suit or proceedings or against which an appeal lies either to the High Court or any subordinate Court. A revision shall not operate as a stay suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

As a general rule the second appeal is on questions of law alone (Section 100).

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

Appeal from orders would lie only from the following orders on grounds of defect or irregularity in law—

(i) an order under Section 35A of the Code allowing special costs, and order under Section 91 or Section 92 refusing leave to Institute a suit of the nature referred to in Section 91 or Section 92,

(ii) an order under Section 95 for compensation for obtaining attachment or injunction on insufficient ground,

(iii) an order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree.

(iv) appealable orders as set out under Order 43, R.1.

However no appeal shall lie from following orders—

(i) any order specified in clause (a) and

(ii) from any order passed in appeal under Section 100.

Appeals to the Supreme Court would lie in the following cases:

(i) from any decree or order of Civil Court when the case is certified by the Court deciding it to be fit for appeal to the Supreme Court or when special leave is granted under Section 112 by the Supreme Court itself,

(ii) from any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,

(iii) from any judgement, decree or final orders passed by a High Court in exercise of original civil jurisdiction.

The general rule is that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary. But the appellate court has a discretion to allow additional evidence in the following circumstances:

(i) When the lower court has refused to admit evidence which ought to have been admitted.

(ii) The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.

(iii) for any other substantial cause.

but in all such cases the appellate court shall record its reasons for admission of additional evidence.

The essential factors to be stated in an appellate judgement are (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision, and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled (O.41, R.31).

The judgement shall be signed and dated by the judge or judges concurring therein.

Test your knowledge

Choose the correct answer

How many kinds of Appeals are there under the Civil Procedure Code?

(a) Two
(b) Three
(c) Four
(d) Five

Correct answer: (c)

17. REFERENCE, REVIEW AND REVISION

Reference to High Court

Subject to such conditions as may be prescribed, at any time before judgement a court in which a suit has been instituted may state a case and refer the same for opinion of the High Court and the High Court may make such order thereon as it thinks fit. (Section 113 Also refer to Rule 1 of Order 46).

Review

The right of *review* has been conferred by Section 114 and Order 47 Rule 1 of the Code. It provides that any person considering himself aggrieved by a decree or order may apply for a review of judgement to the court which passed the decree or made the order on any of the grounds as mentioned in Order 47 Rule 1, namely—

(i) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

(ii) on account of some mistake or error apparent on the face of the record, or

(iii) for any other sufficient reason,

and the Court may make such order thereon as it thinks fit.

Revision

Section 115 deals with *revision*. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(i) to have exercised a jurisdiction not vested in it by law, or

(ii) to have failed to exercise a jurisdiction so vested, or

(iii) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

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

Provided that the High Court shall not vary or reverse any order made or any order deciding an issue in the course of a suit or proceeding except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

The High Court shall not vary or reverse any decree or order against which an appeal lies either to the High Court or any Court subordinate thereto.

A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or proceeding is stayed by the High Court.

18. SUITS BY OR AGAINST A CORPORATION

Signature or verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. (O.29, R.1)

Service of summons

Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served:

(a) on the secretary or any director or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business. (O.29, R. 2)

Power of the Court to require personal attendance

The Court may at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. (O.29, R.3)

Test your knowledge

State whether the following statement is 'True' or 'False'

The right of review has been conferred by Section 114 and Order 47 Rule 1 of the Code.

- True
- False

Correct answer: True

19. SUITS BY OR AGAINST MINORS

A minor is a person (i) who has not completed the age of 18 years and (ii) for whose person or property a guardian has been appointed by a Court, for whose property is

under a Court of Wards, the age of majority is completed at the age of 21 years.

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The next friend should be a person who is of sound mind and has attained majority. However, the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant for the suit. (O.32, Rules 1 and 4).

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. (O.32, R.2).

Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor [O.32, R.3(1)]. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff [O.32, R.3(2)].

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continues as such throughout all proceeding arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree. [O.32, R.3(5)]

When minor attain majority — When the minor plaintiff attains majority he may elect to proceed with the suit or application or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next frined and for leave to proceed in his own name and the title of the suit will be corrected. If he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant apply for an order to dismiss the suit on repayment of the costs incurred by the defendant or opposite party etc. (For details see Rules 12 and 13 - Order 32)

20. SUMMARY PROCEDURE

A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37. Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. (Order 37)

The rules for summary procedure are applicable to the following Courts:

(1) High Courts, City Civil Courts and Small Courts;

(2) Other Courts: In such Courts the High Courts may restrict the operation of order 37 by issuing a notification in the Official Gazette.

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

Institution of summary suits

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

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

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

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

Leave to defend

Order 37 rule 3 prescribe the mode of service of summons etc. and leave to defend. The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such term as the Court or the Judge may think fit. However, such leave shall not be granted where:

(1) the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence or that the defences are frivolous or veracious, and

(2) the part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by him in the Court.

On the hearing of such summon for judgement, the plaintiff shall be entitled to judgement provided the defendant has not applied for leave to defend or if such application has been made and is refused or where the defendant is permitted to defend but he fails to give the required security within the prescribed time or to carry out such other precautions as may have been directed by the Court.

After decree, the Court may, under special circumstances set-aside the decree and if necessary stay or set-aside execution, and may give leave to the defendant to appear and to defend the suit. (Rule 4 order 37)

The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

Test your knowledge

Choose the correct answer

To which of the Courts are the rules for summary suit procedure applicable?

(a) High Courts
(b) City Civil Courts
(c) District Courts
(d) Small Courts

Correct answer: (a), (b) and (d)

LESSON ROUND-UP

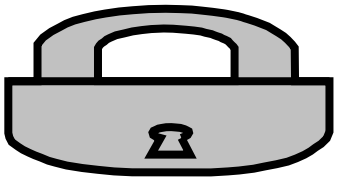
- The Civil Procedure Code consists of two parts. 158 Sections form the first part and the rules and orders contained in Schedule I form the second part. The object of the Code generally is to create jurisdiction while the rules indicate the mode in which the jurisdiction should be exercised.
- The Code defines important terms that have been used thereunder and deals with different types of courts and their jurisdiction. Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication.
- Under the Code of Civil Procedure, a civil court has jurisdiction to try a suit if two conditions are fulfilled: (i) the suit must be of a civil nature; and (ii) the cognizance of such suit should not have been barred. Jurisdiction of a court may be of four kinds: jurisdiction over the subject matter; local or territorial jurisdiction; original and appellate jurisdiction; pecuniary jurisdiction depending on pecuniary value of the suit.
- Section 10 deals with stay of civil suits. The object of the rule contained in Section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel suits in respect of same matter in issue. The section intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions.
- The Code embodies the doctrine of *res judicata* that is, bar or restraint on repetition of litigation of the same issues. It enacts that since a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigaton. It is pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues. In the absence of such a rule there would be no end to litigation and the parties would be put to constant trouble, harassment and expenses.
- In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like nature arising out of the same contract or relating to the same property or right. The Court may grant an injunction on such terms including keeping of an account and furnishing security, etc. as it may think fit.
- The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question.

- The Code also provides for making certain interlocutory orders. The court has power to order sale of any moveable property which is the subject-matter of the suit or attached before judgement in such suit which is subject to speedy and natural decay or for any just and sufficient cause desirable to be sold at once.
- It can also order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein. And for that purpose it can authorise any person to enter upon or into any land or building in the possession of any other party to such suit or authorise any samples to be taken or observation to be made or experiment to be tried for the purpose of obtaining full information.
- Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.
- The main essentials of the suit are: (i) the opposing parties; (ii) the cause of action; (iii) the subject matter of the suit, and (iv) the relief(s) claimed.

Every suit shall be instituted in the Court of the lowest grade to try it. The Code specifies the categories of suits that shall be instituted in the court within the local limits of whose jurisdiction the property is situated. This is subject to the pecuniary or other limitations prescribed by any law. The various stages in proceedings of a suit have been elaborately laid down under the Code.

- It also lays down provisions relating to appeals, reference, review and revision. Any person who feels aggrieved by any decree or order passed by the court may prefer an appeal in a superior court if an appeal is provided against that decree or order or may make an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court.
- A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37. Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.

SELF-TEST QUESTIONS



1. Discuss Jurisdiction of Civil Courts.
2. Define following terms:
   (i) Order
   (ii) Judgement
   (iii) Decree.
3. What is *res judicata* and stay of suits.
4. Briefly discuss the provisions relating to reference, review and revision.
5. Explain in brief Summary Procedure.
6. Discuss the powers of the Court to grant temporary injunction.
7. Explain set-off, counter-claim and equitable set-off under the Civil Procedure Code, 1908.

Suggested Readings:

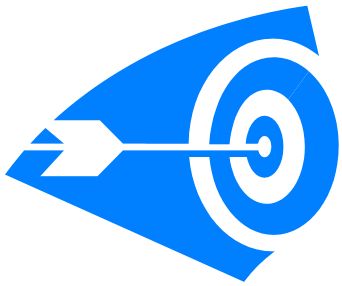
(1) The Code of Civil Procedure, 1908

(2) Civil Procedure Code—*M.P. Tandon*

(3) Civil Procedure Code—*D.F. Mulla*

STUDY IX

THE CODE OF CRIMINAL PROCEDURE, 1973



LEARNING OBJECTIVES

Criminal law occupies a pre-dominant place among the agencies of social control and is regarded as a formidable weapon that society has forged to protect itself against anti-social behaviour. The law of criminal procedure is intended to provide a mechanism for the enforcement of criminal law. Without the proper procedural law the substantive criminal law which defines offences and provides punishment for them would be almost worthless. The objective of this lesson is to impart knowledge to the students so that they develop proper perspective about the important provisions of the criminal procedure. At the end of the Study Lesson you should be able to understand

- Important Definitions
- Classes of criminal courts
- Power of courts
- Arrest of persons
- Summons and warrants
- Security for keeping the peace and good behaviour
- Maintenance of public order and tranquility
- Preventive action of the police and their powers to investigate
- Powers of Magistrate
- Limitation for taking cognizance of certain offences
- Summary trials

1. INTRODUCTION

The Code of Criminal Procedure, 1898 (Cr. P.C.) was repealed by the Code of 1973 enacted by Parliament on 25th January, 1974 and made effective from 1.4.1974 so as to consolidate and amend the law relating to Criminal Procedure. Company Secretaries and the secretarial profession would have relatively less to do with the Code of Criminal Procedure than with other procedural laws, except for safeguarding against incurring of liability for criminal offences by Directors, Secretary, Manager or other Principal Officer under different corporate and industrial laws. Nevertheless, it is necessary that company secretaries and other secretarial staff should be familiar with some of the relevant features of the Code. It is an Act to consolidate and amend the law relating to the

procedure to be followed in apprehending the criminals, investigating the criminal cases and their trial before the Criminal Courts. It is an adjective law but also contains provisions of substantive nature (e.g. Chapters VIII, IX, X and XI). It's object is to provide a machinery for determining the guilt of and imposing punishment on offenders under the substantive criminal law, for example, the Indian Penal Code (I.P.C.). The two Codes are to be read together. The Code also provides machinery for punishment of offences under other Acts.

2. IMPORTANT DEFINITIONS

Offence

Section 2(n) of the Cr.P.C. defines the word "offence" to mean any act or ommission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1871. However, the term is more elaborately defined in Section 40 of the I.P.C. which states that "offence" denotes a thing made punishable by the Code. Section 39 of the Cr. P.C. imposes a duty on every person who is aware of the commission of or of intention to commit an offence, to give information of certain offences which are specified in Clause (i) to (xii) of sub-Section (1). An offence is what the legislature classes as punishable. *Mens Rea* a bad intention or guilt is an essential ingredient in every offence.

Mens rea

Mens rea means a guilty mind. The fundamental principle of penal liability is embodied in the maxim *actus non facit ream nisi mens sit rea*. The act itself does not constitute guilt unless done with a guilty intent. Thus, unless an act is done with a guilty intention, it will not be criminally punishable. The general rule to be stated is "there must be a mind at fault before there can be a crime". *Mens rea* is a subjective matter. Thus *mens rea* is an essential ingredient in every criminal offence.

The motive is not an intention. Intention involves foresight or knowledge of the probable or likely consequences of an injury. In short, *mens rea* is the state of mind which accompanies and directs the conduct resulting in the *actus reus*.

Bailable Offence and Non-bailable Offence

A "bailable offence" means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force. "Non-bailable" offence means any other offence. [Section 2(a)]

Cognizable Offence and Non-cognizable Offence

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

"Non-cognizable offence" means an offence for which, and "non-cognizable" case means a case in which, a police officer has no authority to arrest without warrant. Thus, a non-cognizable offence needs special authority to arrest by the police officer. [Section 2(c) and 2(l)]

In order to be a cognizable case under Section 2(c) of the Code, it would be enough if one or more (not ordinarily all) of the offences are cognizable.

(*Note:* It may be observed from the First Schedule that non-cognizable offences are usually bailable while cognizable offences are generally non-bailable).

Test your knowledge

Choose the correct answer

Which one of the following is the essential ingredient to try a person under criminal law?

(a) A guilty personality

(b) A guilty mind or intent

(c) An intention

(d) A motive

Correct Answer: (b)

Complaint

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include a police report. [Section 2(d)]

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

(i) an oral or a written allegation;

(ii) some person known or unknown has committed an offence;

(iii) it must be made to a magistrate; and

(iv) it must be made with the object that he should take action.

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

Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173.

Test your knowledge

State whether the following statement is "True" or "False"

In a non-cognizable case, a police officer can arrest a person without a warrant.

Correct Answer: False

Bail

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

An *"anticipatory bail"* is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (*State of Assam* v. *R.K. Krishna Kumar* AIR 1998 SC 144).

Inquiry

It means every inquiry other than a trial, conducted under this Code by a Magistrate or Court. *[Section 2(g)].* It carries the following three features:

— the inquiry is different from a trial in criminal matters;

— inquiry is wider than trial;

— it stops when trial begins.

Investigation

It includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. [Section 2(h)]

The three terms — 'investigation', 'inquiry' and 'trial' denote three different stages of a criminal case. The first stage is reached when a police officer either on his own or under orders of a Magistrate investigates into a case (Section 202). If he finds that no offence has been committed, he submits his report to the Magistrate who drops the proceedings. But if he is of different opinion, he sends that case to a Magistrate and then begins the second stage—a trial or an inquiry. The Magistrate may deal with the case himself and either convict the accused or discharge or acquit him. In serious offences the trial is before the Session's Court, which may either discharge or convict or acquit the accused. (Chaper XVIII)

Judicial Proceeding

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

[Section 2(i)]

Pleader

With reference to any proceedings in any Court, it means a person authorised by or under any law for the time being in force, to practise in such Court and includes any other person appointed with the premission of the Court to act in such proceeding. [Section 2(q)]

It is an inclusive definition and a non-legal person appointed with the permission of the Court will also be included.

Public Prosecutor

A "public prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor. [Section 2(u)]

Public prosecutor, though an executive officer is, in a larger sense, also an officer of the Court and he is bound to assist the Court with his fair views and fair exercise of his functions.

Summons and Warrant Cases

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

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

Test your knowledge

The three different stages of a criminal case are:

(a) Investigation
(b) Inquiry
(c) Arrest
(d) Trial

Correct Answer: (a), (b), (d)

3. CLASSES OF CRIMINAL COURTS

Following are the different classes of criminal courts:

(1) High Courts;

(2) Courts of Session;

(3) Judicial Magistrates of the first class, and, in any metropolitan area; Metropolitan Magistrates;

(4) Judicial Magistrates of the second class; and

(5) Executive Magistrates;

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

4. POWER OF COURTS

Chapter III of Cr.P.C. deals with power of Courts. One of such power is to try offences. Offences are divided into two categories:

(a) those under the Indian Penal Code; and

(b) those under any other law.

According to Section 26, any offence under the Indian Penal Code, 1860 may be tried by the High Court or the Court of Session or any other Court by which such offence is shown in the First Schedule to be triable, whereas any offence under any other law shall be tried by the Court mentioned in that law and if not mentioned, it may be tried by the High Court or any other Court by which such offence is shown in the First Schedule to be triable.

This Section is a general Section and is subject to the other provisions of the Code.

Power of the Court to pass sentences:

(a) Sentences which High Courts and Sessions Judges may pass

According to Section 28, a High Court may pass any sentence authorised by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, but any sentence of death passed by any such judge shall be subject to confirmation by the High Court.

An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

Thus, Section 26 of the Code enumerates the types of Courts in which different offences can be tried and then under Section 28, it spells out the limits of sentences which such Courts are authorised to pass.

(b) Sentences which Magistrates may pass

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

(i) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(ii) A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years or of a fine not exceeding five thousand rupees, or of both.

(iii) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.

(iv) A Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, and the powers of the Court of a Magistrate of the First class.

(c) Sentence of imprisonment in default of fine

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

It provides that the Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law provided the that the term:

(i) is not in excess of the powers of the Magistrate under Section 29; and

(ii) where imprisonment has been awarded as part of the substantive sentence, it should not exceed 1/4th of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(d) Sentences in cases of conviction of several offences at one trial

Section 31 relates to the quantum of punishment which the Court is authorised to impose where the accused is convicted of two or more offences at one trial.

Test your knowledge

An 'anticipatory bail' is granted by:

(a) The High Court

(b) The Supreme Court

(c) The Court of Session

(d) Any Magistrate

Correct Answer: (a) and (c)

5. ARREST OF PERSONS

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

(a) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of housebreaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be

stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasobale complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who being a released convict, commits a breach of any rule, relating to notification of residence or change of or absence from residence; or

(i) for whose arrest any requistion, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other causes for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition. (Section 41)

Arrest on refusal to give name and residence

If any person who is accused of committing a non-cognizable offence does not give his name, residence or gives a name and residence which the police officer feels to be false, he may be taken into custody. However, such person cannot be detained beyond 24 hours if his true name and address cannot be ascertained or fails to execute a bond or furnish sufficient sureties. In that event he shall be forwarded to the nearest Magistrate having jurisdiction. (Section 42)

Arrest by a private person

A private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender *(Section 43)*. **This right of arrest arises under the Common Law which applies to India Ramaswamy Aiyar (1921) 44 Mad. 913.**

Arrest by Magistrate

Under Section 44 clause (1), the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody. Under in clause 2, the Magistrate has power to arrest a person for which he is competent and has also been authorised to issue a warrant. However, Section 45 protects members of Armed Forces from arrest where they do something in discharge of their official duties. They could be arrested only after obtaining the consent of the Central Government.

Arrest how made

Section 46 sets out the manner in which an arrest is to be made. The Section authorises a police officer or other person making an arrest to actually touch or confine the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance. The Section does not give a right to cause the death of a person who is not accused of an offence punishable with death sentence or life imprisonment. The word "arrest" when used in its ordinary and natural sense means the apprehension or restrain or the deprivation of one's personal liberty to go where he pleases. The word "arrest" consists of taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of a criminal offence.

Section 47 is an enabling provision and is to be used by the police officer with regard to exigencies of a situation. Section 48 authorises a police officer to pursue the offender in to any place in India for the purpose of effecting his arrest without warrant. Ordinarily, a police officer is not at liberty to go outside India and to arrest an offender without a warrant, but if he can arrest an offender without warrant who escapes into any place in India, he can be pursued and arrested by him without warrant. (See also Section 60)

Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay and subject to the provisions relating to bail, Article 22(2) of the Constitution of India also provides for producing the arrested person before the Magistrate within 24 hours.

When a person is arrested under a warrant, Section 76 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for a period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can under Section 167 order his detention for a term not exceeding 15 days, or he can be taken to a Magistrate, under whose jurisdiction he is to be tried, and such Magistrate can remand him to custody for a term which may exceed 15 days but not more than 60 days.

Officers in-charge of the concerned police stations shall report to the Magistrate the cases of all persons arrested without warrant, within the limits of their respective police stations whether such persons have been admitted to bail or otherwise. (Section 58)

A person arrested by a police officer shall be discharged only on his own bond or on bail or under the special order of a Magistrate, (Section 59). If a person in lawful custody escapes or is rescued, the person, from whose custody he escaped or was rescued, is empowered to pursue and arrest him in any place in India and although the person making such arrest is not acting under a warrant and is not a police officer having authority to arrest, nevertheless, the provisions of Section 47 are applicable which stipulates provisions relating to search of a place entered by the person sought to be arrested.

6. SUMMONS AND WARRANTS

The general processes to compel appearance are:

(1) Summons (Section 61)

(2) Warrants (Section 70)

7. SUMMONS

A summon is issued either for appearance or for producing a document or thing which may be issued to an accused person or witness. Every summons issued by the Court shall be in writing, in duplicate, signed by the Presiding Officer of such Court or by such officer as is authorised by the High Court and shall bear the seal of the Court (Section 61). The summons should be clear and specific in its terms as to the title of the Court, the place at which, the day and time of the day when, the attendance of the person summoned is required.

Service of summons

The summons shall be served by a police officer or by an officer of the Court or other public servant (Section 62). In case the service cannot be effected by the exercise of due diligence, the serving officer can perform substituted service by affixing one of the duplicates of the summons to some conspicuous part of the house or homestead in which person summoned ordinarily resides, and thereupon the Court, after making such enquiries as it thinks fit may either declare that the summons has been duly served or order fresh service, as it considers proper (Section 65).

The service of summons on corporate bodies, and societies

The service of summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the Chief Officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

The word "corporation" in this Section means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860. Thus, the societies may not be formally incorporated, yet they fall within the purview of this section. (Section 63)

When personal service of summons cannot be affected under Section 62, the extended service under Section 64 can be secured by leaving one of the duplicates with some adult male member of his family residing with him who may also be asked to sign the receipt for that. A servant is not a member of the family within the meaning of Section 64.

In the case of a Government Servant, the duplicate copy of the summons shall be sent to the head of the office by the Court and such head shall thereupon cause the summons to be served in the manner provided by Section 62 and shall return it to the Court under his signature with the endorsement required by Section 62. Such signature shall be evidence of due service. (Section 66)

Test your knowledge

Choose the correct answer

When a person is arrested without a warrant, he/she can be kept in the custody not more than:

(a) 24 hours
(b) 48 hours
(c) 72 hours
(d) 15 days

Correct Answer: (a)

8. WARRANT OF ARREST

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

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

Such warrant is only for protection of a person before the concerned Court and not before the police officer.

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

9. PROCLAMATION AND ATTACHMENT

Where a warrant remains unexecuted, the Code provides for two remedies:

(1) issuing a proclamation (Section 82); and
(2) attachment and sale of property (Section 83).

If a Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be

executed, the Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than 30 days from the date of publishing such proclamation. (Section 82)

While issuing proclamation, the Magistrate must record to his satisfaction that the accused has absconded or is concealing himself. The object of attaching property is not to punish him but to compel his appearance.

10. SUMMONS TO PRODUCE

Sometimes it is necessary that a person should produce a document or other thing which may be in his possession or power for the purposes of any investigation or inquiry under this Code. This can be compelled to be produced by issuing summons (Sections 91 and 92) or a warrant (Sections 93 to 98).

11. SEARCH WARRANT

According to Section 93, a search warrant can be issued only in the following cases:

(1) where the Court has reason to believe that a person summoned to produce any document or other thing will not produce it;

(2) where such document or thing is not known to the Court to be in the possession of any person; or

(3) where a general inspection or search is necesary. However, a search warrant may be general or restricted in its scope as to any place or part thereof.

But such warrant shall not be issued for searching a document, parcel or other thing in the custody of the postal or telegraph authority, by a magistrate other than a District Magistrate or Chief Judicial Magistrate, nor would such warrant be issued so as to affect Sections 123 and 124 of the Indian Evidence Act, 1872 or the Bankers' Book Evidence Act, 1891.

In terms of Section 97 any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class who has reasons to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant for the search of the person so confined. The person if found shall be immediately produced before the Magistrate for making such orders as in the circumstances of the case he thinks proper.

Test your knowledge

Choose the correct answer

A search warrant can be issued under:

(a) Section 91

(b) Section 92

(c) Sub-section (2)

(d) Section 93

Correct Answer: (d)

12. SECURITY FOR KEEPING THE PEACE AND GOOD BEHAVIOUR AND PROCEEDINGS FOR MAINTENANCE OF PUBLIC ORDER

(i) Security for keeping the peace and for good behaviour

The provisions of Chapter VIII are aimed at persons who are a danger to the public by reason of the commission of certain offences by them. The object of this chapter is prevention of crimes and disturbances of public tranquillity and breach of the peace.

Security for keeping the peace on conviction

When a Court of Session or Court of a Magistrate of first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

The offences specified under sub-section (2) are as follows:

(a) any offence punishable under Chapter VIII of the India Penal Code 1860.

(b) any offence which consists of or includes, assault or using criminal force or committing mischief;

(c) any offence of criminal intimidation;

(d) any other offence which caused, or was intended or known to be likely to cause a breach of the peace.

However, if the conviction is set-aside on appeal or otherwise, the bond so executed shall become void. (Section 106)

Security for keeping the peace in other cases

When an Executive Magistrate receives information that any person is likely to:

(i) commit a breach of peace; or

(ii) disturb the public tranquillity; or

(iii) do any wrongful act that may probably occasion a breach of the peace; or disturb the public tranquillity;

he may require such person to show cause why he should not be ordered to execute a bond for keeping the peace for a period not exceeding one year as the Magistrate deem fit. (Section 107)

(ii) Maintenance of public order and tranquillity

A—Unlawful assemblies

Dispersal of assembly by use of civil force

Any Executive Magistrate or office in-charge of a police station or, in the absence of

such officer in-charge, any other officer not below the rank of sub-inspector may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse and it shall be thereupon the duty of the members of such assembly to disperse accordingly.

If any such assembly does not disperse or conducts itself in a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to above may proceed to disperse such assembly by force and may require the assistance of any male person not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly and if necessary arresting and confining the persons who form part of it, in order to disperse such assembly. (Section 129)

Use of armed forces to disperse assembly

If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces and to arrest and confine such persons in order to disperse the assembly or to have them punished.

Section 132 protects persons for any act purporting to be done under Sections 129 to 131. No prosecution shall be instituted against such persons in any criminal Court except with the sanction of Central Government if the person is an officer or member of the armed forces or with the sanction of State Government in any other case. *(Section 130)*

B—Public nuisances

Conditional order for removal of nuisance

Section 133 lays down the following public nuisances which can be proceeded against:

(1) the unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(2) carrying on any trade or occupation, or keeping of any goods or merchandise, injurious to the health of the community; or

(3) the construction of any building or the disposal of any substance, as is likely to cause conflagration or explosion; etc.

(4) the building, tent or structure near a public place.

(5) the dangerous animal requiring destroying, confining or disposal.

For initiating prevention under this Section the Magistrate should keep in mind that he is acting purely in the public interest. For the applicability of clause A, the public must have the right of way which is being obstructed.

Power to issue order in urgent cases of nuisance or apprehended danger

As per Section 144 of the Code where in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, in such cases the Magistrate

may by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent or tends to prevent, obstruction, annoyance of injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquillity, or a riot, or an affray.

An order under this Section may be passed ex-parte in cases of emergency or in cases where the circumstances do not admit of the serving of notice in due time upon the person against whom the order is directed. An order under this Section can remain in force for two months, and may be extended further for a period not exceeding six months by the State Government if it considers necessary.

13. PREVENTIVE ACTION OF THE POLICE AND THEIR POWERS TO INVESTIGATE

Section 149 authorises a police officer to prevent the commission of any cognizable offence. If the police officer receives the information of a design to commit such an offence, he can communicate such information to his superior police officer and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence. The police officer may arrest the person without orders from Magistrate and without a warrant if the commission of such offence cannot be otherwise prevented

The arrested person can be detained in custody only for 24 hours unless his further detention is required under any other provsions of this Code or of any other law. (Sections 150 and 151) Section 152 authorises a police officer to prevent injury to public property.

Inspection of weights and measures

Any officer incharge of the police station may without a warrant enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false, and if he finds in such place any false weights, measures or instruments he may seize the same and shall give information of such seizure to a Magistrate having jurisdiction. (Section 153)

14. INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

Information in cognizable cases

Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant. Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. (Section 154)

The above information given to a police officer and reduced to writing is known as First Information Report (FIR). Although such words are not mentioned in the Criminal Procedure Code. The investigation of the case proceeds on this information only. Thus, the principal object of this Section is to set the criminal law in motion and to obtain information about the alleged criminal activities so as to punish the guilty.

For the purpose of enabling the police to start investigation, it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After

all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer-in-charge of the police station as indicated in Section 154 of the Code. (*Mohd. Yousuf* v. *Afaq Jahan,* AIR 2006 SC 708.)

Any person aggrieved by a refusal on the part of an officer incharge of a police station to record the information may send the substance of such information in writing and by post to the Superintendent of Police concerned who if satisfied that such information discloses the commission of a cognizable offence shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him.

A copy of the information as recorded under sub-section (1) shall be given to the informant free of cost.

Information as to non-cognizable cases and investigation of such cases

When information is given to an officer incharge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate. (Section 155)

The police officer is not authorised to investigate a non-cognizable case without the order of Magistrate having power to try such cases, and on receiving the order, the police officer may exercise the same powers in respect of investigation as he may exercise in a cognizable case.

Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable. [Section 155(4)]

Police officer's powers to investigate cognizable case

In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorised by the Magistrate in this behalf. Any Magistrate empowered under Section 190 may order such investigation as above mentioned. Sections 160 and 161 authorise a police officer making an investigation to require the attendance of and may examine orally any person who appears to be acquainted with the facts and circumstances of the case. *(Section 156)*

Search by police officer

This Section authorises general search if the police officer has reason to believe that anything necessary for the purpose of an investigations may be found. The officer acting under this sub-section must record in writing his reasons for making of a search. But, the illegality of search will not affect the validity of the articles or in any way vitiate the recovery of the articles and the subsequent trial. (Section 165)

Whenever any person is arrested or detained in custody and it appears that the investigation cannot be completed within the period of twenty four hours as laid down in

Section 57 and that there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or other competent investigation officer shall promptly transmit to the nearest judicial Magistrate a copy of the entries in the diary relating to the case, and shall forward the accused to such Magistrate at the same time (required to be mentioned day by day under Section 172). The Magistrate may then authorise the detention of the accused in custody for a term not exceeding of fifteen days. (Section 167) Every investigation must be completed without undue delay. On completion of investigation, the competent police officer under the Code shall forward a police report with the prescribed details to a Magistrate empowered to take cognizance of the offence and send along with the report all documents or relevant extracts on which the prosecution intends to rely. (Section 173)

Test your knowledge

State whether the following statement is "True" or "False"

If a case relates to two or more offences and one of the offences is a cognizable offence, the case will be treated as a non- cognizable case.

Correct Answer: False

15. POWERS OF MAGISTRATE

Cognizance of an offence by Magistrate

Section 190 relates to cognizance of offences by Magistrates. The Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it are fulfilled otherwise the Court does not obtain jurisdiction to try the offence (*Mohd. Safi,* AIR 1966 SC 69).

Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon:

(1) receiving a complaint of facts constituting such offence;

(2) a police report of such facts;

(3) information received from any person other than a police officer;

(4) his own knowledge that such offence has been committed.

When a Magistrate takes cognizance of an offence upon information received from any person other than a police officer or upon his own knowledge then the accused is informed that he is entitled to to have the case inquired into or tried by another Magistrate and if the accused objects to further proceedings before the Magistrate taking cognizance, the case is transferred to other Magistrate as is specified by the Chief Judicial Magistrate. (Section 191)

The Chief Judicial Magistrate may after taking cognizance of an offence transfer the case for inquiry or trial to any competent Magistrate subordinate to him. Similarly a first class Magistrate may transfer a case to such other competent Magistrate to try as the

Chief Judicial Magistrate specifies. *(Section 192)*

Cognizance of an offence by Courts of Session

The Court of Session does not take cognizance of any offence, as a Court of original jurisdiction unless the case has been committed to it by a competent Magistrate. The Additional Sessions Judge and Asstt. Sessions Judge try such cases as the High Court may direct or the Sessions Judges may make over to them. (Sections 193 and 194)

Complaints to Magistrates

A Magistrate taking cognizance of an offence on complaint examines the complainant and the witnesses if any upon oath and then the substance of such examination is reduced to writing and signed by the complainant and witnesses and also by the Magistrate.

However, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses. If a public servant in the discharge of his official duties or a Court has made the complaint or if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192. Further, if the Magistrate makes over the case to another Magistrate, under Section 192 after examining the complainant and the witnesses, they need not to be re-examined by the latter Magistrate. (Section 200)

If a complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall return it for presentation to the proper Court if the complaint is in writing, and if the complaint is oral, he should direct the complainant to the proper Court. (Section 201)

The Magistrate enquiring into a case may take evidence of witnesses on oath but where the offence is triable by the Court of Session, he shall call upon the complainant to produce all his witnesses and examines them on oath. He may dismiss the complaint if after considering the statement on oath and the result of the investigation or enquiry, there is no sufficient ground for proceeding and may record his reasons for doing so. (Sections 201 to 203)

On the other hand if the Magistrate is of opinion that there is sufficient ground for taking cognizance of an offence he may either issue summons for attendance of the accused if the case appears to be a summons-case or he may in a warrant case issue a warrant or summons for the accused to be produced at a certain time before such Magistrate. It is important that no summon or warrant shall be issued against the accused unless a list of prosecution witnesses has been filed. In a proceeding instituted on the complaint in writing a copy of the complaint is to be sent with every summons or warrant. (Section 204)

Every charge under this Code shall state the offence with which the accused is charged specifying the law and the name of the offence, particulars of time and place of the alleged offence (Sections 211 and 212). For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately (Section 218). If more than one offence is committed by the same person in one series of acts so connected together as to form the same transaction, he may be charged with and tried at one trial for every such offence (Section 220). Persons accused of the same offence, committed in the course of the same transaction, or abetment of such offence may be charged jointly and tried together.

A person who has once been tried by a Court of competent jurisdiction for an offence and is convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence, nor on the same facts for any other offence A person discharged under Section 258 (i.e. a summons-case where there is judgement of acquittal by a Judicial Magistrate) shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which such Court is subordinate.

The judgement in every trial in any Criminal Court of original jurisdiction shall be pronounced by the presiding officer by delivering or reading out the whole of the judgement or the operative part of the judgement in open Court. (Section 353) Every judgement should be written in the language of the Court and should contain the point or points for determination, the decision thereon and the reasons for the decision. It should specify the offence and the Section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced (Section 354). Except as otherwise specified in the Code, no court when it has signed its judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error (Section 362). A copy of the judgement and also if so desired a certified copy are to be given to the accused free of cost. (Section 363)

Test your knowledge

State whether the following statement is "True" or "False"

Summons or warrant can not be issued against the accused unless and until the list of prosecution witnesses has been filed.

Correct Answer: True

No appeal shall lie from any judgement or order of Criminal Court except as provided for by this Code (Section 372). In the case of an acquittal, the State. Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Every appeal in the case of appealable orders shall be made in the form of a petition in writing presented by the appellant or his pleader and shall be accompanied by a copy of the judgement or order appealed against. No appeal shall be dismissed summarily unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same (Section 384). After perusing such record and hearing the parties, the apellant Court may dismiss the appeal if there are no sufficient grounds for interfering or alter the findings and acquit or discharge the accused or order re-trial by a competent court subordinate to the Appellate Court (Section 386). An Appellate Court may if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct

it to be taken by a Magistrate. (Section 391)

A Court may refer a case to High Court if it is of the opinion that is involves a question as to validity of any Act, Ordinance or Regulation and the Court is of opinion that such Act, Ordinance, or Regulation is in-operative or invalid but has not been declared so by the High Court or the Supreme Court. The Court has to state setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court. The High Court passes such order as it deems fit and causes a copy of such order to be sent to the Court making the reference which shall dispose of the case conformably to the said order. The High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 in the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge. If an appeal lies, but an applications 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, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

Under Section 438, provisions have been made for a person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction and that Court may if it thinks fit direct that in the event of such arrest, the person shall be released on bail on such conditions which the Court may include in such directions.

Bail may be taken when any person other than a person accused of a non-bailable offence, is arrested or detained without warrant by an officer-in-charge of a police station or is brought before a Court, and is prepared at anytime while in custody or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. Such police officer or the Court if it thinks fit may instead of taking bail from such person discharge him on executing a bond without sureties for his appearance as may be required (Section 436). In case any surety becomes insolvent or dies, the Court by whose order such bond was taken, or a Magistrate (First class) may order the person from whom such security was demanded to furnish, fresh security in accordance with the directions of the original order. (Section 447)

16. LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

In general, there is no limitation of time in filling complaints under the Code. But delay may hurdle the investigation. Further, the Indian Limitation Act provides the period of limitation for appeal and revision applications. Therefore, chapter XXXVI has been introduced in the Code prescribing limitation period for taking cognizance of certain offences. (Sections 467 to 473)

Except as otherwise specifically provided in the Code, no Court shall take cognizance of an offence after the expiry of the period of limitation mentioned below:

(a) six months, if the offence is punishable with fine only.

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year; and

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

The period of limitation in relation to offences which may be tried together shall be determined with reference to the gravity of the offence where the punishment inflicted for such offence is more severe or the most severe.

Commencement of the period of limitation

The period in relation to an offender commences (a) on the date of the offence; (b) if the commission of the offence was not known to the person aggrieved or to the police officer, the first day on which either such offence comes to the knowledge of such person or to any police officer, whichever is earlier; (c) where the identity of the offender is not known, the first day on which such identity becomes known either to the person aggrieved or the police officer whichever is earlier. (Section 469)

The object of Section 468 is to prescribe the period of limitation and the Court is enjoined not to take cognizance of an offence specified in sub-section (2) after the expiry of such period of limitaiton. The object is to prevent the parties from filing the case after a long time so that the material evidence may not vanish. Section 469 fixes the day from which the period of limitation should begin to run. However, Section 470 provides provisions for exclusion of time in certain cases. These are as under:

(a) the period during which another prosecution was deligently prosecuted (the prosecution should relate to the same facts and is prosecuted in good faith);

(b) the period of the continuance of the stay order or injunction (from the date of grant to the date of withdrawal) granted against the institution of prosecution;

(c) where notice of prosecution has been given, the period of notice;

(d) where previous sanction or consent for the institution of any prosecution is necessary, the period required for obtaining such consent or sanction including the date of application for obtaining the sanction and the date of the receipt of the order;

(e) the period during which the offender is absent from India or from territory outside India under Central Govt. Administration; and

(f) period when the offender is absconding or concealing himself. (Section 470)

If limitation expires on a day when the Court is closed, cognizance can be taken on the day the Court re-opens. (Section 471)

Continuing offence — In the case of a continuing offence, a fresh period of limitation begins to run at every moment during which the offence continues. (Section 472)

Extension of period of limitation — The Court may take cognizance of an offence after the expiry of the period of limitation if it is satisfied that (i) the delay is properly explained or (ii) it is necessary to do so in the interests of justice. (Section 473)

17. SUMMARY TRIALS

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

Section 260(1) of the Criminal Procedure Code sets out the provisions for summary trials. It says:

(a) any Chief Judicial Magistrate;

(b) any Metropolitan Magistrate;

(c) any Magistrate of the First class who is specially empowered in this behalf by the High Court, may, if he thinks fit, try in a summary way all or any of the following offences:

(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii) theft under Section 379, Section 380 or Section 381 of the Indian Penal Code, where the value of the property stolen does not exceed Rs. 200;

(iii) receiving or retaining stolen property, under Section 411 of the Indian Penal Code, where the value of such property, does not exceed Rs. 200;

(iv) assisting in the concealment or disposal of stolen property, under Section 414 of the Indian Penal Code, where the value of such property does not exceed Rs. 200;

(v) offences under Sections 454 and 456 of the Indian Penal Code;

(vi) insult with intent to provoke a breach of the peace, under Section 504 of the Indian Penal Code;

(vii) abetment of any of the foregoing offences;

(viii) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) any offence constituted by an act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871.

Sub-section (2) states that when in the course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided in this Code. Summary trial is a speedy trial by dispensing with formalities or delay in proceedings.

Section 262 envisages procedure for summary trials. Sub-section (1) lays down that in all summary trials the summons-case procedure should be followed irrespective of the nature of the case i.e. whether it is a summons-case or a warrant case. Sub-section (2) laying down the limit of the sentence of imprisonment states that no sentence of imprisonment for a term exceeding 3 months shall be passed in any conviction in summary trials.

Test your knowledge

State whether the following statement is "True" or "False"

Summary trial is conducted in those offences which are not punishable with imprisonment for a term exceeding two years.

Correct Answer: True

Record in summary trials

The Magistrate shall enter in the prescribed form the following particulars in every case tried summarily:

(1) the serial number of the case;

(2) the date of the commission of the offence;

(3) the date of the report or complaint;

(4) the name of the complainant (if any);

(5) the name, parentage and residence of the accused;

(6) the offence complained of and the offence proved, and the value of the property in respect of which the offence has been committed if the case comes under clause (ii) (iii) or (iv) of Section 260(1).

(7) the plea of the accused and his examination if any;

(8) the findings;

(9) the sentence or other final order;

(10) the date on which proceedings terminated.

The register containing the particulars mentioned above forms the record in a summary trial.

Judgement in summary trials

In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.

The question whether a case may be tried summarily by a Magistrate as provided in this Section and if the offence is summarily triable, it is a matter of discretion of the Magistrate, which is to be judicially exercised with due care as well as considering the circumstances of the case.

Test your knowledge

Which of the following judicial authorities can conduct a summary trial?

(a) Any Judge of a High Court

(b) Any Chief Judicial Magistrate

(c) Any Metropolitan Magistrate

(d) Any first class Magistrate empowered by a High Court

Correct Answer: (b), (c) and (d)

LESSON ROUND-UP

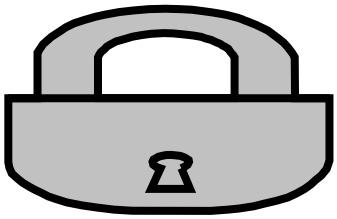
The law of criminal procedure is meant to be complimentary to criminal law. It is intended to provide a mechanism for the enforcement of criminal law. The Code of Criminal Procedure creates the necessary machinery for apprehending the criminals, investigating the criminal cases, their trials before the criminal courts and imposition of proper punishment on the guilty person.

- For the purpose of the Code all offences have been classified into different categories. Firstly, all offences are divided into two categories – cognizable offences and non-cognizable offences; secondly, offences are classified into bailable and non-bailable offences; and thirdly, the Code classifies all criminal cases into summons cases and warrant cases.
- The Code enumerates the hierarchy of criminal courts in which different offences can be tried and then it spells out the limits of sentences which such Courts are authorized to pass.
- The Code contemplates two types of arrests – (a) arrest with a warrant; and (b) arrest without a warrant. Where a person has been concerned in a non-cognizable offence, he cannot, except in a few cases be arrested without a warrant. Powers to arrest without a warrant are mainly conferred on the police. The Code envisages the various circumstances under which a police officer may arrest a person without a warrant.
- Further, a private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence or who is a proclaimed offender. Furthermore, the Magistrate has been given power to arrest a person who has committed an offence in his presence and also commit him to custody.
- Whether the arrest to be made is with a warrant or without a warrant, it is necessary that in making such an arrest, the police officer or other person making such an arrest actually touches or confines the body of the person to be arrested and such police officer or other person may use all necessary means to effect the arrest if there is forcible resistance.
- Persons arrested are to be taken before the Magistrate or officer-in-charge of a police station without unnecessary delay. When a person is arrested under a warrant, Section 76 becomes applicable, and when he is arrested without a warrant, he can be kept into custody for period not exceeding 24 hours, and before the expiry of that period he is to be produced before the nearest Magistrate, who can order his detention for a term not exceeding 15 days, or he can be taken to a Magistrate, under whose jurisdiction he is to be tried, and such Magistrate can remand him to custody for a term which may exceed 15 days but not more than 60 days.

- Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court. Such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Where a warrant remains unexecuted, the Code provides for two remedies (i) issuing a proclamation; and (ii) attachment and sale of property.
- The main processes for compelling production of things and documents are (a) summons issued by a court; (b) warrant order issued by a police officer in charge of a police station; (c) search and seizure with or without a warrant. These processes may be used – (i) for the investigation, inquiry or trial in respect of an offence; or (ii) for any other proceeding generally taken as a preventive or precautionary measure.

- Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant. Every such information shall be signed by the person giving it and the substance thereof shall be entered in a book kept by such officer in such form as may be prescribed by the State Government in this behalf. The above information given to a police officer and reduced to writing is known as First Information Report (FIR). The investigation of the case proceeds on this information only.
- In case of a cognizable offence the police officer may conduct investigations without the order of a Magistrate. Investigation includes all proceedings under the Code for the collection of evidence by the police officer or by any person who is authorized by the Magistrate in this behalf.
- Any Magistrate of first class and of the second class specially empowered may take cognizance of an offence upon: (i) receiving a complaint of facts constituting such offence; (ii) a police report of such facts; (iii) information received from any person other than police officer; (iv) his own knowledge that such offence has been committed.
- The Court of Session does not take cognizance of any offence, as a Court of original jurisdiction unless the case has been committed to it by a competent Magistrate. No Court shall take cognizance of an offence after the expiry of the period of limitation. The object is to prevent the parties from filing the case after a long time so that the material evidence may not vanish.
- Summary trial means the “speedy disposal” of cases. By summary cases is meant a case which can be tried and disposed of at once. Generally, it will apply to such offences not punishable with imprisonment for a term exceeding two years. The kinds of offences that can be tried summarily have been stipulated under the Code. In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgement containing a brief statement of the reason for the finding. The concerned Magistrate must sign such record and judgement.

SELF-TEST QUESTIONS



1. Is the Code of Criminal Procedure a substantive or an adjective law, or both?
2. Distinguish between:
   (a) Cognizable and Non-cognizable offences
   (b) Inquiry, Investigation and Trial
   (c) Bailable and Non-bailable offences
   (d) F.I.R. and Complaint.
3. What are the various classes of Criminal Courts? Discuss their powers.
4. How can arrest be affected by the police? When can police arrest without warrant? Can a private person cause arrest without warrant?
5. Discuss the procedure for search and seizure: (i) of persons (ii) of things.
6. Discuss the procedure for summary trial.
7. Discuss the procedure for investigation by the police.
8. Write short notes on:
   (i) Limitation for taking cognizance of certain offences.
   (ii) Investigation.

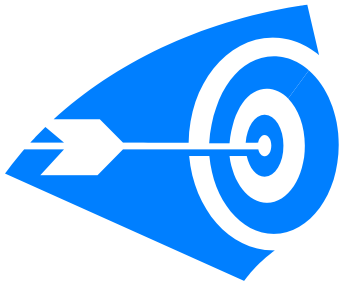
Suggested Readings:

(1) The Code of Criminal Procedure, 1973.

(2) Criminal Procedure Code—*Durga Das Basu*

STUDY X

LAW RELATING TO RIGHT TO INFORMATION



LEARNING OBJECTIVES

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. In India also, the Government enacted Right to Information (RTI) Act in 2005 allowing transparency and autonomy, and access to accountability in public authorities.

It is important for the students to understand the significance of right to information in the changing scenario, and be well versed with the important provisions of this legislation as well as to know the process regarding how to apply for information, where to apply, how much fees etc. and various other related aspects.

At the end of the Study Lesson you should be able to understand

- Important definitions
- Public Authorities & their obligations
- Designation of Public Information Officers (PIO)
- Duties of a PIO
- Exemption from disclosure
- Who is excluded?
- Constitution of Information Commissions
- Powers of the Commission
- Appellate Authorities
- Penalties
- Jurisdiction of Courts
- Role of Central/State Governments

1. INTRODUCTION

Throughout the world, the right to information is seen by many as the key to strengthening participatory democracy and ensuring more people-centred development. Nearly 70 countries around the world have now adopted comprehensive Freedom of

Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. In India also, the Government enacted Right to Information (RTI) Act in 2005 which came into force w.e.f. October 12, 2005.

2. RIGHT TO KNOW

Before dwelling on the RTI Act, 2005, mention should be made that in *R.P.Limited v Indian Express Newspapers,* the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression "liberty" must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know which include a right to receive information.

It may be pointed out that the right to impart and receive information is a species of the right to freedom of speech and expression. Article 19(1) (a) of our Constitution guarantees to all citizens freedom of speech and expression. At the same time, Article 19(2) permits the State to make any law in so far as such law imposes reasonable restrictions on the exercise of the rights conferred by Article 19(1) (a) of the constitution in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, morality, contempt of court, defamation and incitement of offence.

Thus, a citizen has a right to receive information and that right is derived from the concept of freedom of speech and expression comprised in Article 19(1) (a). The State is not only under an obligation to respect the Fundamental Rights of the citizens, but it is equally under an obligation to ensure conditions under which these rights can meaningfully and effectively be enjoyed by one and all.

Right to freedom of speech and expression in Art.19 (1)(a) carries with it the right to propagate and circulate one's views and opinions subject to reasonable restrictions as mentioned above. The prerequisite for enjoying this right is knowledge and information. Information adds something "new to our awareness and removes vagueness of our ideas".

Test your knowledge

Choose the correct answer

Which of the following Articles grant us right of freedom of speech and expression:

(a) Article 19
(b) Article 19(1)
(c) Article 19(1)(a)
(d) Article 21

Correct answer: (c)

3. THE RIGHT TO INFORMATION (RTI) ACT, 2005

The Right to Information Act, 2005 provides an effective framework for effectuating the right to information recognized under Article 19 of the Constitution. It may be pointed out that the Right to Information Bill was passed by the Lok Sabha on May 11, 2005 and by the Rajya Sabha on May 12, 2005 and received the assent of the President on June 15, 2005. The Act considered as watershed legislation, is the most significant milestone in the history of Right to Information movement in India allowing transparency and autonomy and access to accountability.

4. SALIENT FEATURES OF THE ACT

- The RTI Act extends to the whole of India except Jammu & Kashmir.
- It provides a very definite day for its commencement i.e. 120 days from enactment.
- It shall apply to Public Authorities.
- All citizens shall have the right to information, subject to provisions of the Act.
- The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.
- Fee will be payable by the applicant depending on the nature of information sought.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.
- Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions.

OBJECTIVE

As stated above, the RTI Act confers on all citizens a right to information. The Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority.

Test your knowledge

State whether the following statement is "True" or "False"

The RTI Act is applicable to the whole of India with all its provisions.

- True
- False

Correct answer: False

5. DEFINITIONS

The meaning of important terms has been incorporated under section 2 of the RTI Act. These have been discussed herein below:

"Public authority" means any authority or body or institution of self government established or constituted –

(i) By or under the Constitution;

(ii) By any other law made by Parliament;

(iii) By and other law made by State Legislature;

(iv) By notification issued or order made by the appropriate Govt. [Section 2(h)]

Record" includes—

(a) any document, manuscript and file;

(b) any microfilm, microfiche and facsimile copy of a document;

(c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(d) any other material produced by a computer or any other device; [Section 2(I)]

"Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form. [Section 2(f)]

"Right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—

(i) taking notes, extracts, or certified copies of documents or records;

(ii) inspection of work, documents, records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device; [Section 2(j)]

"Third party" means a person other than the citizen making a request for information and includes a public authority. [Section 2(n)]

6. OBLIGATIONS OF PUBLIC AUTHORITY

Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. [Section 4(1)(a)]

As per Section 4(1)(b), every public authority has to publish within one hundred and twenty days of the enactment of this Act:

(i) the particulars of its organization, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in its decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records used by its employees for discharging its functions;

(vi) a statement of the categories of the documents held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by the members of the public, in relation to the formulation of policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted by it. Additionally, information as to whether the meetings of these are open to the public, or the minutes of such meetings are accessible to the public;

(ix) a directory of its officers and employees;

(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details and beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorizations granted by it;

(xiv) details of the information available to, or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers.

(xvii) Such other information as may be prescribed; and thereafter update the publications every year.

7. DESIGNATION OF PUBLIC INFORMATION OFFICERS (PIO)

Every public authority has to—

(i) Designate in all administrative units or offices Central or State Public Information Officers to provide information to persons who have made a request for the information.

(ii) Designate at each sub-divisional level or sub-district level Central Assistant or State Assistant Public Information Officers to receive the applications for information or appeals for forwarding the same to the Central or State Public Information Officers.

(iii) No reason to be given by the person making request for information except those that may be necessary for contacting him. (Section 5)

8. REQUEST FOR OBTAINING INFORMATION

The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.

Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).

(i) Information to be provided within 30 days.

(ii) 48 hours where life or liberty is involved.

(iii) 35 days where request is given to Asst. PIO.

(iv) Time taken for calculation and intimation of fees excluded from the time frame.

(v) No action on application for 30 days is a deemed refusal.

If the interests of a third party are involved then time limit will be 40 days (maximum period + time given to the party to make representation).

No fee for delayed response. (Section 6&7)

9. DUTIES OF A PIO

PIO shall deal with requests from persons seeking information and where the request cannot be made in writing, to render reasonable assistance to the person to reduce the same in writing. If the information requested for is held by or its subject matter is closely connected with the function of another public authority, the PIO shall transfer, within 5 days, the request to that other public authority and inform the applicant immediately.

PIO may seek the assistance of any other officer for the proper discharge of his/her duties. PIO, on receipt of a request, shall as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in S.8 or S.9.

Where the information requested for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request. If the PIO fails to give decision on the request within the period specified, he shall be deemed to have refused the request.

Where a request has been rejected, the PIO shall communicate to the requester - (i) the reasons for such rejection, (ii) the period within which an appeal against such rejection may be preferred, and (iii) the particulars of the Appellate Authority.

PIO shall provide information in the form in which it is sought unless it would disproportionately divert the resources of the Public Authority or would be detrimental to

the safety or preservation of the record in question.

If allowing partial access, the PIO shall give a notice to the applicant, informing:

(i) that only part of the record requested, after severance of the record containing information which is exempt from disclosure, is being provided;

(ii) the reasons for the decision, including any findings on any material question of fact, referring to the material on which those findings were based;

(iii) the name and designation of the person giving the decision;

(iv) the details of the fees calculated by him or her and the amount of fee which the applicant is required to deposit; and

(v) his or her rights with respect to review of the decision regarding non-disclosure of part of the information, the amount of fee charged or the form of access provided.

If information sought has been supplied by third party or is treated as confidential by that third party, the PIO shall give a written notice to the third party within 5 days from the receipt of the request.

Third party must be given a chance to make a representation before the PIO within 10 days from the date of receipt of such notice. (Sections 5, 7, 10 & 11)

Test your knowledge

Choose the correct answer

Which of the following is false in relation to the RTI Act, 2005 regarding the request for obtaining information:

(a) Application is to be submitted in writing or electronically, with prescribed fee, to Public Information Officer (PIO).

(b) Time taken for calculation and intimation of fees excluded from the time frame.

(c) No action on application for 30 days is a deemed refusal.

(d) 20 days is the maximum period allowed under the RTI Act for providing the requested information.

Correct answer: (d)

10. EXEMPTION FROM DISCLOSURE

Certain categories of information have been exempted from disclosure under the Act. These are:

(i) Where disclosure prejudicially affects the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

(ii) Information which has been expressly forbidden by any court or tribunal or the disclosure of which may constitute contempt of court;

(iii) Where disclosure would cause a breach of privilege of Parliament or the State

Legislature;

(iv) Information including commercial confidence, trade secrets or intellectual property, where disclosure would harm competitive position of a third party, or available to a person in his fiduciary relationship, unless larger public interest so warrants;

(v) Information received in confidence from a foreign government;

(vi) Information the disclosure of which endangers life or physical safety of any person or identifies confidential source of information or assistance;

(vii) Information that would impede the process of investigation or apprehension or prosecution of offenders;

(viii) Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

Personal information which would cause invasion of the privacy unless larger public interest justifies it. (Section 8)

11. REJECTION OF REQUEST

The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved. (Section 9)

12. PARTIAL DISCLOSURE ALLOWED

Under Section 10 of the RTI Act, only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.

As per Section 10 of the Act if the request for access to information is rejected on the ground that it is in relation to the information which is exempt from disclosure, in that event access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can be reasonably severed from any part that contains exempt information.

Test your knowledge

State whether the following statement is "True" or "False":

Where the information requested for concerns the life or liberty of a person, the same shall be provided within 48 hours of the receipt of the request.

Correct answer: True

13. WHO IS EXCLUDED?

The Act excludes Central Intelligence and Security agencies specified in the Second Schedule like IB, R&AW, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, the Crime Branch-CID-CB, Dadra and Nagar Haveli and Special Branch, Lakshadweep Police. Agencies specified by the State Governments through a Notification will also be excluded.

The exclusion, however, is not absolute and these organizations have an obligation to provide information pertaining to allegations of corruption and human rights violations. Further, information relating to allegations of human rights violation shall be given only with the approval of the Central Information Commission within forty-five days from the date of the receipt of request. (Section 24]

14. INFORMATION COMMISSIONS

The Act envisages constitution of Central Information Commission and the State information Commissions.

Central Information Commission (CIC): The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of the Chief Information Commissioner and Central Information Commissioners not exceeding 10. These shall be appointed by the President of India on the recommendations of a committee consisting of PM who is the Chairman of the Committee; the leader of Opposition in the Lok Sabha; and a Union Cabinet Minister to be nominated by the Prime Minister.

The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. CIC/IC shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory. He shall not hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

The general superintendence, direction and management of the affairs of the Commission vests in the Chief Information Commissioner who shall be assisted by the Information Commissioners. Commission shall have its Headquarters in Delhi. Other offices may be established in other parts of the country with the approval of the Central Government. Commission will exercise its powers without being subjected to directions by any other authority. (Section 12)

CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment. Salary will be the same as that of the Chief Election Commissioner. This will not be varied to the disadvantage of the CIC during service. (Section 13)

State Information Commission (SIC): The State Information Commission will be constituted by the State Government through a Gazette notification. The State

Information Commission consists of one State Chief Information Commissioner (SCIC) and not more than 10 State Information Commissioners (SIC). These shall be appointed by the Governor on the recommendations of a committee consisting of the Chief Minister who is the Chairman of the committee. Other members include the Leader of the Opposition in the Legislative Assembly and one Cabinet Minister nominated by the Chief Minister.

The qualifications for appointment as SCIC/SIC shall be the same as that for Central Commissioners. The salary of the State Chief Information Commissioner will be the same as that of an Election Commissioner. The salary of the State Information Commissioner will be the same as that of the Chief Secretary of the State Government.

The Commission will exercise its powers without being subjected to any other authority. The headquarters of the State Information Commission shall be at such place as the State Government may specify. Other offices may be established in other parts of the State with the approval of the State Government. (Section 15 & 16)

Test your knowledge

Choose the correct answer

Which of the following acts as a chairman of the Central Information Commission:

(a) President of India
(b) Prime Minister of India
(c) The Leader of Opposition in the Parliament
(d) Any designated member of the Parliament

Correct answer: (b)

15. POWERS OF INFORMATION COMMISSIONS

The Central Information Commission/State Information Commission has a duty to receive complaints from any person—

(i) who has not been able to submit an information request because a PIO has not been appointed;

(ii) who has been refused information that was requested;

(iii) who has received no response to his/her information request within the specified time limits;

(iv) who thinks the fees charged are unreasonable;

(v) who thinks information given is incomplete or false or misleading; and

(vi) any other matter relating to obtaining information under this law.

If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.

The Central Information Commission or the State Information Commission during the inquiry of any complaint under this Act may examine any record which is under the control of the public authority, and no such record may be withheld from it on any grounds. (Section 18)

16. APPELLATE AUTHORITIES

Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.

First Appeal: First appeal to the officer senior in rank to the PIO in the concerned Public Authority within 30 days from the expiry of the prescribed time limit or from the receipt of the decision (delay may be condoned by the Appellate Authority if sufficient cause is shown).

Second Appeal: Second appeal to the Central Information Commission or the State Information Commission as the case may be, within 90 days of the date on which the decision was given or should have been made by the First Appellate Authority (delay may be condoned by the Commission if sufficient cause is shown).

Third Party appeal against PIO's decision must be filed within 30 days before first Appellate Authority; and, within 90 days of the decision on the first appeal, before the appropriate Information Commission which is the second appellate authority.

Burden of proving that denial of information was justified lies with the PIO. First Appeal shall be disposed of within 30 days from the date of its receipt or within such extended period not exceeding a total of forty-five days from the date of filing thereof, for reasons to be recorded in writing. Time period could be extended by 15 days if necessary. (Section 19)

Test your knowledge

State whether the following statement is "True" or "False"

Burden of proving that 'denial of information was justified' lies with the PIO.

Correct answer: True

17. PENALTIES

Section 20 of the Act imposes stringent penalty on a Public Information Officer (PIO) for failing to provide information. Every PIO will be liable for fine of Rs. 250 per day, up to a maximum of Rs. 25,000/-, for -

(i) not accepting an application;
(ii) delaying information release without reasonable cause;
(iii) malafidely denying information;
(iv) knowingly giving incomplete, incorrect, misleading information;

(v) destroying information that has been requested; and

(vi) obstructing furnishing of information in any manner.

The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty. They can also recommend disciplinary action for violation of the law against the PIO for persistently failing to provide information without any reasonable cause within the specified period.

18. JURISDICTION OF COURTS

As per Section 23, lower Courts are barred from entertaining suits or applications against any order made under this Act.

Test your knowledge

The Information Commission (IC) at the Centre and at the State levels has the power to impose penalty on Public Information Officer.

Correct answer: True

19. ROLE OF CENTRAL/STATE GOVERNMENTS

Section 26 contemplates the Role of Central/State Governments. It authorizes the Central/State Governments to:

(i) Develop and organize educational programmes for the public especially disadvantaged communities on RTI.

(ii) Encourage public authorities to participate in the development and organization of such programmes.

(iii) Promote timely and effective dissemination of accurate information by the public authorities.

(iv) Train officers and develop training materials.

(v) Compile and disseminate a User Guide for the public in the respective official language.

(vi) Publish names, designation, postal addresses and contact details of PIOs and other information such as notices regarding fees to be paid, remedies available in law if request is rejected etc.

LESSON ROUND-UP

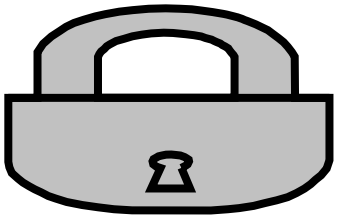
- Right to know is a necessary ingredient of participatory democracy. The Government enacted Right to Information (RTI) Act, 2005 which came into force on October 12, 2005.
- The RTI Act provides for setting out the practical regime of right to information for citizens to secure access to information held by public authorities to promote transparency and accountability in the working of every public authority. Every public authority under the Act has been entrusted with a duty to maintain records and publish manuals, rules, regulations, instructions, etc. in its possession as prescribed under the Act. Further, it is obligatory on every public authority to publish the information about various particulars prescribed under the Act within one hundred and twenty days of the enactment of this Act.

Every public authority has to designate in all administrative units or offices Central or State Public Information Officers to provide information to persons who have made a request for the information. The Public Information Officers/Assistant Public Information Officers will be responsible to deal with the requests for information and also to assist persons seeking information.

- The Act specifies the manner in which requests may be made by a citizen to the authority for obtaining the information. It also provides for transferring the request to the other concerned public authority who may hold the information.
- Certain categories of information have been exempted from disclosure under Section 8 and 9 of the Act.
- Intelligence and security agencies specified in Schedule II to the Act have been exempted from the ambit of the Act, subject to certain conditions.
- The Public Information Officer has been empowered to reject a request for information where an infringement of a copyright subsisting in a person would be involved.
- Only that part of the record which does not contain any information which is exempt from disclosure and which can reasonably be severed from any part that contains exempt information, may be provided.
- The Act envisages constitution of Central Information Commission and the State Information Commissions.
- The Central Information Commission is to be constituted by the Central Government through a Gazette Notification. The Central Information Commission consists of: (i) The Chief Information Commissioner; (ii)Central Information Commissioners not exceeding 10.

- The Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.
- CIC shall be appointed for a term of 5 years from date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier. CIC is not eligible for reappointment.
- The State Information Commission will be constituted by the State Government through a Gazette notification. The State Information Commission consists of: (i) One State Chief Information Commissioner (SCIC) and (ii) Not more than 10 State Information Commissioners (SIC).
- The Central /State Commission have been authorized to receive and enquire into a complaint from any person who has been denied information by the concerned authorities due to various reasons as specified under the Act. If the Commission feels satisfied, an enquiry may be initiated and while initiating an enquiry the Commission has same powers as vested in a Civil Court.
- Any person who does not receive a decision within the specified time or is aggrieved by a decision of the PIO may file an appeal under the Act.
- Stringent penalty may be imposed on a Public Information Officer for failing to provide information. The Information Commission (IC) at the Centre and at the State levels will have the power to impose this penalty.
- The Act also stipulates the role of the Central/State Governments

SELF-TEST QUESTIONS



1. The right to impart and receive information is a species of the right to freedom of speech and expression. Discuss
2. The RTI Act confers on all citizens a right to information. Enumerate the salient features of the Act.
3. Describe the constitution and powers of the Central Information Commission under the Act.
4. Can a person who does not receive a decision within the specified time or is aggrieved by the decision of the PIO file an appeal under the Act?
5. Specify the categories of information that have been exempted from disclosure under the Act.
6. Explain the duties of Public Information Officer under the Act?

7. Write short notes on:
   Right to information
   Obligations of Public Authority
   Agencies excluded under the RTI Act
   Procedure for requesting information
   Penalties

APPENDIX

GLOSSARY OF LEGAL TERMS/MAXIMS

A priori: From the antecedent to the consequent.

Ab initio: From the beginning.

Absolute sententia expositore non indiget: Plain words require no explanation.

Actio mixta: Mixed action.

Actio personalis moritur cum persona: A personal right of action dies with the person.

Actionable per se: The very act is punishable and no proof of damage is required.

Actus Curiae Neminem Gravabit: Act of the Court shall prejudice no one.

Actus non facit reumnisi mens sit rea: An act does not make a man guilty unless there be guilty intention.

Actus reus: Wrongful act.

Ad hoc: For the particular end or case at hand.

Ad idem: At the same point.

Ad valorem: According to value.

Aliunde: From another source.

Amicus Curiae: A friend of court member of the bar who is appointed to assist the Court.

Animus possidendi: Intention to possess

Audi alteram partem: Hear the other side.

Benami: Nameless.

Bona fide: Good faith; genuine.

Caveat: A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator.

Caveat emptor: Let the buyer beware.

Caveat actor: Let the doer beware.

Caveat venditor: Let the seller beware.

Certiorari: A writ by which records of proceeding are removed from inferior courts to High Court and to quash decision that goes beyond its jurisdiction.

Cestui que trust: The person who has the equitable right to property in India he is known as beneficiaries.

Consensus ad idem: Common consent necessary for a binding contract.

Contemporanea expositio est optima et fortissima lege: A contemporaneous exposition or language is the best and strongest in Law.

Corpus delicti: Body/gist of the offence.

Cy pres: As nearly as may be practicable.

Damnum sine injuria: Damage without injury.

De facto: In fact.

De jure: By right (opposed to *de facto*) in Law

Dehors: Outside; foreign to (French term).

De novo: To make something new; To alter.

Dies non: Day on which work is not performed.

Deceit: Anything intended to mislead another.

Del credre agent: is a mercantile agent who in consideration of extra remuneration called a *del credre* commission undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts.

Delegate potestas non-potest delegari: A delegated power cannot be delegated further.

Delegatus non potest delegare: A delegate cannot delegate.

Dictum: Statement of law made by judge in the course of the decision but not necessary to the decision itself.

Dispono: Convey legally.

Ejusdem generis: Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

Estoppel: Stopped from denying.

Ex parte: Proceedings in the absence of the other party.

Expressio unius est exclusio alterius: Express mention of one thing implies the exclusion of another or which is shortly put.

Ex turpi causa non oritur actio: No action arises from an illegal or immoral cause.

Fatum: Beyond human foresight.

Fait accompli: Things done and no longer worth arguing against; an accomplished act.

Factum probandum: Fact in issue which is to be proved.

Factum probans: Relevant fact.

Ferae naturae: Dangerous by nature.

Force majeure: Circumstance beyond one's control, irresistible force or compulsion

Generalia specialibus non derogant: General things do not derogate from special.

Habeas corpus: A writ to have the body to be brought up before the judge.

Ignorantia legis neminem excusat: Ignorance of law excuses no one.

Injuria sine damno: Injury without damage.

Interest reipublicae ut sit finis litium: State or public interest requires that there should be a limit to litigation.

Ipso facto: By the very nature of the case.

In promptu: In readiness.

In posse: In a state of possibility.

In limine: Initial stage; at the outset.

In lieu of: Instead of.

Inter alia: Among other things.

Inter se: Among themselves.

In specie: In kind.

Inter vivos: Between living persons.

Intra vires: Within the powers.

In personam: A proceeding in which relief is sought against a specific person.

Indicia: A symbol; token; mark.

Innuendo: Allusive remark.

Jus in personam: Right against a person.

Jus in rem: Right against the world at large.

Jus non scriptum: Unwritten law; Customary Law.

Jus scriptum: Written Law.

Lex Marcatoria: The law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the common law, afterwards became incorporated into it.

Lex fori: The law of the forum of court.

Lis: A suit cause of action.

Lis pendens: A pending suit.

Locus standi: Right of a party to an action to appear and be heard on the question before any tribunal.

Mala fide: In bad faith.

Mandamus: A writ of command issued by a Higher Court to a Lower Court/Government/Public Authority.

Mens rea: Guilty mind.

Manesuetae natureae: Harmless by nature.

Mesne profits: The rents and profits which a trespasser has received/made during his occupation of premises.

Misnomer: A wrong name.

Mutatis-mutandis: With necessary changes in points of detail.

Noscitur a sociis: A word is known by its associates, one is known by his companions.

Obiter dictum: An incidental opinion by a judge which is not binding.

Onus Probandi: Burden of proof.

Pari passu: On equal footing or proportionately.

Per se: By itself taken alone.

Persona non-grata: Person not wanted.

Per incuriam: Through want of care; through inadvertance.

Prima facie: At first sight; on the face of it.

Profit a prendre: A right for a man in respect of his tenement.

Pro bono publico: For the public good.

Pro forma: As a matter of form.

Pro rata: In proportion.

Posteriori: From the consequences to the antecendent.

Puisne mortgage: Second mortgage.

Pari causa: Similar circumstances, with equal right.

Pari materia: Relating to same person or thing.

Qui facit per alium facit per se: He who acts through another is acting by himself.

Quo warranto: A writ calling upon one to show under what authority he holds or claims an office.

Quia timet: Protective justice for fear. It is an action brought to prevent a wrong that is apprehended.

Quid pro quo: Something for something.

Ratio decidendi: Principle or reason underlying a decision.

Res judicata: A decision once rendered by a competent court on a matter in issue between the parties after a full enquiry should not be permitted to be agitated again.

Res ipsa loquitur: The things speak for itself.

Respondent superior: Let the principal be liable.

Res sub judice: Matter under consideration.

Res gestae: Facts relevant to a case and admissible in evidence.

Rule nisi: A rule which will become imperative and final unless cause to be shown against it.

Scire facias: Your cause to know.

Status quo: The existing state of things at any given date.

Scientiet volenti non fit injuria: Injury is not done to one who knows and wills it.

Spes successionis: Chance of a person to succeed as heir on the death of another.

Supra: Above; this word occurring by itself in a book refers the reader to a previous part of the book.

Suppressio veri: Suppression of previous knowledge.

Sui juris: Of his own right.

Simpliciter: Simply; without any addition.

Scienter: Being aware of circumstances, the knowledge of which is necessary to make one liable, as applied to the keeper of a vicious dog, means no more than reasonable cause to apprehend that he might commit the injury complained of.

Sine qua non: An indispensable condition.

Situs: Position; situation; location.

Suo motu: On its own motion.

Stare decisis: Precedent. Literally let the decision stand

Sine die: Without a day being appointed.

Travaux preparatotries: Preparatory records.

Tortum: Civil wrong actionable without contract.

Uberrimae fide: Of utmost good faith.

Ubi jus ibi remedium: Where there is a right there is remedy.

Ultra vires: Beyond the scope, power or authority.

Ut lite pendente nihil innovertur: Nothing new to be introduced during ligitation.

Usufructuary: One who has the use and reaps the profits of property, but not ownership.

Ut res magis valeat quam pereat: The words of a statue must be construed so as to give a sensible or reasonable meaning to them.

Vis major: Act of God.

Vigilantibuset, non dormientibus, jura subveniunt: The laws help those who are vigilant and not those who are slumber or lazy.

Vice versa: The order being reversed; other way round.

Volenti non fit injuria: Damage suffered by consent gives no cause of action.

EXECUTIVE PROGRAMME

GENERAL AND COMMERCIAL LAWS

EP-GCL/2011

TEST PAPERS

This Test Paper set contains five test papers. Test Paper 1/2011, 2/2011, 3/2011, 4/2011 and 5/2011. The maximum time allowed to attempt each test paper is 3 hours.

Students are advised to attempt atleast **one Test Paper from Test Papers 3/2011, 4/2011 and 5/2011 i.e. either Test Paper 3/2011 or Test Paper 4/2011 or Test Paper 5/2011** and send the response sheet for evaluation to make him/her eligible for Coaching Completion Certificate. However, students may, if they so desire, send more response sheets including Test Paper 1/2011 and 2/2011 for evaluation.

While writing answers, students should take care not to copy from the study material, text books or other publications. Instances of deliberate copying from any source, will be viewed very seriously.

WHILE WRITING THE RESPONSE SHEETS TO THE TEST PAPERS GIVEN AT THE END OF THIS STUDY MATERIAL, THE STUDENTS SHOULD KEEP IN VIEW THE FOLLOWING WARNING AND DESIST FROM COPYING.

W A R N I N G

Time and again, it is brought to our notice by the examiners evaluating response sheets that some students use unfair means in completing postal coaching by way of copying the answers of students who have successfully completed the postal coaching or from the suggested answers/study material supplied by the Institute. A few cases of impersonation by handwriting while answering the response sheets have also been brought to the Institute's notice. The Training and Educational Facilities Committee has viewed seriously such instances of using unfair means to complete postal coaching. The students are, therefore, strongly advised to write response sheets personally in their own hand-writing without copying from any original source. It is also brought to the notice of all students that use of any malpractice in undergoing postal or oral coaching is a misconduct as provided in the explanation to Regulation 27 and accordingly the studentship registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or the Committee concerned may *suo motu* or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity to state his case, suspend or debar the person from appearing in any one or more examinations, cancel his examination result, or studentship registration, or debar him from future registration as a student, as the case may be.

Explanation - Misconduct for the purpose of this regulation shall mean and include behaviour in a disorderly manner in relation to the Institute or in or near an Examination premises/centre, breach of any regulation, condition, guideline or direction laid down by the Institute, malpractices with regard to postal or oral tuition or resorting to or attempting to resort to unfair means in connection with the writing of any examination conducted by the Institute".

EXECUTIVE PROGRAMME

GENERAL AND COMMERCIAL LAWS

TEST PAPER 1/2011
(This Test Paper is based on study lessons 1 to 5)

Time allowed: 3 hours *Max. marks: 100*

NOTE: *Answer All Questions.*

1. (a) "The Constitution of India is basically federal with certain unitary features". Discuss. *(8 marks*)
   (b) On what grounds and against whom can the writ of certiorari be issued? *(6 marks)*
   (c) What are the fundamental duties imposed on the citizens of India? *(6 marks)*
2. (a) Discuss the rule laid down in the case of *Rylands* v. *Fletcher*. What are the exceptions to this rule? *(8 marks)*
   (b) Discuss briefly the doctrine of part-performance embodied in section 53A of the Transfer of Property Act, 1882. *(8 marks*)
3. (a) Discuss the principles on which Court may grant specific performance. *(8 marks)*
   (b) What are the presumptions in the interpretation of statutes when the intention of legislature is not clear? *(8 marks)*
4. (a) Discuss the procedure to be followed for arbitral proceedings by an arbitral tribunal under the Arbitration and Conciliation Act, 1996. *(8 marks)*
   (b) Explain primary and secondary evidence of documents. When may secondary evidence be given? *(4 marks*)
   (c) Within what period, different kinds of instruments chargeable with stamp duty but executed out of India may be stamped? *(4 marks)*
5. Write short notes on the following:
   (i) Doctrine of eclipse.
   (ii) Denoting duty.
   (iii) Doctrine of sufficient cause.
   (iv) Rule of *ejusdem generis.* *(4 marks each)*
6. (a) Distinguish between the following:-
   (i) Condition precedent and condition subsequent.
   (ii) Mortgage and charge.
   ((iii) Nervous shock and false imprisonment.
   (iv) Settlement and stamp. *(4 marks each)*

TEST PAPER 2/2011

(This Test Paper is based on study lessons 6 to 10)

Time allowed: 3 hours *Max. marks: 100*

NOTE: Answer All Questions.

1. (a) Write notes on the following:
   (i) Summary Trial
   (ii) Digital Signature
   (iii) Domain names
   (iv) E-governance. *(5 marks each)*
2. (a) How can arrest be effected by the police ? When can police arrest a person without warrant? Can a private person cause arrest without warrant? *(8 marks)*
   (b) Describe the constitution and powers of the Central Information Commission under the Right to Information Act, 2005. (8 marks)
3. (a) What are the various classes of criminal courts? Discuss their powers. *(8 marks)*
   (b) Discuss the doctrine of *res judicata* under section 11 of the Code of Civil Procedure, 1908. *(8 marks)*
4. (a) State the documents which are required to be compulsorily registered under the Registration Act, 1908. (8 marks)
   (b) Explain briefly 'temporary injunctions' and 'interlocutory orders'. *(8 marks)*
5. (a) Discuss the limitation for taking cognizance of certain offences under the Code of Criminal Procedure, 1973. *(8 marks)*
   (b) Discuss the jurisdiction of civil courts under the Code of Civil Procedure, 1908. *(8 marks)*
6. (a) Distinguish between the following:
   (i) 'Summons cases' and 'warrant cases'.
   (ii) 'Public key' and 'private key'. *(4 marks each)*
   (b) State the composition and functions of Cyber Regulation Appellate Tribunal under the Information Technology Act, 2000. *(8 marks)*

TEST PAPER 3/2011

(This Test Paper is based on ALL study lessons)

Time allowed: 3 hours *Max. marks: 100*

NOTE: Answer All Questions.

1. (a) "Article 14 of the Constitution of India forbids class legislation but does not forbid classification". Discuss and also explain the rules with respect to permissible classification as evolved by the Supreme Court of India. *(8 marks)*

   (b) Explain the mischief rule in the interpretation of statutes. *(5 marks)*

   (c) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):

   (i) Perpetual injunction is granted under section _____ of the Specific Relief Act, 1963.

   (ii) A police officer may arrest an accused without warrant in case of _____.

   (iii) The term 'sufficient cause' has not been defined in the Limitation Act, 1963. It depends on the _____ of each case.

   (iv) In case of a cognizable offence, the police officer may conduct investigations _____ the order of a magistrate.

   (v) The Constitution of India does not use the term 'statute' but it employs the term _____ to describe an exercise of legislative power.

   (vi) The application of revision under the provisions of the Code of Civil Procedure, 1908 is made to _____.

   (vii) _____ means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

   (1 mark each)

2. (a) Attempt the following :

   (i) State the circumstances in which a property may be transferred in favour of an unborn person.

   (ii) What are 'cyber offences' under the Information Technology Act, 2000?

   (iii) Explain the term 'conveyance' under the Indian Stamp Act, 1899.

   (4 marks each)

   (b) Fill in the blank spaces with appropriate nomenclature or terminology in the following:

   (i) Where a person transfers his property so that his creditors shall not have any thing out of the property, the transfer is called _____.

   (ii) _____ means any person against whom a decree has been passed or an order capable of execution has been made.

   (iii) Speedy disposal of cases which can be tried and disposed off at once is known as _____.

   (iv) Any act or omission made punishable by any law for the time being in force is called as _____.

   (1 mark each)

3. (a) Write notes on the following :

(i) Agencies excluded under RTI Act, 2005.

(ii) Mens rea

(iii) Rectification of an instrument.

(4 marks each)

(b) Choose the most appropriate answer from the given options in respect of the following:

(i) Investigation and Inquiry as per the Code of Criminal Procedure 1973 are—

(a) The same

(b) Different

(c) Depends upon the circumstances

(d) None of the above.

(ii) Section 20 of the Right to Information Act, 2005 imposes stringent penalty on a public information officer for —

(a) Failing to provide information

(b) Rejecting an application for information

(c) Concealing the information

(d) None of the above.

(iii) Under the Specific Relief Act, 1963, the relief of cancellation of a written instrument is available —

(a) When an instrument is void or voidable at the option of the plaintiff

(b) Where the plaintiff may apprehend serious injury if the instrument is left outstanding

(c) Where the instrument requires registration but is not registered

(d) Where conditions mentioned (a) and (b) above are fulfilled.

(iv) The definition of the 'State' as given under Article 12 of the Constitution of India includes –

(a) The Central Government and Parliament of India

(b) The Government and the Legislature of each State

(c) All local or other authorities within India and under the control of the Government of India

(d) All of the above. *(1 mark each)*

4. (a) A document was executed outside India and it was presented for registration after a lapse of four months from the date of its arrival in India. Whether the document may be accepted for registration by the Registrar? Decide. *(4 marks)*

(b) State, with reasons in brief, whether the following statements are correct or incorrect:

(i) Article 174 of the Constitution of India empowers the Governor of the State to dissolve the State Legislature.

(ii) The Right to Information Act, 2005 confers on all citizens of India a right to information.

(iii) Under certain circumstances, a person is liable for the torts committed by another.

(iv) While computing the period of limitation for an application to set aside an award, the time required for obtaining a copy of the award shall not be excluded.

(v) Decree is a formal expression of an adjudication, whereas an order is the decision of the court.

(vi) Vivek sells a property to Rahul for Rs. 5 lakh which is subject to a mortgage to Paras for Rs.10 lakh and unpaid interest of Rs. 2 lakh. Stamp duty is payable on Rs. 17 lakh.

(2 marks each)

5. (a) Atul sells a house to Vishal by a written document and delivers possession to Vishal, but the document is not registered. After one year, Atul sues Vishal to take back the possession of the property on the ground that non-registration of a document has no validity. Will Atul succeed? *(4 marks)*

(b) A magistrate of the first class passes a sentence of imprisonment for a term of three years with a fine of Rs.5,000 and in lieu of non-payment thereof, an additional imprisonment for another one year. The convict feels aggrieved by the sentence.

(i) Has the convict any right to appeal against this sentence?

(ii) Will the situation change, if the sentence is passed by the court of a chief judicial magistrate? Give reasons in support of your answer. *(4 marks)*

(c) Dr. Himanshu agrees to perform a certain operation and takes an advance of Rs. 70,000 from the patient. Later on Dr. Himanshu refuses to operate. Decide, giving reasons, whether the patient can get a decree of specific performance from the court against Dr. Himashu? *(4 marks)*

(d) Ratan is charged with forging a particular document. The prosecution produces in evidence a number of documents apparently forged, found in possession of the accused. Are these documents admissible in evidence? *(4 marks)*

6. (a) Mithun and Shekhar entered into an agreement to refer a dispute relating to genuineness of a will to an arbitral tribunal. In spite of this, Shekhar commenced proceedings relating to this dispute in the district court of competent jurisdiction. Mithun submits an application for stay of legal proceedings under the Arbitration and Conciliation Act, 1996. Will he succeed? Explain. *(4 marks)*

(b) Kamna informed Abhay in the year 2003 that she had committed theft of the jewellery of her neighbour. Thereafter, Kamna and Abhay were married in 2005. In the year 2007, criminal proceedings were instituted against Kamna in respect of the theft of jewellery. Abhay is called to give evidence in the case. Decide whether Abhay can disclose the communication made to him by Kamna. *(4 marks)*

(c) Avinash, residing in Delhi, requests his friend Bishnoy, residing in Lucknow, for a loan of Rs.10 lakh . Bishnoy asks Avinash to come to Lucknow and collect the cheque for the said amount. Accordingly, Avinash collects the cheque at Lucknow. Avinash has failed to repay the loan. Bishony wants to institute a suit for the recovery of loan against Avinash. Mention the place where Bishnoy can file a suit against Avinash. Give reasons in support of your answer. *(4 marks)*

(d) Abhay downloaded secret data from the computer network of a foreign company engaged in the manufacture of aircrafts. He was prosecuted and fined Rs.1 lakh by the adjudicating officer under section 43 of the Information Technology Act, 2000. Is any remedy available to Abhay? Advise. *(4 marks)*

TEST PAPER 4/2011

(This Test Paper is based on ALL study lessons)

Time allowed: 3 hours *Max. marks: 100*

NOTE : Answer All questions.

1. (a) Discuss the ordinance making powers of the President of India and the Governor of a State as provided in the Constitution of India. *(6 marks)*

   (b) What is writ of habeas corpus? When can it be issued? *(4 marks)*

   (c) Enumerate the fundamental duties imposed on citizens of India under the Constitution. *(4 marks)*

   (d) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):

   (i) An award can be corrected by an arbitral tribunal within_____ days from the date of the award.

   (ii) Hacking with a computer system is a crime punishable with an imprisonment which may extend upto _____ years.

   (iii) A document other than a will must be presented within _____ of its execution.

   (iv) No sentence of imprisonment for a term exceeding _____ months shall be passed in any conviction in summary trials.

   (v) Under the Article 123 of the Constitution of India, the most important legislative power conferred on the President of India is to _____.

   (vi) Any suit, appeal or application if made beyond the prescribed period of limitation, it is the duty of the court not to_____ with such suits irrespective of the fact whether the plea of limitation has been set up in defence or not. *(1 mark each)*

2. (a) Discuss the procedure to be followed for arbitral proceedings by an arbitral tribunal under the Arbitration and Conciliation Act, 1956. *(4 marks)*

   (b) Explain the distinction between:

   (i) Hacking and passing off

   (ii) Simple mortgage and English mortgage. *(4 marks each)*

   (c) Fill in the blank spaces with appropriate nomenclature or terminology in the following:

   (i) A condition which destroys or divests the rights upon the happening of an event is known as _____.

   (ii) A person who signs a document professing to transfer the property is called as _____.

   (iii) Article 14 of the Constitution forbids class legislation, but does not forbid _____.

   (iv) A gift comprising both of existing property and future property is

_____ as to the latter. *(1 mark each)*

3. (a) Write notes on the following :
   (i) Doctrine of part-performance.
   (ii) The principle of estoppel under the Indian Evidence Act, 1872
   (iii) Persons against whom specific performance cannot be enforced.
   (4 marks each)

   (b) Choose the most appropriate answer from the given options in respect of the following:
   (i) The term 'cognizance' means —
   (a) A crime
   (b) Custody without warrant
   (c) Arousing judicial notice
   (d) Custody with warrant.

   (ii) Any person who is aggrieved by a decree or order may apply for a review of judgement to the —
   (a) Appellate Court
   (b) High Court
   (c) District Court concerned
   (d) Court which passed the decree or order.

   (iii) Registration of a 'will' is —
   (a) Compulsory
   (b) Optional
   (c) Either (a) or (b)
   (d) None of the above.

   (iv) Period of limitation in suits of contracts relating to seamen's wages is —
   (a) 3 years
   (b) 5 years
   (c) 12 years
   (d) None of the above. *(1 mark each)*

4. (a) Enumerate the salient features of the Right to Information Act, 2005. *(4 marks)*

   (b) State, with reasons in brief, whether the following statements are correct or incorrect:

   (i) An unregistered document under section 17 of the Registration Act, 1908 can be used in any legal proceeding to bring out indirectly the effect which it would have if registered.

   (ii) Rectification means putting an end to a contract which is still operative and making it null and void *ab initio.*

   (iii) Every confession must be an admission but every admission may not amount to a confession.

   (iv) Procedure by way of summary suit applies to suits upon the bills of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37 of the Code of Civil Procedure, 1908.

(v) Attestation is an important formality in connection with the execution of the transfer as per the Transfer of Property Act, 1882.

(vi) Freedom of speech and expression is guaranteed to the citizens of India, subject to reasonable restrictions. *(2 marks each)*

5.(a) Anuj, a Hindu, who was separated from his father, sells to Ramesh three fields A, B and C representing that he is authorised to transfer the same. Of these fields, Field-C does not belong to Anuj, as it was retained by his father at the time of partition, but after his father's death Anuj being the heir obtained Field-C. Ramesh did not rescind the contract of sale and asked Anuj to deliver Field-C to him. Whether Ramesh will succeed? Decide.
(4 marks)

(b) A requisition was received by the sub-inspector of a police station from another police station to arrest one Mohan in connection with the commission of a non-cognizable offence. Accordingly, the sub-inspector arrested Mohan. Is the action of the sub-inspector valid. *(4 marks)*

(c) Mukesh instituted a suit against Girsih beyond the prescribed period of limitation. Giresh did not raise the objection that the suit was barred by the law of limitation. The civil court allowed the suit for a hearing and decreed. Would the decree be treated valid in such a suit ? Decide giving reasons. *(4 marks)*

(d) Permission was sought by a foreign national to establish an industry for shoes in Delhi. The competent authority refused the permission. The foreign national intends to file a writ petition challenging the order of refusal on the ground that in India persons are guaranteed fundamental right to freedom of trade. Will he succeed? *(4 marks)*

6. (a) A real estate company has its head office at Delhi and branch offices at Ahemdabad, Patna and Indore. A dispute cropped up between Sorabh and the company in respect of a transaction through Ahemdabad office. Sorabh files a suit in respect of this dispute against the company in a court at Patna. How will the court decide? *(4 marks)*

(b) Kailash owns a shop. After some time Jitesh also opens a shop in the neighbourhood of Kailash's shop. As a result of this Kailash loses some customers and his profits fall off. Kailash files a suit in a court of law against Jitesh and is demanding compensation from Jitesh for loss in his profits. Will Kailash succeed? *(4 marks)*

(c) Subir effects an insurance policy of his own life with the Life Insurance Corporation of India and deposits it with a bank for securing payment of an existing debt. Subir dies and the bank claims the amount for the Life Insurance Corporation of India against Subir's heirs. Discuss whether the claim of the bank is maintainable? *(4 marks)*

(d) A dancer enters into a contract with the owner of a theatre. She agrees that she will give performances in the theatre for a period of one month and during this period she will not give dance performance in any other theatre. Can this contract be specifically enforced against the dancer?
(4 marks)

TEST PAPER 5/2011

(This Test Paper is based on ALL study lessons)

Time allowed: 3 hours *Max. marks: 100*

NOTE: *Answer All Questions.*

1. (a) "The right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India is not an absolute right but subject to reasonable restrictions." Discuss. *(8 marks*)

   (b) Discuss the rule of 'reasonable construction' in the interpretation of statutes. *(5 marks)*

   (c) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s):

   (i) Place of arbitration is important for the determination of the rules applicable to substance of dispute, and recourse against the _____.

   (ii) The act of imposition of a total restraint for some period by one person upon the liberty of another person without sufficient lawful justification is called as _____.

   (iii) A document must be submitted for registration within _____ months from the date of execution.

   (iv) The period of limitation for instituting a summary suit is _____ from the date on which the debt becomes due.

   (v) As per section 123 of the Transfer of Property Act, 1882, a gift of immovable property must be attested by_____ witnesses.

   (vi) The adjudicating officer under the Information Technology Act, 2000 can impose damages by way of compensation exceeding Rs._____ to the person harmed by the tort.

   (vii) The pendency of a suit in a foreign court does not _____ the courts in India from trying a suit having the same course of action.

   (1 mark each)

2. (a) Attempt the following:

   (i) Under what circumstances the opinion of the third person becomes relevant under the Indian Evidence Act, 1872?

   (ii) Define the terms 'computer network and 'intermediary under the Information Technology Act, 2000.

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

   (4 marks each)

   (b) Fill in the blank spaces with appropriate nomenclature or terminology in the following:

   (i) The doctrine which states that during the pendency of a suit in a court of law, property which is subject to litigation cannot be transferred is known as _____.

(ii) A writ issued by a higher court to a lower court preventing the latter from usurping jurisdiction which is not legally vested in it is known as _____..

(iii) A case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years is called as _____.

(iv) A statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. This rule of interpretation of statutes is known as _____.

(1 mark each)

3. (a) Explain the role and scope of the following in the interpretation of statutes:

(i)Mischief rule

(ii)Preamble *(4 marks each)*

(b) Define the terms 'Public authority' and 'Right to information' under the Right to Information Act, 2005. *(4 marks)*

(c) Choose the most appropriate answer from the given options in respect of the following:

(i) An award may be challenged on the grounds of —

(a) Incapacity of a party
(b) Invalidity of the arbitration agreement
(c) Both (a) and (b)
(d) None of the above.

(ii) The rules pertaining to gifts in the Transfer of Property Act, 1882 do not apply to the gifts made by —

(a) Hindus
(b) Mohammendans
(c) Jews
(d) None of the Above.

(iii) As per the Registration Act, 1908, a testator may deposit with any Registrar his will in a sealed cover superscribed with the name of the testator —

(a) Personally
(b) Through an agent
(c) Through any person
(d) Either (a) or (b).

(iv) Actionable claims are claims with respect to –

(a) Immovable property
(b) Secured debts
(c) Unsecured debts
(d) None of the above. *(1 mark each)*

4.(a) Discuss the remedies available to a person who has been refused to register a document by a Sub-Registrar. Can registration of documents be refused on the ground of under-valuation for stamp duty? *(4 marks)*

(b) State, with reasons in brief, whether the following statements are correct or incorrect:

(i) A complaint in a criminal case must be made in a particular format.
(ii) Intelligence and security agencies have been exempted absolutely from the ambit of the Right to Information Act, 2005.
(iii) The limitation period for money payable for the interest upon money due from the defendant to the plaintiff is 12 years.
(iv) Secondary evidence is generally in the form of compared copies, certified copies or copies made by such mechanical processes as in themselves ensure accuracy.
(v) Interpretation of a statute is aimed at giving 'force and life' to the intention of the legislature.
(vi) Each cyber appellate tribunal consists of 3 persons only.

(2 marks each)

5. (a) Which of the following are moveable or immovable properties under the Transfer of Property Act, 1882:
(i) a right to way;
(ii) a factory;
(iii) a right to collect lac from trees;
(iv) hereditary offices;
(v) growing crops; and
(vi) standing timber. *(4 marks)*

(b) Sanjay commits an offence by causing injury to Yogesh, punishable under section 323 of the Indian Penal Code, 1860, the punishment for which is imprisonment for a term which may extend to one year or a fine upto Rs.1,000 or with both. Yogesh makes a complaint to the metropolitan magistrate against Sanjay after ten months of the commission of the offence. Can the said court take cognizance of that offence? Give reasons.

(4 marks)

(c) Nikhil without Sumit's authority contracts to sell to Bimal an estate which Nikhil knows belongs to Sumit. Can Nikhil enforce specific performance of this contract if Sumit is willing to confirm it? *(4 marks)*

(d) During a court proceeding, a hundi was required to be produced. The plaintiff stated that the hundi had been lost. Can the court presume that the hundi had been properly stamped?

(4 marks)

6. (a) On 31st December, 2004 Sumesh took a loan of Rs.20,000 from Himesh. He paid Rs.4,000 to him on 16th June, 2008 towards part-payment. After that, Himesh did not receive any amount from Sumesh. Subsequently, Himesh instituted a suit for recovery of the dues from Sumesh after the expiry of two years from the date of last part-payment. Decide whether Himesh will succeed in his suit.

(4 marks)

(b) The managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign a document transferring her property to him. He had done so without the knowledge of his principal. Whether principal will be liable? Give reasons.

(4 marks)

(c) Government of Andhra Pradesh passed a law prohibiting the manufacture of bidis in the villages during the agricultural season. No person residing in the village could employ any other person nor engage himself in the manufacture of bidis during the agricultural season. The objective of the provision was to ensure adequate supply of labour for agricultural purposes. A bidi manufacturer could not even engage labour from outside the State, and so, had to suspend manufacture of bidis during the agricultural season. Even villagers incapable of engaging in agriculture, like old persons, women and children, etc., who supplemented their income by engaging themselves in manufacturing bidis were prohibited without any reason. Decide whether law passed by Government of Madhya Pradesh is constitutionally valid.
(4 marks)

(d) A first information report is lodged against krook for committing one cognizable and three non-cognizable offences. Can the police conduct investigation in respect of all the four offences without an order from the Magistrate?

(4 marks)

EXECUTIVE PROGRAMME

GENERAL AND COMMERCIAL LAWS

QUESTION PAPERS OF PREVIOUS SESSIONS

Question papers of immediate past two examinations of General and Commercial Laws paper are appended to this study material for reference of the students to familiarize with the pattern and its structure. Students may please note that answers to these questions should not be sent to the Institute for evaluation.

DECEMBER 2010

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer SIX questions including Question No.1 which is COMPULSORY.*

1. (a) Article 32 of the Constitution of India empowers the Supreme Court to enforce the fundamental rights guaranteed under Part III of the Constitution of India. Explain with the help of decided case law how the provisions of Article 32 of the Constitution of India have helped in the enforcement of fundamental rights. *(8 marks)*

   (b) Discuss the ordinance making powers of the President of India and of the Governor of a State as provided in the Constitution of India. *(6 marks)*

   (c) "Rule of ejusdem generis is merely a rule of construction to aid the courts to find out the true intention of the legislature." Explain. *(6 marks)*

2. Write notes on **any four** of the following :

   (i) Circumstantial evidence

   (ii) Appointment of experts by an arbitral tribunal under the Arbitration and Conciliation Act, 1996

   (iii) The rule of strict liability as laid down in Rylands vs. Fletcher

   (iv) Rules relating to presumption

   (v) Spes successionis. *(4 marks each)*

3. Distinguish between **any four** of the following:

   (i) 'Condition restraining alienation' and 'condition restraining enjoyment'.

   (ii) 'Mortgage' and 'charge'.

   (iii) 'Sale' and 'contract for sale'.

   (iv) 'Set-off and 'counter-claim'.

(v) Electronic form' and 'electronic record'. *(4 marks each)*

4. (a) Explain with illustration the doctrine of 'damnum sine injuria' and 'injuria sine damno'. (*6 marks)*

(b) List any ten instruments which are chargeable with duty under the Indian Stamp Act, 1899. *(5 marks)*

(c) What are 'cyber offences' under the Information Technology Act, 2000? *(5 marks)*

5. (a) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :

(i) A writ of _____ is issued to an inferior court preventing the latter from usurping jurisdiction which is not legally vested in it.

(ii) A decree through which the right as to any property or the legal character of a person is judicially ascertained is known as _____.

(iii) The word 'tort' is a French equivalent of English word _____.

(iv) All documents produced for inspection of the court are called_____.

(v) The provisions regarding use of adhesive stamps are given under section_____ of the Indian Stamp Act, 1899.

(vi) The statement given by the court on the grounds of a decree or order as defined in section 2(9) of the Code of Civil Procedure, 1908 is known as _____ . *(1 mark each)*

(b) Choose the most appropriate answer from the given options in respect of the following:

(i) The relief of cancellation of a written instrument is available under the Specific Relief Act, 1963 —

(a) When an instrument is void or voidable at the option of plaintiff

(b) When the plaintiff may apprehend serious injury if the instrument is left outstanding

(c) Where the instrument requires registration but is not registered

(d) Where the conditions (a) and (b) mentioned above are fulfilled.

(ii) An award may be challenged on the ground of —

(a) Incapacity of a party

(b) Invalidity of an arbitration agreement

(c) Both (a) and (b)

(d) None of the above.

(iii) The Parliament is empowered to make laws on the subjects enumerated in—

(a) List-I

(b) List-II

(c) Both List-I and List-II

(d) None of the above.

(iv) As per the Registration Act, 1908, a testator may deposit with any Registrar his will in a sealed cover with the name of the testator —

(a) Personally

(b) Through an agent

(c) Through any person

(d) Either (a) or (b).

(v) Where possession of the property is to be given to the mortgagee, the mortgage is called —

(a) Usufructuary mortgage

(b) Simple mortgage

(c) Anomalous mortgage

(d) None of the above.

(vi) Summary trials will apply to those offences which are not punishable with imprisonment for a term exceeding —

(a) Two years

(b) One year

(c) 60 Days

(d) 90 Days. *(1 mark each)*

(c) Abhay's agricultural land was purchased by the government for the purpose of construction of a factory but no duty was paid for this transfer by the government. Abhay wanted to take back his land on the ground that the government has not paid the duty and, therefore, no sale deed was executed. Will Abhay succeed ? Give reasons. *(4 marks)*

6. State, with reasons in brief, whether the following statements are true or false:

(i) Certain categories of information have been exempted from disclosure under the Right to Information Act, 2005.

(ii) Article 174 of the Constitution of India empowers the Governor of a State to dissolve the State Legislature.

(iii) Arbitration is the means by which the parties to a dispute get it settled through the intervention of a third person.

(iv) The limitation for taking cognizance of certain offences has been prescribed by the Code of Criminal Procedure, 1973.

(v) If the parties to arbitration fail to determine the number of arbitrators, the arbitral tribunal shall consist of three arbitrators.

(vi) An easement can be transferred apart from dominant heritage.

(vii) The doctrine of part-performance is applicable only where the transferee has taken possession of the immovable property.

(viii) A judicial proceeding under the Code of Criminal Procedure, 1973 includes inquiry, trial and investigation. *(2 marks each)*

7. (a) A magistrate of the first class passed a sentence of imprisonment for a term of three years with a fine of Rs.4,000 and in lieu of non-payment thereof an additional imprisonment for another one year. Has the aggrieved person any right to appeal against this sentence? *(6 marks*)

(b) Anil prefers an appeal for setting aside the arbitral award on the ground that he was not given a proper notice of arbitral proceedings and thereby not being able to present his case. He also furnishes sufficient proof and pleads

before the court that he received the arbitral award just 15 days back. Decide with reasons—

(i) whether Anil will succeed in his prayer; and

(ii) whether the law of limitation will not be a bar? *(5 marks)*

(c) Ram and Shyam sell rice for Rs. 25,000 to Sohan and Mohan. Sohan sells cloth worth Rs. 28,000 to Shyam. Sohan files a suit against Shyam for recovery of price of cloth. Shyam claims set-off of the cost of rice in this suit. Will he succeed? *(5 marks)*

8. (a) Ajay-voluntarily makes a gift of his immovable property to Bijoy. Bijoy accepts the gift. The possession of the property was given to Bijoy but the gift deed which required registration under section 123 of the Transfer of Property Act, 1882 was not registered. Whether Ajoy, the donor can revoke the gift? Decide. *(6 marks)*

(b) Amrit contracts Bhushan to sell a piece of land consisting of five bighas of land for Rs.5 lakh. Subsequently, it turns out that only four bighas of land belongs to Amrit. Whether specific enforcement of such part-contract may be possible on the part of either party to the contract ? Decide by referring the specific provisions of the Specific Relief Act, 1963. *(5 marks)*

(c) Angad is charged for murder of Binod. The charge sheet is filed in the court of Chief Judicial Magistrate, who passed an order of sentence of imprisonment for life. Angad engages you as an advocate. Advise the course of action to Angad giving reasons. *(5 marks)*

JUNE 2011

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *Answer **SIX** questions including Question No.1 which is COMPULSORY.*

1. (a) Explain powers of the Parliament to enact laws on subjects enumerated in the State List. *(8 marks)*

   (b) Is it correct to say that Directive Principles of State Policy have to conform to and run as subsidiary to Fundamental Rights? Discuss. *(6 marks)*

   (c) Write in brief the importance of the writ of habeas corpus. *(6 marks)*

2. Write notes on ***any four*** of the following :

   (i) Penalties which can be imposed on public information officer under section 20 of the Right to Information Act, 2005

   (ii) Temporary and perpetual injunction

   (iii) Malicious prosecution

   (iv) Res gestae

   (v) Primary and secondary evidence. *(4 marks each)*

3. (a) Mention the circumstances under which refund of stamp duty or penalty may be made by revenue authorities. *(4 marks)*

   (b) State the documents whose registration is optional under the Registration Act, 1908. *(4 marks)*

   (c) Discuss the rule of harmonious construction in the interpretation of statutes. *(8 marks)*

4. (a) The law of limitation bars the remedy in a court of law when the period of limitation has expired. However, there are certain exclusions in the computation of the period of limitation. Explain. *(4 marks)*

   (b) Distinguish between the following :

   (i) 'Congnizable offence' and 'non-congnizable offence'.

   (ii) 'Hacking' and 'passing off'.

   (iii) 'Computer network' and 'computer system'. *(4 marks each)*

5. (a) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :

   (i) The publication of defamatory statement through written words is known as _____.

   (ii) A pending suit, action, petition or the like is known as _____.

   (iii) The doctrine which underlines the general principle that no one shall be vexed twice for the same cause is known as _____.

   (iv) A statement given by a judge on the grounds of decree or order is known as _____.

   (v) Actionable claims are claims to _____ debts. *(1 mark each)*

(b) Write the most appropriate answer from the given options in respect of the following :

(i) The Constitution of India was enacted on —

(a) 26th November, 1949

(b) 26th January, 1950

(c) 28th January, 1950

(d) None of the above.

(ii) The Preamble of the Constitution —

(a) Is a part of the Constitution

(b) Can be used for interpreting the Constitution

(c) Both (a) and (b)

(d) None of the above.

(iii) The relief of cancellation of instrument is founded upon the principle of —

(a) Preventive justice

(b) Protective justice

(c) Proper justice

(d) None of the above.

(iv) As per the Transfer of Property Act, 1882, a person is an ostensible owner of an immovable property where he becomes interested therein by —

(a) Express consent

(b) Implied consent

(c) Either (a) or (b)

(d) Both (a) and (b).

(v) Second appeal to the Central Information Commission or the State Information Commission, as the case be, may be filed within —

(a) 30 days

(b) 60 days

(c) 90 days

(d) 120 days.

of the date on which the decision was given by the First Appellate Authority.

(vi) The right of review has been conferred by the Code of Civil Procedure, 1908. It provides that any person considering himself aggrieved by a decree or order may apply for a review of the judgement to the —

(a) Appellate Court

(b) High Court

(c) District Court

(d) Court which passed the decree or order. *(1 mark each)*

(c) Define *res judicata* and state the conditions of its application. *(5 marks)*

6. State, with reasons in brief, whether the following statements are true or false:

(i) A contract which is dependent upon the personal qualifications can be specifically enforced.

(ii) 'Arbitral tribunal' means a sole arbitrator or a panel of arbitrators.

(iii) A mere right to sue can be transferred.

(iv) A complaint in a criminal case is what a plaint is in a civil case.

(v) In a declaratory decree, the right of any person to any property or his legal character is ascertained.

(vi) A writ of certiorari is issued to prevent a lower court from usurping jurisdiction which is not legally vested in it.

(vii) All documents produced for the inspection of the court are known as documentary evidence.

(viii) An instrument not 'duly stamped' can be accepted in evidence by an arbitral tribunal. *(2 marks each)*

7. (a) Alok was running a school at a certain place. Bimal started another school near the school of Alok. As a result of this, most of the students of Alok's school left his school and joined Bimal's school. Due to competition, Alok had to reduce the fees by `40 per student per quarter thereby suffering huge monetary loss. Alok instituted a suit against Bimal in the court for claiming compensation. Is the suit instituted by Alok maintainable ?

(6 marks)

(b) Ashok intentionally and falsely leads Bikram to believe that certain land belongs to Ashok, and thereby induces Bikram to buy and pay for it. Afterwards, the land becomes the property of Ashok, and Ashok seeks to set aside the sale on the ground that at the time of the sale he had no title to the property. Can he be allowed to prove his want of title ?

(5 marks)

(c) A document was executed by several persons at different times. The person in whose favour such execution was made, presented the document for re-registration after expiry of three months. Can such document be registered and if so, within what period ? *(5 marks)*

8. (a) A mill owner employed an independent contractor to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir, which the contractor failed to observe because they were filled with soil. Therefore, the contractor did not block them. When water was filled in the reservoir, it burst through the shafts and flooded the plaintiff's coal mines on the adjoining land. Is the mill owner liable to compensate for loss or damage caused to the plaintiff? Give reasons.

(6 marks)

(b) There was a partition of property between a Hindu father and his five sons. The deed provided that if any one of his sons wanted to sell his share, he shall sell it to one of his brothers only and not to any stranger. The consideration for that share shall be `1,000 only. Are these conditions valid ? Give reasons.

(5 marks)

(c) Ram and Shyam entered into an agreement to refer a dispute relating to genuineness of a will to an arbitral tribunal. Inspite of this, Shyam commenced proceedings relating to this dispute in the district court of competent jurisdiction. Ram filed an application for stay of legal proceedings under the Arbitration and Conciliation Act, 1996. Will Ram succeed ? Explain.

(5 marks)