NAAC ACCREDITED

तेजस्वि नावधीतमस्तु

ISO 9001:2008 & 14001:2004

FAIRFIELD

Institute of Management & Technology

'A' Grade Institute by DHE, Govt. of NCT Delhi and Approved by the Bar Council of India and NCTE

Reference Material for Five Years

Bachelor of Law (Hons.)

Code: 038

Semester-V

FIMT Campus, Kapashera, New Delhi-110037, Phones : 011-25063208/09/10/11, 25066256/ 57/58/59/60
Fax : 011-250 63212 Mob. : 09312352942, 09811568155 E-mail : fimtoffice@gmail.com Website : www.fimt-ggsipu.org

INDEX

Five Years Bachelor of Law (Hons.)

Code: 038

Semester – V

ENVIRONMENTAL STUDIES & ENVIRONMENTAL LAWS (301)

ENVIRONMENTAL STUDIES AND ENVIRONMENTAL LAWS

1. INTRODUCTION
   (a) Meaning – Environment is a sum total of air, water and land together. The modern definition of Environment also includes Land, Buildings and Infrastructure apart from the natural environment.
   (b) Environment Pollution – Meaning and Issues – Environment Pollution is the addition of toxic gases or chemicals in the air excessively so as to pollute the environment. It refers to a toxic change in the chemical composition of the air.

      1. Water Pollution is caused by putting waste in the rivers and streams etc
      2. Air Pollution is caused by emission of fumes and pollution particles in the air.
      3. Land Pollution is caused by activities such as piling of garbage and littering around.
      4. Disposal of Industrial Waste is a big problem.
      5. Disposal of bio-medical waste is a big challenge.

2. Constitutional Guidelines

(a) Right to Wholesome Environment : Evolution and Application – Section 21 of the Constitution talks about Right to Life which also includes Right to Wholesome Environment pertaining to Right to live in a healthy and clean environment. The Right to Wholesome Environment has been evolved over a period of time and has been Applied in various cases wherever threat to life and environment is caused thereby invoking Right to Life.

(b) Relevant Provisions - Art 14 and Art 19(1)(g)(The States shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The right to equality may also be infringed by the government decisions that have an impact on the environment. An arbitrary action must necessary involve a negation of equality. Thus urban environmental groups often resort to Art 14 to quash arbitrary municipal permission for construction that are contrary to development regulations. Article 21 (No person shall be deprived of his life or personal liberty except according to procedure established by law) In Maneka Gandhi V Union of India – The Supreme Court while elucidating on the importance of the right to life under Article 21 held that the Right to Life is not confined to mere animal existence, but extends to the right to live with the basic human dignity. Article 48-A (Protection and Improvement of Environment and safeguarding the forests and wildlife of the country). Article 51 A(g)to protect and improve the natural environment including forests, lake, rivers, wildlife and have compassion for living creatures.

(c) Environment Protection through Public Interest Litigation – Our judiciary has used the tool of PIL quite effectively for the cause of environmental protection. But the judiciary

has shown wisdom in denying the false petitions seeking to advance private interests through PIL as evident from the decision of the Supreme Court in Subhash Kumar V State of Bihar. Hence PIL has proved to be a great weapon in the hands of higher courts for protection of environment and our judiciary has certainly utilized this weapon of PIL in best possible manner.

3. Environmental Laws – India and International

(a) Law of Torts - The explosion of environmental statutes over the past forty years, giving rise to the field of environmental law, has created a critical and evolving question in our legal system as to how this comparatively new field of law intersects with the common law of torts. Defining the proper role of tort law in remedying environmental injuries is an important matter of public policy; the answer will determine what the tort system can and cannot achieve, inform what it should and should not achieve, and clarify which common law enforcement areas are actually voids. This information assists the judiciary on its role in addressing alleged injuries to the environment, and guides the legislative and executive branches as to whether and when action is required to fashion a legal remedy. Tort law has historically provided the principal mechanism for remedying harms to the environment. The complexities of many modern environmental harms and the actual or perceived inadequacies of the common law, however, have led policy makers such as Congress to enact wide-ranging laws that provide legal remedies. This Article analyzes how these laws operate in relation to the common law of torts, and provides guidelines for judges to determine whether tort law provides a remedy for an alleged environmental harm. The Article thus seeks to answer a basic, yet largely unexplored, question in the legal system, namely the intersection of tort and environmental law.

A widely accepted premise is that environmental law is principally concerned with the prevention or correction of environmental harm.22 What constitutes such harm, however, is similarly problematic to define. For instance, a law prohibiting the discharge of raw sewage or toxic chemicals into a waterway would likely be viewed as a law designed to prevent or correct an obvious environmental harm. After all, these substances can cause severe harm to humans, aquatic species, and wildlife.23 But what about a law establishing a nature preserve? Presumably, the purpose of such law is to create a protected area for wildlife to flourish, prohibit any artificial development, and prevent future harm to the environment. Is this an environmental law? What about a law providing for a public park? It too has the effect of quarantining an area to preserve a natural state and prevent further development, which could threaten or otherwise be said to harm the environment. Should this also be regarded as an environmental law? And if it is to be included in the field of environmental law, what about other laws, such as zoning laws, which can produce similar effects?

Another watershed substantive federal law is the Clean Water Act (CWA), which was enacted as the Federal Water Pollution Control Act Amendments of 1972.37 The CWA is also regulatory in nature and involves a cost-benefit decision. Congress enacted the CWA with the express objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"38 by imposition of technologybased effluent limitations that would result in the reduced discharge of pollutants into "navigable waters" from "point sources."39 While the CWA states a goal of

zero discharge,40 and authorizes the prohibition of certain pollutant discharges,41 the law can more accurately be described as imposing standards on the direct and indirect discharge of substances into waterways. The CWA establishes a permit system for regulating discharges below a specified, scientifically determined level for a given pollutant.42 Like the CAA, the CWA also provides administrative, civil, and criminal penalties for violators,43 and includes a private right of enforcement.44 A fourth law enacted during the initial “wave” Thus, the CWA is principally a regulatory law supporting the policy goals of prevention and deterrence.

(b) Law of Crimes - Criminal law has always had a place in the environmental protection regimes of all jurisdictions in Australia. It has, however, usually performed an ancillary and supportive function to the main purpose of the regime, which is to regulate the potentially harmful activities of polluters by complex licensing and permission schemes. The emphasis has been upon securing and promoting acceptable behaviour through a process of bargaining, negotiation and compromise carried out between the regulator and the regulated. The outcome of this process is legally acceptable levels of pollution and legalised polluters. Criminal sanctions function primarily within such schemes as a "long stop" (Farrier 1992). They provide a last resort in both practical and symbolic terms for dealing with recalcitrant polluters who, although members of the scheme, refuse to "play fair". The threat of criminal sanctions is distant but has value in "reweighting the bargaining process in favour of the administrative agency" (Farrier 1992, p. 87) and therefore facilitating the negotiation of higher standards and more stringent requirements in the short term. Criminal sanctions also operate in such schemes to punish the behaviour of those who do not carry out all or part of their polluting activities within the approved scheme¾ the "midnight dumpers". This more immediate threat supposedly encourages polluting industries to bring themselves within the scheme where the threat of sanctions decreasing is more remote. However, a number of commentators consider that there is a great deal of evidence that this approach is not effective in securing the level of protection desired by the community and required by the environment itself. Polluters ignoring their responsibilities are not promptly prosecuted, the environment continues to be degraded beyond an acceptable level and community anxiety continues to increase. In part these problems are related to perceptions of "capture" of regulatory bodies by their client groups where few prosecutions of polluters are seen to signal an unhealthy state of affairs. The much-publicised political response in some jurisdictions has been to sharply increase criminal penalties and the scope of criminal offences in relation to the environment, and to tip the scale in favour of what is seen as coercion rather than the encouragement of compliance. Existing regulatory structures have also been tightened ¾ standards and approved processes have been re-articulated as concrete achievable outcomes rather than vague goals. It is easier to determine a licensee's performance against such criteria and thus easier to detect prosecutable noncompliance. However, some problems are apparent in this shift. For example, recent litigation in the Land & Environment Court of NSW, Brown v. EPA (1992) 78 LGRA 119, concerned a challenge to the policy of applying a prosecutable reality approach to the issue of pollution licences by the NSW EPA. The case sought to raise questions about the Criminal Law and Environment Protection 3 application of this policy with respect to the setting of overall pollution standards. The applicant was unsuccessful in the Land and Environment Court

of NSW at first instance. The parties have recently settled the matter and consequently it did not proceed on appeal. In NSW there has been the enactment of the Environmental Offences and Penalties Act 1989 which created a new broadly defined offence of "harm to the environment", in addition to increasing fines and imprisonment terms for all existing criminal environmental offences under the many NSW Acts relating to environment protection. The Act also introduced directors' liability provisions and extended criminal liability for some waste offences. The intention of the Act was expressed as not to create a new criminal pollution control regime, but rather to bolster the threat behind the existing scheme and frighten "sleazy operators" (NSW Minister for Environment 1989) who had in the past taken advantage of the conciliatory attitude and the poor monitoring capability of the authorities. It also provided a bigger stick with which to beat "wildcat" polluters and "midnight dumpers" who operated outside the scheme entirely, and a bigger inducement with which to gain their cooption into the Scheme (NSW Minister for Environment 1989). As such it has focussed upon deterrence through coercion rather than cooperation.

There are certain inherent problems with the use of criminal law to achieve environmental outcomes that are caused by a conflict between the nature of criminal law as it currently stands, and the idea and ideals of environmental protection. Other conflicts are caused where the legislature has sought to change the balance between criminal law and regulatory rules without substantially changing current systems of regulation. Criminal law and environment protection Not preventative by nature The criminal law is not immediately preventative by nature. It is, at least in its initial phase of operation, concerned primarily with the punishment of unacceptable behaviour. It does not, therefore, prevent the occurrence of environmental harm which should be the fundamental basis of environmental protection regimes. Criminal law is also adversarial in nature (the same can be said for civil law of course). Disputes are settled in court which takes up time and resources and may well delay the remediation of the harm for which liability is being debated. Litigation, moreover, absorbs resources that may be more valuably directed towards upgrading harmful processes or remediating damage. Scope and nature of offences are unclear The use of the criminal law in the field of environmental protection also suffers from uncertainties as regards the scope and nature of the offences. For example, what is the requisite state of mind for offenders? Environmental Crime 4 What acts constitute harm to the environment? What should be the burden of proof and on whom should it lie? In terms of the mens rea required for environmental offences, Farrier points out that although some recent legislation has tackled this problem, "there are vast numbers of old environmental offences which reflect the earlier legislative approach of maintaining silence on the issue, leaving the courts with the ostensible task of discovering Parliamentary intention" (Farrier 1992, p. 82). The decision of the High Court in He Kaw Teh (1985) 157 CLR 523 has provided some guidance in finding that three alternatives on this question exist. Depending upon the type of act and the circumstances, mens rea can apply in full, or the offence may be one of strict liability for which the accused may be able to mount a defence of honest and reasonable mistake of fact (in the field of environmental law this defence includes the contention that the accused took all reasonable care or due diligence to prevent the acts leading to the offence) or the offence might be one of absolute liability. In a number of Australian cases (Farrier 1992, p. 83) strict liability has been taken up as the appropriate standard, but in at least one the court has applied the absolute liability classification (Allen v. United Carpet Mills Pty [1989] VR 323). Other uncertainties lie in what actually will constitute the actus reus of

the offence, what will constitute "harm" to the environment, what is "pollution" and what is "the environment"? Such terms have traditionally been broadly defined in order to give the authorities maximum flexibility in determining prosecution strategies. They also vary between jurisdictions. Such uncertainties are further exacerbated by the fact that our scientific knowledge of how the environment absorbs and transmutes toxic substances is in its infancy. Furthermore, research also remains firmly anthropocentric in how it calculates damage.

(c) Public Nuisance - Developments in the use of a federal doctrine of common law of public nuisance to enjoin pollution of interstate and navigable bodies of water! have received considerable recent attention. 2 In Illinois v. City of Milwaukee,3 the United States Supreme Court affirmed a District Court decree granting injunctive relief to the state of Illinois against an out-of-state municipal polluter, the City of Milwaukee, on public nuisance grounds. 4 The federal common law doctrine of public nuisance has been invoked successfully by the federal government to enjoin pollution by a private business concern, 5 and by both the federal government and a state to secure injunctive relief against a private party engaged in intrastate pollution of an interstate body of water.· However, despite this apparent expansion of federal remedies available to both the states and to the federal government, official federal policy as expressed in the Federal Water Pollution Control Act is to place primary pollution control responsibility in the hands of the states. 7 Though the availability of federal remedies is useful in some situations, there are pressing environmental pollution problems which are clearly outside the scope of federal jurisdiction.8 This article will examine the doctrine of common law public nuisance as it has been applied in recent state court decisions,· focusing in particular upon the Pennsylvania case of Commonwealth v. Barnes and Tucker Company,1O (hereinafter cited as Barnes and Tucker). The objectives are threefold: to explain that decision in light of traditional common law public nuisance doctrine; to relate its significant aspects to current developments in other jurisdictions; and to identify the difficulties involved in using the legal theory of public nuisance as a means of pollution control at the state level.

If the common law of public nuisance is to have the effect of supplementing legislative programs that fail to provide, for various reasons, full and complete remedies to particular environmental wrongs, then courts must be open to the particular facts of each case brought before them, and aware of the environmental implications in each case of forcing plaintiffs to resort to alternative administrative channels. However, to the extent that Dairyland Power and Tampa Electric represent the view that only courts are competent to make judgments in the area, they may be ill-considered. Such a view carried to extremes could threaten the independent exercise of agency authority and limit the efficacy of comprehensive legislative schemes for pollution control. Some analysts have argued that ad- PUBLIC NUISANCE 375 ministrative agencies can be more flexible and effective in dealing with particular environmental problems than the courts,78 and the possibilities in this regard should be given weight. Further, technical expertise possessed by administrative bodies may be of considerable value when the feasibility of abatement techniques is at issue. The policy question of whether or not relief should be granted may be inextricably linked with the technical question of whether abatement is possible, especially when the defendant is a public utility providing a necessary service, as in Dairyland Power and Tampa Electric.

One important issue specifically left unresolved by Barnes and Tucker is whether a public nuisance can exist despite legislative, administrative or municipal authorization of the particular

activity in question. The court stated that the legislature could, within constitutionallimits,80 authorize conduct which otherwise would constitute a nuisance, but found that although the defendent operated in accordance with the Clean Streams Law, its discharge of acid mine water during that period was at best "permitted", but not "authorized", by the legislature.8! The defense of legislative authorization was not available to it. This finding is consistent with the generally strict scrutiny given by courts to statutes under which legislative authorization to maintain a nuisance is claimed.82 Any grant of authority must be explicit, and an alleged grant may be held not to extend to a particularly obnoxious means of accomplishing an otherwise permitted activity.83 Thus in a suit by the New York state attorney general to enjoin the operation of a methadone maintenance facility for drug addicts on public nuisance grounds,84 the court affirmed a lower court grant of injunctive relief, despite defendant's argument that the maintenance program was operated pursuant to the New York Public Health Law and was licensed, certified or inspected by various state and federal agencies. The evidence, said the court, supported allegations in the plaintiff's com- 376 ENVIRONMENTAL AFFAIRS plaint that the facility, though authorized, was being operated in an offensive manner.

(d) Emergence of Environmental Legislations - Protection of the environment and keeping ecological balance unaffected is a task which not only the government but also every individual, association and corporation must undertake. It is a social obligation and fundamental duty enshrined in Article 51 A (g) of the Constitution of India. The concept of environmental protection is an age old idea imbibed in the Indian cultural ethos since time immemorial. To understand the present-day legal system for environment protection and conservation of natural resources, it is important to look into the past Indian traditions and practices of protecting the environment. In the early years of Independence there was no precise environmental policy and not much attempts were made to frame any specific policy or law for the protection of environment. However, the concern for environmental protection was reflected in the national planning process and forest policy.

Environmentalism is not a fixed concept, but is always evolving influenced by its context. This also applies to Indian environmentalism, which has developed and changed throughout the years. There is a rapid evolution in the Indian legislations after independence as the need and concern regarding environment arose. From ancient environmental rules including Buddhism and Jainism to medieval and then from British era to afterwards including the post 1972 (Stockholm's) and the coming of modern legislations on environmental laws in India, a great sense of concern has been shown by the legislature and even the Indian judiciary shown a great concern regarding the environment with its landmark judgements.

Policy and Laws in Ancient India (500 BC-1638 AD)

Environmental awareness can be said to have existed even in the prevedic Indian valley Civilization which flourished in northern India about 5,000 years ago. This is evident from the

archaeological evidence gathered from Harappa and Mohenjo-Daro which were the prominent cities of the civilization. Their awareness about hygiene and sanitation as evident from their constructions of ventilated houses, orderly streets, numerous wells, bath rooms, public baths and covered underground drains. Protection and cleaning up of environment was the essence of Vedic (1500–500 BC) culture. Charak Samhita (medical Science book of 900 BC – 600 BC) give many instructions for the use of water for maintaining its purity. Under the Arthashastra (an ancient book on statecraft, economic policy and military strategy), various punishments were prescribed for cutting trees, damaging forests, and for killing animals and environmental ethics of nature conservation were not only applicable to common man but the rulers and kings were also bound by them.

Policy and Laws in Medieval India (1638-1800 AD)

To Mughal rulers, forest meant no more than woodlands where they could hunt. The history of medieval India is dominated by Muslim Rulers where no note worthy development of environmental jurisprudence took place except during the rule of Mughal Emperor Akbar. During Akbar's rule except rulers others are prohibited from hunting or shikar. But no major initiatives took place during medieval period to prevent environmental protection and conservation of natural resources as the rulers were only interested in war, religion propagation and empire building. Barring "royal trees" which enjoyed patronage from being cut except upon a fee, there was no restriction on cutting of other trees, hunting animals, etc. Forests during this period shrank steadily in size.

Laws in British India (1800-1947 AD)

• Shore Nuisance (Bombay and Kolaba) Act, 1853 imposed restrictions on the fouling of seawater.

• Merchant Shipping Act of 1858 dealt with prevention of sea pollution by oil.

• The Fisheries Act, 1897

• The Bengal Smoke Nuisance Act of 1905

• Bombay Smoke Nuisance Act of 1912

• Wild Birds and Animals Protection Act, 1912

Laws after Independence (1947)

• The India Constitution adopted in 1950 did not deal with the subject of environment or prevention and control of pollution as such.

• It was the Stockholm Declaration of 1972 which turned the attention of the Indian Government to the boarder perspective of environmental protection.

• Comprehensive (special) environmental laws were enacted by the Central Government in India.

• National Council for Environmental Policy and Planning was set up in 1972 which was later evolved into Ministry of Environment and Forests (MoEF) in 1985.

• The Wildlife (Protection) Act, 1972, aimed at rational and modern wild life management.

• The Water (Prevention and Control of Pollution) Act, 1974, provides for the establishment of pollution control boards at Centre and States to act as watchdogs for prevention and control of pollution.

• The Forest (Conservation) Act, 1980 aimed to check deforestation, diversion of forest land for non-forestry purposes, and to promote social forestry.

• The Air (Prevention and Control of Pollution) Act,1981, aimed at checking air pollution via pollution control boards.

•The Environment (Protection) Act, 1986 is a legislation which provides for single focus in the country for protection of environment and aims at plugging the loopholes in existing legislation.

• The Public Liability Insurance Act, 1991, provides for mandatory insurance for the purpose of providing immediate relief to person affected by accidents occurring while handling any hazardous substance.

• The Biological Diversity Act, 2002, is a major legislation intervention effected in the name of the communities supposed to be involved in the protection of biodiversity around them.

The National Environment Policy of 2006

Objective

• Conservation of Critical Environmental Resources

• Intra-generational Equity: Livelihood Security for the Poor

• Inter-generational Equity

• Integration of Environmental Concerns in Economic and Social Development

• Efficiency in Environmental Resource Use

• Enhancement of Resources for Environmental Conservation

Principles

• Human Beings are at the Centre of Sustainable Development Concerns

• Environmental Protection is an Integral part of the Development Process

• The Precautionary Approach

• Economic Efficiency

• Environmental Standard Setting

• Preventive Action

• Environmental Offsetting

Hon'ble Supreme Court through its various judgements also held that the mandate of right to life includes right to clean environment, drinking-water and pollution-free atmosphere. These judgments includes the famous Taj Mahal Case, Dehradun Valley Case, Smoking in Public Places Case, Pollution in Delhi Case, Sri Ram Food and Fertilizer Case, Public Health Case, Public Park Case and several landmark judgments on Sustainable development. In a nutshell the policies regarding environment has changed very rapidly through legislations as well as the judicial interpretations but still there is need of further growth and development in this regard.

Unit –II

(a) The Water (Prevention and Control of Pollution) Act, 1974 -

"pollution" means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms.

POWERS AND FUNCTIONS OF BOARDS

16. Functions of Central Board (1) Subject to the provisions of this Act, the main function of the Central Board shall be to promote cleanliness of streams and wells in different areas of the States. (2) In particular and without prejudice to the generality of the foregoing function, the Central Board may perform all or any of the following functions, namely,- (a) advise the Central Government on any matter concerning the prevention and control of water pollution; (b) co-ordinate the activities of the State Boards and resolve disputes among them; (c) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution; (d) plan and organise the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of water pollution on such terms and conditions as the Central Board may specify; (e) organise through mass media a comprehensive programme regarding the prevention and control of water pollution; 15[(ee) perform such of the functions of any State Board as may be specified in an order made under sub-section (2) of 18.

(f) collect, compile and publish technical and statistical data relating to water pollution and the measures devised for its effective prevention and control and prepare manuals, codes or guides relating to treatment and disposal of sewage and trade effluents and disseminate information connected therewith; (g) lay down, modify or annul, in consultation with the State Government concerned, the standards for a stream or well: PROVIDED that different standards may be laid down for the same stream or well or for different streams or wells, having regard to the quality of water, flow characteristics of the stream or well and the nature of the use of the water in such stream or well or streams or wells; (h) plan and cause to be executed a nation-wide programme for the prevention, control or abatement of water pollution; (i) perform such other functions as may be prescribed. (3) The Board may establish or recognise a laboratory or laboratories to enable the

Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents. 17. Functions of State Board (1) Subject to the provisions of this Act, the functions of a State Board shall be- (a) to plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the State and to secure the execution thereof; (b) to advise the State Government on any matter concerning the prevention, control or abatement of water pollution; (c) to collect and disseminate information relating to water pollution and the prevention, control or abatement thereof; (d) to encourage, conduct and participate in investigations and research relating to problems of water pollution and prevention, control or abatement of water pollution; (e) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of water pollution and to organise mass education programmes relating thereto; (f) to inspect sewage or trade effluents, works and plants for the treatment of sewage and trade effluents and to review plans, specifications or other data relating to plants set up for the treatment of water, works for the purification thereof and the system for the disposal of sewage or trade effluents or in connection with the grant of any consent as required by this Act.

(g) to lay down, modify or annul effluent standards for the sewage and trade effluents and for the quality of receiving waters (not being water in an interState stream) resulting from the discharge of effluents and to classify waters of the State; (h) to evolve economical and reliable methods of treatment of sewage and trade effluents, having regard to the peculiar conditions of soils, climate and water resources of different regions and more especially the prevailing flow characteristics of water in streams and wells which render it impossible to attain even the minimum degree of dilution; (i) to evolve methods of utilisation of sewage and suitable trade effluents in agriculture

(j) to evolve efficient methods of disposal of sewage and trade effluents on land, as are necessary on account of the predominant conditions of scant stream flows that do not provide for major part of the year the minimum degree of dilution; (k) to lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream taking into account the minimum fair weather dilution available in that stream and the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents; (l) to make, vary or revoke any order- (i) for the prevention, control or abatement of discharges of waste into streams or wells; (ii) requiring any person concerned to construct new systems for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution; (m) to lay down effluent standards to be complied with by persons while causing discharge of sewage or sullage or both and to lay down,

modify or annul effluent standards for the sewage and trade effluents; (n) to advise the State Government with respect to the location of any industry the carrying on of which is likely to pollute a stream or well; (o) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government. (2) The Board may establish or recognise a laboratory or laboratories to enable the Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents.

18. Power to give directions 16[(1)] In the performance of its functions under this Act- (a) the Central Board shall be bound by such directions in writing as the Central Government may give to it; and (b) every State Board shall be bound by such directions in writing as the Central Board or the State Government may give to it: PROVIDED that where a direction given by the State Government is inconsistent with the direction given by the Central Board, the matter shall be referred to the Central Government for its decision. 15[(2) Where the Central Government is of the opinion that any State Board has defaulted in complying with any directions given by the Central Board under subsection (1) and as a result of such default a grave emergency has arisen and it is necessary or expedient so to do in the public interest, it may, by order, direct the Central Board to perform any of the functions of the State Board in relation to such area for such period and for such purposes, as may be specified in the order. (3) Where the Central Board performs any of the functions of the State Board in pursuance of a direction under sub-section (2), the expenses, if any, incurred by the Central Board with respect to the performance of such functions may, if the State Board is empowered to recover such expenses, be recovered by the Central Board with interest (at such reasonable rate as the Central Government may, by order, fix) from the date when a demand for such expenses is made until it is paid from the person or persons concerned as arrears of land revenue or of public demand. 12 (4) For the removal of doubts, it is hereby declared that any directions to perform the functions of any State Board given under sub-section (2) in respect of any area would not preclude the State Board from performing such functions in any other area in the State or any of its other functions in that area.

21. Power to take samples of effluents and procedure to be followed in connection therewith (1) A State Board or any officer empowered by it in this behalf shall have power to take for the purpose of analysis samples of water from any stream or well or samples of any sewage or trade effluent which is passing from any plant or vessel or from or over any place into any such stream or well. (2) The result of any analysis of a sample of any sewage or trade effluent taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of sub-sections (3), (4) and (5) are complied with. (3) Subject to the provisions of sub-sections (4) and (5),

when a sample (composite or otherwise as may be warranted by the process used) of any sewage or trade effluent is taken for analysis under sub-section (1), the person taking the sample shall- (a) serve on the person in charge of, or having control over, the plant or vessel or in occupation of the place (which person is hereinafter referred to as the occupier) or any agent of such occupier, a notice, then and there in such form as may be prescribed of his intention to have it so analysed; (b) in the presence of the occupier or his agent, divide the sample into two parts; (c) cause each Part to be placed in a container which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent; (d) send one container forthwith- (i) in a case where such sample is taken from any area situated in a Union Territory, to the laboratory established or recognised by the Central Board under section 16; and (ii) in any other case, to the laboratory established or recognised by the State Board under section 17; (e) on the request of the occupier or his agent, send the second container- (i) in a case where such sample is taken from any area situated in a Union Territory, to the laboratory established or specified under sub-section (1) of section 51; and (ii) in any other case, to the laboratory established or specified under subsection (1) of section 52. 18[(4) When a sample of any sewage or trade affluent is taken for analysis under subsection (1) and the person taking the sample serves on the occupier or his agent, a notice under clause (a) of sub-section (3) and the occupier or his agent wilfully absents himself, then- (a) the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in sub-clause (i) or sub-clause (ii), as the case may be, of clause (e) of sub-section (3) and such person shall inform the government analyst appointed under sub-section (1) or sub-section (2), as the case may be, of section 53, in writing about the wilful absence of the occupier or his agent; and (b) the cost incurred in getting such sample analysed shall be payable by the occupier or his agent and in case of default of such payment, the same shall be recoverable from the occupier or his agent, as the case may be, as an arrear of land revenue or of public demand: PROVIDED that no such recovery shall be made unless the occupier or, as the case may be, his agent has been given a reasonable opportunity of being heard in the matter.] (5) When a sample of any sewage or trade effluent is taken for analysis under subsection (1) and the person taking the sample serves on the occupier or his agent a notice under clause (a) of sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in clause (b) of sub-section (3), then, the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in sub-clause (i) or sub-clause (ii), as the case may be, of clause (d) of sub-section (3).

27. Refusal or withdrawal of consent by State Board 24[(1) A State Board shall not grant its consent under sub-section (4) of section 25 for the establishment of any industry, operation or process, or treatment and disposal system or extension or addition thereto, or to the bringing into use of a new or altered outlet unless the industry, operation or process, or treatment and disposal system or extension or addition thereto, or the outlet is so established as to comply with any conditions imposed by the Board to enable it to exercise its right to take samples of the effluent.] 13[(2) A State Board may from time to time review25[(a) any condition imposed under section 25 or section 26 and may serve on the person to whom a consent under section 25 or section 26 is granted a notice making any reasonable variation of or revoking any such condition.] (b) the refusal of any consent referred to in sub-section (1) of section 25 or section 26 or the grant of such consent without any condition, and may make such orders as it deemed fit.] (3) Any condition imposed under section 25 or section 26 shall be subject to any variation made under sub-section (2) and shall continue in force until revoked under that sub-section.

Citizen Suit Provision -Sec.49[12] of the Water Act(as amended in 1988)

(b) Air (Prevention and Control of Pollution) Act, 1981 - "air pollution" means the presence in the atmosphere of any air.

16. Functions of Central Board – (1) Subject to the provisions of this Act, and without prejudice to the performance of its functions under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), the main functions of the Central Board shall be to improve the quality of air and to prevent, control or abate air pollution in the country. (2) In particular and without prejudice to the generality of the foregoing functions, the Central Board may (a) advise the Central Government on any matter concerning the improvement of the quality of air and the prevention, control or abatement of air pollution; (b) plan and cause to be executed a nation-wide programme for the prevention, control or abatement of air pollution; (c) co-ordination the activities of the State Board and resolve disputes among them; (d) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement of air pollution; (dd) perform such of the functions of any State Board as may be specified in an order made under subsection (2) of Sec. 18; (e) plan and organize the training of person engaged or to engaged in programmes for the prevention, control or abatement of air pollution on such terms and conditions as the Central Board may specify; (f)

organize through mass media a comprehensive programme regarding the prevention, control or abatement of air pollution; (g) collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution; (h) lay down standards for the quality of air; (i) collect and disseminate information in respect of matters relating to air pollution; (j) perform such other function as may be prescribed. (3) The Central Board may establish or recognize a laboratory or laboratories to enable the Central Board to perform its functions under this section efficiently. (4) The Central Board may - (a) delegate any of its functions under this Act generally or specially to any of the Committees appointed by it; (b) do such other things and perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this act.

17. Functions of State Boards – (1) Subject to the provisions of this Act, and without prejudice to the performance of its functions, if any, under the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), the functions of a State Board shall be: - (a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof; (b) to advise the State Government on any matter concerning the prevention, control or abatement of air pollution; (c) to collect and disseminate information relating to air pollution; (d) to collaborate with the Central Board in organizing the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organize mass-education programme relating thereto; (e) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution; (f) to inspect air pollution control areas to such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas; (g) to lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft; Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quality and composition of emission of air pollutions into the atmosphere from such industrial plants; (h) to advise the State Government with respect to the suitability of any premises or location for carrying or any industry which is likely to cause air pollution; (i) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government; (j) to do such other things and to perform such other acts as it may think necessary

for the proper discharge of its functions and generally for the purpose of carrying into effect the purpose of this Act. (2) A State Board may establish or recognize a laboratory or laboratories to enable the State Board to perform the functions under the section efficiently.

26. Power to take samples of air or emission and procedure to be followed in connection therewith – (1) A State Board or any officer empowered by it in this behalf shall have power to take, for the purpose of analysis, samples of air or emission from any chimney, flue or duct or any other outlet in such manner as may be prescribed. (2) The result of any analysis of a sample of emission taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of sub-sections (3) and (4) are complied with. (3) Subject to the provisions of sub-section (4), when a sample of emission is taken for analysis under subsection (1), the person taking the sample shall - (a) serve on the occupier or his agent, a notice, then and there, in such form as may be prescribed, of his intention to have it so analysed; (b) in the presence of the occupier or his agent, collect a sample of emission for analysis; (c) cause the sample to be placed in a container or containers which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent; (d) send, without delay, the container or containers to the laboratory established or recognized by the State Board under Sec. 17 or, if a request in that behalf is made by the occupier or his agent when the notice is served on him under CI. (a), to the laboratory established or specified under subsection (1) of Sec. 28. (4) When a sample of emission is taken for analysis under sub-section (1) and the person taking the sample serves on the occupier or his agent, a notice under CI. (a) of sub-section (3) then, - (a) in a case where the occupier or his agent willfully absents himself, the person taking the sample shall collect the sample of emission for analysis to be placed in a container or containers which shall be marked and sealed and shall also be signed by the person taking the sample, and (b) in a case where the occupier or his agent is present at the time of taking the sample but refuses to sign the marked and sealed container or containers of the sample of emission as required under CI. (c) of sub-section (3), the marked and sealed container or containers shall be signed by the person taking the sample, and the container or containers shall be sent without delay by the person taking the sample for analysis to the laboratory established or specified under sub-section (1) of Sec. 28 and such person shall inform the Government Analyst appointed under sub-section (1) of Sec. 29.

Citizen Suit - Sec.43[11] of the Air Act

Noise Pollution Control Order,2000

The Noise Pollution (Regulation and Control) Rules, 2000 1 Short-title and commencement. (1) These rules may be called the-Noise Pollution (Regulation and Control) Rules, 2000. (2) They shall come into force on the date of their publication in the Official Gazette. 2. Definitions.- In these rules, unless the context otherwise requires, (a) "Act" means the Environment (Protection) Act, 1986 (29 of 1986)

(c) "area/zone" means all areas which fall in either of the four categories given in the Schedule annexed to these rules; (c) "authority" means any authority or officer authorised by the Central Government, or as the case may be, the State Government in accordance with the laws in force and includes a District Magistrate, Police Commissioner, or any other officer designated for the maintenance of the ambient air quality standards in respect of noise under any law for the time being in force; (d) "person" in relation to any factory or premises means a person or occupier or his agent, who has control over the affairs of the factory or premises; (e) "State Government" in relation to a Union territory means the Administrator thereof appointed under article 239 of the Constitution. 3. Ambient air Quality standards in respect of noise for different areas/zones. (1) The ambient air quality standards in respect of noise for different areas/zones shall be such as specified in the Schedule annexed to these rules. (2) The State Government may categorize the areas into industrial, commercial, residential or silence areas/zones for the purpose of implementation of noise standards for different areas. (3) The State Government shall take measures for abatement of noise including noise emanating from vehicular movements and ensure that the existing noise levels do not exceed the ambient air quality standards specified under these rules. (4) All development authorities, local bodies and other concerned authorities while planning developmental activity or carrying out functions relating to town and country planning shall take into consideration all aspects of noise pollution as a parameter of quality of life to avoid noise menace and to achieve the objective of maintaining the ambient air quality standards in respect of noise. (5) An area comprising not less than 100 metres around hospitals, educational institutions and courts may be declared as silence area/zone for the purpose of these rules. 4. Responsibility as to enforcement of noise pollution control measures. (1) The noise levels in any area/zone shall not exceed the ambient air quality standards in respect of noise as specified in the Schedule. (2) The authority shall be responsible for the enforcement of noise pollution

control measures and the due compliance of the ambient air quality standards in respect of noise.

4. Restrictions on the use of loud speakers/public address s1stem. (1) A loud speaker or a public address system shall not be used except after obtaining written permission from the authority. (2) A loud speaker or a public address system shall not be used at night (between 10.00 p.m. to 6.00 a.m.) except in closed premises for communication within, e.g. auditoria, conference rooms, community halls and banquet halls. 6. Consequences of any violation in silence zone/area. Whoever, in any place covered under the silence zone/area commits any of the following offence, he shall be liable for penalty under the provisions of the Act: (i) whoever, plays any music or uses any sound amplifiers, (ii) whoever, beats a drum or tom-tom or blows a horn either musical or pressure, or trumpet or beats or sounds any instrument, or (iii) whoever, exhibits any mimetic, musical or other performances of a nature to 44raq crowds. 7. Complaints to be made to the authority. (1) A person may, if the noise level exceeds the ambient noise standards by 10 dB(A) or more given in the corresponding columns against any area/zone, make a complaint to the authority. (2) The authority shall act on the complaint and take action against the violator in accordance with the provisions of these rules and any other law in force. 8. Power to vrohibit etc. continuance of music sound or noise. (1) If the authority is satisfied from the report of an officer incharge of a police station or other information received by him that it is necessary to do so in order to prevent annoyance, disturbance, discomfort or injury or risk of annoyance, disturbance, discomfort or injury to the public or to any person who dwell or occupy property on the vicinity, he may, by a written order issue such directions as he may consider necessary to any person for preventing, prohibiting, controlling or regulating: (a) the incidence or continuance in or upon any premises of - (i) any vocal or instrumental music
5. (ii) sounds caused by playing, beating, clashing, blowing or use in any manner whatsoever of any instrument including loudspeakers, public address systems, appliance or apparatus or contrivance which is capable of producing or re-producing sound, or (b) the carrying on in or upon, any premises of any trade, avocation or operation or process resulting in or attended with noise. (2) The authority empowered under sub-rule (1) may, either on its own motion, or on the application of any person aggrieved by an order made under sub-rule (1), either rescind, modify or alter any such order: Provided that before any such application is disposed of, the said authority shall afford to the applicant an opportunity of appearing before it either in person or by a person representing him and showing cause against the order and shall, if it rejects any such application either wholly or in part, record its reasons for such rejection.

LAND POLLUTION

The waste materials that cause land pollution are broadly classified as municipal solid waste (MSW, also called municipal refuse), construction and demolition (C&D) waste or debris, and hazardous waste. MSW includes nonhazardous garbage, rubbish, and trash from homes, institutions (e.g., schools), commercial establishments, and industrial facilities. Garbage contains moist and decomposable (biodegradable) food wastes (e.g., meat and vegetable scraps); rubbish comprises mostly dry materials such as paper, glass, textiles, and plastic objects; and trash includes bulky waste materials and objects that are not collected routinely for disposal (e.g., discarded mattresses, appliances, pieces of furniture). C&D waste (or debris) includes wood and metal objects, wallboard, concrete rubble, asphalt, and other inert materials produced when structures are built, renovated, or demolished. Hazardous wastes include harmful and dangerous substances generated primarily as liquids but also as solids, sludges, or gases by various chemical manufacturing companies, petroleum refineries, paper mills, smelters, machine shops, dry cleaners, automobile repair shops, and many other industries or commercial facilities. In addition to improper disposal of MSW, C&D waste, and hazardous waste, contaminated effluent from subsurface sewage disposal (e.g., from septic tanks) can also be a cause of land pollution.

Bare Acts – Environment Protection Act, 1986, Forest Act, 1927 and The Wildlife Protection Act, 1927

Human Rights and the Environment

BACKGROUND

More than 2 million annual deaths and billions of cases of diseases are attributed to pollution. All over the world, people experience the negative effects of environmental degradation ecosystems decline, including water shortage, fisheries depletion, natural disasters due to deforestation and unsafe management and disposal of toxic and dangerous wastes and products. Indigenous peoples suffer directly from the degradation of the ecosystems that they rely upon for their livelihoods. Climate change is exacerbating many of these negative effects of environmental degradation on human health and wellbeing and is also causing new ones, including an increase in extreme weather events and an increase in spread of malaria and other vector born diseases. These facts clearly show the close linkages between the environment and the enjoyment of human rights, and justify an integrated approach to environment and human rights.

OVERVIEW OF LEGAL ISSUES

There are three main dimensions of the interrelationship between human rights and environmental protection:

- The environment as a pre-requisite for the enjoyment of human rights (implying that human rights obligations of States should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights);
- Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, as essential to good environmental decision-making (implying that human rights must be implemented in order to ensure environmental protection); and
- The right to a safe, healthy and ecologically-balanced environment as a human right in itself (this approach has been debated).

The Stockholm Declaration, and to a lesser extent the Rio Declaration, show how the link between human rights and dignity and the environment was very prominent in the early stages of United Nations efforts to address environmental problems. That focus has to some extent faded away in the ensuing efforts by the international community to tackle specific environmental problems, with more focus being placed on developing policy and legal instruments, both at the international and national levels, targeted at the environmental problems that were emerging, through a series of MEAs and other mechanisms. Although the foundation of developing such mechanisms laid on the considerations made at the time of the Stockholm Conference, the human rights dimension is not made explicit in most of these instruments.

However, there have been several calls from different UN bodies to address the issues of human rights and environment in conjunction. The Commission on Human Rights (now transformed into the Human Rights Council) by Resolution 2005/60 requested the High Commissioner and invited UNEP, UNDP and other relevant bodies and organizations, within their respective mandates and approved work programmes and budgets:

"to continue to coordinate their efforts in activities relating to human rights and the environment in poverty eradication, post-conflict environmental assessment and rehabilitation, disaster prevention, post-disaster assessment and rehabilitation, to take into consideration in their work relevant findings and recommendations of others and to avoid duplication" (paragraph 8).

The UN reform process also calls for the integration of human rights in all of the organization's work.

In a series of resolutions, the former United Nations Commission on Human Rights and the United Nations Human Rights Council have drawn attention to the relationship between a safe and healthy environment and the enjoyment of human rights. Most recently, the Human Rights Council in its resolution 7/23 of March 2008 and resolution 10/4 of March 2009 focused specifically on human rights and climate change, noting that climate change-related effects have a range of direct and indirect implications for the effective enjoyment of human rights. These resolutions have raised awareness of how fundamental the environment is as a prerequisite to the enjoyment of human rights.

FOCUS OF DELC'S WORK AND INTENDED OUTCOME

Good practices on Human Rights and the Environment

UNEP, the UN Office of the High Commissioner for Human Rights, and the UN Special Rapporteur on human rights and the environment have joined efforts to identify, promote and exchange views on good practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking, especially in the areas of environmental protection and management.

The joint initiative identified practical and concrete examples of good practices where states and other actors have successfully implemented human rights obligations related to environmental protection and management, which could be replicated in other contexts, and which will increase the understanding and awareness of the linkages between human rights and the environment, including providing more clarity on the human rights obligations related to the enjoyment of a safe, clean, sustainable and healthy environment.

The good practices were collected at the international, regional, national and sub-national levels in collaboration through regional/ sub-regional consultations as well as questionnaires and surveys.

In the process of identifying such practices and analyzing the practical aspects of the interaction between the two field of human rights and the environment, UNEP and partners also identified challenges and problems in the balancing of the protection of human rights and the protection of the environment, and identified lessons learned in respect of such interaction, which are also available with the good practices identified.

Stockholm Declaration

Declaration of the United Nations Conference on the Human Environment The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972,having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment, Proclaims that: 1. Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself. 2. The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments. 3. Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living

beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment. 4. In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development. 5. The natural growth of population continuously presents problems for the preservation of the environment, and adequate policies and measures should be adopted, as appropriate, to face these problems. Of all things in the world, people are the most precious. It is the people that propel social progress, create social wealth, develop science and technology and, through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capability of man to improve the environment increases with each passing day. 6. A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind-a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development. 7. To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International cooperation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the

preservation and improvement of the human environment, for the benefit of all the people and for their posterity. Principles States the common conviction that: Principle 1 Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated. Principle 2 The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. Principle 3 The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved. Principle 4 Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development. Principle 5 The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind. Principle 6 The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported. Principle 7 States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea. Principle 8 Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. Principle 9 Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required. Principle 10 For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management, since economic factors as well as ecological processes must be taken into account. Principle 11 The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures. Principle 12 Resources should be made available to preserve and improve the environment, taking into account the circumstances and

particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose. Principle 13 In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population. Principle 14 Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. Principle 15 Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which arc designed for colonialist and racist domination must be abandoned. Principle 16 Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment of the human environment and impede development. Principle 17 Appropriate national institutions must be entrusted with the task of planning, managing or controlling the 9 environmental resources of States with a view to enhancing environmental quality. Principle 18 Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind. Principle 19 Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminates information of an educational nature on the need to project and improve the environment in order to enable mal to develop in every respect. Principle 20 Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connection, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries. Principle 21 States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Principle 22 States shall cooperate to develop further the international law regarding liability and

compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. Principle 23 Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries. Principle 24 International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States. Principle 25 States shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment. Principle 26 Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs.

THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT (1992) PREAMBLE The United Nations Conference on Environment and Development, Having met at Rio de Janeiro from 3 to 14 June 1992, Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it, With the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors of societies and people, Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system, Recognizing the integral and interdependent nature of the Earth, our home, Proclaims that: PRINCIPLE 1 Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. PRINCIPLE 2 States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. 2. PRINCIPLE 3 The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. PRINCIPLE 4 In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. PRINCIPLE 5 All States and all people shall co-operate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world. PRINCIPLE 6 The special situation and needs of developing countries,

particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries. PRINCIPLE 7 States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. PRINCIPLE 8 To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. PRINCIPLE 9 States should co-operate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies. 3. PRINCIPLE 10 Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. PRINCIPLE 11 States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries. PRINCIPLE 12 States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus. PRINCIPLE 13 States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. PRINCIPLE 14 States should effectively co-operate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to

be harmful to human health. PRINCIPLE 15 In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. 4. PRINCIPLE 16 National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. PRINCIPLE 17 Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. PRINCIPLE 18 States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted. PRINCIPLE 19 States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith. PRINCIPLE 20 Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development. PRINCIPLE 21 The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all. PRINCIPLE 22 Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. PRINCIPLE 23 The environment and natural resources of people under oppression, domination and occupation shall be protected. 5. PRINCIPLE 24 Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary. PRINCIPLE 25 Peace, development and environmental protection are interdependent and indivisible. PRINCIPLE 26 States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations. PRINCIPLE 27 States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development. THE EARTH SUMMIT AND AGENDA 21 From: Global Tomorrow Coalition Sustainable Development Tool Kit. INTRODUCTION The United Nations Conference on Environment and Development (UNCED), which took place in Rio de Janeiro in June 1992, was a milestone event bringing together Heads of State and Chiefs of Government than any other meeting in the history of international relations, along with senior diplomats and government officials from around the globe, delegates from United Nations agencies, officials of

international organizations, and many thousands of nongovernmental organization (NGO) representatives and journalists. UNCED made it plain that we can no longer think of environment and economic and social development as isolated fields. In addition to major international treaties and agreements concluded at the Earth Summit on issues of global climate change, biological diversity, deforestation, and desertification, the Declaration of Rio contains fundamental principles on which nations can base their future decisions and policies, considering the environmental implications of socio-economic development. Agenda 21 was a special product of the Earth Summit. It is a vast work program for the 21st century, approved by consensus among the world leaders in Rio, representing over 98% of the world's population. This historic document is 700 pages long and embraces all areas of sustainable development. A comprehensive blueprint for a global partnership, Agenda 21 strives to reconcile the twin requirements of a high quality environment and a healthy economy for all people of the world, while identifying key areas of responsibility as well as offering preliminary cost estimates for success. The framing of Agenda 21 began well over a decade ago. By resolution 38/161 in December 1983, the UN General Assembly convened the World Commission on Environment and Development (WCED), chaired by Ms. Gro Harlem Brundtland, Prime Minister of Norway. The 22 distinguished members of the WCED worked for three years, conducting a series of public hearings throughout the world, reviewing specially commissioned research and reports, and carrying on extensive international dialogue, to produce their unanimous report, Our Common Future, which was presented to the UN General Assembly in October 1987 and disseminated world-wide. The report placed the concept of sustainable development as an urgent imperative on the global agenda, and led directly to the decision by the United Nations to convene the 1992 Earth Summit. Agenda 21 reflects not only the testimony and counsel of the numerous technical and scientific advisers mobilized by the UNCED Secretariat under the leadership of Maurice F. Strong, but painstaking negotiation by the delegates of 172 sovereign nations. The Preparatory Committee, or 2. PrepCom, held four month-long meetings from August 1990 through the spring of 1992. For deliberation at the Earth Summit, the 40 chapters of Agenda 21 were submitted in four sections to the corresponding four major committees of the delegates. Although Agenda 21 is a global consensus document, negotiation at Rio did not settle all disputes to the satisfaction of each participant...and not necessarily in the best interests of all, seen from the broadest perspective. It is, however, a unique step forward on the road toward sustainability, and offers a bold plan to mobilize local, national, and global action. Overview of Agenda 21 SECTION ONE: SOCIAL AND ECONOMIC DIMENSIONS The preamble and the following eight chapters consider the challenges that the adaptation of human behaviour to sustainable development pose to prevailing social and economic structures and institutions. 1. P REAMBLE The preamble concludes, "Agenda 21 is a dynamic program. It will be carried out over time by the various actors according to the different situations, capacities and priorities of countries and regions...The process marks the beginning of a new global partnership..." 2. ACCELERATING SUSTAINABLE DEVELOPMENT Calls for a global partnership to provide a dynamic and growing world economy based on an "...open, equitable,

secure, non-discriminatory, and predictable multilateral trading system," in which commodity exports of the developing countries can find markets at fair prices free of tariff and nontariff barriers. Cost: $8.8 billion 3. C OMBATING POVERTY Suggests that factors creating policies of development, resource management, and poverty be integrated. This objective is to be sought by improving access of the poor to education and health care, to safe water and sanitation, and to resources, especially land; by restoration of degraded resources; by empowerment of the disadvantaged, especially women, youth, and indigenous peoples; by ensuring that "women and men have the same right and the means to decide freely and responsibly on the number of spacing of their children." Cost of implementation: $30 billion 3. 4. CHANGING CONSUMPTION PATTERNS "One of the most serious problems now facing the planet is that associated with historical patterns of unsustainable consumption, and production, particularly in the industrialized countries." Social research and policy should bring forward new concepts of status and lifestyles which are "less dependent on the Earth's finite resources and more in harmony with its carrying capacity." Greater efficiency in the use of energy and resources--for example, reducing wasteful packaging of products-- must be sought by new technology and new social values. Cost of implementation: The recommended measures are unlikely to require significant new financial resources. 5. P OPULATION AND SUSTAINABILITY Urges governments to develop and implement population policies integral with their economic development programs. Health services should "include women-centered, women-managed, safe and effective reproductive health care and affordable, accessible services, as appropriate, for the responsible planning of family size..." Health services are to emphasize reduction of infant death rates which converge with low birth rates to stabilize world population at a sustainable number at the end of the century. Cost of implementation: $7 billion 6. P ROTECTING AND PROMOTING HUMAN HEALTH Calls for meeting basic health needs of all populations; provide necessary specialized environmental health services; co-ordinate involvement of citizens, and the health sector, in solutions to health problems. Health service coverage should be achieved for population groups in greatest need, particularly those living in rural areas. The preventative measures urged include reckoning with urban health hazards and risks from environmental pollution. Cost of implementation: $273 billion 7. S USTAINABLE HUMAN SETTLEMENTS Addresses the full range of issues facing urban-rural settlements, including: access to land, credit, and low-cost building materials by homeless poor and unemployed; upgrading of slums to ease the deficit in urban shelter; access to basic services of clean water, sanitation, and waste collection; use of appropriate construction materials, designs, and technologies; increased use of high-occupancy public transportation and bicycle and foot paths; reduction of long-distance commuting; support for the informal economic sector; development of urban renewal projects in partnership with non-governmental organizations; improved rural living conditions and land-use planning to prevent urban sprawl onto agricultural land and fragile regions. Cost of implementation: $218 billion 4. 8. M AKING DECISIONS FOR SUSTAINABLE DEVELOPMENT Calls on governments to create sustainable development strategies to integrate social and environmental policies in all ministries

and at all levels, including fiscal measures and the budget. Encourages nations and corporate enterprises to integrate environmental protection, degradation, and restoration costs in decision-making at the outset, and to mount without delay the research necessary to reckon such costs, to develop protocols bringing these considerations into procedures at all levels of decision-making. Cost of implementation: $63 million SECTION TWO: CONSERVATION AND MANAGEMENT OF RESOURCES The environment itself is the subject of chapters 9 through 22, dealing with the conservation and management of resources for development. 9. PROTECTING THE ATMOSPHERE Urges constraint and efficiency in energy production and consumption, development of renewable energy sources; and promotion of mass transit technology and access thereto for developing countries. Conservation and expansion of "all sinks for greenhouse gases" is extolled, and transboundary pollution recognized as "subject to international controls." Governments need to develop more precise ways of predicting levels of atmospheric pollutants; modernize existing power systems to gain energy efficiency; and increase energy efficiency education and labelling programs. Cost of implementation: $21 billion 10. M ANAGING LAND SUSTAINABLY Calls on governments to develop policies that take into account the land-resource base, population changes, and the interests of local people; improve and enforce laws and regulations to support the sustainable use of land, and restrict the transfer of productive arable land to other uses; use techniques such as landscape ecological planning that focus on an ecosystem or a watershed, and encourage sustainable livelihoods; include appropriate traditional and indigenous land-use practices, such as pastoralism, traditional land reserves, and terraced agriculture in land management; encourage the active participation in decision-making of those affected groups that have often been excluded, such as women, youth, indigenous people, and other local communities; test ways of putting the value of land and ecosystems into national reports on economic performance; ensure that institutions that deal with land and natural resources integrate environmental, social, and economic issues into planning. Cost of implementation: $50 million 5. 11. C OMBATING DEFORESTATION Calls for concerted international research and conservation efforts to control harvesting of forests and "uncontrolled degradation and conversion to other types of land use," to develop the values of standing forests under sustained cultivation by indigenous technologies and agroforestry, and to expand the shrunken world-forest cover. Governments, along with business, nongovernmental and other groups should: plant more forests to reduce pressure on primary and old-growth forests; breed trees that are more productive and resistant to stress; protect forests and reduce pollutants that affect them, including air pollution that flows across borders; limit and aim to halt destructive shifting cultivation by addressing the underlying social and ecological causes; use environmentally sound, more efficient and less polluting methods of harvesting; minimize wood waste; promote small-scale enterprises; develop urban forestry for the greening of all places where people live; and encourage low-impact forest use and sustainable management of areas adjacent to forests. Cost of implementation: $31.25 billion 12. C OMBATING DESERTIFICATION AND DROUGHT Calls for intensive study of the process in its relation to world climate change to

improve forecasting, study of natural vegetation succession to support large-scale revegetation and afforestation, checking and reversal of erosion, and like small-and grand-scale measures. For inhabitants whose perilously adapted livelihoods are threatened or erased, resettlement and adaptation to new life ways must be assisted. Governments must: adopt national sustainable landuse plans and sustainable management of water resources; accelerate planting programs; and help to reduce the demand for fuelwood through energy efficiency and alternative energy programs. Cost of implementation: $8.6 billion. 13. S USTAINABLE MOUNTAIN DEVELOPMENT Calls for study, protection, and restoration of these fragile ecosystems and assistance to populations in regions suffering degradation. Governments should: promote erosion-control measures that are low-cost, simple, and easily used; offer people incentives to conserve resources and use environment-friendly technologies; produce information on alternative livelihoods; create protected areas to save wild genetic material; identify hazardous areas that are most vulnerable to erosion floods, landslides, earthquakes, snow avalanches, and other natural hazards and develop early-warning systems and disaster-response teams; identify mountain areas threatened by air pollution from neighbouring industrial and urban areas; and create centres of information on mountain ecosystems. Cost of implementation: $13 billion. 6. 14. S USTAINABLE AGRICULTURE AND RURAL DEVELOPMENT Rising population food needs must be met through: increased productivity and co-operation involving rural people, national governments, the private sector, and the international community; wider access to techniques for reducing food spoilage, loss to pests, and for conserving soil and water resources; ecosystem planning; access of private ownership and fair market prices; advice and training in modern and indigenous conservation techniques including conservation tillage, integrated pest management, crop rotation, use of plant nutrients, agroforestry, terracing and mixed cropping; and better use and equitable distribution of information on plant and animal genetic resources. Cost of implementation: $30.8 billion 15. C ONSERVATION OF BIOLOGICAL DIVERSITY Recognizing the need to conserve and maintain genes, species, and ecosystems, urges nations, with the co-operation of the United Nations, nongovernmental organizations, the private sector, and financial institutions, to: conduct national assessments on the state of biodiversity; develop national strategies to conserve and sustain biological diversity and make these part of overall national development strategies; conduct long-term research into importance of biodiversity for ecosystems that produce goods and environmental benefits; protect natural habitats; encourage traditional methods of agriculture, agroforestry, forestry, range and wildlife management which use, maintain, or increase biodiversity. Cost of implementation: $3 billion. 16. M ANAGEMENT OF BIOTECHNOLOGY Calls for the transfer of biotechnology to the developing countries and the creation of the infrastructure of human capacity and institutions to put it to work there. Highlights need for internationally agreed principles on risk assessment and management of all aspects of biotechnology, to: improve productivity and the nutritional quality and shelf-life of food and animal feed products; develop vaccines and techniques for preventing the spread of diseases and toxins; increase crop resistance to diseases and pests, so that there will be less need

for chemical pesticides; develop safe and effective methods for the biological control of disease-transmitting insects, especially those resistant to pesticides; contribute to soil fertility; treat sewage, organic chemical wastes, and oil spills more cheaply and effectively than conventional methods; and tap mineral resources in ways that cause less environmental damage. Cost of implementation: $20 billion. 17. P ROTECTING AND MANAGING THE OCEANS Sets out goals and programs under which nations may conserve "their" oceanic resources for their own and the benefit of the nations that share oceans with them, and international programs that may protect the residual commons in the interests even of land-locked nations, such as: anticipate 7. and prevent further degradation of the marine environment and reduce the risk of long-term or irreversible effects on the oceans; ensure prior assessment of activities that may have significant adverse impact on the seas; make marine environmental protection part of general environmental, social, and economic development policies; apply the "polluter pays" principle, and use economic incentives to reduce polluting of the seas; improve the living standards of coast-dwellers; reduce or eliminate discharges of synthetic chemicals that threaten to accumulate to dangerous levels in marine life; control and reduce toxic-waste discharges; stricter international regulations to reduce the risk of accidents and pollution from cargo ships; develop land-use practices that reduce run-off of soil and wastes to rivers, and thus to the seas; stop ocean dumping and the incineration of hazardous wastes at sea. Cost of implementation: $13 billion. 18. P ROTECTING AND MANAGING FRESH WATER Sets out measures, from development of long-range weather and climate forecasting to cleanup of the most obvious sources of pollution, to secure the supply of fresh water for the next doubling of the human population. Focus is on developing low-cost but adequate services that can be installed and maintained at the community level to achieve universal water supply by 2025. The interim goals set for 2000 include: to provide all urban residents with at least 40 liters of safe drinking water per person per day; provide 75% of urban dwellers with sanitation; establish standards for the discharge of municipal and industrial wastes; have three-quarters of solid urban waste collected and recycled, or disposed of in an environmentally safe way; ensure that rural people everywhere have access to safe water and sanitation for healthy lives, while maintaining essential local environments; control water-associated diseases. Cost of implementation $54.7 billion. 19. S AFER USE OF TOXIC CHEMICALS Seeks objectives such as: full evaluation of 500 chemicals before the year 2000; control of chemical hazards through pollution prevention, emission inventories, product labelling; use limitations, procedures for safe handling and exposure regulations; phase-out or banning of high-risk chemicals; consideration of policies based on the principle of producer liability; reduced risk by using less-toxic or non-chemical technologies; review of pesticides whose acceptance was based on criteria now recognized as insufficient or outdated; efforts to replace chemicals with other pest-control methods such as biological control; provision to the public of information on chemical hazards in the languages of those who use the materials; development of a chemical-hazard labelling system using easily understandable symbols; control of the export of banned or restricted chemicals and provision of information on any exports to the importing countries. Cost of implementation: $600

million. 8. 20. M ANAGING HAZARDOUS WASTES Seeks international support in restraint of the trade and for containing the hazardous cargoes in safe sinks. Governments should: require and assist in the innovation by industry of cleaner production methods and of preventive and recycling technologies; encourage the phasing out of processes that produce high risks because of hazardous waste management; hold producers responsible for the environmentally unsound disposal of the hazardous wastes they generate; establish public information programs and ensure that training programs provided for industry and government workers on hazardous-waste issues, especially use minimization; build treatment centres for hazardous wastes, either at the national or regional level; ensure that the military conforms to national environmental norms for hazardous-waste treatment and disposal; ban the export of hazardous wastes to countries that are not equipped to deal with those wastes. Industry should: treat, recycle, reuse, and dispose of wastes at or close to the site where they are created. Cost of implementation: $18.5 billion 21. M ANAGING SOLID WASTES AND SEWAGE Governments should urge waste minimization and increased reuse/recycling as strategies toward sound waste treatment and disposal; encourage "life-cycle" management of the flow of material into and out of manufacturing and use; provide incentives to recycling; fund pilot programs, such as small-scale and cottage-based recycling industries, compost production, irrigation using treated waste water, and the recovery of energy from wastes; establish guidelines for the safe reuse of waste and encourage markets for recycled and reused products. Cost of implementation: $23.3 billion 22. M ANAGING RADIOACTIVE WASTES Calls for increasingly stringent measures to encourage countries to co-operate with international organizations to: promote ways of minimizing and limiting the creation of radioactive wastes; provide for the sage storage, processing, conditioning, transportation, and disposal of such wastes; provide developing countries with technical assistance to help them deal with wastes, or make it easier for such countries to return used radioactive material to suppliers; promote the proper planning of safe and environmentally sound ways of managing radioactive wastes, possibly including assessment of the environmental impact; strengthen efforts to implement the Code of Practice on the Transboundary Movements of Radioactive Wastes; encourage work to finish studies on whether the current voluntary moratorium on disposal of low-level radioactive wastes at sea should be replaced by a ban; not promote or allow storage or disposal of radioactive wastes near seacoasts or open seas, unless it is clear that this does not create an unacceptable risk to people and the marine environment; not export radioactive wastes to countries that prohibit the import of such waste. Cost of implementation: $8 million. 9. SECTION THREE: STRENGTHENING THE ROLE OF MAJOR GROUPS The issues of how people are to be mobilized and empowered for their various roles in sustainable development are addressed in chapters 23 through 32. 23. P REAMBLE "Critical to the effective implementation of the objectives, policies, and mechanisms agreed to by Governments in all program areas of Agenda 21 will be the commitment and involvement of all social groups..." 24. W OMEN IN SUSTAINABLE DEVELOPMENT Urges governments to face the status question; give girls equal access to education; reduce the workloads of girls and women; make health-care systems

responsive to female needs; open employment and careers to women; and bring women into full participation in social, cultural, and public life. Governments should: ensure a role for women in national and international ecosystem management and control of environmental degradation; ensure women's access to property rights, as well as agricultural inputs and implements; take all necessary measures to eliminate violence against women, and work to eliminate persistent negative images, stereotypes, and attitudes, and prejudices against women; develop consumer awareness among women to reduce or eliminate unsustainable consumption; and begin to count the value of unpaid work. Cost of implementation: $40 million. 25. C HILDREN AND YOUTH IN SUSTAINABLE DEVELOPMENT Calls on governments, by the year 2000, to ensure that 50% of their youth, gender balanced, have access to secondary education or vocational training; teach students about the environment and sustainable development through their schooling; consult with and let youth participate in decisions that affect the environment; enable youth to be represented at international meetings, and participate in decision-making at the United Nations; combat human rights abuses against youth and see that their children are healthy, adequately fed, educated, and protected from pollution and toxic substances; and develop strategies that deal with the entitlement of young people to natural resources. Cost of implementation: $1.5 million. 26. S TRENGTHENING THE ROLE OF INDIGENOUS PEOPLES Urges governments to enrol indigenous peoples in full global partnership, beginning with measures to protect their rights and conserve their patrimony; recognize that indigenous lands need to be protected from environmentally unsound activities, and from activities the people consider to be 10. socially and culturally inappropriate; develop a national dispute resolution procedure to deal with settlement and land-use concerns; incorporate their rights and responsibilities into national legislation; recognize and apply elsewhere indigenous values, traditional knowledge and resource management practices; and provide indigenous people with suitable technologies to increase the efficiency of their resource management. Cost of implementation: $3 million. 27. P ARTNERSHIPS WITH NONGOVERNMENTAL GROUPS [CIVIC GROUPS] Calls on governments and the United Nations system to: invite nongovernmental groups to be involved in making policies and decisions on sustainable development; make NGOs a part of the review process and evaluation of implementing Agenda 21; provide NGOs with timely access to information; encourage partnerships between NGOs and local authorities; review financial and administrative support for NGOs; utilize NGO expertise and information; and create laws enabling NGOs the right to take legal action to protect the public interest. Cost of implementation: no estimate. 28. L OCAL AUTHORITIES Calls on local authorities, by 1996, to undertake to promote a consensus in their local populations on "a local Agenda 21;" and, at all times, to invite women and youth into full participation in the decision-making, planning, and implementation process; to consult citizens and community, business, and industrial organizations to gather information and build a consensus on sustainable development strategies. This consensus would help them reshape local programs, policies, laws, and regulations to achieve desired objectives. The process of consultation would increase people's awareness of sustainable development issues.

Cost of implementation: $1 million. 29. W ORKERS AND TRADE UNIONS Challenges governments, businesses, and industries to work toward the goal of full employment, which contributes to sustainable livelihoods in safe, clean, and healthy environments, at work and beyond, by fostering the active and informed participation of workers and trade unions in shaping and implementing environment and development strategies at both the national and international levels; increase worker education and training, both in occupational health and safety and in skills for sustainable livelihoods; and promote workers' rights to freedom of association and the right to organize. Unions and employees should design joint environmental policies, and set priorities to improve the working environment and the overall environmental performance of business and develop more collective agreements aimed at achieving sustainability. Cost of implementation: $300 million. 11. 30. B USINESS AND INDUSTRY Calls on governments to: use economic incentives, laws, standards, and more streamlined administration to promote sustainably managed enterprises with cleaner production; encourage the creation of venture-capital funds; and co-operate with business, industry, academia, and international organizations to support training in the environmental aspects of enterprise management. Business and industry should: develop policies that result in operations and products that have lower environmental impacts; ensure responsible and ethical management of products and processes from the point of view of health, safety, and the environment; make environmentally sound technologies available to affiliates in developing countries without prohibitive charges; encourage overseas affiliates to modify procedures in order to reflect local ecological conditions and share information with governments; create partnerships to help people in smaller companies learn business skills; establish national councils for sustainable development, both in the formal business community and in the informal sector, which includes small-scale businesses, such as artisans; increase research and development of environmentally sound technologies and environmental management systems; report annually on their environmental records; and adopt environmental and sustainable development codes of conduct. Cost of implementation: no estimate. 31. S CIENTISTS AND TECHNOLOGISTS Indicates that governments should: decide how national scientific and technological programs could help make development more sustainable; provide for full and open sharing of information among scientists and decision-makers; fashion national reports that are understandable and relevant to local sustainable development needs; form national advisory groups to help scientists and society develop common values on environmental and developmental ethics; and put environment and development ethics into education and research priorities. Scientists and technologies have special responsibilities to: search for knowledge, and to help protect the biosphere; increase and strengthen dialogue with the public; and develop codes of practice and guidelines that reconcile human needs and environmental protection. Cost of implementation: $20 million. 32. S TRENGTHENING THE ROLE OF FARMERS To develop sustainable farming strategies, calls on governments to collaborate with national and international research centres and nongovernmental organizations to: develop environmentally sound farming practices and technologies that improve crop yields, maintain land quality, recycle nutrients, conserve water and

energy, and control pests and weeds; help farmers share expertise in conserving land, water, and forest resources, making the most efficient use of chemicals and reducing or re-using farm wastes; encourage self-sufficiency in low-input and low-energy technologies, including indigenous practices; support research on equipment that makes optimal use of human labour and animal power; delegate more power and responsibility to those who work the 12. land; give people more incentive to care for the land by seeing that men and women can get land tenure, access to credit, technology, farm supplies, and training. Researchers need to develop environment-friendly farming techniques and colleges need to bring ecology into agricultural training. Cost of implementation: no estimate. SECTION FOUR: MEANS OF IMPLEMENTATION Chapters 33 through 40 deal with the ways and means of implementing Agenda 21. 33. F INANCING SUSTAINABLE DEVELOPMENT At UNCED, countries committed to the consensus of a global partnership, holding that the eradication of poverty "is essential to meeting national and global sustainability objectives;" that "the cost of inaction could outweigh the financial costs of implementing Agenda 21;" that "the huge sustainable development programs of Agenda 21 will require the provision to developing countries of substantial new and additional financial resources;" and that "the initial phase will be accelerated by substantial early commitments of concessional funding." Further, the developed countries "reaffirmed their commitments to reach the accepted United Nations target of 0.7% of GNP for concessional funding... as soon as possible." Cost of implementation: $561.5 billion per year total for all programs, including $141.9 billion in concessional financing. 34. T ECHNOLOGY TRANSFER Economic assistance would move from the developed to the developing counties principally in the form of technology. Developing countries would be assisted in gaining access to technology and know-how in the public domain and to that protected by intellectual property rights as well, "taking into account developments in the process of negotiating an international code of conduct on the transfer of technology" proceeding under the United Nations Agreement on Tariffs and Trade. To enhance access of developing countries to environmentally sound technology, a collaborative network of laboratories is to be established. Cost of implementation: $500 million 35. S CIENCE FOR SUSTAINABLE DEVELOPMENT Sustainable development requires expansion of the ongoing international collaborative enterprises in the study of the geochemical cycles of the biosphere and the establishment of strong national scientific enterprises in the developing countries. The sciences link fundamental understanding of the Earth system to development of strategies that build upon its continued healthy functioning. "In the face of threats of irreversible environmental damage, lack of full scientific understanding should not be an excuse for postponing actions which are justified in their own right." 13. Countries need to develop tools for sustainable development, such as: quality-of-life indicators covering health, education, social welfare, and the state of environment, and the economy; economic incentives that will encourage better resource management; and ways of measuring the environmental soundness of new technologies. They should use information on the links between the state of ecosystems and human health when weighing the costs and benefits of different development policies, and conduct scientific studies to

help map our national and regional pathways to sustainable development. When sustainable development plans are being make, the public should be involved in setting long-term goals for society. Cost of implementation: $3 billion. 36. E DUCATION , TRAINING , AND PUBLIC AWARENESS Because sustainable development must ultimately enlist everyone, access to education must be hastened for all children; adult illiteracy must be reduced to half of its 1990 level, and the curriculum must incorporate environmental and developmental learning. Nations should seek to: introduce environment and development concepts, including those related to population growth, into all educational programs, with analyses of the causes of the major issues. They should emphasize training decision-makers; involve schoolchildren in local and regional studies on environmental health, including safe drinking water, sanitation, food, and the environmental and economic impacts of resource use; set up training programs for school and university graduates to help them achieve sustainable livelihoods; encourage all sectors of society to train people in environmental management; provide locally trained and recruited environmental technicians to give local communities services they require, starting with primary environmental care; work with the media, theatre groups, entertainment, and advertising industries to promote a more active public debate on the environment; and bring indigenous peoples' experience and understanding of sustainable development into education and training. Cost of implementation: $14.6 billion. 37. C REATING CAPACITY FOR SUSTAINABLE DEVELOPMENT Developing countries need more technical co-operation and assistance in setting priorities so that they can deal with new long-term challenges, rather than concentrating only on immediate problems. For example, people in government and business need to learn how to evaluate the environmental impact of all development projects, starting from the time the projects are conceived. Assistance in the form of skills, knowledge, and technical know-how can come from the United Nations, national governments, municipalities, nongovernmental organizations, universities, research centres, and business and other private organizations. The United Nations Development Program has been given responsibility for mobilizing international funding and co-ordination programs for capacity building. Cost of implementation: $650 million. 14. 38. O RGANIZING FOR SUSTAINABLE DEVELOPMENT To the existing UN system, the General Assembly as the supreme deliberative and policymaking body, the Economic and Social Council as the appropriate overseer of system-wide coordination reporting to the General Assembly, the Secretary General as chief executive, and the technical agencies seeing to their special functions, Agenda 21 proposes to add a Commission on Sustainable Development to monitor implementation of Agenda 21, reporting to the General Assembly through ECOSOC. The Conference also recommended that the UN Secretary-General appoint a high-level board of environment and development experts to advise on other structural change required in the UN system. The United Nations Environment Program will need to develop and promote natural resource accounting and environmental economics, develop international environmental law, and advise governments on how to integrate environmental considerations into their development policies and programs. Cost of implementation: no estimate. 39. I NTERNATIONAL LAW The

major goals in international law on sustainable development should include: the development of universally negotiated agreements that create effective international standards for environmental protection, taking account of the different situations and abilities of various countries; an international review of the feasibility of establishing general rights and obligations of nations as in the field of sustainable development; and measures to avoid or settle international disputes in the field of sustainable development. These measures can range from notification and talks on issues that might lead to disputes, to the use of the International Court of Justice. Cost of implementation: no estimate. 40. I NFORMATION FOR DECISION -MAKING Calls on governments to ensure that local communities and resource users get the information and skills needed to manage their environment and resources sustainably, including application of traditional and indigenous knowledge; more information about the status of urban air, fresh water, land resources, desertification, soil degradation, biodiversity, the high seas, and the upper atmosphere; more information about population, urbanization, poverty, health, and rights of access to resources. Information is also needed about the relationships of groups, including women, indigenous peoples, youth, children and the disabled with environment issues. Current national accounting reckons environmental costs as "externalities." Internalization of such costs, the amortization of non-renewable resources, and the development of indicators of sustainability all require not only new data but new thinking. Cost of implementation: $2.1 billion. This overview is based in large measure on an article entitled "The Earth Summit's Agenda for Change" by Michael Keating in the Earth Summit Times, September 1992, published by the Centre for Our Common Future, 52, rue des Paquis, 1201 Geneva, SwitzerlandBottom of Form

Fundamental Principles of Environmental Protection

The concept of sustainable use of earth's resource is an ancient one. Without the principles of sustainability as a way of life, humans would not have survived in the 20th century...

United Nations Environment Programme (UNEP)

In India since: 2016

About: The United Nations Environment Programme (UNEP) is the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment. UNEP's work encompasses: assessing global, regional and national environmental conditions and trends; developing international and national environmental instruments and; strengthening institutions for the wise management of the environment.

National Green Tribunal

The NGT was established on October 18, 2010 under the National Green Tribunal Act 2010, passed by the Central Government. The stated objective of the Central Government was to provide a specialized forum for effective and speedy disposal of cases pertaining to environment protection, conservation of forests and for seeking compensation for damages caused to people or property due to violation of environmental laws or conditions specified while granting permissions.

Structure

Following the enactment of the said law, the Principal Bench of the NGT has been established in the National Capital – New Delhi, with regional benches in Pune (Western Zone Bench), Bhopal (Central Zone Bench), Chennai (Southern Bench) and Kolkata (Eastern Bench). Each Bench has a specified geographical jurisdiction covering several States in a region. There is also a mechanism for circuit benches. For example, the Southern Zone bench, which is based in Chennai, can decide to have sittings in other places like Bangalore or Hyderabad. Click here for a copy of the notification specifying jurisdiction of each bench. Provided below is a link to all NGT zonal benches, addresses & contact details.

The Chairperson of the NGT is a retired Judge of the Supreme Court, Head Quartered in Delhi. Other Judicial members are retired Judges of High Courts. Each bench of the NGT will comprise of at least one Judicial Member and one Expert Member. Expert members should have a professional qualification and a minimum of 15 years experience in the field of environment/forest conservation and related subjects.

Powers

The NGT has the power to hear all civil cases relating to environmental issues and questions that are linked to the implementation of laws listed in Schedule I of the NGT Act. These include the following:

1. The Water (Prevention and Control of Pollution) Act, 1974;
2. The Water (Prevention and Control of Pollution) Cess Act, 1977;
3. The Forest (Conservation) Act, 1980;
4. The Air (Prevention and Control of Pollution) Act, 1981;
5. The Environment (Protection) Act, 1986;
6. The Public Liability Insurance Act, 1991;
7. The Biological Diversity Act, 2002.

This means that any violations pertaining only to these laws, or any order / decision taken by the Government under these laws can be challenged before the NGT. Importantly, the NGT has not been vested with powers to hear any matter relating to the Wildlife (Protection) Act, 1972, the Indian Forest Act, 1927 and various laws enacted by States relating to forests, tree preservation etc. Therefore, specific and substantial issues related to these laws cannot be raised before the NGT. You will have to approach the State High Court or the Supreme Court through a Writ Petition (PIL) or file an Original Suit before an appropriate Civil Judge of the taluk where the project that you intend to challenge is located.

Procedure for filing an Application or Appeal

The NGT follows a very simple procedure to file an application seeking compensation for environmental damage or an appeal against an order or decision of the Government. The official language of the NGT is English.

For every application / appeal where no claim for compensation is involved, a fee of Rs. 1000/- is to be paid. In case where compensation is being claimed, the fee will be one percent of the amount of compensation subject to a minimum of Rs. 1000/-.

A claim for Compensation can be made for:

1. Relief/compensation to the victims of pollution and other environmental damage including accidents involving hazardous substances;
2. Restitution of property damaged;
3. Restitution of the environment for such areas as determined by the NGT.

No application for grant of any compensation or relief or restitution of property or environment shall be entertained unless it is made within a period of five years from the date on which the cause for such compensation or relief first arose.

Principles of Justice adopted by NGT

The NGT is not bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice. Further, NGT is also not bound by the rules of evidence as enshrined in the Indian Evidence Act, 1872. Thus, it will be relatively easier (as opposed to approaching a court) for conservation groups to present facts and issues before the NGT, including pointing out technical flaws in a project, or proposing alternatives that could minimize environmental damage but which have not been considered.

While passing Orders/decisions/awards, the NGT will apply the principles of sustainable development, the precautionary principle and the polluter pays principles.

However, it must be noted that if the NGT holds that a claim is false, it can impose costs including lost benefits due to any interim injunction.

Review and Appeal

Under Rule 22 of the NGT Rules, there is a provision for seeking a Review of a decision or Order of the NGT. If this fails, an NGT Order can be challenged before the Supreme Court within ninety days.

Frequently Asked Questions (FAQs)

1. What is the difference between a Court and a Tribunal?

The Supreme Court has answered this question by holding that “Every Court may be a tribunal but every tribunal necessarily may not be a court”. A High court for instance, where a PIL would be filed, may have wide ranging powers covering all enacted laws (including the power of contempt) but the NGT has only been vested with powers under the seven laws related to the Environment.

2. We are trying to protect a National Park/Sanctuary from various pressures including a dam proposal and widening of a highway. Should we approach the NGT?

No. As explained above, the NGT is not empowered to hear matters pertaining to issues coming under the ambit of the Wildlife (Protection) Act, 1972, which is applicable in case of National Parks, Sanctuaries and Tiger Reserves. It would be appropriate to approach either the High Court in your State or the Supreme Court. Please consult a competent lawyer for advice.

3. Can I personally argue a matter before the NGT or do I need a lawyer?

Yes. You can argue the matter yourself provided you are well acquainted with the facts and are reasonably knowledgeable about the law and procedures. The language of the NGT is English, and some guidelines related to dress apply. However, it would be best if a lawyer represents you since (s)he will be better equipped to argue and handle all procedural aspects.

4. What is the penalty for non-compliance of an NGT Order?

If a project proponent or any authority does not comply with the directions contained in an NGT order, the penalty can be imprisonment for three years or fine extending to 10 crores or both. Continued failure will attract a fine of twenty five thousand rupees per day.

5. Is there a bar on civil courts to hear /take up cases under the seven specified laws in Schedule I of the NGT Act?

Yes. With the enactment of the NGT Act, Civil courts cannot hear matters related to Environmental issues under the seven laws which the NGT is empowered to deal with.

LAW OF EVIDENCE (303)

UNIT-I

INTRODUCTION AND RELEVANCY

A. DEFINITIONS

a) Facts:

Factsmeans anything or state of things or relations of thing which can be perceived by senses (see, touch, taste, hear, and smell). Particular 'state of mind' is also a fact. Examples of facts:

1. Knife which is used for murder is a fact (things)
2. The blood of the victim on the sport or over the knife is facts (relation with the things i.e. knife)
3. Presence of victim and accused at the sport immediately before occurrence is also fact (state of things)
4. In case of murder through poisoning, pre-poisoning state condition of body and after poisoning condition of body of the victim is fact (State of things & relation of things) etc.

b) Facts in issue

It is defined under section 3 of IEA, which simply means those facts which can established right, duty, liabilities or obligations.

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 proceeding, 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.

Thus, in a dispute relating to possession of house, ownership would be fact in issue, since once the ownership is decided, who should have possession can easily be decided just by application of law. In criminal law, ingredients of an offence are 'facts in issue'. Say example, in case of murder, whether death is caused or not, whether death was caused with same intention as required by section 300 IPC or not? Whether accused is entitled for any right of private defense or not? These are 'facts in issue'. Example given in the IEA is:

Illustrations

A is accused of the murder of B. At his trial the following facts may be in issue:—

That A caused B's death; (*will fix the liability* as required by section 300 IPC)

That A intended to cause B's death; (*will fix the liability* as required by section 300 IPC)

That A had received grave and sudden provocation from B; (*will reduce the liability* as provided in section 300 IPC)

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. (*will absolve from any liability* since it general exception to any offence and a very good defense)

c) Relevant facts:

Relevant facts are those facts which are so connected with the 'fact in issue' that it can explain, assert or deny existence of 'facts in issue'. However, it is to be noted here that every facts connected with 'facts in issue' is not relevant, unless the said fact is connected with 'facts in issue' in the same way as described in section 6-55 of IEA. Categories of relevant facts are:

1. Facts forming part of same transactions
2. Certain Statements like admission, confession or dying declarations
3. Earlier judgment pertaining to the said cause of action
4. Opinion of expert of facts disputed

5. Character of parties

d. Evidence proved, disproved and not proved:

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the Court believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither proved nor disproved.

"Proved":

The English author, Cunn, gives the analogy of a merchant who receives information that the rate of exchange will vary, or a General who gets information about the movement of the enemy. The success of either will depend on his judging soundly when he ought to act on the assumption that what he hears is true, or when prudence bids him to assume it to be false.

If he waits for absolute certainty, he would never be able to act at all. Similarly, all that a judge needs to look for is such a high degree of probability that a prudent man, in any other similar transaction, would act on the assumption that such a thing was true.

"Matters before It":

The expression "matters before it" includes matters which do not fall within the definition of the term "evidence" (in S. 3 of the Act), as for instance, a fact orally admitted in Court or the result of a local investigation under the Civil Procedure Code. Therefore, in determining what is "evidence" other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved'.

It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the expression 'matters before it'. For instance, a fact may be orally admitted in Court. Such an admission would not come within the definition of the term 'evidence' as given in this Act.

Yet, it is a matter which the Court before whom the admission was made, would have to take into consideration, in order to determine whether the particular fact was proved or not. Similarly, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court, though it is not 'evidence' within the definition given by the Act.

'Legal Proof' and 'Moral Conviction':

'Legal proof is to be distinguished from 'moral conviction'. Legal proof is neither more nor less than what is indicated by the definition of the word 'proved' in S. 3. Whatever may be the moral certainty in a case, unless it is legally proved to such an extent as would amount to legal proof, a judicial decision cannot be arrived at. So also, however morally convinced a judge may feel as to the truth of a particular fact, unless there is a legal proof of its existence, he cannot take it as proved.

e. Relevance and admissibility:

In civil proceedings in the common-law countries, evidence is both ascertained and simultaneously restricted by the assertions of the parties. If the allegations of one party are not disputed or contested by the other, or if the allegations are even admitted, then no proof is required. Proof would, in fact, be irrelevant. Evidence offered to prove assertions that are neither at issue nor probative of the matter at issue would also be irrelevant. The only evidence that is, therefore, relevant, is evidence that to some degree advances the inquiry and has a probative value for the decision. While continental European judges, in ordering the hearing of evidence or in deciding on evidence, indicate the facts to be proved and thereby strictly eliminate irrelevant facts, Anglo-American judges first give the parties an opportunity to furnish any evidence that they deem suitable. If, during the hearing of witnesses, irrelevant questions are put, they are rejected after the adversary has objected to them.

It has been said that relevance depends on logical considerations and that admissibility depends on the law. In contrast to civil law, the common law has developed a large number of rules governing the admissibility of evidence. Relevant evidence is not admissible, for example, if the witnesses are excluded from testifying because of incompetency, or if they are protected by privileges against self-incrimination, or in instances in which they would have to divulge confidential or professional communications that have a privileged status or government secrets, or, again, when the evidence is excluded by the rules against hearsay.

In criminal cases in civil-law countries, relevance relates to such questions that are so far removed from the case that they have no evidence value at all. Admissions and confessions do

not exclude further evidence. According to Anglo-American law, the accused may be a competent witness under the admissibility rules, but, in contrast to an ordinary witness, he has the privilege of not taking the witness stand. According to continental European law, the accused is neither a party nor a witness. He can be heard, but he cannot be forced to answer questions of fact. In general, Anglo-American rules of admissibility apply to criminal proceedings much as they apply to civil cases.

e) Doctrine of Res gestae

Iin English law all facts which are connected through 'part of the same transaction' they are called as evidence of 'res gestae', however in India such facts are codified from section 6 to section 11. Res Gestae in IEA are:

1. Facts forming part of same transaction (section 6)
2. Facts which are occasion, cause or effect of facts in issue (Section 7)
3. Facts suggesting Motive, preparation and previous or subsequent conduct (Section 8)
4. Facts necessary to explain or introduce relevant facts (section 9)
5. Things said or done by conspirator in reference to common design (Section 10)
6. When Facts not otherwise relevant become relevant because these facts make other facts in issue or any relevant fact either highly probable or highly improbable (section 11)

Facts forming part of same transactions (Section 6):

All facts which are connected with the 'facts in issue' due to:

1. Proximity of time
2. Proximity of place
3. Continuity of action
4. Community of purposes, whether happen at same time and place or different time and different place

Then, they are said be 'part of the same transactions'. For example

(a) 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 is as to from part of the transaction, is a relevant fact.

(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 goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though 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.

Facts which are occasion, cause or effect of facts in issue (Section 7):

These facts are those which provide either occasion or cause or create effect over 'facts in issue'. For example in murder case, 'presence' of accused and victim at the place of occurrence at same time or accused 'having gun', at given time, or 'altercation between' accused and victim are the facts proving occasion, and thus they are relevant in this section. 'Firing' of bullet is cause of death, so 'firing' as such is a relevant fact; 'firing of bullet' may have effect of causing death or serious injuries, here injuries or death is effect of 'firing of bullet', so such injuries are relevant facts.

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 where 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.

Facts suggesting Motive, preparation and previous or subsequent conduct (Section 8):

Facts suggesting motive (say example previous fighting, property dispute, love affair, family dispute, business rivalry etc.) or preparation (say example just before the murder accused purchased a gun or bullets, or took training for shooting, or in case of forgery, he purchase few stamp papers to forged a sale deed etc) or conduct, whether previous or subsequent of the parties are also relevant (examples of previous conducts like, previous attempts, any fights; example of subsequent conduct such as being missing from house after committing murder, suspicious act of hiding himself or certain goods used for the offence etc.)

It is important to note that conducts of parties as well as their agents both are relevant in any suit or proceeding.

Illustrations

(a) A is tried for the murder of B.

The facts 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 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, it 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 or other wills to be prepared of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts, 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 favorable to himself, on 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.

Generally, conduct does not include a bare statement, however, if such statement has affected the conduct of the parties, then not only such conduct but also statement both will be relevant. For example:

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence – "the police are coming to look for the man who robbed B" and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The fact that, A asked C to lend him money, an that D said to C in A's presence and hearing "Advice you The Orient Tavern 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 facts that, A absconded after receiving a litter 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 property 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 facts 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.

f) CONSPIRACY:

Section 10 of Indian evidence act:

Things said or done by conspirator in reference to common design.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their

common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. Things said or done by conspirator in reference to common design.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it." Illustration Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the 1[Government of India]. The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it. Comments tc "Comments" Existence of conspiracy If prima facie evidence of existence of a conspiracy is given and accepted, the evidence of acts and statements made by anyone of the conspirators in furtherance of the common object is admissible against all; JayendraSaraswatiSwamigal v. State of Tamil Nadu, AIR 2005 SC 716. Object Section 10 has been deliberately enacted in order to make acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of crime; BadriRai v. State of Bihar, AIR 1958 SC 953. Significance of "common intention" The words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. It had noting to do with carrying the conspiracy into effect; Mirza Akbar v. Emperor, AIR 1940 PC 176.

Unit-II

Statements: Admission, Confessions & Dying Declaration (Section 17-32)

a) Admission:

According to section 31 of IEA, Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained. Admissions are those statements of made by the parties which are against their own interest. Why these statements are relevant is easy to appreciate. If some one is making statement against his own interest, then either he is insane or he is speaking truth, and if he is speaking truth, law must recognise that statement. For example when the question between A and B is, whether a certain deed is or is not forged? And A affirms that it is genuine, B that it is forged. Here, '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 con B Prove a statement by himself that the deed is gorged.

Since, admissions are made by parties against their own interest, during suit or proceeding, they are often proved by opposite party, except in following cases:

1. An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead it would be relevant as between third person under section 32 i.e. dying declaration

1. For example 'A' the captain of a ship, is tried for casting the ship away. Evidence is given to show that the ship was taken out of her proper course. 'A' produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statement, because they would be admissible between third parties, if he were dead under Section 32, Clause (2)

2. Another example would be where 'A' is accused of a crime committed by him at Calcutta. He produces a letter written by him, and dated at Lahore on that day, and bearing the Lahore post-mark of that day. Generally this letter will not be admissible as it is written by him only; however, this will be admissible because if A were dead it would be admissible under Section 32, Clause (2).

3. An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

1. A is accused of receiving stolen goods knowing them to be stolen. He officers to prove that he refused to sell them below their value. A may prove these statements though they are admissions, because they are explanatory of conduct influenced by facts in issue.

4. An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

1. A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the coins as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine. A may prove these facts because they are explanatory of conduct that he has no intention to possess any counterfeit coins and this is very must suggested by the fact the he as asked some one to examine the coin.

Who can make Admissions? (Section 18, 19 & 20 IEA)

Admissions can be made by:

a. Parties to the case

b. Authorised agents of parties, whether expressly authorised or authorised impliedly

c. In a Representation suit, the person who is representing others

- ‘A’ files a representation suit against government against torts of Nuisance. An admission made by A, would be binding all interested parties, if the statement was made when A was holding representative character.

d. Persons having any proprietary or pecuniary interest in the subject-matter of the proceeding

- A, a partner in a firm with B, files suit for possession of property against Z. B, makes an statement that A is fighting a wrong claim against B, would be relevant as he has pecuniary interest in the property and still making such comment.

e. Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, and where statement was made during the continuance of such interest of the persons making the statements

- A files suit for recovery of 20, 000/- Rs against B, claiming that the house which he purchased from C was under mortgage with said amount in his name. A want to prove a statement given by C, which was made when house was owned by C, that house is under a mortgage for 20,000/- Rs, with A. Since, the statement was given when C was having possession of the house, this would be good piece of admission as he made statement against his own interest and now B is deriving his interest from the same house.

f. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit

- A undertakes to collect rent for 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 owned B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

(a) Admission by persons expressly referred to by party to suit

(b) The question is, whether a horse sold by A to B is sound A says to B “Go and ask CC knows all about it” C’s statement is an admission.

Admission can be made both in civil proceeding as well as in criminal proceedings. For example, if during a criminal trial for murder, accused admit his presence at place or occurrence or admit that weapon use for committing offence belongs to him etc., then such facts need not to be proved. It is because of this reason it is stated that 'facts admitted need not to be proved.'

B)Confession (Section 24-30)

Confession is that type of admission in criminal matter where accused admits guilt in its absolute terms, leaving prosecution to prove nothings. In other words, confession of guilt in its entirety may be termed as confession.

Lord Atkin in Pakla Narayan Swami v. Emperor (AIR 1941 PC 39) provided interesting example of confession. If accused admit the guilt which highly inclupatory and says that he had stabbed the victim to death through his knife, and admit the knife as well, it is still not confession because prosecution would have to prove whether or not act of accused is covered by any private defense or protected under any general exception such as unsoundness of mind.

Rule regarding Admissibility of Confession—

(d) According to section 24 of IEA, No confession given by an accused person would be relevant if it given in a criminal proceeding, and it was given under any inducement, threat or promise, with reference to the charge against the him, and such inducement, threat or promise was given by a person in authority in relation to that case and sufficient, in the opinion of the Court, 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 proceeding against him.

(e) It must be noted that until all elements of section 24 are there, no such confession could be rejected. Say example, even if there is threat or promise, but it was not related to the consequence (like spiritual threat) or not coming out from the authority in proceeding, then if confession is made, it will be relevant.

(e) A, an accused was threaten by a priest as to spiritual consequences, unless he confess, and accordingly accused makes confession, here only few elements of section 24 are there and not all, so this confession is admissible.

(f) The best example of cases where all elements mentioned in section 24 is present is when a police officer arrest any accused. It because of this reason that any confession made to a police officer is inadmissible by section 25 of IEA.

(g) Only coercive confessions are made inadmissible. However, if the accused want to confess voluntarily, then code of criminal procedure prescribes such procedure in section 164(3), and a Magistrate, when satisfied that accused is making confession voluntarily, he may record the same, and that is often used as substantial piece of evidence against the accused. If the confession is made through this process, it is called as judicial confession. Any confession made otherwise to any other person, such as friend, stranger etc. is called as Extra Judicial Confession. An extra judicial confession is legal and valid.

(h) It is difficult to rely upon the extra judicial confession as the exact words or even the words as nearly as possible have not been reproduced. Such statement cannot be said to be voluntary so the extra judicial confession has to be excluded from the purview of consideration for bring home the charge; C.K. Raveendran v. State of Kerala, AIR 2000 SC 369.

Exception to Rules of Confession—

- The first exception to rule of confession is provided in section 27 of IEA. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, *so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved*. For example if accused says that "I killed B, and I can show you the place where I have buried the knife"…in this statement, police, if discover the 'knife' then the fact that it was discovered at the instance of accused may be proved.
- The condition necessary to bring the section 27 into operation is that the discovery of a fact in a consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as

relates distinctly to the fact thereby discovered may be proved; PulukuriKottaya v. Emperor, AIR 1947 PC 119.

- If such a confession as is referred to in Section 24 is made after the impression caused by any inducement, threat or promise has, in the opinion of the Court been fully removed it is relevant.
- Section 29 provides that Confession otherwise relevant not to become irrelevant because of promise of secretary etc. Say for example B asked A, an accused of murder to make confession to him and he (B) promises that he will not disclose it to any one. Since, it is extra judicial confession which is admissible, it will not be held inadmissible only because there was a promise of its secrecy.
- Section 30 of IEA provides that when a confession is given by one accused, and the same was proved, it can be used against the co-accused if he is tried together in the same case during the joint trial. However, as per Illustration (b) of Section 114 of IEA, such confession should not be relied until the same is proved with material corroboration. Why corroboration is important in this case? Let's examine. A committed murder of B with the help and conspiracy of X, Y and Z. all four were put on joint trial. During trial, X became approver and made confession. Now, since, he is also a co-accused, as per law, i.e. section 30 r/w 133 (Section 133 defines that accomplice/approver is a good witness) his statement is good evidence against all others accused. Rule of logic suggest that if X can ditch his closest friend like A, Y and Z, he must be very shrewd person and, what is guarantee that he will tell truth now. So, illustration (b) of section 114 provides rule of logic or rule of prudence that such testimony should not be relied on until corroborated in material particular i.e. through other evidence.

Illustrations

(a) 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.

(b) A is on his trail 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". The statement may not be taken into consideration by the Court against A as B is not being jointly tried.

c) Dying Declaration:

Generally, no statement given by any person can be used as evidence, until he comes to the court and testified on oath as to veracity of his statement. The reason behind this rule is that court cannot rely on a statement which is just a hearsay or rumor. What someone said, who know better than the person who made that statement, and until he comes to court, his statement should not be considered. However, in those cases where calling that person to court would be futile because either he exist no more or live at some place from where he could not be brought to the court, and he made certain statement which is so relevant to the case, then as a matter of public policy the same must be allowed to be proved. Let's take an example. A killed B. before his death, B made certain statement to doctor as to cause of his death i.e. who causes those injuries. Now, as matter of general rule, his statement should not be proved since a dead man cannot be brought to the court to testify something on oath. It is also a fact that no body knows better as to cause of his death other than he. In such case, public policy allows that such statement may be admissible subject to certain strict rules.

A statements, written or verbal, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death – When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) Or is made in course of business – When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods securities or property of any kind; or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him.

(3) Or against interest of maker – When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true it would expose him or would have exposed him to criminal prosecution or to a suit for damages.

(4) Or gives opinion as to public right or custom, or matters of general interest – When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) Or relates to existence of relationship – When the statement relates to the existence of any relationship [1]by blood, marriage or adoption between persons as to whose relationship [1]by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) Or is made in will or deed relating to family affairs – When the statement relates to the existence of any relationship [1]by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on

which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) Or in document relating to transaction mentioned in section 13, Clause (a). – When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a).

(8) Or is made by several persons and express feelings relevant to matter in question – When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

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 cause 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 was in Calcutta on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta , for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day. A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land. A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) 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.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship. A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way. A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A. A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married. An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a 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.

- Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving a particular fact in later stage of the same judicial proceeding, when the witness cannot be found or is dead

Public Entries, documents & Judgment of the Court:

- Section 35 provides that entry in public record or an electronic record made in performance of official duty is relevant for example it has been held regarding proof about legitimacy of child that the Birth Certificate proceeding on the basis of Baptism Certificate, containing fact that Baptism record was read and checked before the god parents and signed by person along with god parents, such certificate is valid. Thus, Birth Certificate proceeding on basis of Baptism Certificate, legally recognised legitimacy; Luis Caetano Viegan v. Esterline Mariana R.M.A. Da'Costa, AIR 2003 SC 630.
- Section 36 provides that statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts, or plans are themselves facts.
- According to Section 37, When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

- Section 40 provides that the existence of any judgment etc which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is, whether such Court ought to take cognizance of such suit or to hold such trail.
- A final judgment or order or decree of a Competent Court, in exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or to take away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing not as against any specified person but absolutely, is relevant when the existence of any legal character, or the title of any such person to any such thing, is relevant.
- Judgments, orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the inquiry; nut such judgments, orders or decrees are not conclusive proof of that which they state.
- judgments, orders or decrees other then those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant, under some other provision of this Act.

Illustrations

(a) A and B separately sue C for a libel which reflects upon each of them C in each case says that the matter alleged to libelous is true and the circumstances are such that it is probable true in each case, or in neither. A obtains a decree against C for damages on the ground that C filed The Orient Tavern make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife. B denies that C is A's wife, but the court convicts B of adultery. Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. CC says that she never was A's wife. The judgment against B is irrelevant as against C.

(c) A prosecuted B for stealing a cow, from him, B is convicted. A, afterwards, sues C for cow. Which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against A,C,B's son murders A in consequence. The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under Section 8 as showing the motive for the fact in issue.

- Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40,41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Unit-III-

METHOD OF PROOF OF FACTS

a) Presumptions:

Presumptions are inferences which are drawn by the court with respect to the existence of certain facts. When certain facts are presumed to be in existence the party in whose favor they are presumed to exist need not discharge the burden of proof with respect to it. This is an exception to the general rule that the party which alleges the existence of certain facts has the initial burden of proof but presumptions do away with this requirement.

Presumptions can be defined as an affirmative or negative inference drawn about the truth or falsehood of a fact by using a process of probable reasoning from what is taken to be granted. A presumption is said to operate where certain fact are taken to be in existence even there is no complete proof. A presumption is a rule where if one fact which is known as the primary fact is proved by a party then another fact which is known as the presumed fact is taken as proved if there is no contrary evidence of the same. It is a standard practice where certain facts are treated

a uniform manner with regard to their effect as proof of certain other facts. It is an inference drawn from facts which are known and proved. Presumption is a rule which is used by judges and courts to draw inference from a particular fact or evidence unless such an inference is said to be disproved.

Presumptions can be classified into certain categories:

- Presumptions of fact.
- Presumptions of law.
- Mixed Presumptions.

Presumptions of fact are those inferences which are naturally and logically derived on the basis of experience and observations in the course of nature or the constitution of the human mind or springs out of human actions. These are also called as material or natural presumptions. These presumptions are in general rebuttable presumptions.

Presumptions of law are those inferences which are said to be established by law. It can be subdivided into rebuttable presumptions of law and irrebuttable presumptions of law. Rebuttable Presumptions of law are those presumptions of law which hold good until they are disproved by evidence to the contrary. Irrebuttable Presumptions of Law are those presumptions of law which are held to be conclusive in nature. They cannot be overturned by any sort of contrary evidence however strong it is.

Mixed Presumptions are certain inferences which can be considered as observations of law due to their strength or importance. These are also known as presumptions of mixed law and fact and presumptions of fact recognized by law.

Section 4 of the Indian Evidence Act deals with three categories of presumptions

- Discretionary Presumptions
- Mandatory Presumptions

- Conclusive Proof

The Sections of the Indian Evidence Act which deal with Discretionary Presumptions relating to documents are sections 86, 87, 88, 90 and 90-A. These Presumptions are those in which the words may presume are used in the sections and the words may presume is used signifies that the courts of law have discretion to decide as to whether a presumption is allowed to be raised or not. In the case of such presumptions the courts of law will presume that a fact is proved unless and until it is said to be disproved before the court of law or it may call for proof of a fact brought before it. The Sections of the Indian Evidence Act which deal with Mandatory Presumptions are Section 79, 80, 80-A, 81, 82, 83 85 and 89. These Presumptions are those in which the words shall presume is used. In case of such presumptions the courts of law will presume that a fact before it is proved until and unless it is disproved. The words shall presume signify that the courts have to mandatorily raise a presumption and such a presumption which is raised shall be considered to be proved unless and until the presumption is said to be disproved and there is no discretion left to the court therefore there is no need for call of proof in this case. It is like command of the legislature to the court to raise a presumption and the court has no choice but to do it. The similarity between discretionary and mandatory presumptions is that both are rebuttable presumptions.

Conclusive Proof is defined under Section 4 that one fact is said to be conclusive proof of another fact when the court shall on the proof of a certain fact regard another fact to be proved and the court shall not allow any evidence which shall to be given for the purpose of disproving such a fact. Conclusive Proof is also known as Conclusive Evidence. It gives certain facts an artificial probative effect by law and no evidence shall be allowed to be produced which will combat that effect. It gives finality to the existence of a fact which is sought to be established. This generally occurs in cases where it is in the larger interest of society or it is against the governmental policy. This is an irrebuttable presumption.

The general rule about burden of proof is that it lies on the party who alleges the fact to prove that the fact exists. But a party can take advantage of the presumptions which are in his favor. If the prosecution can prove that the conditions of a presumption are fulfilled and such a

presumption is of rebuttable nature then the burden of prove to rebut it is always on the party who wants to rebut it.

PRESUMPTIONS RELATING TO DOCUMENTS

Discretionary presumptions are those presumptions where the discretion is left to the court whether or not to raise the presumption. The provisions in which the words "may presume" are used are discretionary presumptions. The discretionary presumptions relating to documents are provided under Sections 86, 87, 88, 90 and 90-A of the Indian Evidence Act. Section 86 lays down the principle that the court may make a presumption relating to the genuineness and accuracy of a certified copy of a judicial record of any foreign country if the said document is duly certified in accordance with the rules which are used in that country for certifying copies of judicial records. The presumption under this section is permissive and imperative in nature and hence should be complied with. But the court has the discretion to decide whether the presumption should be raised or not. If there is no certificate under this section then a foreign judgment is not admissible as evidence in court. But this does not mean that it excludes other proof. It is not necessary that the foreign judgment should have already been admitted as evidence so as to give rise to this presumption .

The presumption under Section 87 is related to the authorship, time and place of the book or map or chart and not related to accuracy or correctness of facts contained in the book, map or chart. The accuracy of the information in the map, book or chart is not conclusive but in the absence of contrary evidence it is presumed to be accurate. The accuracy of the information in a map or a chart depends on the source of information. The age of the publication is also not important the court can refer to any publication as long as it is relevant to the suit brought before it.

The presumption under Section 88 is based on the principle that the acts of official nature are performed in a regular manner. Under this section the court accepts hearsay statement as evidence about the identity of the message which was delivered. The requirement under this section that no presumption shall be made with regard to the person who has delivered the message for the purpose of transmission is mandatory and should be necessarily complied with.

This presumption only operates if the message has been delivered to the addressee otherwise the message is not held to be proved. This presumption applies only those messages which are transmitted to the addressee through the telegraphic office. This presumption also applies to radio messages .

The form which is given to the post office by the sender of the message is the original of the telegram and not the form given by the post office to the addressee. Either the original copy must be submitted before the court by a post office official or proof of its destruction must be given before copy can admitted as secondary evidence before the court under this section.

According to Section 88 there is only a presumption that the message received by the addressee corresponds to the message delivered for transmission to the telegraph office and there is no presumption as to the person who delivered the said message for transmission. But the proof relating to the authorship of the message is not direct but of a circumstantial nature. The content of the message read in context with the chain of correspondence is proof relating to the authorship of the message.

Section 88-A is similar to Section 88 in structure and it is like an extension of Section 88 which deals with the transmission of electronic message. According to this section the court may presume that an electronic message forwarded by the originator through an electronic mail server to be addressee to whom the message purports to be addressed corresponds with the message with the message as fed into his computer for transmission but the court shall not make any presumption as to the person by whom the message is sent. The terms “addressee” and “originator” given in this section can be defined by looking into Clauses (b) and (za) of Subsection (1) of Section 2 of the Information Technology Act of 2000.

Section 90 deals with presumption relating to ancient documents or documents which are 30 years old. The basis of Section 90 is the principle of convenience and necessity. The basic objective of this section is to reduce any difficulties faced by persons who want to prove the handwriting, execution and attestation of ancient documents for establishing their case.

Under this section the court may make the following presumptions with respect to ancient documents: a) the signature and every part of handwriting of such a person and b) that the document was duly executed and attested by the person it is supposed to be executed and attested. The presumption under this section does not apply to other aspects of the document like its contents or its authenticity.

The presumption under this section applies to all the documents which come under the definition given under Section 3 of the Indian Evidence Act. It applies to books of accounts, testamentary documents, private and public documents. This presumption does not apply to anonymous documents.

For the presumption under Section 90 to be applicable the following conditions have to be fulfilled:

The document should be proved or purported to be 30 or more years old. There must be some evidence or at least a prima facie case should be made out to support that the document is 30 years old. This is however a rebuttable presumption. Ancient documents can be read as evidence without any formal proof. The period of 30 years is commuted from the date of the execution of the document to the date on which it is put as evidence.

The document should be produced from proper custody. It can be proved that document is produced from proper custody either by giving evidence to prove the fact or show that the person who produced it was the depository of the document.

The document should be original and not certified copies or registered copies. If an original document is not produced before the court and no reason is given for the non production of the original documents the certified copies are not admissible before the court. However if a copy of a document can be admitted as secondary evidence under Section 65 and is produced from proper custody and is over thirty years old then signature which authenticates the document may be presumed as genuine but this does prove the execution of the document. Certified copies are admissible if the original document is in the possession of the opposite party. Certified copies are also admissible to prove contents of the original if the original copy is lost.

This presumption applies only in the case of proving the signature and the handwriting of the document. If the documents do not have a signature then the presumption under Section 90 does not apply to it. The definition of signature under this section includes thumb impressions if there is no evidence to the contrary. However the signature under this section does not include seals because seals do not fall within the definition of signature given in the General Clauses Act.

However there are certain causes which weaken the presumption under Section 90 are:

The court may presume the genuineness of the document if it more than 30 years and produced from proper custody. The presumption is weakened by circumstances which raise doubts authenticity of the document. When the genuineness of the document is disputed the court has to consider external and internal evidence related to it in order to decide whether there was proper execution and signature.

When the document is suspicious on the face of it the court need not presume that the document was executed by the person purported to have executed it.

Section 90-A is similar to Section 90 of the Indian Evidence Act in structure and is like an extension of Section 90 which applies to electronic records which are 5 years old. According to this section if any electronic record purporting or proved to be 5 years old is produced from custody which the court in the particular case considers proper the court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or authorized by him in this behalf.

The explanation to this section states that the electronic records are said to be in proper custody if they are in the place in which and under the care of the person with whom they naturally be but no custody is said to be improper if it is proved to have a legitimate origin or the circumstances of the case are such as to render such an origin probable.

b) Expert opinion

Law of evidence allows a person –who is a witness to state the facts related to either to a fact in

issue or to relevant fact, but not his inference. It applies to both criminal law and civil law. The opinion of any person other than the judge by whom the fact has to be decided as to the existence of the facts in issue or relevant facts are as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons- for this would invest the person whose opinion was proved with the character of a judge. The rule however, is not without its exceptions. “If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns”.

The expert witness is, thus, an exception to the exclusionaryrule and is permitted to give opinion evidence. The Judge is not expected to be an expert in all thefields-especially where the subject matters involves technical knowledge. He is not capable ofdrawing inference from the facts which are highly technical. In these circumstances he needs thehelp of an expert- who is supposed to have superior knowledge or experience in relation to thesubject matter. This qualification makes the latter’s evidence admissible in that particular casethough he is no way related to the case. Because an expert has an advantage of a particularknowledge vis-à-vis a judge who is not equipped with the technical knowledge and hence notcapable of drawing an inference from the facts presented before him.

Who is an expert?

An expert is a person who devotes his time and study to a special branch of learning.

The Courts in India in theirjudgment described an expert as a person who has acquired special knowledge, skill orexperience in any art, trade or profession. Such knowledge need not be imparted by anyUniversity. He might have acquired such knowledge by practice, observation or careful study. Theexpert operates in a field beyond the range of common knowledge. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons especially skilled in such foreign law, science or art (or in questions as to identity of handwriting) or finger impressions are relevant facts6. Such persons are called experts. To sum up an expert is one who is skilled in any particularart, trade or profession being possessed of peculiar knowledge concerning the same.

Expert as a witness:

The phrase expert testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special knowledge simply testifies as to the impressionsproduced in his mind. Question of common knowledge such as whether the hammering of the steelplates with hammers weighing 10 kg cause noise or not does not need an expert. Expert evidenceis often sought in the matters of handwriting, age, on weather, general conduct of a business etc. Aperson having special knowledge of the value of land by experience though not by any professioncan be treated as an expert.

The Cases in which Expert Evidence can be admitted:

The Supreme Court of New Hampstead has classified the cases under three heads and declared that experts may give opinions on the following:

1. Questions of science, skill or trade or other subjects.

2. When the subject matter of enquiry is of such a nature that inexperienced persons are not likelyto form a correct judgment over it without assistance.

3. When the subject matter of investigation so far as it partakes of the nature of a science as to mean a course of previous habit or a study in the attainment of knowledge of it .

Expert Evidence in Indian Evidence Act:

Expert evidence is covered under Ss.45-51 of Indian Evidence Act. S.45 of the Act allows that when the subject matter of enquiry partakes of science or art as to require the course of previous habit or study and in regard to which inexperienced persons are unlikely to form correct judgment.

Therefore the opinion of persons having special knowledge of the subject – matter of the enquiry

and described as experts is made relevant. However, whether a particular person is a competent witness or not is to be proved in the Court of Law before his testimony is admitted. Thecompetency of an expert is a preliminary question before the Judge. An expert need not be a paid

professional expert who makes living by giving such evidence, but he must have devoted sufficienttime and study to the subject so that he can make his evidence trustworthy.

Subject Matters of Expert Evidence: The subjects of expert testimony mentioned by the section are foreign law, science, art and the identity of handwriting or finger –impressions. Expert on anyother subject is not admissible. This was the position in 1954. No more it is the law. Law relatedto expert evidence has developed in a piece meal method growing hand by hand with the development of technology in every field. The word science or art if interpreted in a narrow sense,would exclude matters upon which expert testimony is admissible such as matters related to trade,handicrafts, ballistics and many more. Every business or employment which has a particular classdevoted to its pursuit is an art or trade. When the question of foreign law is raised the evidence ofprofessional lawyer or the holder of an official situation which requires and therefore implies legalknowledge or a teacher of law is admissible. As far as science and art concerned they are to bebroadly construed so as to include all subjects on which a course of special study or experience isnecessary to the formation of an opinion and embrace also the opinion of an expert in footprint as well.

S.47 of the Indian Evidence Act exclusively deals with the opinion as to the handwriting.

The explanation further elaborates the circumstances under which a person is said to have known the disputed handwriting. Under this section a person who is deposing the evidence need not be a handwriting expert. Indeed the knowledge the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstance of bias or suspicion,is far more satisfactory than the most elaborate comparison of even an experienced person. Onecan get acquainted with others handwriting in many ways. The former might have seen the latterwriting a particular handwriting. He might be receiving letter from the latter

regularly. A superiorofficer might have seen his subordinate's writing on several occasions and vice versa. But, theevidence given by a person who has insufficient familiarity should be discarded. Indian EvidenceAct insists that documents either be proved by primary evidence or by secondary evidence.

S.67of the Indian Evidence Act prescribes the mode of proving the signature in a document. However,the opinion as to handwriting is admissible only if the condition laid down in S. 47 is fulfilled, that is

the witness is established to have been acquainted with the writing of the particular person in one of the modes enumerated in this section.20 However, the opinion of an expert is relevant when theCourt has to form an opinion on a point of science or art. At times expert opinion differs on provenor admitted facts. But when the facts are not admitted the Court will have first to come to aconclusion on the evidence as to what facts have been proved and then to apply to such facts thevarious expert opinions which have been offered. The opinion of an expert in handwriting should bereceived with great caution and should not be relied on unless corroborated.21 But no suchcorroboration is need in the case of finger prints. Of course, an expert can always refresh himmemory by referring to the text books. A doctor can refer to medical books, a valuer to the pricelists, a foreign lawyer to legal codes, texts and other journals.

The expert opinion is not confined to handwriting alone. The opinions in relation to customs are also admissible according to S. 48 of Indian Evidence Act.40 Section 1341 and S.32 (4) alsomentions about custom.42S.13 deals with all rights and customs, public, general and private and

refers to specific facts which may be given in evidence. The latter is a hearsay evidence where a secondhand opinion can be admissible in the Court of law where the person who opined cannot bebrought before the Court (because of death or inability) upon the question of the existence of anypublic right or custom or matter of public or general interest made ante litem motan. But S.48 dealswith the evidence of a living witness, who stood before the Court sworn to depose and subject tocross examination. Not only custom under this section opinion regarding usage is also admissible.

d. ORAL EVIDENCE

The facts judicially noticeable and facts admitted are need not to be proved. Oral and documentary evidence are not only media of proof. This chapter deals with the oral evidence only. It enacts two broad rules regard to oral evidence: firstly, that all facts except contents of documents may be proved by oral evidence, and secondly, that oral evidence in all cases must be direct and not hearsay.

The meaning of expression "oral evidence" is given along with the definition of the term as-: "evidence" in Section 3 of Indian evidence act "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 records produced for the inspection of the Court such documents are called documentary evidence.

Section 59 of the Indian evidence act reads as-:

All facts, except the contents of documents, [or electronic records, be proved by oral evidence.

Principle: This section lays down that all facts may be proved by oral evidence, except the contents of a document. The section is rather loosely worded as it makes an unqualified statement as regards the exclusion of oral evidence to prove the contents of a document. The true position is that oral evidence can be led as evidence relating to documents under section.

In general the evidence of a witness is given orally, and this means oral evidence. The expression oral evidence therefore includes the statement of witness before the court which the court either permits or requires them to make. The statement may be made by any method by which the witness is capable of making it. A witness who cannot speak may communicate of facts to the court by signs or by writings and in either case it will be regarded as oral evidence. Thus where a women was unable to speak because her throat was cut and she suggested the name of her assailant by the signs of her hand that was held to be a verbal statement relevant as a dying declaration.

Where oral evidence is credible and cogent, medical evidence is to contrary is inconsequential. Only when medical evidence totally improbable oral evidence, adverse inference can be drawn. Evidentiary value of the oral testimony of an eye-witness cannot be diluted by reason of non-production of any document in support of a claim contrary to the oral testimony.

Difference between 'Relevancy' & 'Admissibility'-: there are following three differences between the relevancy and Admissibility -:

1) The first deals with the probative value of specific facts,

2) The second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it, and

3) The third covering all those rules which rest on extrinsic policies irrespective of probative values.

EVIDENTIARY VALUE-: Oral evidence is a much less satisfactory medium of proof than documentary proof. But justice can never be administered in the most important cases without resorting to it. In all civilized systems of jurisprudence there is a presumption against perjury. The correct rule is to judge the oral evidence with reference to the conduct of the parties, and the presumptions and probabilities legitimately arising in the case. Another test is to see whether the

evidence is consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with well-known principles of human action.

FALUS IN UNO FALUS OMNIBUS-: The maxim means false in one particular, false in all. This principle is a somewhat dangerous maxim. There is always a fringe of embroidery to a story, however true in the main and so where the falsehood in merely an embroidery, that would not be enough to discredit the whole of the witness's evidence; where , on the other hand the falsehood relates to a major or material point that is enough to discredit the witness.

APPRECIATION-: oral evidence should be approached with caution. The court must shift the evidence, separate the grain from the chaff and accept what it finds to be true and reject the rest. The credibility of the witness should be decided on the following important points:

(a) Whether the witness have the means of gaining correct information,

(b) Whether they have any interest in concealing the truth,

(c) Whether they agree in their testimony.

Though a chance witness is not necessarily being a false witness, it proverbially rash to rely upon such evidence. The real tests for accepting or rejecting evidence are; how consistent is the story in itself, how does it stands of cross-examination and how far does it fit it with the rest of the evidence and circumstances of the case. Non-consideration of oral evidence by the lower appellate court, it is a non observance of the mandatory provision of Order 41, Rule 31 which brings in the sessions infirmity in the judgment. The judgment in such a cases stands vitiated and is not binding on the high court in the second appeal. When a girl states that a particular person used to conduct himself as her father, she says so from his personal knowledge and it is not hearsay.

ELECTRONIC RECORDS-The section was amended by the Information Technology Act, 2000 so as to include within the meaning of the term "document", electronic records also. Hence,

every other fact, except contents of an electronic record or of any document, can be proved by oral evidence.

S.60 deals with Oral evidence must be direct -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 seen 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 in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds -

Provided that the opinion of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

PRINCIPLE-: this section enacts the general English rule that hearsay is no evidence. It embodies the second important rule about oral evidence, viz., that it must in all cases be direct and not hearsay. The section sets out the scope of the expression 'direct evidence'. It is true that hearsay evidence is excluded by this section. However, this is subject to well- recognized exceptions (e.g., sections 17 to 39).

Stephen – "the word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else."

HEARSAY EVIDENCE AND ITS EXCLUSION-: the term hearsay is ambiguous and misleading as it is used in more than one scene. Stephen says "sometimes it means whatever a person is heard to say; sometimes it means whatever a person declared on information given by someone else; sometimes it is treated as nearly synonymous with irrelevant" , (Stephen's evidence, introduction. In its more generally accepted since the term hearsay is used to indicate that evidence which does not derive its value from the credit given to the witness himself, but which rests also on the veracity and competence of some other person. It is thus used in contradiction to 'direct evidence'. It is derivative evidence.

REASONS FOR EXCLUSION OF HEARSAY-:

(a) The irresponsibility of the original declerant;

(b) The deprecation of truth in the process of repetition; and

(c) The opportunities for fraud its admission would open; to which are sometimes added these grounds, viz.,

(d) The tendency of such evidence to protract legal inquires, and

(e) To encourage the substitution of weaker for stronger proof.

Hearsay evidence is the statement of a witness not based on his personal knowledge but on what he heard from others. If the evidence is that of a fact the happening of which could be heard, for example, the noise of an explosion, the evidence must be that of a person who personally heard the happening of the fact. The evidence of a reporter that after filing the F.I.R at the instance of his companion, who told by the people there, by naming the accused, that he assaulted the deceased and escaped, was held to be irrelevant, being not an eye witness account. Thus all the cases the evidence has to be that of a person who himself witnessed the happening of the fact of which he gives evidence in whatever way the fact was capable of being witnessed. Such a

witness is called an eye-witness or a witness of fact and the principle is known as that of direct oral evidence or of the exclusion of hearsay evidence. A post mortem report was produced by the record clerk of the hospital. The doctor who conducted the post mortem was not produced. The court ruled that in such circumstances the report was not provable. Only the original report stand not a copy of it is admissible.The accused person was prosecuted for causing hurt by throwing a stone at prosecutor. So soon he was hit by the stone a woman who saw a man throwing the stone drew his attention towards a house and said: "*the person who threw the stone went in there*." Very soon thereafter he was caught and arrested in that house. But the above statement was held to be not relevant. The prosecutor himself had not seen any person throwing a stone at him and thereafter entering a particular house and, therefore, the statement was not hearsay.

EXCEPTIONS TO HEARSAY

Res Gestae [s.6]

Admissions and Confessions

Statement relevant under section.32 Statements in Public Documents.

Evidence in Former Proceedings Statements of Experts in Treatises

Difference between Direct Evidence and Hearsay Evidence

Direct Evidence	Hearsay Evidence
1. Direct evidence is that which the witness is giving on the basis of his own perception	1. Hearsay evidence is that which has been derived by other person.
2. Direct evidence is best oral evidence of the fact to be proved.	2. Hearsay evidence is secondary one and it is admitted in exceptional cases.
3. The liability of veracity of direct evidence is on person who is giving its evidence.	3. In case of hearsay evidence the person giving evidence does not take the responsibility of its veracity.
4. The person giving direct evidence is available for cross examination for testing its veracity.	4. The person giving hearsay evidence is not author of original evidence. It is derived from original author.
5. The source of direct evidence is the person who is present in court and giving evidence.	5. In case of hearsay evidence the person giving hearsay evidence is not original source of evidence given by him.

DOCUMENTARY EVIDENCE

MEANING--: the expression *"documentary evidence"* as it is defined in section 3, means:

All documents including records produced for the inspection of the Court] such documents are called documentary evidence.

The expression "document" is defined in section 3 as follows:

"Document"- means any matter expressed or described upon any substance by means of letter, figures or makes, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

S.3 defines the term 'evidence' as meaning and including oral and documentary evidence. All evidence comes to the tribunal either as the statement of a witness or as the statement of a document, i.e., oral or documentary evidence. The present chapter deals with the documentary evidence, i.e., the mode of proof of contents of documents old documents either by primary or secondary evidence, the types of documents, viz., public and private documents of the presumptions as to the documents. Father we are going to deal with the 3 main aspects --:

a) How documents are to be proved the manner of,

b) What are the presumptions about the various kinds of documents, and

c) When is oral evidence excluded by documentary evidence.

R.M.Malkani v. State of Maharashtra, the accused, which an appealed to the Supreme Court against his conviction, was the coroner of Bombay. A doctor, who was running a nursing home, operated upon a patient who afterwards died. It, being a post-operation death, becomes the subject of post-mortem and inquest. The coroner persuaded the doctor to pay him a sum of money if he wanted the report to be favorable to him. The payment was arranged to be made through another doctor and the final meeting for this purpose was to be settled by telephone call from the house of another the doctor. The police commissioner was called with the tape-

recording mechanism. This was connected to the doctor's telephone and thus the most incriminating conversation was recorded in the presence of the police officer. The Bombay High Court held that the testimony of the two doctors required corroboration and that the tape amply corroborated it. The decision was upheld by the Supreme Court.

N.Sri Rama Reddy v. V.V. Giri&Pratap Singh v. State of Punjab,

The court accepted conversation of dialogue recorded on tape-recording machine as admissible evidence.

S.61 – Proof of contents of documents--: *The contents of document may be proved either by primary or secondary evidence.* Law of best evidence requires the best evidence must be given in proof of the facts in issue or the other relevant facts. Primary evidence is the best evidence. The best evidence rule is to produce the original and secondary evidence is not admissible unless the original is proved to be lost, etc, as required under section 65. Contents may be proved, i.e., in other words, there are no degrees of secondary evidence. n India the rule is the same as in England. The section means that there no other method allowed by law for providing the contents of a document except by the primary or the secondary evidence. Where admissions were made in a written statement by the plaintiff's predecessors-in-interest which was filed in several judicial proceedings regarding the rights in the suit property, a certified copy of the written statement was held to be admissible in proof of the settled rights to the property. Where the document carried adhesive stamps which belonged to a period prior to six months from the date of purchase, the court said that such document could not be attached in evidence. it would have been admissible if it was not creative of any rights in favour of any party and merely recorded something. An unregistered family settlement deed was held to admissible strictly for collateral purposes only.

The subject of documentary evidence can be divided into three parts:

1. How the contents of a document are to be proved? {61-66}

2. How the document is to be proved to be genuine? {67-90}

3. How far and in what cases the oral evidence is executed by documentary evidence? {91-109}

e)BURDEN OF PROOF

1. What is meant by Burden of Proof.

Description, letter, then definition:

The judge or jury can decide a case only by considering the truth and values of the several facts alleged and proved by the parties and as the facts are unknown to both judge and jury. They must be established by evidence. The question at once arises, which party must adduce evidence ?The responsibility for adducing such evidence as will establish any allegation is called the " Burden of Proof".

The subject-matter of the Burden of Proof as applied to judicial proceedings falls into two parts:

1. Burden of Proving an issue.
2. Burden of Proving a particularfact.

THE NECESSITY FOR MAKING THIS DIVISION.

The Proof of an issue may involve the proof of many facts as they may involve the proof of only one fact.

Illustration:

1. Issue is, Did A commit murder of *B*?
2. Issue is, Is the signature on the document that *of A*?

Issue No. 2 involves the proof of one fact only. Issue No. I may involve the proof of many facts. e.*g.*

Was *A*present ? .

Could *C* see him?

Is the bloodstained shirt his ?and so on.

Burden of Proving an issue.

3. The framing of an issue presupposes an assertion of the existence of a certain set off acts and circumstances by one party and the denial of them by the opposite party. There aretwo ways by which the issue may be adjudicated upon (1) By proving that the circumstances alleged do not exist or (2) By proving that the circumstances alleged do exist. Question is which of the two modes of proving the issue to be adopted— the mode of proving the affirmative or the mode of proving the negative.

4. Where there are no reasons for holding :

(a) that what is asserted is more probable than what is denied and

(b)where the means of proof are equally accessible to both the parties then the rule is that the party which alleges the existence of the facts must prove that they exist. The burden is on him who states the affirmative of the proposition. He who denies need not prove that they do not exist.

This rule is laid down in Section 101.

5. Reasons why the law requires the affirmative to be proved instead of the negative.

(1) The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof in his adversary.

(2) A simple negative by reason of its indefiniteness is difficult if not impossible of proof. A person asserts that a *certain event took place,* not saying when, where, or under what circumstances. How can a person disprove that, and convince others that at no time, at no place and under no circumstances has such a thing occurred. The utmost that could possibly be done in most instances would be to show the impossibility of the supposed event and even this would require an enormous mass of presumptive evidence.

A negative averment must be distinguished from a contradiction of a positive averment, technically known as a " traverse ".

Illustrations: Malicious Prosecution.

In an action for Malicious Prosecutions the Plaintiff makes two main allegations.—

(1) That the Defendant prosecuted him,

(2) That the Defendant had no reasonable cause for the prosecution.

The first being affirmative the second a negative averment. The burden of proof of both of them is on the Plaintiff.

Negligence.

The Defendant did not take reasonable and proper care. This is not a negative but a negative Averment.

6. Two things must be noted with regard to the rule of evidence that the affirmative of a proposition must be proved.

The Burden of proving the issue in Criminal Trials

1. Section 101 is a general section and applies to both civil as well as criminal proceedings.

Section 105 is another section which relates to the burden of proving an issue as distinguished from the burden of proving a fact but applies to criminal proceedings only.

2. To understand this section it is necessary to know the scheme of the Indian Penal Code. The Indian Penal Code defines various offences such as theft, murder, cheating etc. Some 400 in all.The task of framing definitions which would be exact, neither too wide, nor too narrow has been very difficult and with the best of efforts the authors of the Code have failed to frame exact definitions. They have however erred in making them too broad. Consequently they found it necessary to limit these definitions by enacting exceptions. Some of these exceptions arc common to all the offences as defined by the Code. Other exceptions arc specifically applicable

to a particular offence.

I. BURDEN OF PROOF

(i) Matters of which Proof is not required.

Facts of which Proof is not required.

1. Matters of which Proof is not required fall under three heads:

(1) Facts Judicially noticed.

(2) Facts admitted by the Parties.

(3) Facts the existence of which is presumed by law.

(i) Facts judicially noticed.

1. Sections 56 and 57 deals with facts judicially noticed.

2. Section 56 says no fact of which the Court will take judicial notice need be proved.

3. Sec. 57 lays down 13 matters of which the Court *must* take judicial notice.

4. Principle of the Section. Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus—

(1) Commencement and Continuance of hostilities.

(2) Geographical Divisions.

The last two paras are important and read with section 56. They furnish a clue to the proper understanding of them. The effect is that when a matter enumerated in Section 57 comes into question, the parties who assert the existence to the contrary need not produce any evidence in support of their assertions. The judge must come to a conclusion without requiring any formal evidence.

The Judge 'sown knowledge may be sufficient. If it is not he must look the matter up.

The Judge can also call upon the parties to assist him, if he thinks it necessary.

The Judge in making this investigation is emancipated entirely from all the rules of evidence laid down for the investigation of facts which the law requires a person to prove.

(ii) Facts admitted by parties. Section 58

There are two sorts of admissions which must be distinguished.

(1) Formal admissions made touching matters related to a proceeding in a Court and made intentionally by parties so as to dispense with their Proof.

(2) Informal admissions alleged to have been made by a party to the proceedings but not made in the course of the proceedings.

Section 58 applies only to formal Admissions. Formal admissions may be made by parties in 6 different ways : (i) On the pleadings. (ii) In answer to interrogatories. (iii) In answer to a notice to admit specified facts. (iv) In answer to produce and admit documents. (v) By the Solicitor of a party during the litigation. (vi) In open Court by the litigant himself or by his Advocate.

3. Proofofsuchfactswouldbefutile.TheCourthastotrythe questions on which the parties are at issue and not on which they are agreed.

f).English and Indian Law of Estoppel.

1. Under the English Law Estoppels are usually classed under three heads.
    - (i) (i)Estoppel by Record.
    - (ii) (ii)Estoppel by Deed.
    - (iii) (iii)Estoppel by Conduct
2. Estoppel by Record means estoppel by the Judgement of a competent Court.

    (i) Estoppel by Record is recognised by the law of India. It is dealt with:

    - (a) (a) By the Code of Civil Procedure. *Sections 11-4.*
    - (b) (b) By the Evidence Act. *Sections 40-44.*

3. Estoppel by Deed.

1. Under the English Law a party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. This rule affords an illustration of the exaggerated importance of a ' seal ' in English law. Neither sealing wax nor Walter is necessary to constitute a seal. Apparently, a smudge of ink on document purporting to be a deed is a seal if so intended, and it makes a greater importance in law than a deliberate and identifiable signature. There is no estoppel in the case of ordinary signed documents.

2. The strict technical doctrine of Estoppel by Deed cannot be said to exist in India.

3. But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. In some cases such a statement amounts to a mere admission of more or less evidential value according to circumstances, but not conclusive. In other cases namely those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation under Section 115.

4. An estoppel does not arise under the Evidence Act merely because a statement is contained in a deed. It can work an estoppel only when it can fall with section 115.

5. A Recital in a deed may be merely an admission or it may be estoppel according to circumstances.

Particular Estoppels.

1. Section 115 deals with Estoppels in general, sections 116 and 117 deal with particular Estoppels.

2. The distinction between Estoppels under Section 115 and Estoppels under 116-117 may be noted.

(i) Estoppels under section 115 can arise between any two parties. It is not necessary that they should be related by a particular legal tie. Estoppels under 116-117 arise only between parties who are related by a particular relationship.

(ii) Estoppel under 115 arises by reason of misrepresentation of facts by one party to another. Estoppel under 116, 117 arise by reason of agreement between the parties which

has forged a particular relationship between them.

Section 116.deals with Estoppels between

(i) (i)Landlord and Tenant and

(ii) (ii)Licensee and Licensor of immovable property.

I. Landlord and Tenant.

1. This Estoppel applies to the tenant of immovable property.

2. This estoppel applies also to a person claiming through the tenant. In other words, if a tenant sublets his property without the knowledge or permission of the landlord, the sub-tenant will also be estopped from denying that the landlord had the title in the beginning.

3. This Estoppel does not ensure to the benefit of a person claiming through the landlord.

There are two possible cases in which premises may be let :

(i) Where the Plaintiff has let the Defendant into possession of the land.

(ii) When Plaintiff is not himself the person who lets the Defendant into possession, but claims under a title derived from the person who did.

This section applies to the first case and estops the tenant from denying the Landlord's title. It does not apply in the second case where the title of the landlord is derivative i.e. by sale, lease or inheritance so that when the Plaintiff claims by a derivative title, the defendant is not estopped from showing that the title is not in the Plaintiff but in some other person. The tenant can show that he has no derivative title. This is the effect of the absence of the words " claiming through the landlord "..

This estoppel applies to a denial of title at the beginning of the tenancy, so that a tenant can show that his landlord's title has expired or is determined. In such a case he does not dispute the title, but confesses and avoids it by a matter *ex-post facto*. Justice requires that the tenant should be permitted to raise this plea, for, a tenant is liable to the person who has the real title and may be faced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.

4. The Scope of the Estoppel. A tenant or his representative will not be permitted to deny that on the day on which his tenancy commenced, the landlord who granted the tenancy had title to

the property.

5. This Estoppel binds the tenant only so long as the tenancy continues. Once the tenancy has ceased he is free to deny that his landlord had any title even on the day on which tenancy commenced.

II. Licensee and Licensor of immovable property.

1. The rule is the same as a licensee, namely, that the licensor had title to such possession at the time when such license was given.

2. Difference between a tenant and a licensee.

License means permission given by one man to another to do some act, which without such permission it would be unlawful for him to do. It is a personal right, and is not transferable, but dies with the man to whom it is given. It can as a rule be revoked by the Licensor unless the licensee has paid money for it.

Tenancy is an interest in land and is transferable and heritable.

Section117 deals with (1) Estoppel of acceptor of a Bill of Exchange.

(2) Estoppel of a Bailee.

(3) Estoppel of a Licensee.

(1) The Estoppel with regard the Acceptor is to the effect that he shouldnotbepermittedto deny that the drawer had an authority to draw the Bill or to endorse it.

g. Privileged Communications

Regarding privileged communications , Taylor said , "… it is thought that greater mischief would probably result from requiring or permitting their admission , than from wholly rejecting them ". A witness though compellable to give evidence , is privileged , in some cases , with respect to particular matters . And in those matters , there are limits within which a witness is not bound to answer questions while giving evidence . Some of these privileges are based on public

policy . These privileges are contained in sections 121 , 122 ,123 , 124 , 125, 126 and 129 of the Indian Evidence Act .

i) Judges and Magistrates :-

Section 121 of the Indian Evidence Act provides that no judge or Magistrate shall , except upon the special order of some Court to which he is subordinate , be compelled to answer any questions as to ---

i) his own conduct in Court as such Judge or Magistrate , or

ii) as to anything which came to his knowledge in Court as such Judge or Magistrate ;

but he may be examined as to other matters which occurred in his presence whilst he was so acting .

Let us suppose , A , on his trial before the Court of Sessions , says that a deposition was improperly taken by B , the Magistrate . B can not be compelled to answer the questions as to this , except upon the special order of a superior Court .

But when , A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B , a Sessions Judge . B may be examined as to what occurred .

ii) Communications during marriage :-

This kind of privilege is based on the ground that the admissions of such evidence would have a powerful tendency to disturb the peace of families.

Section 122 of the Indian Evidence Act provides that no person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married nor shall he be permitted to disclose any such communication , unless the person who made it , or his representative-in-interest , consents , except---

i) in suits between married persons , or

ii) proceedings in which one married person is prosecuted for any crime committed against the other .

iii) Affairs of State :-

The State has the prerogative of preventing evidence being given on the matters that would be contrary to the public interest .

Section 123 of the Indian Evidence Act lays down that no one shall be permitted to give any evidence derived from any unpublished official records relating to any affairs of the 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 .

Court can draw an adverse inference if the head of the Department does not state why the privilege is claimed or what matters of the State are involved .

iv) Official Communications :-

Section 124 of the Indian Evidence Act says that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure .

But the protection is not afforded to the statements made by a witness to a police officer during investigation , to any public servant accused of dishonesty or bad faith and the officer of any Nationalized Bank .

v) Information as to crime :-

Section 125 of the Indian Evidence Act lays down that no Magistrate , Police Officer or Revenue Officer shall be compelled to disclose the source of his information as to the commission of any offence .

This section protects disclosure of the name of a spy or secret informant .

vi) Professional Communications :-

This rule is made in the interest of justice .

In the case of Bolton Vs. Liverpool , it was held that if such communications were not protected , no man would dare to consult a professional advisor , with a view to his defence , or to the enforcement of his rights , and no man could safely come into Court , either to obtain redress or to defend himself .

Section 126 of the Indian Evidence Act says that no barrister , attorney , pleader or vakil shall at any time be permitted , unless with his client's express consent , to disclose any communication made to him in the course and for the purpose of his employment as such barrister , attorney , pleader or vakil , by or on behalf of his client , or to state the contents or the condition of any document with which he has become acquainted in the course and for the purpose of his professional employment , or to disclose any advice given by him to his client in the course and for the purpose of such employment ;

Provided that nothing in this section shall protect from disclosure ---

1) any such communication made in furtherance of any illegal purpose ,

2) any fact observed by any barrister , attorney , pleader or vakil in the course of his employment as such , showing that any crime or fraud has been committed since the commencement of his employment .

It is immaterial whether the attention of such barrister , attorney , pleader or vakil was or was not directed to such fact by or on behalf of his client .

It has been explained by section 126 that the obligation stated in this section continues after the employment has ceased .

Let us suppose , A , a client , says to B , an attorney , " I have committed forgery and I wish you to defend me " . As the defence of a man known to be guilty is not a criminal purpose , this communication is protected from disclosure .

But when, A , a client , says to B , an attorney , " I wish to obtain possession of property by the use of a forged deed on which I request you to sue " , this communication being made in furtherance of a criminal purpose , is not protected from disclosure.

This species of professional communication is not absolute in nature . Because this privilege is for the protection of the client and not of the lawyer . And that the client is entitled to waive it .

Section 129 is a counterpart of section 126 of the Evidence Act . Section 129 lays down that no litigant shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser , unless he offers himself as a witness , in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given , but no others .

Unit-IV

PRESUMPTIONS REGARDING DISCHARGE OF BUDEN OF PROOF

a)Accomplice –

An accomplice is a person who has taken part, whether big or small, in the commission of an offence. Accomplice includes principles as well as abettors. Not an Accomplice - person under threat commits the crime, person who merely witnesses the crime, detectives, paid informers, and trap witnesses

Generally, a small offender is pardoned so as to produce him as a witness against the bigger offender. However, evidence by an accomplice is not really very reliable because – 1) he is likely to swear falsely in order to shift blame, 2) as a participator in a crime, he is a criminal and is likely immoral, and so may disregard the sanctity of oath, and 3) since he gives evidence in promise of a pardon, he will obviously be favorable to prosecution. Even so, an accomplice is allowed to give evidence. As per Section 133, he is a competent witness against the accused and a conviction based on his evidence is not illegal merely because

his evidence has not been corroborated. At the same time, Section 114(b) contains a provision that allows the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particular. The idea is that since such a witness is not very reliable, his statements should be or verified by some independent witness. This is interpreted as a rule of caution to avoid mindless usage of evidence of accomplice for producing a conviction. Since every case is different, it is not possible to precisely specify a formula for determining whether corroborative evidence is required or not. So some guiding principles were propounded in the case of R vs Baskerville, 1916.

According to this procedure –

1. It is not necessary that there should be an independent confirmation of every detail of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstanceof the crime.

2. There must at least be confirmation of some particulars which show that the accused committed the crime.

3. The corroboration must be an independent testimony. i.e one accomplice cannot corroborate other.

4. The corroboration need not be by direct evidence. It may be through circumstantial evidence. This rule has been confirmed by the Supreme Court in Rameshwar vs State of Rajasthan, 1952.

Accomplice and Co-accused

The confession of a co-accused (S. 30) is not treated in the same way as the testimony of an accomplice because - 1. The testimony of an accomplice is taken on oath and is subjected to cross examination and so is of a higher probative value.

2. The confession of a co-accused can hardly be called substantive evidence as it is not evidence within the definition of S. 3. It must be taken into consideration along with other evidence in the case and it cannot alone form the basis of a conviction. While the testimony of an accomplice alone may be sufficient for conviction.

Different stages in testimony of a witness. (Sections 137, 138)

Witnesses are examined by the parties or their advocates by the way of asking questions with a view to elicit responses that build up a factual story. To be able to derive meaningful conclusions from the statements of the witnesses, it is necessary to follow a standard pattern in presenting them and questioning them before the court. It will also be impractical and time consuming to call witnesses multiple times at random. Besides causing severe inconveniences to the witnesses, it will also not be helpful in arriving at a decision. Thus, standard procedure for examining a witness must followed so that a trial can proceed swiftly. This procedure is described in Sections 137 and 138.

Stages of Examination

Section 137 defines three stages of examination of a witness as follows - Examination-in-chief – The examination of a witness, by the party who calls him, shall be called his examination-in-chief.

Cross-examination – The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination – The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Section 138specifies the order of examinations – Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not to be confined to the facts which the witness testified on his examination-in-chief. Direction of re-examination – The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter by permission of the Court,

introduced in re-examination, the adverse party may further cross-examine upon that matter.
Let us discuss these stages one by one –

1. Examination in Chief – The first stage is where a witness is examined by the party who has called it. In this stage, the goal of the party is to make the witness make statements that prove the facts alleged by the party. The party asks questions, the responses to which are expected to support the factual story submitted by the party.

2. Cross Examination – The second stage is where the witness is cross examined by the opposite party. In this stage the goal of the party which is examining the witness is to poke holes in the story of the witness with a view to discredit the evidence that the witness has given. However, when it is intended to suggest to the court that the witness is not speaking the truth on a particular point, it is necessary to direct his attention to it by questions in this stage. The witness must then be given an opportunity to explain the apparant contradictions while he is in the witness box. For example, in the case of Ravinder Kumar Sarma vs State of Assam, 1999, the appallant sued two police officers for damages for malicious prosecution. The appallant put questions in that regard to one of them who denied the allegation that he demanded a bribe. He did not put the allegation on the other police officer. It was held that the appallant had not properly substantiated the allegation.

3. Re-examination – The final stage, is where the witness is re examined by the party who called the witness if, in the cross examination stage, inconvenient answers are given by the witness. The goal in this stage is to nullify the effect of such answers and to reestablish the credibility of the evidence given by the witness.

The Re Examination is not confined to the matters discussed in Examination in Chief. New matter may be elicited with the permission of the court and in such a case, the opposite party can again Cross examin the witness on new matters.

In Tej Prakash vs State of Haryana, 1996, it was held that tendering a witness for cross examination without examination in chief is not warranted by law and it would amount to failure to examine the witness at the trial.

Section 138 provides a valuable right to cross examin a witness and Section 146 further gives the right to ask additional questions to shake the credibility of the witness. In case of Rajendra vs Darshana Devi, 2001, it was held that if a party has not taken advantage of these provisions, he cannot be allowed to complain about the credibility of the witness.

What is a leading question? (Section 141)

According to BENTHAM, a Leading Question is a question that indicates to the witness the real or supposed fact which the examiner expects or desires to have confirmed with the witness. For example, "did you not work with Mr X for five years?", "is your name so and so", "did you not see the accused leave the premise at 8 PM?", are all leading questions. Section 141 defines a Leading question thus – Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question. In the previous examples, it is clear that the question itself contains the answer and the examiner is merely trying to confirm those answers with the witness and are thus leading questions.

When leading questions may and may not be asked –

As per Section 142 – Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed or which have, in its opinion, been already sufficiently proved.

Further, Section 143 provides that Leading questions may be asked in cross-examination. The purpose of Examination in Chief of a witness is to enable the witness to tell the court the relevant facts of the case. A question should be put to him about a relevant fact and he should be given ample scope to answer the question from the knowledge that he posses about the case. The witness should be left to tell the story in his own words. However, as seen in the previous example, instead of eliciting information from a witness, information is being given to the witness. This does not help the court arrive at the truth. If this type of questioning is allowed in

Examination in Chief, the examiner would be able to construct a story through the mouth of the witness that suits his client. This affects the rights of the accused to a fiair trial as enshrined in Article 21 of the constitution and is therefore not allowed. A question, "do you not live at such and such address?", amply gives hint to the witness and he will immediately say yes. Instead, the question should be, "where do you live?" and he then should be allowed to answer in his own words.

Normally, the opposite party raises an objection when a leading question in asked in Examination in Chief or Re Examination. If the examining party then desires, it can request the court for its permission to ask the question and the court permits the question if it pertains to matters which are introductory, matters on which there is no dispute, or matters which are already proven.

Overall, a leading question can be asked in the following situations -

1.In Examination in Chief and Re – examination if -

a) the opposite party does not object or

b) the question is about the matter which is introductory, undisputed, or is already proven or b) the court permits the question overruling the objection of the opposite party 2. In Cross examination.

Categories of Accomplice:

1. Principal offender of First Degree and Second Degree: The principal offender of first degree is a person who actually commits the crime. The principal offender of the second degree is a person who either abets or aids the commission of the crime.

2. Accessories before the fact: They are the person who abet, incite, procure, or counsel for the commission of a crime and they do not themselves participate in the commission of the crime.

3. Accessories after the fact: They are the persons who receive or comfort or protect persons who have committed the crime knowing that they have committed the crime. If they help the accused

in escaping from punishments or help him from not being arrested, such person are known as harbourers. These persons can be accomplices because all of them are the participants in the commission of the crime in some way or the other. Therefore anyone of them can be an accomplice.

Competency of Accomplice as Witness:

An accomplice is a competent witness provided he is not a co accused under trial in the same case. But such competency which has been conferred on him by a process of law does not divest him of the character of an accused. An accomplice by accepting a pardon under Section 306 CrPC becomes a competent witness and may as any other witnesses be examined on oath; the prosecution must be withdrawn and the accused formally discharged under Section 321 CrPC before he can become a competent witness. Even if there is an omission to record discharge an accused becomes a competent witness on withdrawal of prosecution. Under Article 20(3) of the Constitution of India, 1950 no accused shall be compelled to be a witness against himself. But as an accomplice accepts a pardon of his free will on condition of a true disclosure, in his own interest and is not compelled to give self-incriminating evidence the law in Sections 306 and 308, Code of Criminal Procedure is not affected. So a pardoned accused is bound to make a full disclosure and on his failure to do so he may be tried of the offence originally charged and his statement may be used against him under Section 308.

When Accomplice becomes a competent witness:

Section 118 of the Indian Evidence Act says about competency of witness. Competency is a condition precedent for examining a person as witness and the sole test of competency laid down is that the witness should not be prevented from understanding the questions posed to him or from giving rational answers expected out of him by his age, his mental and physical state or disease. At the same time Section 133 describes about competency of accomplices. In case of accomplice witnesses, he should not be a co-accused under trial in the same case and may be examined on oath.

Importance of Section 114 and 133:

These are the two provisions dealing with the same subject. Section 114 of the Indian Evidence Act says that the court may presume that an accomplice is unworthy of any credit unless corroborated in material particulars.

Section 133 of the Indian Evidence Act says that an accomplice shall be a competent witness as against the accused person and a conviction the accused based on the testimony of an accomplice is valid even though it is not corroborated in material particulars.

Necessity of Corroboration:

Reading Section 133 of the Evidence Act along with Section 114(b) it is clear that the most important issue with respect to accomplice evidence is that of corroboration. The general rule regarding corroboration that has emerged is not a rule of law but merely a rule of practice which has acquired the force of rule of law in both India and England. The rule states that: A conviction based on the uncorroborated testimony of an accomplice is not illegal but according to prudence it is not safe to rely upon uncorroborated evidence of an accomplice and thus judges and juries must exercise extreme caution and care while considering uncorroborated accomplice evidence.

An approver on his own admission is a criminal and a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin. His evidence, therefore must be received with the greatest caution if not suspicion. Accomplice evidence is held untrustworthy and therefore should be corroborated for the following reasons:

- An accomplice is likely to swear falsely in order to shift the guilt from himself.
- An accomplice is a participator in crime and thus an immoral person.
- An accomplice gives his evidence under a promise of pardon or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution.
- Like the Supreme Court has laid down what is known as theory of “double test” in the case of Sarwan Singh v. State of Punjab . In this case Sarwan Singh who was the third accused, was tried along with two others, i.e. Gurdayal Singh and Harbans Singh, under Section 302 for the murder of one Gurdev Singh who was the brother of the first accused, Harbans

Singh. The case was that Sarwan Singh along with Gurdayal Singh and Banta Singh, who became an approver later on , caused the death of Gurdev Singh and all the accused were convicted on the basis of the evidence of Banta Singh. So the evidence of Accomplice is subject to corroboration.

Application of the Concept of Accomplice witness in various cases:

- Janendranath Ghose v. State of West Bengal the accused was tried for the offence of murder and the jury found him guilty on the evidence of the approver corroborated in material particulars. It was contended that there was a misdirection because the jury were not told of the double test in relation to the approver's evidence laid down in Sarwan Singh case.
- Raghubir Singh v. State of Haryana – In this case it was observed:
- "To condemn roundly every public official or man of the people as an accomplice or quasi – accomplice for participating in a raid is to harm the public cause. May be a judicial officer should hesitate to get involved in police traps when the police provides inducements and instruments to commit crimes, because that would suffer the image of the independence of the judiciary." In the present case the Magistrate was not a full – blooded judicial officer, no de novo temptation or bribe money was offered by the police and no ground to discredit the veracity of the Magistrate had been elicited.
- Lachi Ram v. State of Punjab – the accused was charged with murder and was convicted on the evidence of an approver corroborated in material particulars. On the question whether proper tests were applied in applied in appreciating the approver's evidence the Supreme Court held:
- "It was held by this Court in Sarwan Singh case that an approver's evidence to be accepted must satisfy two tests".
- The first case to be applied is that his evidence must show that he is a reliable witness, and that is a test which is common to all witness. The fact that High Court did not accept the evidence of the approver on one part of the story does not mean that the high Court held that the approver was an unreliable or untruthful witness. The test obviously means

that the Court should find that there is nothing inherent or improbable in the evidence given by

the approver and there is no finding that the approver has given false evidence.

- The second case which thereafter still remains to be applied in the case of an approver and which is not always necessary when judging the evidence of the witness, is that his evidence must receive sufficient corroboration. In the present case the evidence of the approver was reliable and was corroborated on material particulars by good prosecution witnesswho have been belived by the lower courts."

B) Judicial Notice

Generally, if a fact is alleged by any party to a suit or criminal case, that party has to provide proof of the truthfulness of that fact to the court. However, Indian Evidence Act allows the court to accept certain kinds of facts without any necessity to be proven by any party. These kinds of facts are specified in Section 56, 57, 58, and 114.

Section 56 – Facts judicially noticeable need not be proved – No fact of which the Court will take judicial notice need be proved. This means that if the court is bound to take notice of a particular fact, the parties do not have the burden of proving that fact. It is part of the judicial function to know that fact. For example, the court is bound to know the various laws and customs of the country. A party does not need to provide any proof when stating any law. Facts for which a court will take judicial notice are specified in Section 57. These include Laws in force in India, Public Acts of Parliament, Local, and person acts declared by it to be judicially noticed, Articles of War for Indian armed forces, the rule of the road, land, or sea, that vehicles in India must keep to the left of a road etc, the territories under the dominion of Govt. of India. In all these case, the court may resort appropriate books or documents of reference for its aid. Also, the matters enumerated in this section are not exhaustive. The section merely provides that the court must take judicial notices of the facts enumerated in this section. It does not prohibit the court from takings judicial notice of any other facts. To understand this point, we need to look at the meaning of judicial notice –

Meaning of "Taking Judicial Notice" - It means recognition of something as existing or as being true without having any proof. Judicial notice is based upon reasons of convenience and expediency. Certain things are so commonly known that any ordinary person is aware of it and it is a waste of time to seek any proof for such things. For example, it is a commonly known fact that certain parts of MP, Bihar, and AP are naxalite affected or that J&K is a terror striken area. A court does not need to spend time in looking for its proof. Thus, judicial notice is the cognizance taken by the court itself of certain matter which are so notorious or clearly established that the evidence of their existence is unnecessary. For example, in the case of Managing Committee of Raja Sidheshwar High School vs State of Bihar, AIR 1993, the court took judicial notice of the fact that education in the state was virtually crumbled. In another case, court took judicial notice of the fact that several blind persons have acquired great academic distinction. If the court is called upon by a person to take judicial notice of a fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so. The basic requirement for taking judicial notice is that the fact has to be of a class that is so generally as to give rise to the presumption that all persons are aware of it. However, a judge cannot bring his personal knowledge into judicial notice if that knowledge is not public knowledge. Just because a judge knows something does not make it a thing of common knowledge. J Chandrachud observed that a court does not operate in ivory tower. It can take cognizance of facts that are happening all around it. Shutting judicial eye to the existence of such facts and matters is in a sense an insult to common sense and would reduce the judicial process to a meaningless and wasteful trial. No court therefore need to insist upon a formal proof of notorious facts such as date of polls, passing away of an eminent person, or events that have rocked the nation.

Section 58 – Facts admitted need not be proved – No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or

which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

This basically means that if a fact has been admitted by a party, the other party need not provide proof of that fact. For example, admissions made in written statements, or things said before and accepted to be said in the trial need not be proved. in averments made in a petition that have not been controverted by the respondent carry the weight of a fact admitted. However, an admission may not necessarily constitute conclusive evidence of the fact admitted. Therefore, this section allows the court to ask for some other proof of the admitted fact. This is a discretionary power of the court.

Section 114 – Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. For example, a person may be presumed to be dead if his whereabouts are not known for seven years. Such facts need not be proven.

c) Dowry death

"Legislation cannot by itself normally solve deep rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to be given a certain shape." These are the words of late Prime Minister Jawaharlal Nehru. Dowry system and the deaths associated with it is one such problem. Dowry system is an evil which has been plaguing the society for centuries. It is a matter of grave concern considering its ever increasing and disturbing proportions and the inability of the legislations to curb the menace. This is what prompted the writers of this article to go deep into the problem and to analyse the legal ambit and scope of various legislations enacted in this regard, especially Section 113-B of Indian Evidence Act and Section 304-B of Indian Penal Code.

Definition

Before going into the legal connotations it is better to have an understanding of what 'Dowry' is and what 'dowry death' means in layman's language. Dowry is the property which a girl brings to her husband's house at the time of marriage. It is the payment made in cash or kind by the bride's family to the bridegroom's family along with the giving away of the bride. 'Dowry death' means the death of a married woman caused due to cruelty or harassment by her husband or his relatives in connection with demand for dowry.

The definition of 'dowry' as in Dowry Prohibition Act 1961, Section 2, has been enumerated below:

'Dowry' means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

(b) by parents of either party to a marriage or by any other to either party to the marriage or to any person;

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of person to whom the Muslim Personal Law (Shariat) applies.

Section 304-B(1) of the Indian Penal Code tells the meaning of dowry death. It is as follows:

"Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death." The explanation relating to this section adds that for the purpose of the above sub-section, 'dowry'

shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

In , the origin of dowry system can be traced back to the upper caste families wherein dowry was a form of wedding gift given to the bride by her family. Later on it was given to help with marriage expenses and soon took the shape of an insurance given to prevent the in-laws form mistreating the bride. Although dowry was legally prohibited in 1961, it still continues to be highly institutionalized.

Recent Legislations and their Scope

Section 304-B of Indian Penal Code and Section 113-B of the Indian Evidence Act was inserted by the Dowry Prohibition (Amendment) Act, 1986 and are the pillars in Indian law as far as cases pertaining to dowry deaths are concerned. Section 304-B of IPC defines 'dowry death' and prescribes the punishment for the same.

Sub-section 1 of Section 304-B defines 'dowry death.' Accordingly 'where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.' Further, the explanation pertaining to this section lays down that for the purpose of this section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

Sub-section 2 of Section 304-B states the following: "Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life."

Section 113-B of the Indian Evidence Act, along with section 304-B of Indian Penal Code, was inserted by the Dowry Prohibition (amendment) Act 43 of 1986 to combat the increasing

problems of dowry deaths. It states thus: "When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for or in connection with any demand for dowry, the court shall presume that such person had caused the dowry death."

The 91st report of Law Commission on 'Dowry Death & Law Reforms' was the driving force behind the insertion of these sections in Indian Penal Code and the Indian Evidence Act by an amendment. The observations made by the commission and the recommendations suggested prompted the legislature to insert Section 113-B by an amendment after a century of enacting the Indian Evidence Act. The commission observed that in spite of the then existing laws, the death of married women in highly suspicious circumstances were increasing alarmingly. They concluded that the weak link was the incompetent law itself which did not provide to include all facts fully and even if it did so, could not aid to prove a dowry death beyond all reasonable doubts due to the many loopholes it fathered. Further, the offender is either the husband or any of his relatives and this aids in covering up the guilt as the family members remain silent though they may be witnesses to all that happened. The commission concluded that when the gap between one fact and another is very wide-which is what happens in most dowry death cases-it cannot be crossed with normal rules of evidence but only by presumptions. They therefore recommended that a presumption regarding dowry death be inserted urgently so as to connect the facts in cases. Though the insertion of such presumptions was considered a deviation from the prescribed norms of criminal law, they were absolutely necessary to bring the offenders before the judiciary. This resulted in Section 113-B of Indian Evidence Act along with Section 304-B of Indian Penal Code.

Section 113-B of Indian Evidence Act simply enjoins upon the court to draw a presumption of dowry death on proof of circumstances. Thus, it actually shifts the onus on the accused to show that his wife was not treated with cruelty soon before her death. But it cannot be opined that the section tilts the scale of balance in favour of the prosecution. It was held by the Rajasthan High Court in Gurditta Singh v. State of Rajasthan[5] while dealing with Section 304-B of IPC and Section 113-B of IEA that there are sufficient in built safe guards for the accused in these

provisions. The presumption under Section 113-B can be raised only on the proof of the following essentials:

(i) The question before the court must be whether the accused has committed the dowry death of a woman. That is, the presumption can be raised only if an accused is being tried for an offence under Section 304-B of IPC. If the Prosecution has failed to prove the case under Section 304-B IPC, then no presumption can be raised under Section 113-B.[6]

(ii) The woman was subjected to cruelty or harassment by the husband or his relatives.

(iii) Such cruelty or harassment was for or in connection with any demand for dowry.

(iii) Such cruelty or harassment was soon before her death.

Section 113-B and the presumption raised there under has been effective in plugging most of the loopholes in the then existing law and in punishing the guilty. In Gurbachan Singh v. Satpal Singh the circumstantial evidence showed that wife was compelled to take the extreme step of committing suicide as the accused person had subjected her to cruelty by constant taunts, maltreatment and also by alleging that she had been carrying an illegitimate child. The suicide was committed within 7 years after the marriage and the Supreme Court held that the presumption under Section 113-B could be drawn. Similarly, in Public Prosecutor, Andhra Pradesh High Court v. T. BasavaPunnaiah, the Court held that even where the wife has committed suicide by hanging, the death will be regarded as 'dowry death' within the scope of Section 304-B of the Indian Penal code, if it is shown that she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry.

In a case, where the death took place within seven years of marriage and the in-laws of the deceased did not inform deceased's parents about the death but hurriedly cremated the dead body, the court held that the death could not be considered as a natural death

and hence the presumption under Section 113-B stands attracted. In Hemchand v. State of

Haryana, the Supreme Court held that irrespective of whether the accused any direct connection with the death or not, he shall be presumed to have caused dowry death provided the ingredients of Section 113-B have been proved. In this particular case, the death was found to be unnatural viz. by strangulation and cruelty on the part of husband was also proved and hence the presumption under Section 113-B was held to be rightly drawn. Where the ingredients of dowry death were established, the Supreme Court held that merely because the accused was acquitted under Section 302 of IPC (ie. charge of murder) did not absolve him of the liability of 'dowry death' and the presumption under Section 113-B did not automatically stand rebutted. In G.M.Natarajan v. State, the Court held that harassment of a woman can take place even without inflicting injuries on her body and the burden of proof cannot be shifted upon the prosecution solely on the account that there were no injuries on the body of the woman.

Thus we find that the 'presumption' has served one of its purposes which is to help in the conviction of the accused and in preventing the accused from going scot-free in cases where the gap between two facts is very wide. But the evil system of dowry still goes on unabated and it is in this respect that the law has failed miserably. Certain obvious drawbacks in the law or perpetuated by the judicial decisions are very much evident.

For the purpose of Section 113-B, dowry death has the same meaning as in Section 304-B of IPC. Accordingly, the death of a woman should take place within 7 years of marriage for it to fall under the purview of Section 304-B. For raising a presumption under Section 113-B, death within 7 years of marriage has to be proved. It was so held in Ratanlal v. State of MP. This can be considered as one of the weak links tailing behind Sections 304-B & 113-B. If a woman dies within 6 years and 9 months after

marriage, the husband is presumed to have caused dowry death (provided other conditions are satisfied) but if a woman dies after 7 years and 1 month, the husband is not convicted for dowry death even if there is ample proof to show the wife was harassed for dowry soon before her death. This is grossly unfair and irrational as a difference of few days can make a difference between justice and injustice. The husband might be convicted under some other section but the laws relating to dowry death do not serve their purpose which is to put an end to the dowry system.

This fixed time limit is a small loophole which can be made larger thus aiding in deflating a case of dowry death. Besides, there is no specific reason or logical ground for fixing the time limit at 7 years[14] and it is a test of reasonableness which has been applied in this regard. But it can never be conclusively said that a dowry death cannot occur after 7 years of marriage. Further, in cases where the death occurs after six years or so, the accused often challenges the marriage as having taken place seven years prior to the death of the woman. Then the burden falls on the prosecution to show that the death took place within seven years of marriage and this becomes all the more difficult in cases where the marriage has not been registered which often happens in rural areas. A man escaping from liability under Section 304-B solely due to the fact that the 'seven years condition' has not been satisfied is a big blot on the law. Fortunately, our judiciary has not been embroiled in many such cases though possibility of such a case -raising a big hue and cry- in future cannot be ruled out. Therefore it is advocated that the 'seven years' condition shouldn't be strictly adhered to. It has to be given respect considering the facts and circumstances of the case and relaxation of the rule should be allowed in those cases marked by the presence of blatant evidences against the accused. In this regard judicial activism is the need of the hour.

Another very frequently debated question in cases of dowry death relates to the expression 'soon before' used in Section 113-B. the Supreme Court and various High Courts have pronounced judgments and given their opinions regarding this in a number of cases. In Shamlal v State of

Haryana, the Supreme Court had an occasion to deal with Section 113-B. It stated that for raising the presumption under 113-B, it is essential to prove that the deceased woman was subject to cruelty or harassment 'soon before her death'. If it is not proved that soon before her death, the victim was subjected to cruelty or harassment in connection with demand for dowry, no presumption under Section 113-B can be raised.

In BabajuCharan Barik v. State, the Orissa High Court held that the prosecution is obliged to prove that there was cruelty or harassment soon before the occurrence of death and only in that case the presumption under Section 113-B is operational. It also stated that 'soon before' is a relative term and no fixed period can be indicated in this regard.

Judicial Activism and Approach of Judiciary

Though judicial activism and role of judiciary can help prevent the guilty from going scot-free, it cannot and has not put an end to the system of dowry. Besides, many times the judiciary has refused to break free from the shell of orthodoxy and give creative decisions. Despite the existence of rigorous laws to prevent dowry deaths and related crimes to women, the problem continues unabated. More and more bride burning cases are being reported and still many more are going unreported. This implies that the law has not been able to create any influence upon the society and the enforcement of legislation seems to be weak. The question is will the enhancement of punishment deter dowry seekers and whether law alone can prevent dowry violence to women? The answer is a big blatant 'no'. The system of dowry exists not because the law is inadequate and punishment is not severe but because it is a long established tradition which will only die when social condition and social values change. Social intervention is low and despite the stigma dowry continues to be a signature of marriage. More awareness and education among women has led to increasing resistance to demands for dowry, but it has also led to increased familial friction. It is a difficult battle to win for women as they are handicapped by a social system with strong gender bias. In such a

detrimental gender system, dowry is the main consideration for a women's status elevation.[28] Still, educated women who refuse to be absorbed into orthodoxy are putting up an impressive defiance though it is coming at a cost.

There is a pungent smell of hypocrisy attached to each and everything related to dowry. This is obvious even in the manner in which the society views dowry and treats those guilty of dowry death. The guilty are ostracized and at the same time giving and taking of dowry is widely accepted. While the laws remain stringent, the crimes continue. Most go unreported, thus reducing the role of law and judiciary to a large extent. A study made by the Institute of Development and Communication points out that for every reported case of bride burning or dowry death, 299 go unreported. And of those reported, only 5 percent are legally pursued as compromise through monetary means has become an easy alternative. The lack of official registration of crimes related to bride burning is obvious in

Delhi , where 90 percent of the cases of women burnt were recorded as accidents and 5 percent were shown as suicide. Only the remaining 5 percent were shown as murder.

Therefore, it is very evident that eradication of this evil is an uphill task. It is in no way a cakewalk and cannot be achieved overnight. We have to work hard in the society itself and try to educate people, particularly the younger generation about the evils of dowry system. Suggestions to prevent bride burning include: an increase in the standard of education for women which will improve economic and social independence; establishment of voluntary associations to decrease the importance of dowry in general and to help change the social milieu in which the phenomenon occurs; conducting awareness campaigns especially in rural areas and proper implementation of the existing laws with the back-up of an active judiciary possessing the fortitude to challenge the existing social norms with constructive decisions. Only a combination of legal and social measures may help us to eradicate this evil of dowry system from our society.

d. CERTAIN OFFENCES:

Section 111A in The Indian Evidence Act, 1872

111A. Presumption as to certain offences.—

Where a person is accused of having committed any offence specified in sub-section (2), in— tc "1[111A. Presumption as to certain offences.—(1) Where a person is accused of having committed any offence specified in sub-section (2), in—"

(a) any area declared to be a disturbed areas under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or tc" (a) any area declared to be a disturbed areas under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or"

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace, tc" (b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace," and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in sub-section (1) are the following, namely:—tc "(2) The offences referred to in sub-section (1) are the following, namely\:—"

(a) an offence under section 121, section 121A section 122 or section 123 of the Indian Penal Code (45 of 1860); tc" (a) an offence under section 121, section 121A section 122 or section 123 of the Indian Penal Code (45 of 1860);"

(b) criminal conspiracy or attempt to commit, or abatement of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860).] tc" (b) criminal conspiracy or attempt to ommit, or abatement of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860).]"

CORPORATE LAW (305)

MEANING, CHARACTERISTICS AND TYPES OFA COMPANY

INTRODUCTION

Industrial has revolution led to the emergence of large scale business organizations. These organization require big investments and the risk involved is very high. Limited resources and unlimited liability of partners are two important limitations of partnerships of partnerships in undertaking big business. Joint Stock Company form of business organization has become extremely popular as it provides a solution to overcome the limitations of partnership business. The Multinational companies like Coca-Cola and, General Motors have their investors and customers spread throughout the world. The giant Indian Companies may include the names like Reliance, Talco Bajaj Auto, Infosys Technologies, Hindustan Lever Ltd., Ranbaxy Laboratories Ltd., and Larsen and Tubro etc.

MEANINGOF COMPANY

Section 3 (1) (i) of the Companies Act, 1956 defines a company as "a company formed and registered under this Act or an existing company". Section 3(1) (ii) Of the act states that "an existing company means a company formed and registered under any of the previous companies laws". This definition does not reveal the distinctive characteristics of a company . According to Chief Justice Marshall of USA, "A company is a person, artificial, invisible, intangible, and existing only in the contemplation of the law. Being a mere creature of law, it possesses only those properties which the character of its creation of its creation confers upon it either expressly or as incidental to its very existence".

Another comprehensive and clear definition of a company is given by Lord Justice Lindley, "A company is meant an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business, and who share the profit and loss (as the case may be) arising there from. The common stock contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share. Shares are always

transferable although the right to transfer them is often more or less restricted".

According to Haney, "Joint Stock Company is a voluntary association of individuals for profit, having a capital divided into transferable shares. The ownership of which is the condition of membership".

From the above definitions, it can be concluded that a company is registered association which is an artificial legal person, having an independent legal, entity with a perpetual succession, a common seal for its signatures, a common capital comprised of transferable shares and carrying limited liability.

CHARACTERISTICS OF A COMPANY

The main characteristics of a company are :

1. Incorporated association. A company is created when it is registered under the Companies Act. It comes into being from the date mentioned in the certificate of incorporation. It may be noted in this connection that Section 11 provides that an association of more than ten persons carrying on business in banking or an association or more than twenty persons carrying on any other type of business must be registered under the Companies Act and is deemed to be an illegal association, if it is not so registered.

For forming a public company at least seven persons and for a private company at least two persons are persons are required. These persons will subscribe their names to the Memorandum of association and also comply with other legal requirements of the Act in respect of registration to form and incorporate a company, with or without limited liability [Sec 12(1)]

2. Artificial legal person. A company is an artificial person. Negatively speaking, it is not a natural person. It exists in the eyes of the law and cannot act on its own. It has to act through a board of directors elected by shareholders. It was rightly pointed out in Bates V Standard Land Co. that : "The board of directors are the brains and the only brains of the company, which is the body and the company can and does act only through them".

But for many purposes, a company is a legal person like a natural person. It has the right to acquire and dispose of the property, to enter into contract with third parties in its own name, and can sue and be sued in its own name.

However, it is not a citizen as it cannot enjoy the rights under the Constitution of India or Citizenship Act. In State Trading Corporation of India v C.T.O (1963 SCJ 705), it was held that neither the provisions of the Constitution nor the Citizenship Act apply to it. It should be noted that though a company does not possess fundamental rights, yet it is person in the eyes of law. It can enter into contracts with its Directors, its members, andoutsiders.

Justice Hidayatullah once remarked that if all the members are citizens of India, the company does not become a citizen of India.

3. Separate Legal Entity : A company has a legal distinct entity and is independent of its members. The creditors of the company can recover their money only from the company and the property of the company. They cannot sue individual members. Similarly, the company is not in any way liable for the individual debts of its members. The property of the company is to be used for the benefit of the company and nor for personal benefit of the shareholders. On the same grounds, a member cannot claim any ownership rights in the assets of the company either individually or jointly during the existence of the company or in its winding up. At the same time the members of the company can enter into contracts with the company in the same manner as any other individual can. Separate legal entity of the company is also recognized by the Income Tax Act. Where a company is required to pay Income-tax on its profits and when these profits are distributed to shareholders in the form of dividend, the shareholders have to pay income-tax on their dividend of income. This proves that a company that a company and its shareholders are two separate entities.

The principal of separate of legal entity was explained and emphasized in the famous case of Salomon v Salomon & Co. Ltd.

The facts of the case are as follows :

Mr. Saloman, the owner of a very prosperous shoe business, sold his business for the sum of $ 39,000 to Saloman and Co. Ltd. which consisted of Saloman himself, his wife, his daughter

and his four sons. The purchase consideration was paid by the company by allotment of & 20,000 shares and $ 10,000 debentures and the balance in cash to Mr. Saloman. The debentures carried a floating charge on the assets of the company. One share of $ 1 each was subscribed by the remaining six members of his family. Saloman and his two sons became the directors of this company.

Saloman was the managing Director.

After a short duration, the company went into liquidation. At that time the statement of affairs' was like this: Assets :$ 6000, liabilities; Saloman as debenture holder $ 10,000 and unsecured creditors $ 7,000. Thus its assets were running short of its liabilities b $11,000

The unsecured creditors claimed a priority over the debenture holder on the ground that company and Saloman were one and the same person. But the House of Lords held that the existence of a company is quite independent and distinct from its members and that the assets of the company must be utilized in payment of the debentures first in priority to unsecured creditors.

Saloman's case established beyond doubt that in law a registered company is an entity distinct from its members, even if the person hold all the shares in the company. There is no difference in principle between a company consisting of only two shareholders and a company consisting of two hundred members. In each case the company is a separate legal entity.

The principle established in Saloman's case also been applied in the following: Lee V. Lee's Airforming Ltd. (1961) A.C. 12 Of the 3000 shares in Lee's Air Forming Ltd., Lee held 2999 shares. He voted himself the managing Director and also became Chief Pilot of the company on a salary. He died in an aircrash while working for the company. His wife was granted compensation for the husband in the course of employment. Court held that Lee was a separate person from the company he formed, and compensation was due to the widow. Thus, the rule of corporate personality enabled

Lee to be the master and servant at the same time.

The principle of separate legal entity of a company has been, in fact recognized much earlier than in Saloman's case. In Re Kondoi Tea Co Ltd. (1886 ILR 13 Cal 43), as held by Calcutta High Court that a company was a separate person, a separate body altogether from its Shareholders. In Re. Sheffield etc. Society - 22 OBD 470), it has been held that a corporation is a legal person, just as much in individual but with no physical existence.

The characteristic of separate corporate personality of a company was also emphasized by Chief Justice Marshall of USA when he defined a company "as a person, artificial, invisible, intangible and existing only in the eyes of the law. Being a mere creation of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as accident to its very existence". [Trustees of Darmouth College v woodward (1819) 17 US 518)

4. Perpetual Existence. A company is a stable form of business organization. Its life does not depend upon the death, insolvency or retirement of any or all shareholder (s) or director (s). Law creates it and law alone can dissolve it. Members may come and go but the company can go on for ever. "During the war all the member of one private company , while in general meeting, were killed by a bomb. But the company survived; not even a hydrogen bomb could have destroyed i". The company may be compared with a flowing river where the water keeps on changing continuously, still the identity of the river remains the same. Thus, a company has a perpetual existence, irrespective of changes in its membership.

5. Common Seal. As was pointed out earlier, a company being an artificial person has no body similar to natural person and as such it cannot sign documents for itself. It acts through natural person who are called its directors. But having a legal personality,it can be bound by only those documents which bear its signature. Therefore, the law has provided for the use of common seal, with the name of the company engraved on it, as a substitute for its signature. Any document bearing the common seal of the company will be legally binding on the company. A company may have its own regulations in its Articles of Association for the manner of affixing the common seal to a document. If the Articles are silent, the provisions of Table-A (the model set of articles appended to the Companies Act) will apply. As per regulation 84 of Table-A the seal of the company shall not be

affixed to any instrument except by the authority of a resolution of the Board or a Committee of the Board authorized by it in that behalf, and except in the presence of at least two directors and of the secretary or such other person as the Board may appoint for the purpose, and those two directors and the secretary or other person aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

6. Limited Liability : A company may be company limited by shares or a company limited by guarantee. In company limited by shares, the liability of members is limited to the unpaid value of the shares. For example, if the face value of a share in a company is Rs. 10 and a member has already paid Rs. 7 per share, he can be called upon to pay not more than Rs. 3 per share during the lifetime of the company. In a company limited by guarantee the liability of members is limited to such amount as the member may undertake to contribute to the assets of the company in the event of its being woundup.

7. Transferable Shares. In a public company, the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision

(8) in the articles. However, the articles shall prescribe the manner in which such transfer of shares will be made and it may also contain bona fide and reasonable restrictions on the right of members to transfer their shares. But absolute restrictions on the rights of members to transfer their shares shall be ultra vires. However, in the case of a private company, the articles shall restrict the right of member to transfer their shares in companies with its statutory definition.

In order to make the right to transfer shares more effective, the shareholder can apply to the Central Government in case of refusal by the company to register a transfer of shares.

8. Separate Property : As a company is a legal person distinct from its members, it is capable of owning, enjoying and disposing of property in its own name. Although its capital and assets are contributed by its shareholders, they are not the private and joint owners of its property. The company is the real person in which all its property is vested and by which it is controlled, managed and disposed of.

9. Delegated Management : A joint stock company is an autonomous, self-governing and self-controlling organization. Since it has a large number of members, all of them cannot take part in the management of the affairs of the company. Actual control and

management is, therefore, delegated by the shareholders to their elected representatives, know as directors. They look after the day-to-day working of the company. Moreover, since shareholders, by majority of votes, decide the general policy of the company, the management of the company is carried on democratic lines. Majority decision and centralized management compulsorily bring about unity of action.

DISTINCTION BETWEEN COMPANY AND PARTNERSHIP

The difference between a company and partnership is as follows:

	Company	**Partnership**
1. Mode of creation	By Registration by	By Agreement
	Statute.	
2. Legal Statute	Legal entity distinct	Firm and partners
	from members,	are not separate; no
	perpetual succession.	separate entity;
		uncertain life
3. Liability	Limited liability of	Unlimited joint and
	members	several liability of
		partners
4. Authority	Divorce between	Right to share mana

	ownership and	gement, common and
	management	ownership and
	Representative	Management.
	Management	Mutual agency -
		Implied authority.
5. Transfer	Public Co.-freely	Ordinarily no right of
of shares	transferable; transferee	transfer of share by a
	gets all the rights of	partner-limited rights
	the transferor	of transferee

TYPES OF COMPANY

Joint stock company can be of various types. The following are the important types of company:

1. Classification of Companies by Mode of Incorporation

Depending on the mode of incorporation, there are three classes of joint stock companies.

A. Chartered companies. These are incorporated under a special charter by a monarch. The East India Company and The Bank of England are examples of chartered incorporated in England. The powers and nature of business of a chartered company are defined by the charter which incorporates it. A chartered company has wide powers. It can deal with its property and bind itself to any contracts that any ordinary person can. In case the company deviates from its business as prescribed by the charted, the Sovereign can annul the latter and close the company. Such companies do not exist in India.

B. Statutory Companies. These companies are incorporated by a Special Act passed by the Central or State legislature. Reserve Bank of India, State Bank of India, Industrial Finance Corporation, Unit Trust of India, State Trading corporation and Life Insurance Corporation are some of the examples of statutory companies. Such companies do not have any memorandum or articles of association. They derive their powers from the Acts constituting them and enjoy certain

powers that companies incorporated under the Companies Act have. Alternations in the powers of such companies can be brought about by legislative amendments.

The provisions of the Companies Act shall apply to these companies also except in so far as provisions of the Act are inconsistent with those of such Special Acts [Sec 616 (d)]

These companies are generally formed to meet social needs and not for the purpose of earning profits.

C. Registered or incorporated companies. These are formed under the Companies Act, 1956 or under the Companies Act passed earlier to this. Such companies come into existence only when they are registered under the Act and a certificate of incorporation has been issued by the Registrar of Companies. This is

the most popular mode of incorporating a company. Registered companies may further be divided into three categories of the following.

i) Companies limited by Shares : These types of companies have a share capital and the liability of each member or the company is limited by the Memorandum to the extent of face value of share subscribed by him. In other words, during the existence of the company or in the event of winding up, a member can be called upon to pay the amount remaining unpaid on the shares subscribed by him.

ii) Such a company is called company limited by shares. A company limited by shares may be a public company or a private company. These are the most popular types of companies.

iii) Companies Limited by Guarantee : These types of companies may or may not have a share capital. Each member promises to pay a fixed sum of money specified in the Memorandum in the event of liquidation of the company for payment of the debts and liabilities of the company [Sec 13(3)] This amount promised by him is called

'Guarantee'. The Articles of Association of the company state the number of member with which the company is to be registered [Sec 27 (2)]. Such a company is called a company limited by guarantee. Such companies depend for their existence on entrance and subscription fees. They may

or may not have a share capital. The liability of the member is limited to the extent of the guarantee and the face value of the shares subscribed by them, if the company has a share capital. If it has a share capital, it may be a public company or a private company.

The amount of guarantee of each member is in the nature of reserve capital. This amount cannot be called upon except in the event of winding up of a company. Non-

trading or non-profit companies formed to promote culture, art, science, religion, commerce, charity, sports etc. are generally formed as companies limited by guarantee.

iv) Unlimited Companies : Section 12 gives choice to the promoters to form a company with or without limited liability. A company not having any limit on the liability of its members is called an 'unlimited company' [Sec 12(c)]. An unlimited company may or may not have a share capital. If it has a share capital it may be a public company or a private company. If the company has a share capital, the article shall state the amount of share capital with which the company is to be registered [Sec 27 (1)]

The articles of an unlimited company shall state the number of member with which the company is to be registered.

II. On the Basis of Number of Members

On the basis of number of members, a company may be :

(1) Private Company, and (2) Public Company.

A. Private Company

According to Sec. 3(1) (iii) of the Indian Companies Act, 1956, a private company is that company which by its articles of association :

i) limits the number of its members to fifty, excluding employees who are members or ex-employees who were and continue to be members;

ii) restricts the right of transfer of shares, if any;

iii) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

Where two or more persons hold share jointly, they are treated as a single member.

According to Sec 12 of the Companies Act, the minimum number of members to form a private company is two. A private company must use the word "Pvt" after its name.

Characteristics or Features of a Private Company. The main features of a private of a private company are as follows :

i) A private company restricts the right of transfer of its shares. The shares of a private company are not as freely transferable as those of public companies. The articles generally state that whenever a shareholder of a Private Company wants to transfer his shares, he must first offer them to the existing members of the existing members of the company. The price of the shares is determined by the directors. It is done so as to preserve the family nature of the company's shareholders.

ii) It limits the number of its members to fifty excluding members who are employees or ex-employees who were and continue to be the member. Where two or more persons hold share jointly they are treated as a single member. The minimum number of members to form a private company is two.

iii) A private company cannot invite the public to subscribe for its capital or shares of debentures. It has to make its own private arrangement.

B. Public company

According to Section 3 (1) (iv) of Indian Companies Act. 1956 "A public company which is not a Private Company",

If we explain the definition of Indian Companies Act. 1956 in regard to the public company, we note the following :

i) The articles do not restrict the transfer of shares of the company

ii) It imposes no restriction no restriction on the maximum number of the members on the company.

iii) It invites the general public to purchase the shares and debentures of the companies

(Differences between a Public Company and a Private company)

1. **Minimum number :** The minimum number of persons required to form a public company is 7. It is 2 in case of a private company.

2. **Maximum number :** There is no restriction on maximum number of members in a public company, whereas the maximum number cannot exceed 50 in a private company.

3. **Number of directors.** A public company must have at least 3 directors whereas a private company must have at least 2 directors (Sec. 252)

4. **Restriction on appointment of directors.** In the case of a public company, the directors must file with the Register a consent to act as directors or sign an undertaking for their qualification shares. The directors or a private company need not do so (Sec 266)

5. **Restriction on invitation to subscribe for shares.** A public company invites the general public to subscribe for shares. A public company invites the general public to subscribe for the shares or the debentures of the company. A private company by its Articles prohibits invitation to public to subscribe for its shares.

6. **Name of the Company :** In a private company, the words "Private Limited" shall be added at the end of its name.

7. **Public subscription :** A private company cannot invite the public to purchase its shares or debentures. A public company may do so.

8. **Issue of prospectus :** Unlike a public company a private company is not expected to issue

a prospectus or file a statement in lieu of prospectus with the Registrar before allotting shares.

9. **Transferability of Shares.** In a public company, the shares are freely transferable (Sec. 82). In a private company the right to transfer shares is restricted by Articles.

10. **Special Privileges.** A private company enjoys some special privileges. A public company enjoys no such privileges.

11. **Quorum.** If the Articles of a company do not provide for a larger quorum. 5 members personally present in the case of a public company are quorum for a

pany. It is 2 in the case of a private company (Sec. 174) (17)

12. **Managerial remuneration.** Total managerial remuneration in a public company cannot exceed 11 per cent of the net profits (Sec. 198). No such restriction applies to a private company.

13. **Commencement of business.** A private company may commence its business immediately after obtaining a certificate of incorporation. A public company cannot commence its business until it is granted a "Certificate of Commencement of business".

Special privileges of a Private Company

Unlike a private a public company is subject to a number of regulations and restrictions as per the requirements of Companies Act, 1956. It is done to safeguard the interests of investors/shareholders of the public company. These privileges can be studied as follows :

a) Special privileges of all companies. The following privileges are available to every private company, including a private company which is subsidiary of a public company or deemed to be a public company :

1. A private company may be formed with only two persons as member. [Sec.12(1)]
2. It may commence allotment of shares even before the minimum subscription is subscribed for or paid (Sec. 69).
3. It is not required to either issue a prospectus to the public of file statement in lieu of a prospectus. (Sec 70 (3)]
4. Restrictions imposed on public companies regarding further issue of capital do not apply on private companies. [Sec 81 (3)]

(18)

5. Provisions of Sections 114 and 115 relating to share warrants shall not apply to it. (Sec. 14)

6. It need not keep an index of members. (Sec. 115)

7. It can commence its business after obtaining a certificate of incorporation. A certificate of commencement of business is not required. [Sec. 149 (7)]

8. It need not hold statutory meeting or file a statutory report [Sec. 165 (10)]

9. Unless the articles provide for a larger number, only two persons personally present shall form the quorum in case of a private company, while at least five member personally present form the quorum in case of a public company (Sec. 174).

10. A director is not required to file consent to act as such with the Registrar. Similarly, the provisions of the Act regarding undertaking to take up qualification shares and pay for them are not applicable to directors of a private companies [Sec. 266 (5) (b)]

11. Provisions in Section 284 regarding removal of directors by the company in general meeting shall not apply to a life director appointed by a private company on or before 1st April 1952 [Sec. 284 (1)]

12. In case of a private company, poll can be demanded by one member if not more than seven members are present, and by two member if not more than seven member are present. In case of a public company, poll can be demanded by persons having not less than one-tenth of the total voting power in respect of the resolution or holding shares on which an aggregate sum of not less than fifty thousand rupees has been paid-up (Sec. 179).

13. It need not have more than two directors, while a public company must have at least three directors (Sec. 252)

b) Privileges available to an independent private company (i.e. one which is not a subsidiary of a public company)

An independent private company is one which is not a subsidiary of a public company. The following special privileges and exemptions are available to an independent private company.

1. It may give financial assistance for purchase of or subscription for shares in the company itself.

2. It need not, like a public company, offer rights shares to the equity shareholders of the company.

3. The provisions of Sec. 85 to 90 as to kinds of share capital, new issues of share capital, voting, issue of shares with disproportionate rights, and termination of disproportionately excessive rights, do not apply to an independent private company.

4. A transfer or transferee of shares in an independent private company has no right of appeal to the Central Government against refusal by the company to register a transfer of its shares.

5. Sections 171 to 186 relating to general meeting are not applicable to an independent private company if it makes its own provisions by the Articles. Some provisions of these Sections are, however made expressly applicable.

6. Many provisions relating to directors of a public company are not applicable to an independent private company, e.g.

(20)

a) it need not have more than 2 directors.

b) The provisions relating to the appointment, retirement, reappointment, etc. of directors who are to retire by rotation and the procedure relating, there to are not applicable to it.

c) The provisions requiring the giving of 14 days' notice by new candidates seeking election as directors, as also provisions requiring the Central Government's sanction for increasing the number of directors by amending the Articles or otherwise beyond the maximum fixed in the Articles, are not applicable to it.

d) The provisions relating to the manner of filing up casual vacancies among directors and the duration of the period of office of directors and the requirements that the appointment of directors should be voted on individually and that the consent of each candidate for directorship should be filed with the Registrar, do not apply to it.

e) The provisions requiring the holding of a share qualification by directors and fixing the time within which such qualification is to be acquired and filing with the Registrar of a declaration of share qualification by each director are also not applicable to it.

f) It may, by its Articles, Provide special disqualifications for appointment of directors.

g) It may provide special grounds for vacation of office of a director.

h) Sec. 295 prohibiting loans to directors does not apply to it.

i) An interested director may participate or vote in Board's proceedings relating to his concern of interest in any contract of arrangement.

7. The restrictions as to the number of companies of which a person may be appointed managing director and the prohibition of such appointment for more than 5 years at a time, do not apply to it

8. The provisions prohibiting the subscribing for, or purchasing of, shares or debentures of other companies in the same group do not apply to it.

9. The provisions of Section 409 conferring power on the Central Government to present change in the Board of directors of a company where in the opinion of the Central Government such change will be prejudicial to the interest of the company, do not apply to it.

When a Private company becomes a Public company

A private company shall become a public company in following cases :

i) By default : When it fails to comply with the essential requirements of a private company provided under Section 3 (1) (iii) Default in complying with the said three provisions shall disentitle a private company to enjoy certain privileges (Sec. 43).

ii) A private company which is a subsidiary of another public company shall be deemed to be a public company.

iii) By provisions of law - Section 43-A.

Section 43-A

a) Where not less than 25% of the paid-up share capital of a private company is held by one or more bodies" corporate such a private company shall

(22)become a public company from the data in which such 25% is held by body corporate [Sec. 43-A (1)]

b) Where the average annual turnover of a private company is not less than Rs. 10 crores during the relevant period, such a private company shall become a public company after the expiry of the period of three months from the last day of the relevant period when the accounts show the said average annual turnover [Sec. 43 A (1 A)].

c) When a private company holds not less than 25% of the paid up share capital of a public company the private company shall become a public company from the date on

which the private company holds such 25% [Sec. 43A (IB)].

iv)

a) Where a private company accepts, after an invitation is made by an advertisement of receiving deposits from the public other than its members, directors or their relatives, such private company shall become a public company [Sec. 43A (IC)].

v) **By Conversion :** When the private company converts itself into a public company by altering its Articles in such a manner that they no longer include essential requirements of a private company under Section 3 (1) (iii). On the data of such alternations, it shall cease to be private company. It shall comply with the procedure of converting itself into a public company [Sec. 44].

The Articles of Association of such a public company may continue to have the three restrictions and may continue to have two directors and less than seven members.

Within 3 months of such a conversion. Registrar of Companies shall be intimated. The Registrar shall delete the word 'Private' before the words 'Limited' in the name of the company and shall also make necessary alternations in the certificate of incorporation.

III. On the basis of Control

On the basis of control, a company may be classified into :

1. Holding companies, and
2. Subsidiary Company

1. Holding Company [Sec. 4(4)]. A company is known as the holding company of another company if it has control over the other company. According to Sec 4(4) a company is deemed to be the holding company of another if, but only if that other is its subsidiary.

A company may become a holding company of another company in either of the following three ways :-

a) by holding more than fifty per cent of the normal value of issued equity capital of the company; or

b) By holding more than fifty per cent of its voting rights; or

c) by securing to itself the right to appoint, the majority of the directors of the other company , directly or indirectly.

The other company in such a case is known as a "Subsidiary company". Though the two

companies remain separate legal entities, yet the affairs of both the companies are managed and controlled by the holding company. A holding company may have any number of subsidiaries. The annual accounts of the holding company are required to disclose full information about the subsidiaries.

2. Subsidiary Company. [Sec. 4 (I)]. A company is know as a subsidiary of another company when its control is exercised by the latter (called holding company) over the

former called a subsidiary company. Where a company (company S) is subsidiary of another company (say Company H), the former (Company S) becomes the subsidiary of the controlling company (company H).

IV. On the basis of Ownership of companies

a) Government Companies. A Company of which not less than 51% of the paid up capital is held by the Central Government of by State Government or Government singly or jointly is known as a Government Company. It includes a company subsidiary to a government company. The share capital of a government company may be wholly or partly owned by the government, but it would not make it the agent of the government . The auditors of the government company are appointed by the government on the advice of the Comptroller and Auditor General of India. The Annual Report along with the auditor's report are placed before both the House of the parliament. Some of the examples of government companies are - Mahanagar Telephone Corporation Ltd., National Thermal Power Corporation Ltd., State Trading Corporation Ltd. Hydroelectric Power Corporation Ltd. Bharat Heavy Electricals Ltd. Hindustan Machine Tools Ltd. etc.

b) Non-Government Companies. All other companies, except the Government Companies, are called non-government companies. They do not satisfy the characteristics of a government company as given above.

V. On the basis of Nationality of the Company

a) Indian Companies : These companies are registered in India under the Companies Act. 1956 and have their registered office in India. Nationality of the members in their case is immaterial.

b) Foreign Companies : It means any company incorporated outside India which has an established place of business in India [Sec. 591 (I)]. A company has an

OF ASSOCIATION

AND ARTICLES

OFASSOCIATION

(1)

INTRODUCTION

We know that a company is a separate legal entity which is formed and registered under the Companies Act. It may be noted that before a company is actually formed (i.e., formed and registered under the Companies Act), certain persons, who wish to form a company, come together with a view to carry on some business for the purpose of earning profits. Such persons have to decide various questions such as (a) which business they should start, (b) whether they should form a new company or take over he business of some existing company, (c) if new company is to be started, whether they should start a private company or pubic company, (d) what should be the capital of the company etc. After deciding about the formation of the company, the desirous persons take necessary steps, and the company is actually formed. Thereafter, they start their business. Thus, there are various stage in the formation of a company from thinking of starting a business to the actual starting of the business.

INCORPORATION OF COMPANIES

Company is an artificial person created by following a legal procedure. Before a company is formed, a lot of preliminary work is to be performed. The lengthy process of formation of a company can be divided into four distinct stages : (I) Promotion; (ii) Incorporation or Registration; (iii) Capital subscription; and (iv) Commencement of business. However, a private company can start business as soon as it obtains the certificate of incorporation. It needs to go through first two stages only. The reason is that a private company cannot invite public to subscribe to its share capital. But a public company having a share capital, has to pass through all the four stages mentioned above before it can commence business or exercise any borrowing powers (Section 149). These four stages are discussed as follow :

(2)

Promotion

The term 'promotion' is a term of business and not of law. It is frequently used in business. Haney defines promotion as " the process of organizing and planning the finances of a business enterprise under the corporate form". Gerstenberg has defined promotion as "the discovery of business opportunities and the subsequent organization of funds, property and managerial ability into a business concern for the purpose of making profits therefrom." First of all the idea of carrying on a business is conceived by promoters. Promoters are persons engaged in, one or the other way; in the formation of a company. Next, the promoters make detailed study to assess the feasibility of the business idea and the amount of financial and other resources required. When the promoters are satisfied about practicability of the business idea , they take necessary steps for assembling the business elements and making provision of the funds required to launch the business enterprise. Law does not require any qualification for the promoters. The promoters stand in a fiduciary position towards the company about to be formed. From the fiduciary position of promoters, the following important results follow:

1. A promoter cannot be allowed to make any secret profits. If any secret profit is made in violation of this rule, the company may, on discovering it, compel the promoter to account for and surrender such profit.

2. The promoter is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed. If he contracts to sell his own property to the company without making a full disclosure, the companmy may either rescind the sale or affirm the contract and recover the profit made out of it by the promoter.

(3)

3. The promoter must not make an unfair or unreasonable use of his position and must take care to avoid anything which has the appearance of undue influence or fraud.

Promoter's Remuneration

A promoter has no right to get compensation from the company for his services in promoting it unless the company, after its incorporation, enters into a contract with him for this purpose. If allowed, remuneration may be paid in cash or partly in cash partly in shares and debentures of the company.

Promoter's Liability

If a promoter does not disclose any profit made out of a transaction to which the company is a party, then the company may sue the promoter and recover the undisclosed profit with interest Otherwise, the company may set aside the transaction i.e., it may restore the property to promoter and recover its money.

Besides, Section 62 (1) holds the promoter liable to pay compensation to every person who subscribes for any share or debentures on the faith of the prospectus for any loss or damage sustained by reason of any untrue statement included in it. Section 62 also provides certain grounds on which a promoter can avoid his liability. Similarly Section 63 provides for criminal liability for misstatement in the prospectus and a promoter may also become liable under this section.

Promoter's Contracts

Preliminary contracts are contracts made on behalf of a company yet to be incorporated. Following are some of the effects of such contracts;

1. The company, when it comes into existence, is not bound by any contract made on its behalf before its incorporation. A company has no status prior to its incorporation.

(4)

2. The company cannot ratify a pre-incorporation contract and hold the other party liable. Like the company, the other party to the contract is also not bound by such a contract.

3. The agents of a proposed company may sometimes incur personal liability under a contract made on behalf of the company yet to be formed.

Kelner v Bexter (1886) L.R. 2 C.P.174. A hotel company was about to be formed and promoters signed an agreement for the purchase of stock on behalf of the proposed company. The company came into existence but, before paying the price, went into liquidation. The promoters were held personally liable to the plaintiff.

Further, an agent himself may not be able to enforce the contract against the other party. So far as ratification of a pre-incorporation contract is concerned, a company cannot ratify a contract entered into by the promoters on its behalf before its incorporation. The reason is simple, ratification can be done only if an agent contracts for a principal who is in existence and who is competent to contract at the time of the contract by the agent.

Incorporation

This is the second stage of the company formation. It is the registration that brings a company into existence. A company is legally constituted on being duly registered under the Act and after the issue of Certificate of Incorporation by the Registrar of Companies. For the incorporation of a company the promoters take the following preparatory steps:

i) To find out form the Registrar of companies whether the name by which the new company is to be stareted is available or not. To take approval of the name, an application has to be made in the prescribed form along with requisite fee;

ii) To get a letter of Intent under Industries (Development and Regulation) Act, 1951, if the company's business comes within the purview of the Act.

iii) To get necessary documents i.e. Memorandum and Articles of Association prepared and printed.

iv) to prepare preliminary contracts and a prospectus or statement in lieu of a prospectus.

Registration of a company is obtained by filing an application with the Registrar of Companies of the State in which the registered office of the comapany is to be situated. The application should be accompanied by the following documents:

1. Memorandum of association properly stamped, duly signed by the signatories of the memorandum and witnessed.
2. Ariticles of Association, if necessary.
3. A copy of the agreement, if any, which the company proposes to enter into with any individual for his appointment as managing or whole-time director or manager.
4. A written consent of the directors to act in that capacity, if necessary.
5. A statutory declaration stating that all the legal requirements of the Act prior to incorporation have been complied with.

The Registrar will scrutinize these documents. If the Registrar finds the document to be satisfactory, he registers them and enters the name of the company in the Register of Companies and issues a certificate called the certificate of incorporation (Section 34).

The certificate of incorporation is the birth certificate of a company. The company comes into existence from the date mentioned in the certificate of incorporation and the date appearing in it is conclusive, even if wrong. Further, the

(6)

certificate is 'conclusive evidence that all the requirements of this Act in respect of registration and matters precedent and related thereto have been fulfilled and that the association is a company authorized to be registered and duly registered under this Act.

Once the company is created it cannot be got rid off except by resorting to provisions of the Act which provide for the winding up of company. The certificate of incorporation, even if it contains irregularities, cannot be cancelled.

Capital Subscription

A private company can start business immediately after the grant of certificate of incorporation but public limited company has to further go through 'capital subscription stage' and 'commencement of business stage'. In the capital subscription stage, the company makes necessary arrangements for raising the capital of the company. With a view to ensure protection on investors, Securities and Exchange Boar of India (SEBI) has issued 'guidelines for the disclosure and investor protection'. The company making a public issue of share capital must comply with these guidelines before making a public offer for sale of shares and debentures.

If the capital has to be said through a public offer of shares, the directors of the public company will first file a copy of the prospectus with the Registrar of Companies. On the scheduled date the prospectus will be issued to the public. Investors are required to forward their applications for shares along with application money to the company's bankers mentioned in the prospectus. The bankers will then forward all applications to the company and the directors will consider the allotment of shares. If the subscribed capital is at least equal to 90 percent of the capital issue, and other requirements of a valid allotment are fulfilled the directors pass a formal resolution of allotment. However,

if the company does not receive applications which can cover the minimum subscription

(7)

within 120 days of the issue of prospectus, no allotment can be made and all money received will be refunded.

If a public company having share capital decides to make private placement of shares, then, instead of a 'prospectus' it has to file with the Registrar of Companies a ' statement in lieu of prospectus' at least three days before the directors proceed to pass the first share allotment resolution.

The contents of a prospectus and a statement in lieu of a prospectus are almost alike.

Commencement of Business

A private company can commence business immediately after the grant of certificate of incorporation, but a public limited company will have to undergo some more formalities before it can start business. The certificate for commencement of business is issued by Registrar of Companies, subject to the following conditions.

1. Shares payable in cash must have been allotted upto the amount of minimum subscription
2. Every director of the company had paid the company in cash application and allotment money on his shares in the same proportion as others.
3. No money should have become refundable for failure to obtain permission for shares or debentures to be dealt in any recognized stock exchange.
4. A declaration duly verified by one of directors or the secretary that the above requirements have been complied with which is filed with the Registrar.

The certificate to commence business granted by the Registrar is a conclusive evidence of the fact that the company has complied with all legal formalities and it is legally entitled to commence business. It may also be noted that the court has the

(8)

power to wind up a company, if it fails to commence business within a year of its incorporation [Sec. 433 (3)]

MEMORANDUM OF ASSOCIATION

The formation of a public company involves preparation and filing of several essential documents. Two of basic documents are :

1. Memorandum of Association
2. Articles of Association

The preparation of Memorandum of Association is the first step in the formation of a company. It is the main document of the company which defines its objects and lays down the fundamental conditions upon which alone the company is allowed to be formed. It is the charter of the company. It governs the relationship of the company with the outside world and defines the scope of its activities. Its purpose is to enable shareholders, creditors and those who deal with the company to know what exactly is its permitted range of activities. It enables these parties to know the purpose, for which their money is going to be used by the company and the nature and extent of risk they are undertaking in making investment. Memorandum of Association enable the parties dealing with the company to know with certainty as whether the contractual relation to which they intend to enter with the company is within the objects of the company.

Form of Memorandum (Sec. 14)

Companies Act has given four forms of Memorandum of Association in Schedule I. These are as follows :

Table B	Memorandum of a company limited by shares
Table C	Memorandum of a company limited by guarantee and not having a share capital

(9)

Table D Memorandum of company limited by guarantee and having share capital.

Table E Memorandum of an unlimited company

Every company is required to adopt one of these forms or any other form as near there to as circumstances admit.

Printing and signing of Memorandum (Sec. 15).

The memorandum of Association of a company shall be (a) printed, (b) divided into paragraphs numbered consecutively, and (c) signed by prescribed number of subscribers (7 or more in the case of public company, two or more in the case of private company respectively). Each subscriber must sign for his/her name, address, description and occupation in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

Contents of Memorandum

1. Name clause

Promoters of the company have to make an application to the registrar of Companies for the availability of name. The company can adopt any name if :

i) There is no other company registered under the same or under an identical name;

ii) The name should not be considered undesirable and prohibited by the Central Government (Sec. 20). A name which misrepresents the public is prohibited by the Government under the Emblems & Names (Prevention of Improper use) Act, 1950 for example, Indian National Flag, name pictorial representation of Mahatma Gandhi and the Prime Minister of India, name and emblems of the U.N.O., and W.H.O., the official seal and Emblems of the Central Government and State Governments.

(10)

Where the name of the company closely resembles the name of the company already registered, the Court may direct the change of the name of the company.

iii) Once the name has been approved and the company has been registered, then

a) the name of the company with registered office shall be affixed on outside of the business premises;

b) if the liability of the members is limited the words "Limited" or "Private Limited" as the case may be, shall be added to the name; [Sec 13(1) (1)]: Omission of the word 'Limited' makes the name incorrect. Where the word'

Limited" forms part of a company's name, omission of this word shall make the name incorrect. If the company makes a contract without the use of the word "Limited", the officers of the company who make the contract would be deemed to be personally liable [Atkins & Co v Wardle, (1889) 61 LT 23]

The omission to use the word 'Limited' as part of the name of a company must have been deliberate and not merely accidental. Note the following case in this regard:

Dermatine Co. Ltd. v Ashworth, (1905) 21 T.L.R. 510. A bill of exchange drawn upon a limited company in its proper name was duly accepted by 2 directors of the company. The rubber stamp by which the word of acceptance were impressed on the bill was longer that the paper of the bill and hence the word 'Limited' was missed. Held, the company was liable to pay and the directors were not personally liable.

(c) the name and address of the registered office shall be mentioned in all letter- heads, business letters, notices and Common Seal of the Company, etc. (Sec. 147).

In Osborn v The Bank of U. A. E., [9 Wheat (22 US), 738]; it was held that the

(11)

name of a company is the symbol of its personal existence. The name should be properly and correctly mentioned. The Central Government may allow a company to drop the word "Limited" from its name.

2. Registered Office Clause

Memorandum of Association must state the name of the State in which the registered office of the companmy is to be situated. It will fix up the domicile of the company. Further, every company must have a registered office either from the day it begins to carry on business or within 30 days of its incorporation, whichever is earlier, to which all communications and notices may be addressed. Registered Office of a company is the place of its residence for the purpose of delivering or addressing any communication, service of any notice or process of court of law and for determining question of jurisdiction of courts in any action against the company. It is also the place for keeping statutory books of the company.

Notice of the situation of the registered office and every change shall be given to the Registrar within 30 days after the date of incorporation of the company or after the date of change. If default is made in complying with these requirements, the company and every officer of the company who is default shall be punishable with fine which may extend to Rs. 50 per during which the default continues.

3. Object Clause

This is the most important clause in the memorandum because it not only shows the object or objects for which the company is formed but also determines the extent of the powers which the comapany can exercise in order to achieve the object or objects. Stating the objects of the company in the Memorandum of Association is not a mere legal technicality but it is a necessity of great practical importance. It is essential that the public who purchase its shares should know clearly what are the objects for which

(12)

they are paying.

In the case of companies which were in existence immediately before the commencement of the Companies (Amendment) Act. 1965, the object clause has simply to state the objects of the company. But in the case of a company to be registered after be amendment, the objects clause must state separately.

i) **Main Objects** : This sub-clause has to state the main objects to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of main objects.

ii) **Other objects**: This sub-clause shall state other objects which are not included in the above clause.

Further, in case of a non-trading company, whose objects are not confined to one state, the objects clause must mention specifically the States to whose territories the objects extend. (Sec. 13)

A company, which has a main object together with a number of subsidiary objects, cannot continue to pursue the subsidiary objects after the main object has come to an end.

Crown Bank. Re (1890) 44 Ch D. 634. A company's objects clause enabled it to act as a bank and further to invest in securities land to underwrite issue of securities. The company abandoned its banking business and confined it self to investment and financial speculation. Held, the company was not entitled to do so.

Incidental acts. The powers specified in the Memorandum must not be construed strictly. The company may do anything which is fairly incidental to these powers. Anything reasonable incidental to the attainment or pursuit of any of the express objects of the company will, unless expressly prohibited, be within the implied powers of the

(13)

company.

While drafting the objects clause of a company the following points should be kept in mind.

i) The objects of the company must not be illegal, e.g. to carry on lottery business.

ii) The objects of the company must not be against the provisions of the Companies Act such as buying its own shares (Sec. 77), declaring dividend out of capital etc.

iii) The objects must not be against public, e.g. to carry on trade with an enemy country.

iv) The objects must be stated clearly and definitely. An ambiguous statement like "Company may take up any work which it deems profitable" is meaningless.

v) The objects must be quite elaborate also. Note only the main objects but the subsidiary or incidental objects too should be stated.

The narrower the objects expressed in the memorandum, the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company.

4. Capital Clause

In case of a company having a share capital unless the company is an unlimited company, Memorandum shall also state the amount of share capital with which the company is to be registered and division there of into shares of a fixed amount [Sec. 13 (4)]. The capital with which the company is registered is called the authorized or nominal share capital. The nominal capital is divided into classes of shares and their values are mentioned in the clause. The amount of nominal or authorized capital of the company would be normally, that which shall be required for the attainment of the main objects

(14)

of the company. IN case of companies limited by guarantee, the amount promised by each member to be contributed by them in case of the winding up of the company is to be mentioned. No subscriber to the memorandum shall take less than one share. Each subscriber of the Memorandum shall write against his name the number of shares he takes.

5. Liability Clause

In the case of company limited by shares or by guarantee, Memorandum of Association must have a clause to the effect that the liability of the members is limited. It implies that a shareholder cannot be called upon to pay any time amount more then the unpaid portion on the shares held by him. He will no more be liable if once he has paid the full nominal value of the share.

The Memorandum of Association of a company limited by guarantee must further state that each member undertakes to contribute to the assets of the company if wound up, while he is a member or within one year after he ceased to be so, towards the debts and liabilities of the company as well as the costs and expenses of winding up and for the adjustment of the rights of the contributories among themselves not exceeding a specified amount.

Any alteration in the memorandum of association compelling a member to take up more shares, or which increases his liability, would be null and void. (Sec 38).

If a company carries on business for more than 6 months while the number of members is less than seven in the case of public company, and less than two in case of a private company, each member aware of this fact, is liable for all the debts contracted by the company after the period of 6 months has elapsed. (Sec. 45).

6. Association or Subscription Clause

In this clause, the subscribers declare that they desire to be formed into a

company and agree to take shares stated against their names. No subscriber will take less than one share. The memorandum has to be subscribed to by at least seven persons in the case of a public company and by at least two persons in the case of a private company. The signature of each subscriber must be attested by at least one witness who cannot be any of the subscribers. Each subscriber and his witness shall add his address, description and occupation, if any. This clause generally runs in this form : "we, the several person whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of the number of shares in the capital of the company, set opposite of our respective name".

After registration, no subscriber to the memorandum can withdraw his subscription on any ground.

Alteration of Memorandum of Association

Alteration of Memorandum of association involves compliance with detailed formalities and prescribed procedure. Alternations to the extent necessary for simple and fair working of the company would be permitted. Alterations should not be prejudicial to the members or creditors of the comapany and should not have the effect of increasing the liability of the members and the creditors.

Contents of the Memorandum of association can be altered as under :

1. Change of name

A company may change its name by special resolution and with the approval of the Central Government signified in writing . However, no such approval shall be required where the only change in the name of the company is the addition there to or the deletion there from, of the word "Private", consequent on the conversion of a public company into a private company or of a private company into a public company. (Sec. 21)

(16)

By ordinary resolution. If through inadvertence or otherwise, a company is registered by a name which, in the opinion of the Central Government, is identical with or too nearly resembles the name of an existing comapany, it may change its name by an ordinary resolution and with the previous approval of the Central Government signified in writing. [Sec. 22(1) (a)].

Registration of change of name. Within 30 days passing of the resolution, a copy of the order of the Central Government's approval shall also be field with the Registrar within 3 months of the order. The Registrar shall enter the new name in the Register of Companies in place of the former name and shall issue a fresh certificate of incorporation with the necessary alterations. The change of name shall be complete and effective only on the issue of such certificate. The Registrar shall also make the necessary alteration in the company's memorandum of association (Sec. 23)

The change of name shall not affect any right or obligations of the company or render defective any legal proceeding by or against it. (Sec. 23).

2. Change of Registered Office

This may involve :

a) Change of registered office from one place to another place in the same city, town or village. In this case, a notices is to be give within 30 days after the date of change to the Registrar who shall record the same.

b) Change of registered office from one town to another town in the same State. In this case, a special resolution is required to be passed at a general meeting of the shareholders and a copy of it is to be filed with the Registrar within 30 days. The within 30 days of the removal of the office. A notice has to be given to the Registrar of the new location of the office.

c) Change of Registered Office from one State to another State to another State.

(17)

Section 17 of the Act deals with the change of place of registered office form one State to another State. According to it, a company may alter the provision of its memorandum so as to change the place of its registered office from one State to another State for certain purposes referred to in Sec 17(1) of the Act. In addition the following steps will be taken.

Special Resolution

For effecting this change a special resolution must be passed and a copy there of must be filed with the Registrar within thirty days. Special resolution must be passed in a duly convened meeting.

Confirmation by Central Government

The alteration shall not take effect unless the resolution is confirmed by the Central Government.

The Central Government before confirming or refusing to confirm the change will consider primarily the interests of the company and its shareholders and also whether the change is bonafide and not against the public interest. The Central Government may then issue the confirmation order on such terms and conditions as it may think fit.

3. Alteration of the Object Clause

The Company may alter its objects on any of the grounds (I) to (vii) mentioned in Section 17 of the Act.

The alteration shall be effective only after it is approved by special resolution of the members in general meeting with the Companies Amendment Act, 1996, for alteration of the objects clause in Memorandum of Associations sanction of Central Government is dispensed with.

Limits of alteration of the Object Clause

(18)

The limits imposed upon the power of alteration are substantive and procedural. Substantive limits are provided by Section 17 which provides that a company may change its objects only in so far as the alteration is necessary for any of the following purposes:

i) to enable the company to carry on its business more economically or more effectively;

ii) to enable the company to attain its main purpose by new or improved means;

iii) to enlarge or change the local area of the company's operation;

iv) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company;

v) to restrict or abandon any of the objects specified in the memorandum

vi) to sell or dispose of the whole, or any part of the undertaking of the company;

vii) to amalgamate with any other company or body of persons.

Alterations in the objects is to be confined within the above limits for otherwise alteration in excess of the above limitations shall be void.

A company shall file with the registrar a special resolution within one month from the date of such resolution together with a printed copy of the memorandum as altered. Registrar shall register the same and certify the registration. [Sec. 18].

Effect of non Registration with Registrar

Any alteration, if not registered shall have no effect. If the documents required to be filed with the Registrar are not filed within one month, such alteration and the order of the Central Government and all proceedings connected therewith shall at the expiry of such period become void and inoperative. The Central Government may, on sufficient cause show, revive the order on application made within a further period of one month [Sec. 19]

4. Alteration of Capital Clause19)

The procedure for the alteration of share capital and the power to make such alteration are generally provided in the Articles of Association If the procedure and power are not given in the Articles of Associational, the company must change the articles of association by passing a special resolution. If the alteration is authorized by the Articles, the following changes in share capital may take place :

1. Alteration of share capital [Section 94-95]
2. Reduction of capital [Section 100-105]
3. Reserve share capital or reserve liability [Section 99]
4. Variation of the rights of shareholders [Section 106-107]
5. Reorganization of capital [Section 390-391]

5. Alteration of Liability Clause

Ordinarily the liability clause cannot be altered so as to make the liability of members unlimited. Section 38 states that the liability of the members cannot be increased without their consent. It lays down that a member cannot by changing the memorandum or articles, be made to take more shares or to pay more the shares already taken unless he agrees to do so in writing either before or after the change.

A company, if authorized by its Articles, may alter its memorandum to make the liability of its directors or manager unlimited by passing a special resolution. This rule applies to future appointees only. Such alteration will not effect the existing directors and manager unless they have accorded their consent in writing. [Section 323].

Section 32 provides that a company registered as unlimited may register under this Act as a limited company. The registration of an unlimited company as a limited company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into by the company before such registration.

ARTICLES OFASSOCIATION

(20)

Every company is required to file Articles of Association along with the Memorandum of Association with the Registrar at the time of its registration. Companies Act defines 'Articles as Articles of Association of a company as originally framed or as altered from time to time in pursuance of any previous companies Acts. They also include, so far as they apply to the company, those in the Table A in Schedule I annexed to the Act or corresponding provisions in earlier Acts.

Articles of Association are the rules, regulations and bye-laws for governing the internal affairs of the company. They may be described as the internal regulation of the company governing its management and embodying the powers of the directors and officers of the company as well as the powers of the shareholders. They lay down the mode and the manner in which the business of the company is to be conducted.

In framing Articles of Association care must be taken to see that regulations framed do not go beyond the powers of the company it self as contemplated by the Memorandum of Association nor should they be such as would violate any of the requirements of the companies Act, itself. All clauses in the Articles ultra vires the Memorandum or the Act shall be null and void.

Article of Association are to be printed, divided into paragraphs, serially numbered and signed by each subscriber to Memorandum with the address, description and occupation. Each subscriber shall sign in the presence of at least one witness who shall attest the signatures and also mention his own address and occupation.

Contents of Articles of Association

Articles generally contain provision relating to the following matters; (1) the exclusion, whole or in part of Table A; (ii) share capital different classes of shares of shareholders and variations of these rights (iii) execution or adoption of preliminary agreements, if any; (iv) allotment of shares; (v) lien on shares (vi) calls on shares; (vii)

(21)

forfeiture of shares; (viii) issue of share certificates; (ix) issue of share warrants; (x) transfer of shares; (xi) transmission of shares; (xii) alteration of share capital; (xiii) borrowing power of the company; (xiv) rules regarding meetings; (xv) voting rights of members; (xvi) notice to members; (xvii) dividends and reserves; (xviii) accounts and audit; (xix) arbitration provision, if any; (xx) directors, their appointment and remuneration; (xxi) the appointment and reappointment of the managing director, manager and secretary; (xxii) fixing limits of the number of directors (xxiii) payment of interest out of capital; (xxiv) common seal; and (xxv) winding up.

Model form of Articles

Different model forms of memorandum of association and Articles of Association of various types of companies are specified in Schedule I to the Act. The schedule is divided into following tables.

Table A deals with regulations for management of a company limited by shares.

Table B contains a model form of Memorandum of Association of a company limited by shares.

Table C gives model forms of Memorandum and Articles of Association of a company limited by guarantee and not having a share capital.

Table D gives model forms of Memorandum and Articles of Association of a company limited by guarantee and having a share capital. The Articles of such a company contain in addition to the information about the number of members with which the company proposes to be registered, all other provisions of Table A.

Table E contains the model forms of memorandum and Articles of Association of an unlimited company.

A Public Company may have its own Article of Association. If it does not

(22)

have its own Articles, it may adopt Table A given in Schedule I to the Act.

Adoption and application of Table A (Section 28). There are 3 alternative forms in which a public company may adopt Articles :

1. It may adopt Table A in full
2. It may wholly exclude Table A, and set out its own Articles in full
3. It may frame its own Articles and adopt part of Table A.

In other words, unless the Articles of a public company expressly exclude any or all provisions of Table A shall automatically apply to it.

Alteration of Articles

Section 31 grant power to every company to alter its articles whenever it desires by passing a special resolution and filing a copy of altered Articles with the Registrar. An alteration is not invalid simply because it changes the company's constitution. Thus in Andrews v Gas Meter Co., A company was allowed by changing articles to issue preference shares when its memorandum was silent on the point.

Alteration of articles is much easier than memorandum as it can be altered by special resolution. However, there are various limitations under the Companies Act to the powers of the shareholders to alter the articles.

In case of conversion of a public company into a private company, alteration in the articles would only be effective after approval of the Central Government [Section 31]. The power are now vested with the Registrar of Companies.

Alteration of the articles shall not violate provisions of the Memorandum. It must be made bonafide the benefit of the company. All clauses in the articles ultra vires the Memorandum shall be null and void, and the articles shall be held inoperative. Alteration must not contain anything illegal and shall not constitute

fraud on the minority.

(23)

Alteration in the articles increasing the liability of the members can be done only with the consent of the members.

The Court may even restrain an alteration where is likely to cause a damage which cannot be adequately compensated in terms of money. Similarly, a company cannot by altering articles, justify a breach of contract. Any alteration so made shall be valid as if originally contained in the articles.

Where a special resolution has been passed altering the articles or an alteration has been approved by the Central Government where required, a printed copy of the articles so altered shall be filed by the company with the Registrar of Companies within one month of the date of the passing of special resolution.

DISTINCTION BETWEEN ARTICLES OFASSOCIATION AND MEMO- RANDUM OFASSOCIATION

The difference between memorandum of association and articles of association is as under:

	Memorandum of Association		***Articles of Association***
1.	It is character of company indicating business & capital.	1.	They are the regulation nature of for the internal management It also
	defines the company's rela-		of the company and
			are subsidiary to the mem- orandum.
2.	It defines the scope of the the company, or	2.	They are the rules for activities of carrying out the objects of
	the area beyond which the actions of the company cannot		the company as set out in the Memorandum. go.
3.	It, being the charter of the	3.	They are subordinate to

(24)

company, is the supreme the Memorandum. If there is a conflict between the Articles and the Memo- randum, the act of the company

	Any act of the company which the Memorandum is wholly void and cannot be ratified even by the whole body shareholders.	4. Any act of the company is ultra vires which is ultra vires the articles can be confirmed by the share- of holders if it is intra vires the memorandum.
	Every company must have its Memorandum Articles of its own. In such A case, Table A Applies.	5. A company limited by own Shares need not have
	There are strict restrictions alteration. Some of the conditions of incorporation it cannot be altered sanction of the Central Government.	6. They can be altered by a on its special resolution, to any extent, provided they do contained in not conflict with the except with the Memorandum and the Companies Act.

CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES OF ASSOCIATION

The Memorandum and Articles of a company are registered with the Registrar. These are the public documents and open to public inspection,. Every person

(25)

contracting with the company must acquaint himself with their contents and must make sure that his contract is in accordance with them, otherwise he cannot sue the company.

On registration the memorandum and articles of association become public documents. These documents are available for public inspection either in the office of the company or in the office of the Registrar of Companies on payment of one rupee for each inspection and can be copied (Sec. 610).

Every person who deals with the company, whether shareholder or an outsider is presumed to have read the memorandum and articles of association of the company and is deemed to know the contents of these document. Therefore, the knowledge of these documents and their contents is known as the constructive notice of memorandum and articles of association.

It is presumed that persons dealing with the company have not only read these documents but they have also understood their proper meaning.

Where a person deals with the company in a manner, which is inconsistent with the provisions of memorandum or articles, or enters into a transaction which is beyond the powers of the company, shall be personally liable to bear the consequences regarding such dealings.

SUMMARY

The whole process of formation of a company can be divided into four distinct stages namely promotion incorporation, capital subscription and commencement of business. However, a private company can start business as soon as it obtains the certificate of information. The memorandum of Association of a company tells us the objects of the company's formation and the utmost possible scope of its

(26)

operations beyond which its actions cannot go. The memorandum of association of every clause, objects clause, liability clause, Memorandum of association cannot be altered by the sweet will of the members of the company. It can be altered only by following the procedure prescribed in the Companies Act. Articles of association contain the rules and regulations which are granted for the internal management of the company. The company may alter its articles of association any time by following the procedure as prescribed in the Companies Act. Every person dealing with the company is presumed to have read the memorandum and articles of association and understood them in their time perspective. This is known as doctrine of constructive notice.

PROSPECTUS AND COMMENCEMENT OF BUSINESS

(1)

NTRODUCTION

The promoters of a public company will have to take steps to raise the necessary capital for the company, after having obtained the Certificate of Incor- poration. A public company may invite the public to subscribe to its shares or debentures. Prospectuses are to be issued for this purpose. To issue a prospectus is very essential for a public company. If the promoters of the company are confident of raising the required capital privately from their friend or relatives, they need not issue a prospectus. In such a case, a statement in lieu of prospectus must be filed with the Registrar. A private company is not allowed to issue a prospectus since it cannot invite the general public to subscribe to its shares and debentures. It is not required to file a statement in lieu of prospectus.

DEFINITION OF PROSPECTUS

Section 2(36) defines a prospectus an "any document described as issued as a prospectus and includes any notice, circular, advertisement or other docu- ment inviting deposits from the public or inviting orders from the public for the subscription or purchase of any share in, or debentures of, a body corporate". In simple words, a prospectus may be defined as an invitation to the public to subscribe to a company's shares or debentures. By

virtue of the Amendment Act of 1974, any document inviting deposits from the public shall also come within the definition of prospectus. The word "Prospectus" means a document which invites deposits from the public or invites offers from the public to buy shares or debentures of the company

A document will be treated as a prospectus only when it invites offers from a public. According to Section 67 the term "public" is defined as, "It in- cludes any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the pro- spectus or in any other manner". It further provides that no offer of invitation shall be treated as mode to the public if, (i) the same is not calculated to result in the shares or debentures becoming available other than those receiving the offer or invitation; (ii) it appears to be a domestic concern of the person making and receiving the offer or invitation. The 'public' is a general word. No particular numbers are prescribed. The point is that the offer makes the shares and deben- tures available for subscription to any one who brings his money and applies in due form, whether the prospectus was addressed to him on behalf of the company or not. A private communication does not satisfy the above point.

Where directors make an offer to a few of their friends, relatives or customers by sending them a copy of the prospectus marked "not for publica- tion" it is not considered an offer to the public.

The provisions of the Act relating to prospectus are not attracted unless the prospectus is issued to the public. Issued means issued to the public. Whether the prospectus has been issued to the public or not is a matter of fact. The leading case of this point is Nash v Lynde (1929) A.C. 158. In this case the managing director of a company prepared a document that was marked "strictly private and confidential" and did not contain the particulars required to be dis- closed in a prospectus. A copy of the document along with application forms was

(3)

sent to a solicitor who in turn sent it to the plaintiff. The document was held not be prospectus and as such the claim of the plaintiff for compensation was dis- missed.

In the case Re South of England Natural Gas and Petroleum Co. Ltd. (1911) 1 Ch. 573, the distribution of 3,000 copies of a prospectus among the members of certain gas companies was held to be an offer to the public because person other than those receiving the offer could also accept it. One may note that under Section 67 an offer or invitation to any section of the public, whether selected as members or debenture holders of the company or as clients of the person making the invitation, will be deemed to be an invitation to the public.

The term "subscription of purchase of shares" means taking or agreeing to take shares for cash. Any document to be called a prospectus must have the following ingredients :

I. There must be an invitation offering to the public;

II. The invitation must be or on behalf of the company or in relation to an intended company;

III. The invitation must be to subscribe or purchase.

IV. The invitation must relate to shares or debentures.

OBJECTS OF PROSPECTUS

The main objects of a prospectus are as follows :

1. To bring to the notice of public that a new company has been formed.

2. To preserve an authentic record of the terms of allotment on which the public have been invited to but its shares or debentures.

3. The secure that the directors of the company accept responsibility of the statement in the prospectus.

REQUIREMENTS REGARDING ISSUE OF PROSPECTUS

The relevant requirements regarding issue of prospectus are given below:

1. Issue after Incorporation

Section 55 of the Act permits the issue of prospectus in relation to an intended company. A prospectus may be issued by or on behalf of the company.

a) by a person interested or engaged in the formation company or

b) through an offer for sale by a person to whom the company has allotted shares.

2. Dating of Prospectus

A prospectus issued by a company shall be dated and that date shall be taken as the date of publication of the prospectus (Section 55). Date of issue of the prospectus may be different from the date of publication.

3. Registration of Prospectus

A copy of every prospectus must be delivered to the Registrar for regis- tration before it is issued to the public. Registration must be made on or before the date of its publication. The copy sent for registration must be signed by every person who is named in the prospectus as a director or proposed director of the

ompany or by his agent authorized in writing. Where the prospectus is issued in more than one language, a copy of its as issued in each language should be delivered to the registrar. This copy must be accompanied with the following documents:

a) If the report of an expert is to be published, his written consent to such publication;

b) a copy of every contract relating to the appointment and remuneration of managerial personnel;

c) a copy of every material contract unless it is entered in the ordinary course of business or two years before the date of the issue of prospectus;

d) a written statement relating to adjustments; if any, made by the auditors or accountants in their reports relating to profits and losses, assets and li- abilities or the rates of dividends, etc.; and

e) written consent of auditors, legal advisers, attorney, solicitor, banker or broker of the company to act in that capacity.

A copy of the prospectus along with specific documents must been field with the

Registrar. The prospectus must be issued within ninety days of its reg- istration. A prospectus issued after the said period shall be deemed to be a prospectus, a copy of which has not been delivered to the Registrar for registra- tion. The company and every person who is knowingly a party to the issue of prospectus without registration shall be punishable with fine which may extend to five thousand rupees (Section 60

4. Expert to be unconnected with the Formation of the Company

A prospectus must not include a statement purporting to be made by an expert such as an engineer, valuer, accountant etc. unless the expert is a person who has never been engaged or interested in the formation or promotion as in the management of the company (Section 57).

A statement of an expert cannot be include in the prospectus without his written consent and this fact should be mentioned in the prospectus. Further, this consent should not be withdrawn before delivery of the prospectus for registra- tion Section (58).

5. Terms of the contract not to be varied

The terms of any contract stated in the prospectus or statement in lieu of prospectus cannot be varied after registration of the prospectus except with the approval of the members in the general meeting (Section 61).

6. Application Forms to be Accompanied with the Copy of Prospectus

Every from of application for subscribing the shares or debentures of a com- pany shall not be issued unless it is accompanied by a copy of prospectus except when it is issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to shares or debentures or in relation to shares or debentures which were not offered to the public [(Section 56(3)].

Section 56(5) provides that the prospectus need not contain all the details required by the Act where the offer is made to exiting members or debenture holders of the company or if such shares or debentures are in all respect uniform with shares or debentures already issued and quoted on a recognize stock ex-

(7)

change.

7. Personation for Acquisition etc. of Shares

The provision, consequences of applying for shares in fictitious names to be prominently displayed must be reproduced in every prospectus and every application form issued by the company to any person.

A person who makes in a fictitious name to a company for acquiring shares or subscribing any shares or subscribing any shares shall be liable to imprisonment which may extend to five years similarly, a person who induces a company to allot any shares or to register any transfer of shares in a fictitious name is also liable to the same punishment. [Section 68(a)].

8. Contents as per Schedule II

Every prospectus must disclose the matters as required in Schedule II of the Act. It is to be noted that if any condition binding on the applicant for shares or debentures in a company to waive compliance with any requirements of the Act as to disclosure in the prospectus or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus shall be void [Section 56(2)].

If a prospectus is issued without a copy thereof, the necessary documents or the consent of the experts the company and every person, who is knowingly a part to the issue of the prospectus, shall be punishable with fine which may extend to Rs. 5,000/-.

CONTENTS OF PROSPECTUS

We know that a prospectus is issued to the public to purchase the shares or debentures of the company. Every person wants to invest his money in some sound undertaking. The soundness of a company can be known from the prospec- tus of a company. Thus, the prospectus must disclose the true nature of company's activities which enable the public to decide whether or not to invest money in the company. In fact, the public invest money in the company on the faith of the representation contained in the prospectus. Therefore, everything should be stated with strict accuracy, and the complete and true position of the company should be disclosed to the public.

Section 56 lays down that every prospectus issued (a) by or on behalf of a company,

or (b) by on behalf of any person engaged or interested in the for- mation of a company, shall :

1. State the matters specified in Part I of Schedule II, and.
2. Set out the reports specified in Part II or Schedule II both Part I and II shall have effect subject to the provisions contained in Part III of that Schedule II.

Part I of Schedule II

1. The main objects of the company with names, descriptions, occupations and addresses of the signatories to the Memorandum of association, and number of shares subscriber by them.
2. The number and classes of shares, and the nature and extent of the inter- ests of the shareholders in the property and profits of the company.
3. The number of redeemable preference shares intended to be issued with

(9)

particulars as regards their redemption.

4. The number of shares fixed by the articles of company as the qualification of a director.
5. The names, addresses, description and occupation of directors, managing director or manager or any of those proposed person.
6. Any provisions in the articles or any contract relating to appointment, remuneration and compensation for loss of office of directors, managing director or manager.
7. The amount of minimum subscription.
8. The time of the opening of the subscription list cannot be earlier than the beginning of the fifth day after the publication of prospectus.
9. Amount payable on application and allotment on each share shall be stated. If any allotment was previously made within two preceding years, the details of the shares allotted and

the amount; if any, paid thereon.

10. Particulars about any option or preferential right to be given to any person to subscribe for shares or debentures of the company.

11. The number, description and amount of shares and debentures which, within the last two years, have been issued or agreed to be issued as fully or partly paid up than in cash.

12. The amount paid or payable as a premium, if any, on such share issued within two years preceding the date of the prospectus or is to be issued

(10)

stating the necessary particulars.

13. The names of the underwriters of shares or debentures, if any, and the opinion of the directors that the resources of the underwriters are suffi- cient to discharge their obligations.

14. The names or addresses description and occupations of the vendors from whom the property has been purchased or is to be purchased, and the amount paid or payable in cash, shares or debentures respectively.

15. The amount of underwriting commission paid within two preceding years or payable to any person for subscribing or procuring subscription for any shares or debentures of the company.

16. Any benefit given to any promoter or officer in preceding two years and the consideration for giving of the benefit.

17. Particulars as to the date, parties and general nature of every contract appointing or fixing the remuneration of managing director or manager, whenever entered into.

18. Particulars of every material contract not entered into in the ordinary course of business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of the prospectus.

19. Names and addresses of the auditors of the company.

20. Full particulars of the nature and extent of interested of the directors or promoter in the promotion of the company or in the property acquired by

(11)

the company within two years of the issue of the prospectus.

21. If the share capital of the company is divided into different classes of shares, the rights of voting at meeting of the company and the rights in respect of capital and the dividends attached to several classes of shares respectively.

22. Where the articles of the company impose any restriction upon the mem- bers of the company in respect of the rights to attend, speak or vote at meetings of the company or the rights to transfer shares or on the direc- tors of the company in respect of their powers of management, the nature and extent of these restrictions.

23. Where the company carries on business, the length of time during which it has been carried on. If the company proposes to acquire a business which has been carried on for less than three years, the length of time during which the business had been conducted.

24. If any reserves or profits of the company or any of its subsidiaries have been capitalized, particulars of the capitalization and particulars of the surplus arising from any revaluation on the assets of the company.

25. A reasonable time and place at which copies of all balance sheets and profits and loss accounts, if any, on which the report of the auditors under part II below is based, may be inspected.

Part II of Schedule II

I General Information

Names and address of the Company Secretary, Legal Adviser, Lead Man- (12)

agers, Co-managers, Auditors, Bankers to the company. Bankers to the issue and Brokers to the issue.

2. Consent of Directors, Auditors, Solicitors/Advocates, Managers to issue, Registrar of Issue, Bankers to the company, Bankers to the issue and Experts.

3. Expert's opinion obtained, if any.

4. Change, if any, in directors and auditors during the last 3 years, and rea- sons thereof.

5. Authority for the issue and details of resolution passed for the issue.

6. Procedure and time schedule for allotment and issue of certificates.

II. Financial Information

1. Report by the Auditors

A report by the auditors of the company as regards (a) its profits and losses and assets and liabilities of the company and (b) the rates of dividend, if paid by the company during the preceding 5 financial years.

If no accounts have been made up in respect of any part of the period of 5 years ending on a date 3 months before the issue of the prospectus, the report shall, in addition, deal with either the combined profits and losses and assets and liabilities of its subsidiaries or each of the subsidiary, so far as they concern the members of the company.

2. Reports by the Accountants

(13)

(a) A report by the accountants on the profits or losses of the business for the preceding 5 financial years, and on the assets and liabilities of the busi- ness on a date which shall not be more than 120 days before the date of the issue of the prospectus. This report is required to be given, if the proceeds of the issue of the shares or debentures are to be applied di- rectly on the purchase of any business.

(b) A similar report on the account of a body corporate by an accountant if the proceeds of the issue are to be applied in the purchase of shares of a body corporate so that body corporate becomes a subsidiary of the acquiring company.

(c) Principal terms of loans and assets charged as security.

3. Statutory and other Information

Statutory and other information minimum subscription, underwriting com- mission and brokerage; date of allotment, closing date, date of refund, option to subscribe, material contracts and inspection of documents, etc. are required to set out in the prospectus.

Part III of Schedule II

Part III of the schedule consists of provisions applying to Part I and II of the said schedule.

A. Every person shall, for the purpose of this schedule, be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase of any property to be acquired by the company, in any case where (a) the purchase money is not fully paid at the date of the issueof the prospectus (b) the purchase money is to be paid or satisfied, wholly or in part, out of the proceeds of the issue offered for subscription by the prospectus; (c) the contract depends for its validity or fulfillment on the result of that issue.

B. In the case of a company which has been carrying on business for less than 5 financial years, reference to 5 financial years means reference to that number of financial years for which business has been carried on.

C. Reasonable time and place at which copies of all balance sheets and profit and loss accounts on which the report of the auditors is based, and mate- rial contracts and other documents may be respected.

"Term year" wherever used herein earlier means financial year.

Declaration

That all the relevant provision of the Companies Act, 1956 and the guide lines issued by the Government have been complied with and no statement made in the prospectus is contrary to the provisions of the Companies Act, 1956 and rules thereunder. The prospectus shall be dated and signed by the directors.

Statement by Experts

1. Experts to be unconnected with formation or management of company (Section 57). Where a prospectus includes a statement made by an expert, he shall not be engaged or interested in the formation, promotion or man- agement of the company. The expression 'expert' includes an engineer, accountant, a valor and, any other person whose profession gives authority

(15)

to a statement made by him.

2. Expert's consent to issue of prospectus containing statement by him (Sec- tion 58). A prospectus including a statement made by an expert shall not be issued, unless (a) he has given his written consent to be issued of the prospectus with the statement included in the form and context in which it is included and; (b) statement that he has given and has not withdrawn his consent as aforesaid appears in a prospectus.

A wholesome rule intended to protect intending investors by making the expert a party to the issue of the prospectus and making him liable for untrue statements (Section 58). Penalty [Section 59 (1)], if any, prospec- tus is issued in contravention of Section 57 or 58, the company, and every person who is knowingly a party to the issue thereof, shall be punishable with fine which may extent to Rs. 5,000/-

MIS-STATEMENT IN THE PROSPECTUS

A prospectus is an invitation to the public to subscribe to the shares or debentures of a company. Every person authorizing the issue of prospectus has a primary responsibility to seed that the prospectus contains the true state of affairs of the company and does not give any fraudulent picture to the public. People invest in the company on the basis of the information published in the prospectus. They have to be safeguarded against all wrongs or false statements in prospectus. Prospectus must give a full, accurate and a fair picture of material facts without concealing or omitting any relevant fact. This is known as the 'Golden Rule' for framing prospectus as laid down in New Brunswick etc. Co. V.

(16)

Muggeridge [(1860) 3 LT 651]. The true nature of company's venture should be disclosed. The statements which do not qualify to the particulars mentioned in the prospectus or any information is intentionally and willfully concealed by the directors of the company, would be considered as mis-statement.

Thus, the term 'venture statement' as 'mis-statement' is used in a broader sense. It includes not only false statements which produce a impression of actual facts. Concealment of a

material fact also comes within the category of mis- statement.

A statement included in a prospectus shall be deemed to be untrue, if

- The statement is misleading in the form and context in which it is in- cluded; and
- the omission from a prospectus of any matter is calculated to mislead (Section 65).

If there is any misstatement of a material fact in a prospectus as if the prospectus is wanting in any material fact, this may arise-

1. Civil Liability
2. Criminal Liability

1. Civil Liability

A person who has induced to subscribe for shares (or debentures) on the faith of a misleading prospects has remedies against the company, directors,
romoters, and experts. Every person who is a director and promoter of the company, and who has authorized the issue of the prospectus [Section (2)].

a) Compensation

The above persons shall be liable to pay compensation to every person who subscribes for any shares or debentures for any loss or damage sustained by him by reason of any untrue statement included therein [Section 62(1)].

In McConnel V. Wright (1903 1 Ch 5460 it has been held that the measure of the damages is the loss suffered by reason of the untrue statement, omissions, etc. the difference between the value which the shares would have had and the true value of the shares at the time of the allotment.

b) Recession of the Contract for Misrepresentation

Avoiding the contract is recession. Any person can apply to the court for recession of the contract if the statements on which he has taken the shares are false or caused by misrepresentation whether innocent or fraudulent.

The contract can be rescinded if the following conditions are satisfied:

1) The statement must b a material misrepresentation of fact

2) It must have induced the shareholder to take the shares.

3) The deceived shareholder is an allottee and he must have relied on the statement in the prospectus.

4) The omission of material fact must be misleading before recession is granted.

5) The proceedings for recession must be started as soon as the allottee comes to know of a misleading statement.

c) Damages for Deceit as Fraud

Any person induced to invest in the company by fraudulent statement in a prospectus can sue the company and person responsible for damages. The share should be first surrendered to company before the company is used for damages.

Fraud occurs when any statement is made without belief in the truth or carelessly. A statement made with knowledge that it is false, will constitute fraud or deceit. In the leading case on the point - Derry V. Peek (1889 14 AG 337). It has been held that if the person making the statement honesty believes it to be true, he is not guilty of fraud even if the statement is not true. The facts of this
case were:

The Tramway company had power by special Act to make tramways and to use steam power with the consent of the Board of Trade. The plants of the company are approved honesty. The directors of the company believed that since the plans were approved, permission to use steam power from Board of Trade was only a formality and would be granted. Prospectus was issued wherein the directors stated that the consent to use steam power was obtained by the com- pany. Subsequently, the consent was refused and company had to be wound up. On the action by plaintiffs for deceit it was held that the directors were not liable for fraud as they honesty believed that the consent would be obtained, though the statement was untrue.

d) Liability for non-compliance

A director or other person responsible shall be liable for damage for non- compliance with or contravention of any of the matters to be stated and reports to be set out in the prospectus as provided [by Section 56(41)].

e) Damages for Fraud under General Law

Any person responsible for the issue of prospectus may be held liable under the general law or under the Act for misstatements or fraud.

f) Penalty for Contravening Section 57 & 58

If any prospectus is issued is contravention of Section 57, (experts to be unconnected with formation or management of company), or Section 58 (expert's consent to issue of prospectus containing statement by him) the company and every person who is knowingly party to the issue thereof, shall be punishable
with fine which may extend to Rs. 5,000/-.

g) Penalty for issuing the Prospectus without Registration

If a prospectus is issued without a copy of thereof being delivered to the Registrar, the company and every person who is knowingly a party to the issue of the prospectus shall be punishable with fine which may extent to Rs 5,000 [Sec- tion 60(5)].

Defence against Civil Liability

Every person made liable to pay compensation for any loss or damages may escape such liability by proving that :

I. Having consented to become a director of the company, he withdrew his consent before the issue of the prospectus and that it was issued withohis authority or consent.

II. The prospectus was issued without his knowledge or consent and that on becoming aware of its issue he forth with gave reasonable public notice that it was issued without his knowledge or consent.

III. After the issue of prospectus, and before allotment thereunder he, on becoming aware of any untrue statement therein withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal.

IV. If a director, etc., has reasonable ground to believe that the statement was true

and he, in fact, believed it to be true up to the time of allotment, he is not liable. But it is not enough for a director to say that he was honest, he has to show that his honest belief was based on reasonable grounds.

V. If statement is a correct and fair representation or extract or copy of the statement made by an expert who is competent to make it and had given his consent and had not withdrawn it, the director, etc., is not liable. Like- wise, if the statement is a correct and fair representation or extract or copy of an official document or is based on the authority of an official person, no liability attaches to the director etc.

2. Criminal Liability

Every person who authorized the issue of prospectus shall be punishable for untrue statement with imprisonment for a term which may extend to 2 years or with fine which may extend to Rs. 5,000/- or with both [Section 63(1)].

Penalty for Fraudulently inducing Persons to Invest Money [Section 68]

Any person who either knowingly or recklessly makes any statement, pro
(21)
ises or forecast which is false, deceptive or misleading or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into;

- Any agreement with a view to acquiring, disposing of, subscribing for, or underwriting shares or debentures;
- An agreement to secure to any of the parties from the yield of shares or debentures; or by reference to fluctuation in the value of shares or deben- tures; shall be punishable for a term which may extend to 5 years of with fine which may extend to Rs. 10,000/- or with both.

Defence against Criminal Liability

Any person made criminally liable can escape the same as proving that

- the statement was true [Section 63(i)]. statement was immaterial; or
- he had a reasonable ground to believe and did upto the time of the issue of prospectus that the statement was true [Section 63(i)].

STATEMENT IN LIEU OF PROSPECTUS (SECTION 70)

A company having a share capital which does not issue a prospectus or which has issued a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or deben- tures, unless at least three days before the allotment of shares or debentures, this has been delivered to the Registrar for registration a 'statement in lieu of pro- spectus' signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and

(22)

containing the particulars set out in Part I of Schedule III and setting out the reports specified in Part II of Schedule III subject to the provisions contained in Part III of that Schedule (Section 70).

A private company on becoming a public company shall deliver to the Registrar a statement in lieu of prospectus in the form containing the particulars specified in Part I of Schedule IV with report set out in Part II of Schedule IV subject to the provisions contained in Part III of that Schedule [Section 44(2) (b)].

If the company acts in contravention of the provisions, the company and every director who is at fault shall be punishable with fine which may extent to Rs. 1,000/-.

If the 'statement in lieu of prospectus' include any untrue statement, any person who authorized the delivery of the statement in lieu of prospectus shall be, punishable with imprisonment up to two years or with fine which may extent to Rs. 5,000/- or with both. He can avoid liability if he proves either that the statement was immaterial or that he had reasonable ground to believe that the statement was immaterial or that he had reasonable ground to believe that the statement was true. The civil and criminal liability for mis-statements or misrep- resentations is the same as in the case of a prospectus [Section 70(5)].

MINIMUM SUBSCRIPTION (SECTION 69)

When shares are offered to the public the amount of minimum subscrip- tion has to be mentioned in the prospectus. It means the amount which, in the opinion of the directors, is enough to meet the purchase price of any property,

liminary expenses and working capital. No allotment shall be made until at least so much amount has been subscribed for. If the minimum subscription has not been received within 120 days, of the issue of the prospectus, the money received from the applicants must be repaid without interest. If the money is not paid back within 130 days, the directors become personally liable to pay it with interest, unless they can show that default was not due to any negligence or misconduct or their part.

COMMENCEMENT OF BUSINESS

A private company can commence business immediately on its incorpora- tion. A public

company has to, however, comply with certain additional formali- ties before it can commence its business. This can be grouped under the follow- ing three heads.

1. ***Public Company Issuing a Prospectus***

No public company having a share capital and issuing a prospectus inviting the public to subscribe for its shares, shall commence business or borrow unless it has obtained 'certificate of commencement of business' from the Registrar of Companies. The certificate of commencement of business will be issued after the following formalities are complied with -

a) At least minimum subscription has been raised;

b) every director of the company has paid to the company, on each of the shares taken by him or agree to be taken by him the amount payable by him on application and allotment of the shares;

(24)

c) Obtain or apply for permission for dealing of the shares or debentures on the recognized stock exchange so that no money is repayable to applica- tion for an shares of debentures offered for public subscription by reason of any failure to apply for, or to obtain stock exchange permission;

d) A duly verified declaration has been filed with the Registrar by one of the director or the secretary or of the secretary in whole time practice that the above provisions have been complied with [Section 149(1)].

2. Public Company Not Issuing a Prospectus

Where a company having a share capital has not issued a prospectus invit- ing the public subscribe for its shares, it can commence business or exercise any borrowing powers if the following conditions are fulfilled:

- A statement in lieu of prospectus has been filled in the Registrar.
- Every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him for cash, the application and allotment money.
- There has been filed with the Registrar a duly verified declaration by one of the directors or the secretary, a secretary in whole time practice, in the prescribed form, that the above provisions have been complied with.

When the company fulfils the above conditions, the Registrar shall certify that it is entitled to commerce business and that the certificate shall be conclu- sive evidence that the company is so entitled [Section 149(3)].

Any contract made by a public company after incorporation but before the

date on which it is entitled to commence business shall be provisional only and shall not be binding on the company until the certificates is obtained [Section 149(4)].

Thus where goods are supplied to the company which never become en- titled to commence business not one can sue the company for the price of goods supplied to it.

3. Failure to Commence business

It may also be noted that the court has the power to wind up a company, if it does not commence its business within a year of its incorporation [Section 433(3).

SUMMARY

A prospectus means any invitation issued to the public inviting it to de- posit money with the company or to take share or debentures of the company such invitation may be in the form of a document or a notice, circular, advertise- ment etc. Section 55 states that every prospectus must be dated, and that date is deemed to be the date of publications of the prospectus, prospectus should nei- ther contain any mis-statement i.e. untrue or misleading nor omit to disclose any material fact. It there is any mis-statement or omission of material facts, then the directions promoters, the persons responsible for the issue of prospectus, and the company incur a liability for the same. The company can also allot shares or

(26)

debentures without issuing the prospectus. However, in such a case, a statement known as 'Statement in lieu of Prospectus' is required to be prepared and field with the Registrar of Companies.

(28)

LESSON -4
ALLOTMENT OF SHARES AND DEBENTURES;
TRANSFER AND TRANSMISSION OF SHARES; SHARE WARRANT AND SHARE CERTIFICATE

INTRODUCTION

When a company issue a prospectus inviting the public to subscribe for the shares of a company, it is merely an invitation rather than

an offer. An application for shares is an offer by the prospective shareholders to take the shares of the company. Such offers are made on application forms supplied by the company. When an application is accepted, it is called allotment. Allotment is the acceptance by the company of the offer made by the applicant. Allotment results in a binding contract between the parties. The term allotment has not been defined in the Companies Act.

In *Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd., (1963),* allotment of shares was explained by the Supreme Court as "the appropriation, out of the previously unappropriated capital of the company, of a certain number of shares to a person. It is only after allotment that shares come into existence. Reissue of forfeited shares is not an allotment'.

GENERAL PRINCIPLES REGARDING ALLOTMENT

The provisions of the law of contract regarding the acceptance of an offer apply to the allotment of shares by a company. The general principles relating to the allotment of shares are as follows :

1. Proper Authority

Allotment must be made by a resolution of the Board of Directors or by a committee authorised to allot shares on behalf of the Board if permitted by the articles.

2. Absolute and unconditional

The allotment must be absolute and unconditional. If an application for shares in made subject to a condition, then that condition has to be fulfilled in order to make the allotment effective. In case that condition is not fulfilled, the applicant is not bound to take the shares.

3. Within a reasonable time

The allotment must be made within a reasonable time after the receipt of the application. Otherwise the applicant shall not be bound to accept it.

In *Ramasgate Victoria Hotel Co. v. Monterfiore*, Monterfiore applied for shares on June 28. But allotment was made on November 23 and he refused to take the shares. In this case it was held that the offer had lapsed and the applicant was not liable to pay for the allotment.

4. Must be communicated

The allotment must be communicated to the person making the application so that it is legally complete. Communication need not be in a particular form unless the articles of the company provide otherwise. Whatever is the mode of communication, it must be made to the applicant or his agent who is duly authorised to receive it. In case of postal communication, allotment is complete as soon as the letter of allotment is posted even though it is never received (Household Fire Insurance Co. v. Grant).

5. Revocation of the offer

An offer to take shares can be revoked at any time before the allotment is communicated.

H applied for shares in a company which were allotted to him. The letter of allotment was sent by the company's agent to be delivered by hand to H. Before the delivery of the letter of allotment, H withdrew his application. It was held that H was not a shareholder of the company. [*Re National Savings Bank Association (1867) L.R. 4E9.9]*

In the same way, the allotment can be withdrawn by the company before it is communicated completely to the applicant.

RULES OF ALLOTMENT

The Companies Act, 1956 does not prescribe any restriction as to the allotment of shares and debentures when issued by private companies. However, the Companies Act prescribes certain restrictions regarding the allotment of shares and debentures by public companies. Such restriction may be discussed under the following two heads :

(A) When no public offer is made.

(B) When public offer is made.

(A) When no public offer is made

A public company having share capital, which does not issue a prospectus or has issued a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless a statement in lieu of prospectus has been delivered to the Registrar at least three days before the first allotment of shares or debentures. The statement must be signed by every person who is a director or proposed director of the company or by his agent authorised in writing. (Section 70 (1)]

If the company contravenes the above provision, the allotment shall be irregular and voidable at the option of the allottee. Further, the company, and every director of the company who willfully authorises or permits the contravention, shall be punishable with fine which may extend to Rs. 1000. [Section 70(4)]

(B) When public offer is made

In the case of public company offering shares or debentures to the public for subscription, the provisions relating to allotment may be discussed under the following three heads :

1. First allotment of shares.
2. Subsequent allotment of shares.
3. Allotment of debentures.

1. First allotment of shares

The Companies Act, 1956 imposes the following restrictions which must be complied with by a public company which offers shares to the public for the first time :

(i) Registration of prospectus : The company must deliver a copy of the prospectus to the Registrar for registration on or before the date of its publication. It must be signed by every director or proposed director of the company or by his agent authorised in writing. [Sec. 60(1)]

(ii) Minimum subscription : No allotment shall be made of any share capital of the company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount has been subscribed and the sum payable on application for such amount has been paid to or received by the company. [Sec.69(1)]

The amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash. [Sec.69(2)]

A company making any rights or public issue of shares, debentures etc. must receive a minimum of 90 per cent subscription against the entire issue before making an allotment of shares or debentures to the

public. If the amount of minimum subscription is not received within 120 days of the issue of the prospectus, all amounts received from the applicants shall be refunded to them immediately without interest. However, if the refund is not made within 130 days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay the money with interest @ 6% p.a. for the delayed period.

(iii) Application money : The amount payable on application for each share shall not be less than 5% of the nominal amount of the share [Sec.69(3)]. SEBI guidelines prescribe that in the case of mega issues (exceeding Rs. 500 crore), the amount payable with the application on allotment or any one call should not exceed 25% of the value of shares.

All moneys received from the applicants for shares shall be deposited and kept deposited in a scheduled bank :

(a) until the certificate of commencement of business is obtained, or

(b) where such certificate has already been obtained, until the entire amount payable on application for shares in respect of the minimum subscription has been received by the company. [Sec. 69 (4)]

If the conditions aforesaid have not been complied with, all moneys received from the applicants for shares shall be forthwith repaid to them without interest. If any such money is not so repaid within one hundred and thirty days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of 6% p.a. from the expiry of 130 days. A director shall not be liable if he proves that default in the repayment of the money was not due to any misconduct or negligence on his part. [Sec. 69 (4)]

Any condition which requires or binds any applicant for shares not to comply with any requirement of Section 69 shall be void. [Sec. 69(6]

(iv) Subscription list : No allotment shall be made until the beginning of the 5th day after a date on which the prospectus is issued or such later time as may be specified in the prospectus. This day is known as the 'opening of the subscription list'.

Where after the issue of the prospectus, a public notice is given by some responsible person, disclaiming his responsibility for the issue of the prospectus, no allotment shall be made until the beginning of the fifth day after that on which such public notice is first given [Sec. 72(1)]

A company may proceed to allot shares soon after the opening of the subscription list. In case of listed shares, however, the subscription list must be kept open for at least 3 days under the rules of recognised stock exchanges. The prospectus generally states the time when the subscription lists will be closed. The allotment of shares in contravention of these provisions is valid. But the company and every officer who is in default shall be liable to a fine upto Rs. 5,000 [Section 72(3)].

An application for shares shall not be revocable until after the expiry of the fifth day after the opening of the subscription list. [Section 72 (5)]. The object of these provisions is to discourage the activities of stags.

(v) Shares and debentures to be dealt on a stock exchange : Where a prospectus states that an application has been, or will be, made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, the allotment made under such prospectus be void :

(i) if the permission has not been applied for before the 10th day after the issue of the prospectus, or

(ii) if permission has not been granted by the stock exchange, as the case may be, before the expiry of 10 weeks from the date of the closing of the subscription list.

If the allotment becomes void, the company must forthwith repay without interest all moneys received from applicants in pursuance of the prospectus and if any such money is not repaid within 8 days after the company becomes liable to repay it, the directors shall be jointly and severally liable to repay that money with interest between 4 to 15% per annum from the expiry of the eighth day [Sec. 73(2)].

Return of excess money where permission is granted

Where permission has been granted by the recognised stock exchange or stock exchanges for dealing in any shares or debentures and moneys received from the applicants for shares or debentures are in excess of the aggregate of the application moneys relating to the shares or debentures in respect of which allotments have been made, the company shall repay the moneys to the extent of such excess forthwith without interest. If such money is not repaid within eight days from the day the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than 4% and not more than 15%, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money. [Sec. 73(2A)]

If default is made in complying with the provisions of Section 73(2A), the company and every officer of the company who is in default

shall be punishable with fine which may extend to Rs. 5000 and where the repayment is not made within 6 months from the expiry of the eight day, also with imprisonment for a term which may extend to one year. [73(2B)]

All moneys to be kept in a separate bank account in a scheduled bank

Where a prospectus states that an application has been made to stock exchange for permission for the shares to be dealt in on the stock exchange, all moneys received shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted and where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal. Where the permission has not been applied for or has not been granted, the moneys shall be repaid within the time and in the manner specified in Section 73(2). If default is made in complying with this Section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 5000. [Sec. 73(3)]

2. Subsequent allotment of shares

In case of subsequent allotment of shares all the 'statutory provisions' regarding 'first allotment of shares' apply equally, except :

(a) minimum subscription [Sec. 69 (1)]; and

(b) application money must be deposited in a scheduled bank. [Sec69(4)]

3. Allotment of debentures

In case of issue of debentures all the statutory provisions regarding 'first allotment of shares' apply equally, except :

(a) minimum subscription [Sec. 69(1)];

(b) the amount payable on application; [Sec.69(3)] and

(c) application money must be deposited in a scheduled bank. [Sec.69(4)]

TRANSFER AND TRANSMISSION OF SHARES

A. Transfer of Shares

The shares in a company are movable property and they can be transferred in the manner provided by the articles of the company. A private company with a share capital, by its very nature as provided by Section 3(1)(iii) of the Act restricts the right of transfer in shares by its articles. Transfer of shares is less strict in a public company.

In a public company, every shareholder has right to transfer his shares to any person without the consent of other shareholders subject to such express restrictions as are found in the articles of the company. A restriction on transfer of shares which is not specified in the articles is not binding on the company or the shareholders. A transfer of share is valid if it is not forbidden under the articles of the company, even if it has been made with the object of escaping liability on the shares.

Procedure for Transfer of Shares

Ordinarily, shares can be transferred by a person whose name appears in the register of members and who is the holder thereof. As per Section 109, a legal representative of a deceased member, although not a member at the time of transfer, can also transfer shares.

Shares may be transferred by executing an instrument of transfer (called the 'transfer deed'). The instrument of transfer must be in the prescribed form. Before it is signed by or on behalf of the transferor and before any entry is made therein, it shall be presented to the prescribed authority which shall stamp or otherwise endorse on it the date of presentation.

The instrument of transfer shall then be executed by the transferor and the transferee and completed in all respects. Thereafter, it shall be presented to the company for registration within the following time limits :

(i) Where the shares of the company are listed/dealt in/quoted on a recognised stock exchange, the instrument of transfer must be presented for registration at any time before the register of members is closed for the first time after the date of presentation of the instrument to the prescribed authority or within 12 months thereof, whichever is later.

(ii) In any other case, the instrument of transfer shall be presented to the company within 2 months of the date of presentation to the prescribed authority. [Section 108 (1A)]

The Central Government may, however, on application extend the period by such further time as it may think fit to avoid any hardship [Section 108 (1-D)]

When a duly executed and stamped transfer deed is delivered to the company within the prescribed time, the transfer is complete irrespective of whether the company registers it or not. But the transferee becomes a member only when the transfer is registered. Pending registration, the transferor is a trustee of the shares for the transferee. The transferor continues to be the holder of the shares until his name is struck off the register and that of the transferee substituted in its place. The transferor must pay over to the transferee any dividends or other rights which he may receive from the company after the date of the transfer deed.

The application for transfer of shares may be made either by the transferor or the transferee. In case any application is made by the

transferor and relates to partly paid shares, the transfer shall not be registered unless the company gives notice of application to the transferee and the later raises no objection to the transfer within two weeks from the receipt of such notice. No such notice needs to be given where fully paid shares are transferred or where the application for the registration of transfer is made by the transferee.

In case a company refuses to register the transfer of shares, it must give notice to the transferor and the transferee within 2 months from the date of which the instrument of transfer was delivered, giving reasons for such refusal.

The transferor or the transferee may prefer an appeal to the Central Government within 2 months of the receipt of such notice of refusal. In case the notice of refusal has not been given by the company, the appeal must be filed within 4 months from the date on which the instrument of transfer was delivered to the company. On its appeal, the Central Government must give an opportunity to the company, the transferor and the transferee to make their representation before issuing any order. If the refusal of the company seems to be unjustified, the Central Government may issue an order to the company to register the transfer.

Issue of new share certificate (Sec. 113)

On the approval of the transfer, the company shall cancel the old share certificate and issue a new one made out in the name of the transferee. Normally, it is done by making an endorsement on the back of the share certificate.

The transfer when registered has retrospective effect from the time when the transfer was first made. It should be noted that the seller

of the shares is not bound to procure registration. He will simply hand over to the transferee a duly executed transfer form and the share certificate or the letter of allotment.

Power of Directors to refuse transfer

Where the articles do not contain any clause, allowing the directors to reject the transfer, the shareholder may freely transfer his share and can compel the directors for registering of shares. On the other hand, if the articles contain a clause empowering the directors to reject the transfer, the directors can reject such transfer but subject to the following conditions :

(a) Power must be exercised by the directors in the interest of the company as a whole and not in the interest of a section of shareholders.

(b) For rejection, the conditions given in the articles must be followed.

(c) Refusal must be exercised within a reasonable time.

(d) Refusal must be exercised by the board and not by one of the directors.

(e) The court cannot compel the directors to supply the reasons of rejection but if supplied can examine and if inadequate can reject the order of the directors.

The following are the grounds on which the board may refuse registration of transfer :

(a) If partly paid up shares are being transferred and transferee is known to be financially incapable of paying balance calls.

(b) Where partly paid up shares are being transferred to a minor incapable of entering into a contract.

(c) When the transferor is a debtor of the company and the company has lien on such shares.

(d) When the transferor has not paid the due call money.

(e) Where the instrument of transfer is incomplete, irregular and defective and not properly stamped.

(f) On any other reasons which are just and equitable and are in the general interest of the company.

Grounds on which the company may refuse to register transfer in the case of the listed companies

The Companies Act does not specify the grounds on which the board of directors may refuse to register a transfer of shares. But after the insertion of Section 22-A in the Securities Contract (Regulation) Act, 1956, the Board of Directors of a company, the shares of which are listed on a stock exchange, can refuse to register a transfer on only one or more of the four grounds provided for in Section 22-A (3).

Thus in the case of listed securities, the absolute powers with the directors to refuse registration of transfer are no longer available. There are now only four grounds (and no other) on which transfer can be refused in the case of listed shares. The four grounds under Sec. 22-A (3) are :

(a) Where there are defects or deficiencies in the transfer deed, i.e., instrument of transfer is not proper or the certificate relating to the securities has not been delivered to the company or that any other requirement under the law relating to registration of such transfer has not been complied with. This is a technical ground on which

transfer of shares can be refused.

(b) The transfer of shares is likely to result in such a change in the composition of the Board of Directors as would be prejudicial to the interests of the company or to the public interest.

(c) The transfer of shares is in contravention of any law.

(d) The transfer of shares is prohibited by any court, tribunal or other authority under any law for the time being in force.

Certification of transfer

Where a person purchases a number of shares, only one certificate of shares is issued in respect of the whole lot of shares so that when he desires to transfer a part of his shares, he is required to produce before the company his certificate of shares along with the instrument of transfer for the purpose of certification. The company then endorses on the instrument of the transfer the fact of the certificate having been lodged with the company. The company will cancel the old certificate and prepare two new share certificates to be delivered to the transferor and the transferee. This is known as the certification of transfer and is provided for in Section 112 of the Companies Act.

The certification of shares amounts to a representation by the company that the document which evidences the title to the transferor has been produced to the company. It gives neither warranty of the transferor's title nor any guarantee on the part of the company.

Forged Transfer

A forged document never has any legal effect. If a forged transfer is lodged with the company for registration, the position of the parties affected is as follows :

(i) If the true owner has been removed from the register, he can compel the company to replace him.

(ii) If the company has issued a new certificate to the so called transferee, it can not deny his title to the shares, the certificate stops it (the company) from doing so.

(iii) The person lodging the transfer must indemnify the company against loss by forgery.

Companies normally notify the transferor of the transfer so that he can object if he wishes. The transferor is, however, under no legal obligation to reply and therefore no estoppel can be raised against the owner on his failure to reply.

Blank Transfer

A blank transfer is an instrument of transfer signed by the transferor in which the name of the transferee is not filled.

Since the name of the transferee is not filled, the shares in such cases may further be transferred merely by delivering the blank instrument of transfer. Thus, stamp duty and registration fee is saved. Only the last transferee has to bear these expenses. The results are :

(i) this helps in avoiding or reducing liability of tax thereon; and

(ii) these may act as clear security for creditors.

But blank transfer does not confer the ownership of shares on the transferee. If he wants to retain the shares, he can fill in his name and date in the transfer deed and get himself registered as shareholder. Until such registration, the original transferor continues to be the owner and remains liable for any amount remaining unpaid on the shares. Morally, he is a trustee for the dividends declared and received. But it does not confer

any right on the transferee to prefer any claim against the company in the event of the transferor's failure to pay him the dividends etc.

A blank transfer, however, can remain in circulation only for 12 months after its signing by the prescribed authority or up to the time of closure of the register of members by the company, whichever is later. This provision has been made to curb the abuse of this system.

B. Transmission of shares

When a registered shareholder dies or becomes bankrupt his share are transmitted to his legal representative or the Official Assignee or Receiver, This is called transmission of shares. It takes place when a registered shareholder (a) dies or (b) becomes bankrupt.

Transmission of death : When a registered shareholder dies, his shares vest in his legal representative. If they wish, they may ask the company to register them as the holder of these shares and for this purpose no instrument of transfer is required and the company is bound to accept the probate of will or letters of administration as sufficient evidence of the title to those shares. When they are registered as the holder of these shares and their names are put on the company's register of members, they become personally liable on the shares. Thus if the shares are not fully paid, they will be liable to pay the unpaid value of the shares.

However, if the legal representatives do not wish to be registered as the holder of the shares, they may transfer them without being so registered. Section 109 enables the legal representative to transfer the shares even if he is not himself a member of the company. Thus the transfer of shares of a deceased member made by his legal representative, although the legal representative does not get himself registered as the holder of

these shares, (i.e., the member of the company) is perfectly valid and the transferee acquires a good title to the shares.

Transmission on bankruptcy : If a registered shareholder is adjudged an insolvent, his shares vest in the Official Assignee or Receiver who may either get himself registered as the holder of the these shares or transfer them to another person. The Official Assignee or Receiver can also disclaim the shares if they contain liability. Usually the articles of the company contain provisions relating to the transmission of shares. Clauses 25 to 28 of Table A in Schedule I contain regulation governing the transmission of shares. If the transmission is not accepted by the company, the same remedies are available against the company as in the case of the refusal of a transfer of shares.

Distinction Between Transfer And Transmission of Shares

The following are the points of difference between transfer and transmission of shares :

(a) A transfer is a deliberate act of the holder, while transmission results by operation of law.

(b) A transfer requires an execution of an instrument of transfer, while transmission requires evidence showing the entitlement of the transferee.

(c) For the execution of transfer, stamp duty is payable, while no stamp duty is payable in case of transmission.

(d) The company charges for registering a transfer, while no charges are levied for registering a transmission.

(e) In case of transfer, the liability of the transferor ceases as soon as the transfer is complete, while in transmission, the shares continue to be subject to original liabilities.

SHARE WARRANT AND SHARE CERTIFICATE

A. Share Warrants

A public company limited by shares may issue share warrants under its common seal in the following circumstances :

(i) if it is authroised by its articles ;

(ii) shares are fully paid up ; and

(iii) previous approval of the Central Government is obtained.

A share warrant is a document which shows that the bearer of the warrant is entitled to the shares specified therein. It is a substitute for the share certificate. A shares warrant may have coupons attached to it to provide for the payment of future dividends on the shares specified in the warrant. A shares warrant shall entitle the bearer thereof to the shares specified therein. The shares may be transferred by delivery of the warrant.

On issue of a share warrant, the company shall strike out of its register the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member. The following particulars shall be entered in the register :

(i) the fact of the issue of the warrant ;

(ii) a statement of the shares specified in the warrant, distinguishing each share by its number ; and

(iii) the date of the issue of the warrant.

The bearer of a share warrant shall subject to the articles of the company be entitled to have his name entered as a member in the register of members on surrendering the warrant for cancellation and paying such fee to the company as the Board of Directors may from time to time determine.

The bearer of the share warrant may, if the articles of the company so provide, be deemed to be a member of the company.

B. Share Certificate

The holder of share or shares is issued a share certificate by the company. A certificate under the common seal of the company, signed by one or more of directors, specifying shares held by the member and the amount paid up on the shares shall be prima facie evidence of the title of the member to such share or shares.

Every company shall deliver the certificates to the allottee within three months from the date of allotment and to the transferee within two months of making of the application for the registration of the transfer of shares, debentures or debenture stock.

If default is made, the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs. 5,000/- for every day during which the default continues. The person may make an application to the court if default is not made good by the company within 10 days after the service of the notice. The court may order the company and any officer of the company to make good the default.

Objects and Advantages : Since a share certificate is prima facie evidence of title, a shareholder is able to show his title to the shares by producing his share certificate. Thus it is very easy for a shareholder to sell his shares in the market by producing a share certificate showing his title to these shares. Besides it would be very easy for a lender to lend money to the shareholder taking the possession of his share certificate by way of security.

Duplicate Certificate

Section 84(2) provides that a company may renew or issue a

duplicate certificate if it is proved to have been lost or destroyed or having been defaced, mutilated or torn; is surrendered to the company. The articles may provide other terms and conditions like requiring the allottee to give an indemnity bond (Clause 89 Table A).

If a company with the intent to defraud renews a certificate or issues a duplicate thereof, the company shall be punishable with fine which may extend to Rs. 10,000 and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs. 10000 or with both [Sec.84(3)].

The Central Government may prescribe rules regarding the issue or renewal of certificates and duplicates, fees, etc. (Sec. 84(4)). The rules so made override the provisions in the articles.

DIFFERENCE BETWEEN A SHARE CERTIFICATE AND A SHARE WARRANT

1. The holder of a share certificate is a registered member of the company whereas the bearer of a share warrant is not. The bearer of a share warrant can be a member only when the Articles so provide and only for the purposes defined in the Articles.
2. A share certificate may be issued in respect of partly or fully paid shares, whereas a share warrant can be issued only when shares are fully paid up.
3. Only public companies are authorised to issue share warrants but share certificates are issued by both public and private companies.
4. A share warrant is transferable by delivery only and no transfer deed and registration of transfer with the company is required. But a share certificate is transferred only in pursuance of a transfer deed along

with the delivery of the share certificate. The transfer of a share certificate must be registered with the company.

5. A share warrant is a negotiable instrument as it is transferable by delivery only. But a share certificate is not a negotiable instrument.

6. Stamp duty is payable for the transfer of a share certificate but no stamp duty is payable in the case of transfer of a share warrant.

7. The permission of the Central Government is not necessary for the issue of share certificates but share warrants can be issued only if allowed by the Articles and with the prior permission of the Central Government.

8. The holder of a share warrant does not qualify to become a director of the company (where qualification share are required for directorship). But the holder of a share certificate is so qualified.

9. The petition for the winding up of the company can be presented by the holders of share certificates only. Holders of shares warrants cannot do so.

10. Payment of dividend on a share warrant is made by way of coupons attached with it. But in the case of share certificates, the company issues dividend warrants to the holders by name.

SUMMARY

Allotment means and implies a division of the share capital into defined shares of a particular value or of different classes and assignment of such shares of different persons. An allotment is the acceptance of an offer in purchase relating to valid acceptance of an offer must be followed. The shares can be transferred by any person who is the holder of shares and whose name appears in the Register of Members or by

anyone with his authority. However, the legal representative of a deceased member can validly transfer the shares even if he is not the member. The transmission of shares takes place on the death or insolvency of the shareholder. Every person whose name is entered as a member in the register of members, is entitled to receive share certificate from the company. A share warrant is a document specifying certain shares and stating that the bearer of the document is entitled to the shares specified in it.

LESSON : 5

MEMBERSHIP OF COMPANIES; BORROWING POWERS

INTRODUCTION

A company is composed of certain persons who constitute it as a corporate body. However, the identity of the company is different from the persons composing it. The persons composing the company are the 'members' or 'shareholders' of the company. A member is a person who has signed company's memorandum of association. Any other person who agrees in writing to become a member and whose name is entered in company's register of members is also a member of the company [Section 41].

It is important to note here that the terms 'member' and 'shareholder' are used inter-changeably in the Companies Act. A shareholder means a person who holds the shares of the company. A part from a few exceptional cases, the terms member and shareholder are synonymous. In these exceptional cases, a person may be a member but not a shareholder, or he may be a shareholder but not a member. In the following cases, a person is a member, but not a shareholder:

(a) A person who signs company's memorandum of association, immediately becomes the member on registration of the memorandum before any shares are allotted to him.

(b) A person who transfers his shares, continues to be the member of the company until his name is replaced by the name of the transferee. But he is no more a shareholder.

(c) A person who has ceased to be a shareholder by reason of forfeiture, surrender or transfer of shares, may be held liable as member, for the payment of unpaid amount on shares in case of default by the present shareholder.

(d) A company limited by guarantee or an unlimited company having no share capital will have only members but no shareholders.

In the following cases, a person is a shareholder, but not a member:

1. A person having a share warrant is a shareholder but he is not a member [Section 115 (1)]. However, he may be treated as member for specific purpose if company's articles so provide.
2. A legal representative of a deceased shareholder is the shareholder even if his name is not entered in the register of members. He becomes a member only when his name is entered in the register.

Note: The Depositories Act, 1996 has further widened the definition of a member by inserting a new Sub-section 41 (3). This sub-section provides that every person holding equity share capital of the company and whose name is entered as beneficial owner in the record of the depository, shall be deemed to be a member of the company.

DIFFERENCE BETWEEN MEMBERS AND SHAREHOLDERS

The terms 'member' and 'shareholder' have been used interchangeably in the Companies Act. The word 'shareholder' is used in relation to a company having a share capital and there can be no membership except through the medium of shareholding. A holder of shares becomes a member only when his name is entered on the register of members. But the term 'member' is wider in scope and may be used in relation to all types of company. A person may become a member of a company without holding any shares. Companies limited by guarantee or unlimited companies having no share capital can have no shareholders but do have members.

The following are the points of distinction between members and shareholders :

1. A holder of a share warrant is a shareholder but not a member as his name is struck off the register of members immediately after the issue of such share warrant.

2. Every registered shareholder is a member but every registered member may not be a shareholder because the company may or may not have share capital.

3. The transferor or the deceased person is a member so long as his name is on the register of members whereas he cannot be termed as shareholder.

4. Similarly, a shareholder by transfer is not a member until his name is entered in the company's register of members.

5. A person who mispresents himself to be a member is estopped from denying his position subsequently. He is said to have become a member by estoppel.

6. A person may become a member by an order or decree of a court.

CAPACITY OF A MEMBER

We know that the capacity means the competency of a person to enter into a contract. A contract to purchase shares in a company is like any other contract. Therefore, the membership of a company is open to any person who is competent to enter into a valid contract. The Companies Act does not prescribe any qualifications for becoming a member of a company. However, only such a person who is competent to contract as per the Indian Contract Act, 1872 may become a member. This is, however, subject to the provisions of the memorandum and articles of the company. The articles may provide that certain persons cannot become members of the company. The membership rights of certain persons and organisations are discussed hereunder :

1. Minor

Under the English Law, a minor can be a member of the company because a contract with a minor is voidable and not void. But under the Indian Law, a minor being incompetent to contract can not become a member of a company because a contract with a minor is absolutely void here. A minor in India may apply for and receive an allotment of shares subject to a right to repudiate liability on them before or within a reasonable time after attaining full age.

In the case of *Palaniappa Mudliar v. Official Liquidator, Pasupathi Bank Ltd., A.I.R. (1942) Mad. 470.*, an application for shares in a company was made by a father as a guardian of his minor daughter. The company allotted the shares in the name of the daughter described as a minor. Subsequently, the company went into liquidation and the liquidator placed the father's name in the list of contributories. It was held that the transaction was void ab-initio and neither the minor nor her guardian could be placed on the list of contributories.

2. Company

Since a company is a legal person, it can become a member of another company, provided it is so authorised by its memorandum, by investing in the shares of that company.

3. Partnership Firm

Since a partnership firm has no legal personality, it cannot purchase shares in a company in its own name.

4. Person taking shares in fictitious names

A person who takes shares in the name of a fictitious person will be liable as a member in respect of those shares and his name shall be

entered in the register of members. Besides, such a person can be punished for impersonation under Section 68-A.

5. Hindu Undivided Family

It can have shares in the name of its karta.

6. Foreigners/Non-Residents

Foreigners can become members of companies registered in India but permission of the Reserve Bank of India under FERA, 1973 has to be obtained for this purpose. This right of the foreigner as a member will be suspended if he becomes an alien enemy.

7. Insolvent

An insolvent being incompetent to contract can not become a member of a company. But if a person is a member of a company and afterwards he is declared insolvent, he will be regarded as a member so long as his name appears in the register of members and he will be entitled to vote but the beneficial interest in the shares will be vested in the official assignee or receiver and any dividend on shares will be received by the assignee.

8. Pawnee

In case of a pledge, the ownership remains with the pawner and the possession with the pawnee. So the pawnee does not become the member of the company. The pawner continues to be the member and he can exercise the rights of a member.

MODES OF ACQUIRING MEMBERSHIP

A person may become a member in a company in any of the following ways :

1. Membership by Subscribing to Memorandum (Section 41)

All the subscribers to the memorandum are deemed to have agreed to become members of the company and on the registration of the company their names are automatically entered as members in the company's register of members. Thus, the signatories to the memorandum become members of the company simply by reason of their having signed the memorandum. Neither an application form nor allotment of shares is necessary for becoming a member in their case. A person who signs the memorandum enters into a contract with the company to take the number of shares written opposite his name and be cannot repudiate his contract on the ground of misrepresentation.

In the case of *Metal Constituents Co., (1902) 1.Ch. 707,* a subscriber agreed to take 350 shares. Then, he wanted to rescind the contract on the ground of misrepresentation on the part of the promoters. Held that the subscriber by signing the Memorandum becomes liable to other members in the company brought into existence by his own act. So he can not rescind the contract.

2. Membership by Qualification shares

Before a person can be appointed a director of a public company, he must take, or sign an undertaking to take and pay for the qualification shares. He thus becomes a member and is in the same position as a subscriber to the memorandum of the company is.

3. Membership by Application and Allotment

A person may become a member of a company by an application for shares subject to formal acceptance by the company. The ordinary law of contracts applies to the agreement to take shares in a company. An

application for shares may be absolute or conditional. If it is absolute, a simple allotment and notice thereof to the applicant will constitute the agreement. If it is conditional, the allotment must be made on the basis of the conditions specified. Where there is a conditional application for shares and an unconditional allotment, there is no contract constituted.

R agreed to take shares in a company provided he was appointed local manager of the company. Shares were allotted to him but he was not given the appointment. R refused to take the shares. It was held that R was not a member as his application was conditional and allotment was unconditional. [Roger's case (1868) L.R. 3Ch. 633].

4. Membership by Transfer

Where a transfer of share is made and the transfer is registered with the company, the transferee becomes entitled to be placed on the company's register of members in the place of the transferor in respect of the shares so transferred.

5. Membership by Transmission

On the death of a member his shares rest with his legal representative. The legal representative is entitled to be registered as the holder of the shares and to get his name entered as member in the register of members provided there is no provision in the articles of the company and for the purpose no instrument of transfer is required to be delivered by him to the company.

If a company unduly refuses to accept a transmission, the same remedies are available to the legal representative as in the case of transfer.

In the case of *Indian Chemical Products V. State of Orissa, AIR (1967) SC 253*, by devolution, the state of Orissa had become entitled

to the shares of the Maharajas. But the company refused to register the shares in the name of state's representative. It was held that the company was bound to register the shares in favour of the state's representative because it was a case of transmission. And the state became entitled to the shares due to the operation of law.

6. Membership by Estoppel

If a person holds himself out in writing or allows his name to be on the register of members, he is deemed to be a member of the company. Thus if a persons's name is improperly placed on the register of members, and he knows and assents to it, he cannot afterwards say that he is not a member. Estoppel is simply a rule of evidence which prevents a person from denying the legal implications of his conduct.

CESSATION OF MEMBERSHIP

A person may cease to be a member of a company :

(a) if he transfers his shares to another person.

(b) by the sale of his shares by the company in exercise of right of lien over his shares.

(c) by forfeiture of his shares;

(d) by a valid surrender of his shares.

(e) by the death of a member. The estate of the deceased remains liable until the shares are registered in the name of his legal representative.

(f) by his insolvency.

(g) by his rescission of contract to take shares on the ground of misrepresentation or fraud.

(h) by the winding-up of the company, of course he remains liable as a contributory.

(i) by redemption of redeemable preference shares.

(j) by issue of share warrants to him in exchange of fully paid shares.

DUTIES AND LIABILITIES OF MEMBERS Duties

It is the duty of a shareholder :

(a) as a subscriber of the memorandum, to take the share written opposite his name direct from the company and pay for them ;

(b) to take shares when they are duly allotted to him and pay for them according to the terms of issue of the shares ;

(c) to pay all valid calls as and when they are made;

(d) to abide by the decisions of the majority of members unless the majority acts vindictively, oppressively, mala fide or fraudulently;

(e) to contribute to the asset of the company when it goes into liquidation.

Liability

The liability of the members of a company depends upon the nature of the company.

Company limited by shares. In the case of a company limited by shares, the liability of a member of company is the amount, if any unpaid on his shares. If his shares are fully paid, his liability is nil for all purposes.

Company limited by guarantee. The liability of the members of a company limited by guarantee is limited to the amount they undertook to contribute to the assets of the company in the event of winding up.

*Company with unlimited liability***.** Every member of an unlimited company is liable in full for all debts contracted by the company during the period he was a member.

RIGHTS OF MEMBERS

When a person becomes a member of a company he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Act. The rights of a member can be classified under the following heads :

(A) Statutory Rights

Statutory rights are those which are given to the members by the statute, i.e. the Companies Act, 1956. No document of the company can take away or modify such rights. Such rights, for example, are :

1. Right to receive copies of the Balance Sheet and Profit and Loss Account of the company along with the auditor's report.
2. Right to obtain a copy of the contract for the appointment of managing directors/managers of the company.
3. Right to receive notice of the general meetings of the company.
4. Right to get the copies of the Memorandum and the Articles of the company on payment of the prescribed fees.
5. Right to inspect the register of members, and debentureholders and index registers, annual returns etc. and get copies thereof on payment of the prescribed fee.
6. Right to inspect the debenture trust deed and get copies thereof on payment of the prescribed fees.

7. Right to inspect the register of charges and get copies thereof on payment of the prescribed fees.

8. Right to receive a copy of the statutory report.

9. Right to apply to the Central Government to call the annual general meeting when default is made by the company in holding annual general meeting (AGM).

10. Right to attend the AGM.

11. Right to appoint a proxy to attend the AGM and vote in his place and right to inspect the proxy register.

12. Right to receive a share certificate in respect of his share holding and a certificate of stock within a prescribed time.

13. Right to transfer shares.

14. Right to receive dividend when declared by the company.

15. Preemptive right i.e. right to have the rights shares on any further issue of shares.

16. Right of participation in the appointment the directors who are to retire by rotation by taking part in the AGM.

17. Right of participation in appointing the auditors and fixing their remuneration.

18. Right to have a share in the surplus of assets, if any, on the winding up of the company.

19. Right of dissident shareholders to apply to the court to have any variation of their rights cancelled.

20. Right to have notice of any resolution requiring a special notice in the meeting.

21. Right to inspect the shareholders' minutes book and get copies thereof on payment of the prescribed fees.

(B) Documentary Rights

There rights are the rights given by the two basic documents
i.e. memorandum of association and articles of association. The company may also give certain rights to its members by expressly providing for them in the memorandum or the articles of the company.

(C) Legal Rights

These rights are given to members under general law. For example, a person who has taken shares of a company on the faith of a misleading prospectus can avoid the contract and claim damages under the general law.

REGISTER OF MEMBERS (SEC. 150)

It is the statutory obligation of every company to maintain a register of its members containing the following particulars :

(a) The name and address and the occupation, if any, of each member ;

(b) In the case of a company having share capital, the shares held by each member and the amount paid or agreed to be considered as paid on those shares;

(c) The date on which each person was entered in the register as a member;

(d) The date on which any person ceased to be a member.

(e) Where the company has converted any of its shares into stock and given notice of conversion to the Registrar, the register shall show the amount of the stock held by each of the members concerned instead of the shares so converted which were previously held by him.

If default is made in complying with these provisions, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

INDEX OF MEMBERS (SEC. 151)

Every company having more than fifty members must keep an index of members, unless the register is already in the form of an index. Any alteration in the register of members must be noted in the index within 14 days of alteration. The index must, in respect of each member, contain a sufficient indication to enable the entries relating to that member in the register to be readily found. The index must always be kept at the same place as the register of members.

Inspection : The register of members and the index must be open for inspection, except when closed under the provisions of the Act, by members and debenture-holders free and by other persons on payment of such sum as may be prescribed. The company is also bound to supply a copy of the register on demand on payment.

Closure of Register of Members : As per Sec. 154, a company may, after giving not less than seven days' previous notice by advertisement in a local daily, close the register of members, for a period not exceeding 45 days in a year, but not exceeding 30 days at any one time.

The closure of the register of members is necessary whenever any general meeting of the shareholders is to be held or interim dividend is to be declared or a call is made. During the period of closure, no transfer of shares can take place and therefore, the company may determine its membership and may send notices of general meetings and calls made and also the dividend warrants to is members.

ANNUAL RETURNS

Every company is required to file with the Registrar an annual return containing certain particulars relating to the company. The object of filing the annual return is to enable the Registrar to record the changes that have occurred in the constitution of the company during the years. The particulars to be stated in the annual return are different for the companies having a share capital, and for the companies having no share capital. The returns for these companies, are, therefore, discussed separately:

I) By Company having a Share Capital (Sec.159)

Every company having a share capital shall within 60 days from the day on which each of the annual general meetings is held, prepare and file with the Registrar a return containing the particulars specified in parts I and II of Schedule V, as they stood on that day regarding its :

1. Registered office.
2. Register of members.
3. Register of debenture-holders.
4. Shares and debentures.
5. Indebtedness.
6. Members and debenture-holders, past and present; and
7. Its directors, managing directors, managers and secretary, past and present.

8. Names and addresses of and number of equity shares held by each of the following, namely :

(a) Foreign holdings;

(b) Government-sponsored financial institutions;

(c) Bodies corporates (not covered under (a) and (b) above);

(d) Directors and their relatives, their shareholdings and directorships ;

II) By Company not having Share Capital (Sec. 160)

Every company not having a share capital shall within 60 days from the day on which each of the annual general meetings is held, prepare and file with the Registrar a return stating the following particulars as they stood on that day :

(a) Registered office.

(b) Name of members and respective dates on which they became members.

(c) Names of persons who ceased to be members since the date of the annual general meeting of the immediately preceding year, and the dates on which they so ceased.

(d) Particulars regarding its directors, managers and its secretary.

Other provisions regarding annual return (Sec.161)

The copy of the annual return filed with the Registrar under Section 159 or 160 shall be signed both by a director and by the manager or secretary of the company. Where there is no manager or secretary, it shall be signed by two directors of the company, one of whom shall be the managing director, where there is one. The annual return is also required to

be signed by a secretary in whole time practice, in the case of a company whose shares are listed on a recognised stock exchange.

Penalty: In case of non compliance with any of the provisions contained in Sections 159, 160 or 161 the company and every officer who is in default shall be punishable with fine upto Rs. 50 for every day during which the default continues. (Section 162).

BORROWING POWERS

Capital is necessary for the establishment and development of a business and borrowing is one of the most important source of the capital, but unfortunately there is no express provision in the Companies Act as to the borrowing powers of the company. Every trading company, unless prohibited by its memorandum or articles, has an implied power to borrow money for the purpose of its business, and to give security for the loan by creating a mortgage or charge on its property even though such power is not expressed in the memorandum of the company. On the other hand, a non-trading company has no implied power to borrow money and, therefore, it cannot borrow unless such power is expressly provided in the memorandum. If the memorandum does not contain such a power, the memorandum have to be amended before the company can exercise its borrowing powers. Again a public company having a share capital cannot exercise the borrowing powers unless a certificate of commencement of business has been obtained by it (Section 149).

In General Auction Estate and Monetary Co. v. Smith (1891) 3ch. 432 case the company had among its objects the sale and purchase of estates and property, loans on deposits of securities and discounting of bills. The Memorandum of the company did not expressly give it anypower

to borrow money. The company borrowed money from one of the directors on the security of some of its estates to pay off some depositors and creditors. The company was wound up within six months. The liquidator wanted to set aside the security as it was beyond the powers of the company. Held, being a trading company, it had an implied power to borrow money for its business and to give security to the person making the advance (loan). Where a company has express or implied power to borrow it can raise, borrow or secure the payment of any sum of money for the purposes of business subject to the limits set by its Memorandum or Articles.

The Board's Powers

The borrowing power is exercised by the board of directors subject to the provisions in the memorandum and articles of the company. The memorandum or articles generally specify the maximum limit of borrowing power allowed to the Board of Directors and may impose restrictions upon the exercise of such power. Section 293(1)(d) also limits the directors' power to borrow. It provides that the Board of Directors of a public company or of a private company which is a subsidiary of a public company, shall not except with the consent of such public company or its subsidiary in a general meeting borrow moneys, where the moneys to be borrowed together with the moneys already borrowed by the company (apart from the temporary loans obtained from the company's bankers in the ordinary course of business) will exceed the aggregate of paid-up capital of the company and its free reserves (that is to say, reserves not set apart for any specific purpose). Thus, the power of directors to borrow is subject to two main limitation :

1. Statutory limitations and
2. Limitations enumerated in the memorandum and articles.

ULTRAVIRES BORROWINGS

Ultra vires borrowings mean borrowings which are beyond the powers of the company or the directors. Borrowing by a company may be :

1. Ultra vires of the company, or
2. Intra vires of the company but ultra vires of the directors.

1. Borrowing which is ultra vires of the company

Where a company borrows money in excess of its powers, the borrowing would be ultra vires the company. In such a case, the contract is void and the lender cannot sue the company for the return of the loan. The securities given for such ultra vires borrowings are also void and inoperative, and no ratification can render the debt valid.

In the case of *Introduction Ltd. v. National Provincial Bank Ltd. (1970) Ch. 199,* a company was formed with the main object of providing information and facilities to the overseas visitors to the Festival of Britain in 1950. The company later engaged in pig breeding as its sole activity. For this purpose, it borrowed money from a bank which took debentures as a security. The bank was given a copy of the Memorandum and it knew that the only business being carried on by the company was pig breeding. Held, the loan was for a purpose known to be ultra vires and therefore, the debentures were sold.

The lender has, however, the following remedies :

(a) Injunction

If the money lent to the company has not been spent, the lender can get an injunction to prevent the company from parting with it.

(b) Subrogation

If the money borrowed has been used by company in paying off its lawful debts, the lender will rank as a creditor upto the amount so used, and can recover it from the company. He can sue the company by virtue of principle of subrogation. But the lender will have no priority over other creditors even though the debts paid off had priority.

Example : A company had exhausted its borrowing powers by issuing three different series of debentures A, B and C. A had priority over B and B had priority over C. The company took a loan from the plaintiff to pay interest on A debentures. The borrowing by the company was ultra vires. It was held that plaintiff was a legal creditor of the company to the extent his loan was used to pay-off legal debts, but he was not entitled to the priority of A debentures. (Re Wrexham Mold C. Ltd. (1899) 1 Ch. 440).

(c) Tracing

If the lender is in a position to trace the property purchased with his money, he can get a tracing order from the court and follow the property. If traced, the company will be deemed as a trustee for theproperty on behalf of the lender.

In the case of *Sinclair v. Broughham, (1914) A.c. 398,* the Memorandum of a building society empowered it to borrow or to lend on the security of land. But the building society also developed a large banking business which was ultravires of the society. The company was wound up and the company's assets were composed partly of the shareholder's money (i.e. the money of the members of the society) and partly of the depositors money (i.e. the money of the ultravires lenders). The company had to pay the outside creditors, the shareholders of the society (i.e. members) and the depositors of money. The outside creditors were paid in-full with the

consent of the shareholders and the depositors. The remaining assets were not capable of being identified; nor were they sufficient to pay both the shareholders and the depositors in full. Held the remainder of the assets should be apportioned between the shareholders and the ultravires depositors in proportion to the amount paid by them.

(d) Recovery of damages

The ultra vires lender has a right to sue the directors for the breach of warranty of authority and recover the damages. e.g. if the directors knowingly misrepresent their authority, the lender can claim the money back fromthem.

Example : Under the authority of an investment trust company, its managing director borrowed large sums of money. He utilised large sums of such borrowed money for the purpose of gambling in shares differences and also misappropriated some money. It was held that the company was liable. [V.K.R.S.T. Firm v. Oriental Investment Trust Ltd. AIR 1944 Mad 532]

2. Borrowing intra vires of the company but ultra vires of the directors

In this case, the borrowings is within the powers of the company but restrictions have been placed on the authority of the directors to borrow. Borrowing ultra vires the directors, but within the power conferred by the memorandum, is voidable only and may be ratified by the company. If the borrowing is ratified, the company becomes liable to repay the money. Whereas such borrowing is not ratified by the company, the remedies available to lender are :

(i) Doctrine of indoor management. By relying on the rule of indoor management he can recover the amount of loan from the company provided the borrowing was due to non-compliance with some internal regulations of the company.

(ii) No notice for unauthorised business. A lender is deemed to have notice of the limitations imposed by the memorandum and articles on the borrowing powers of the directors. A company can avoid the liability on the ground that borrowing was known or deemed to be known to be ultra vires. But if restrictions on the director's authority are secret or not obvious from these documents, or otherwise the lender does not know of it from some other source, the company will be bound.

Further, the company shall not be liable for the unauthorised borrowings of its directors if it can establish that the borrowing was neither necessary not 'bonafide' or for the benefit of the company but if a loan has not been taken in the name of the company it will not be liable even if it has received some benefit.

In Equity Insurance Co. Ltd v. Dinshaw & Co., AIR 1940 outh 202 case, it was held- "Where the managing agent of a company who is not authorised to borrow has borrowed money which is not necessary, neither bonafide, nor for the benefit of the company, the company is not liable for the amount borrowed.".

But if a loan has not been obtained in the name of the company, it will not be liable even though such amount has been used for the benefit of the company.

CHARGES SECURINGDEBENTURES

A company can issue debentures either secured or unsecured by a charge on its property. Such charge may :

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

Fixed charge

A fixed charge or specific charge is one which is created on some ascertained and definite property of the company such as building or machinery, etc.

The effect of such a charge is that the company cannot deal with such property freely, i.e. it cannot sell without the consent of the holder. Again in the winding up of the company, the holder of a debenture secured by a fixed charge ranks as a secured creditor in respect of debt due to him on the debenture.

Floating charge

When a charge is created on property which is not fixed but changing or unstable, it is known as floating charge. For example, where a debenture is secured by creating a charge on stock-in-trade, the charge will be valid as a floating charge.

Lord Macnaghten remarks, "A floating charge is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying conditions in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. [*Government Stock Investment Co. Ltd. v. Manila Rly Company Ltd.(1897) A.C.]*

The chief characteristics of a floating charge have been summed up by Justice Romer in Re *Uorkshire Woolcomber's Association Lt.* His Lordship said that mortgage or charge will be treated as a floating charge, if :

1. It is a charge upon a class of assets both present and future.

2. The class of assets upon which the charge has been created must be one which in the ordinary course of the business of the company would be changing from time to time, and

3. It has been contemplated by the charge that until some step is taken by the mortgagee, the company can use the assets comprised in the charge in the ordinary course of business.

Crystallisation of a Floating Charge

Crystallisation is the conversion of a floating charge into a fixed charge on the assets in the class charged at the moment of crystallisation A floating charge crystallises and becomes fixed in the circumstances given below :

1. When the company goes into liquidation, or

2. When the company ceases to carry on business, or

3. When the debenture-holders take steps to enforce their security, e.g. by appointing a receiver.

Effects

In the case of floating charge

1. The company has a free hand to deal with the property charged in the ordinary course of business in any way authorised by its memorandum or articles so long as the company remains a going concern or so long as the charge does not become a fixed charge.

2. Unless otherwise agreed, a floating charge leaves the company at liberty to create a specific mortgage on the property subject to the floating charge ranking in priority in such floating charge.

3. The company can sell the whole of its undertaking if that is one of its objects specified in the memorandum, in spite of a floating charge on the undertaking.

Invalidity of Floating Charge

A floating charge created within 12 months of the commencement of the winding up of a company will be invalid unless it is proved that the company immediately after the creation of the charge was solvent. Even a charge created within twelve months of the commencement of the winding up of the company is valid to the extent of the cash paid or to be paid to the company in consideration for such charge, together with interest on that amount at the rate of 5% per annum or such other rate as may for the time being be notified by the Central Government in this behalf in the official Gazette (Sec. 534).

CHARGES REQUIRING REGISTRATION

All charges are not required to be registered. Only nine types of charges need compulsory registration under Section 125 with the Registrar of Companies within 30 days of their creation. They are :

1. A charge for the purpose of securing any issue of debentures
2. A charge on uncalled share capital of the company
3. A charge on any immovable property
4. A charge on any book debts of the company
5. A charge not being a pledge on any movable property of the company
6. A floating charge on the undertaking or any property of the company including stock in trade.

7. A charge on calls made but not paid

8. A charge on a ship or any share in a ship

9. A charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright

It is the duty of the company to send the above particulars to the Registrar within 30 days of charge or extended period which cannot be more than seven days, but registration may also be effected on the application of the creditor. The creditor may in such a case recover the registration fee from the company (Sec.134).

CONSEQUENCES OF NON-REGISTRATION OF CHARGES

If any charge which is required to be registered under Sec. 125 is not registered, the consequences will be as follows :

1. The charge becomes void as against the liquidators (if the company goes into liquidation) and against the creditors.

2. The charge is good against the company and may be enforced until the company goes into liquidation.

3. Money secured by the charge becomes immediately payable.

4. A subsequent registered charge will have priority over a prior unregistered charge even if the subsequent creditor has notice of the prior mortgage or charge.

5. The holder of an equitable charge whose charge is void for non-registration, has no lien on the title deeds or documents deposited with him as they are only ancillary to the void charge.

6. At the time of liquidation of the company, the creditor having an unregistered charge becomes an unsecured creditor of the company

as the charge is void against the liquidator and the creditors.

7. If default is made in filing the particulars of charges, the company and every officer of the company or any other person who is in default shall be punishable with fine which may extend to Rs. 500 for every day during which the default continues. A further fine of upto Rs. 1000 may be imposed on the company and every officer of the company for other defaults relating to the registration of charges (Sec. 142).

The Company's Register of Charges (Sec. 143)

Every company has to keep at its registered office a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case :

(a) a short description of the property charged ;

(b) the amount of charge ; and

(c) the names of the persons entitled to charge.

If any officer of the company knowingly omits or wilfully authorises or permits the omission of any of the above entries, he shall be punishable with fine which may extend to Rs. 500.

Further, under Sec. 136, every company must keep at its registered office a copy of every instrument creating any charge requiring registration. But in the case of a series of uniform debentures , a copy of only one debenture of the series is sufficient. The register of charges and the documents must be open for inspection by any person.

Register of Charges to be kept by the Registrar (Sec. 130)

The Registrar must also keep, with respect to each company, a register of all the charges requiring registration. He must, on payment of the prescribed fee, enter in the register, with respect to every charge, the following particulars :

(a) the date of the creation of the charge (if the charge is a charge created by the company), or the date of the acquisition of the property (if the charge was a charge existing on property acquired by the company);

(b) the amount secured by the charge ;

(c) short particulars of the property charged ; and

(d) the persons entitled to the charge

SUMMARY

There are two important elements which must be present to make one a member of a company (a) these must be an agreement to become a member and (b) the name must be entered in the register of member of the company. Companies Act does not prescribe any qualifications for the members of a company but as regards the competency of a member, the provisions of the Indian Contract Act shall apply. There are different modes of acquiring membership- Companies Act confers a number of rights on the members of a company. The liability of the members of the company depends upon the nature of company. Every company is bound to keep the register of its members. But when the number of company's members is more than fifty, it must also keep an index of the names of its member.

Every trading company, unless prohibited by its memorandum or articles, has an implied power to borrow money for the purpose of its business, and to give security for the loan by creating a mortgage or charge

on its property even though such power is not expressed in the memorandum of the company, whom borrowings are beyond the powers of the company or the directors, it is ultra vires borrowings. In case of borrowing which is ultra vires of the company, the lender has no right for the recovery of his loan, yet he has the right of injunction, subrogation, identification and tracing, and recovery of damages against the company. The charges which a company may create on its assets are of two kinds namely fixed charge and floating charge. The effect of non-registration of a charge is that the security created by the charge becomes void as against the liquidator and other creditors.

LESSON : 6

MEETINGS; MANAGERIAL REMUNERATION

INTRODUCTION

The company is an artificial person created by law having a separate entity distinct from its members. Being an artificial person, it cannot take decisions on its own. It has to take decisions on matters relating to its well being by way of resolutions passed at properly constituted and convened meetings of its shareholders or directors. The decisions about a company's management are taken by the directors in their meetings and they are to be ratified in the general meetings of the company by the shareholders.

There in an old proverb that "Two heads are always better than one". When two or more than two persons come together to discuss matters of common interest, there is said to be a meeting. It follows that to constitute a meeting there must be two or more persons. Generally, the purpose of a meeting is to consider issues of common interests to its attendants.

KINDS OFMEETINGS

The meetings of a company are of three kinds :

1. Meetings of the shareholders

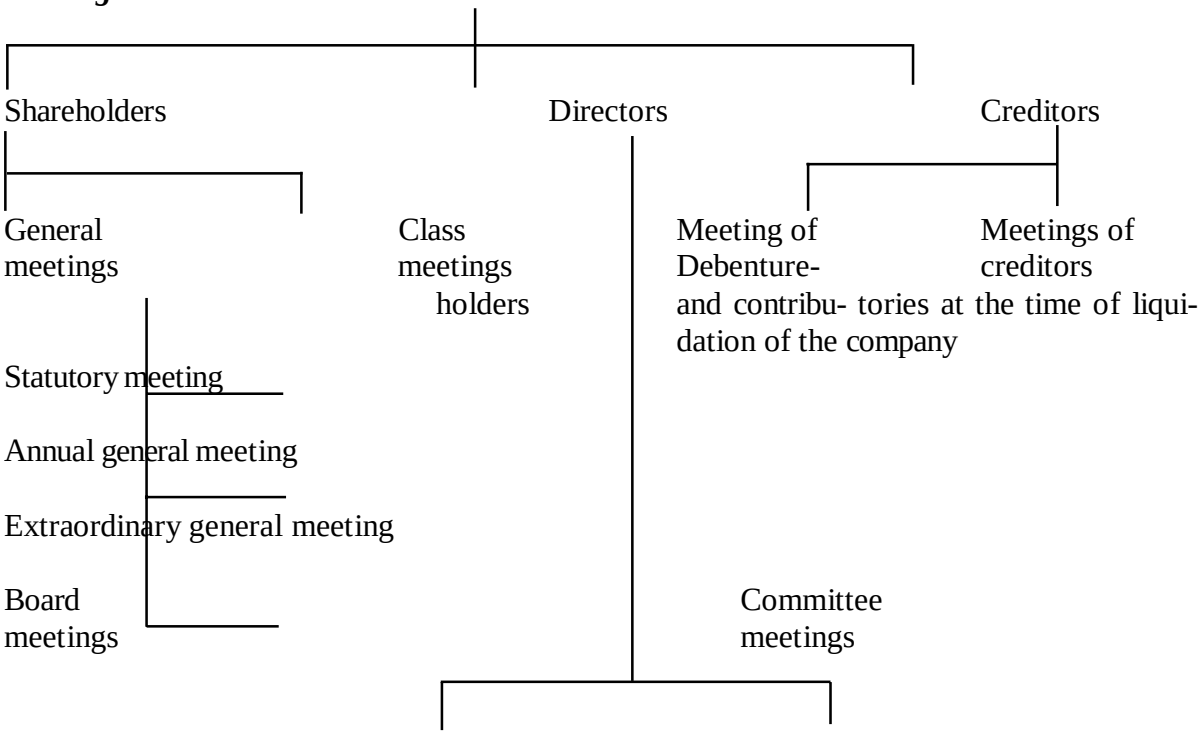
(i) General meetings

(ii) Class meetings

2. Meetings of the Directors

3. Meetings of the Creditors

Meetings



In this lesson, the discussion will be confined to the meetings of the shareholders.

STATUTORYMEETING

Every public company limited by shares and every company limited by guarantee and having a share capital, shall, within a period of not less than one month nor more than six months from the date on which the company is entitled to commence business hold a general meeting of the members of the company. This meeting is called 'the statutory meeting'. [Sec. 165 (1)]

A meeting held prior to the statutory period of one month from the date of entitlement of a company to commence business can not be called the statutory meeting. The notice for such a meeting should state it

to be statutory. The statutory meeting is held only once in the life time of a company.

Private companies, public companies limited by guarantee and not having a share capital and unlimited companies are not required to hold the statutory meeting. However, a private company which becomes a public company by the application of Sec. 43 will have to comply with the provisions of the Act which are applicable to public limited companies from the date of its becoming a public limited company. A private company can commence business on the date of its incorporation. If the date of its becoming a public company is within 6 months of its incorporation, it must hold a statutory meeting in accordance with the provision of Section 165 (1). If it becomes a public company after 6 months of its incorporation, it is not required to hold the statutory meeting.

Notice

The company must give notice to its members 21 days before the holding of the statutory meeting. The notice convening the statutory meeting must specifically state that the meeting is the statutory meeting. The time, date and place of the meeting must be mentioned in the notice. However, a shorter notice may be sufficient if consent is accorded by the members of the company :

(a) If the company has a share capital, holding not less than 95% of such part of the paid up share capital of the company as gives a right to vote at the meeting.

(b) If the company has no share capital, holding not less than 95% of the total voting power exercisable at the meeting.

Statutory Report

The Board of Directors is required to prepare a report which is known as the 'statutory report" and must send this report to the members at least 21 days before the day on which the meeting is to be held [Section 165(2)]. If the report is sent later than is required, it will be deemed to have been duly forwarded if it is so agreed to by all the members entitled to attend and vote at the meeting. Thus the delay in sending the report can be condoned by unanimous consent of all the members present at the meeting. The statutory report is required to be certified as correct by at least two directors of the company, one of whom must be a Managing Director, if there is any. Thereafter the auditor must certify the report to be correct in so far as it relates to the shares allotted by the company, the cash received in respect of such shares and the receipts and payments of the company [Section 165(4)]. A copy of the report must be sent to the Registrar also [Section 165(5)].

Contents of Statutory Report

The statutory report shall set out :

(a) The total number of shares allotted, distinguishing those allotted as fully or partly paid-up otherwise than in cash, the extent to which they are partly paid up and the consideration for which they have been allotted.

(b) The total amount of cash received by the company in respect of all the shares allotted.

(c) An abstract of the receipts and payments made thereout up to a date within 7 days of the date of the report.

(d) The name, address and occupations of the directors of the company and of its auditors and also if there be any, of its manager and secretary.

(e) The particulars of any contract which , or the modification or the proposed modification of which is to be submitted to the meeting for its approval.

(f) The extent to which each underwriting contract (if any) has not been carried out and the reason therefor.

(g) The arrears due on cash from every director and from the manager.

(h) Particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director.

Procedure at the meeting

A list showing the names, addresses and occupation of the members of the company and the number of shares held by them must be produced by the Board of Directors at the commencement of the statutory meeting. The list is to remain open and accessible to any member of the company during the continuance of the meeting [Section 165 (6)].

It is to be noted that the members of the company present at the meeting are at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not but one resolution may be passed of which notice has not been given in accordance with the provisions of Companies Act. [Sec. 165 (7)]

Adjournment of Statutory Meeting

The meeting may adjourn from time to time and at any adjourned meeting any resolution of which notice has been given in accordance with the provisions of the Companies Act may be passed and the adjourned meeting will have the same power as an original meeting. [Sec. 165(8)]

Penalty

If any default is made in complying with the above provisions, every director or other officer of the company who is in default shall be liable to a fine which may extend to Rs. 500. Besides, if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting, the Court may order the compulsory winding up of the company. [Sec. 433 (b)]

Objects

The obvious purpose of the statutory meeting with its preliminary report is to put the shareholders of the company as early as possible in possession of all the important facts relating to the new company what shares have been taken up, what moneys received, what contracts entered into, what sums spent on preliminary expenses, etc. Furnished with these particulars the shareholders are to have an opportunity of meeting and discussing the whole situation in the management methods and prospects of the company. If the shareholders fails to do so, they have only themselves to blame.

ANNUAL GENERAL MEETING

Every company must in each year hold in addition to any other meeting a general meeting, as its annual general meeting and must specify the meeting as such in the notices calling it [Section 166 (1)]. The annual

general meeting is to be held in addition to any other general meeting that might have been held in a year. It appears that holding of an annual general meeting in every calender year is a statutory necessity. Calender year is to be calculated from Ist January to 31st December and not twelve months from the date of incorporation of the company.

First annual general meeting

A company must hold its first annual general meeting within a period of not more than 18 months from the date of its incorporation and if such general meeting is held within that period, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year [Section 166(1)]. For example a company is incorporated in October 1994. Its first annual general meeting is required to be held within 18 months from the incorporation, i.e. up to March 1996 and if such a meeting is held within this period, no other meeting will be necessary either for 1995 or 1996.

Subsequent annual general meeting

As already discussed a company is required to hold an annual general meeting in each year. Where a meeting called and held on a day in one year is adjourned to a date in the next year and held on that date, the meeting held on the latter date is not a different meeting and does not comply with the requirements of Section 166. However, the gap between one annual general meting and the next should not be more than fifteen months.

In the case of Shree Meenakshi Mills Company Limited v. Astt. Registrar of Joint Stock Companies Madurai AIR 1938 Mad. 640, the annual general meeting of a company called in December 1934 was adjourned and held in March 1935. The next annual general meeting was held in January,

1936, no other meting being held in 1935. The company was prosecuted for failure to call the annual general meeting in 1935. It was held that there should be one meeting per year and as many meetings as there are years.

The Registrar can, for any special reason, extend the time within which any annual general meeting is required to be held by a period not exceeding 3 months but the time for holding the first annual general meeting cannot be so extended. [Sec. 166(1)]

Power to convene an annual general meeting

The proper authority to convene an annual general meeting is the Board of Directors, and if the managing director, manager, secretary or other officer calls a meting without such authority, it will not be effectual unless the Board ratifies the act before the meeting is held.

Notice

A public company must give at least 21 days notice for convening any general meeting including annual general meeting. Annual general meeting may be called after giving a shorter notice than 21 days if it is so agreed by all the members entitled to vote in the meeting (Section 171). In calculating 21 days, the date on which the notice is served and the day of the meeting are excluded.

Date, time and place of holding the annual general meeting

Every annual general meeting shall be called at any time during the business hours, on a day that is not a public holiday. It shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated [Section 166(2)]. The Central Government may exempt any class of companies from the provisions of Sec. 166 subject to such conditions as it may impose.

(a) A public company or a private company which is a subsidiary of a public company, may by its Articles fix the time for its annual general meetings and may also by a resolution passed in preceding annual general meeting fix the time for its subsequent annual general meetings and

(b) A private company which is not a subsidiary of a public company may in like manner and also by a resolution agreed to by all the members thereof, fix the time as well as the place for its annual general meetings [Sec. 166(2)]

Adjournment

Where an annual general meeting is held but adjourned, the adjourned meeting is nothing but continuance of the earlier meeting and therefore if in the adjourned meeting the Balance Sheet and the Profit and Loss Account of the company are laid and adopted and thereafter sent to the Registrar, Section 220(I) is not violated.

Holding of annual general meeting where the annual accounts are not ready

According to Central Government instructions, in case the annual accounts are not ready for laying at the appropriate annual general meeting, the company must hold the annual general meeting within the time limit, transact all business other than the consideration of the accounts, announce when the accounts are expected to be ready for laying and pass a suitable resolution adjourning the said annual general meeting to a specific date or to a date to be specified later on. Thus the company cannot take the plea that the annual general meeting was not held because the accounts were not ready.

Power of Central Government to call annual general meeting

The Central Government may, on the application of any member of the company, call or direct the calling of a general meeting of the company. However, it is to be noted that the Court has no power to call such meeting. A general meeting held in pursuance of this order will be deemed to be an annual general meeting of the company.

The Central Government may direct that only one member of the company present in person or by proxy shall be deemed to constitute a meeting. [Section 167]

Penalty

If a default is made in holding an annual general meeting in accordance with the above provisions or in complying with the directions given by the Central Government, the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs. 5000 and in the case of a continuing default, with a further fine which may extend to Rs. 250 for every day after the first during which the default continues. (Section 168)

Importance

It is the annual general meeting at which the shareholders can exercise control over the affairs of the company. At this meeting some directors retire and come up for re-election and thereby the shareholders find an opportunity to refuse to re-elect a director of whose action and policy they disapprove. Appointment of auditors is also made at this meeting.

Annual accounts are presented at this meeting for the consideration of the shareholders and the shareholders can ask any question relating to the account. It is at this meeting that dividends are declared. At

this meeting the shareholders can discuss any other matters relating to the company's business.

EXTRAORDINARY GENERAL MEETING

Regulation 47 of the Table A provides that all general meetings other than annual general meetings shall be called extraordinary general meetings. An extraordinary general meeting is called to consider those transactions or business which cannot be postponed till the next annual general meeting. Hence, it is a meeting of a company which is held between two consecutive annual general meetings for transacting some urgent or special business. An extraordinary general meeting may be convened :

1. By the Board of Directors on its own or on the resolution of members; or
2. By the requisitionists themselves on the failure of the Board to call the meeting ; or
3. By the Central Government.

1 Extraordinary meeting convened by the Board of Directors

(A) On its own

Regulation 48(1) of Table A provides that the board may, whenever it thinks fit, call an extraordinary general meeting. An extraordinary general meeting may be convened by the Board of Directors if some business of special importance requires the approval of the members and which in the opinion of the Board of Directors can not be postponed till the next annual general meeting. The directors can call an extraordinary general meeting by passing a resolution in a properly convened board meeting or by a circular resolution. Regulation 48(2) of Table A

provides that "If at any time, they are not present within India, the number of directors capable of acting and forming a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner, as nearly as possible, as that in which such a meeting may be called by the Board".

(B) On the requisition of members

The directors are bound to call an extraordinary general meeting of the company if the requisition is made :

(i) in the case of a company having a share capital, by the holders of at least one-tenth paid up capital having the right to vote on the matter of requisition ; or

(ii) in the case of a company not having a share capital, by members representing not less than one-tenth of the total voting power in regard to the matter of requisition.

The Board of Directors is under a legal obligation to proceed within 21 days of the deposit of the requisition to call a meeting. The meeting shall be held within 45 days of such deposit of the requisition with the company [Sec. 169(6)]. On receipt of the requisition, the Board shall send out notices for the meeting giving not less that 21 days' time.

3. Extraordinary meeting covered by the Central Government

If due to any reason it is impracticable to call or conduct an extraordinary general meeting, the Central Government may, either on its own or on the application of any director or any member who would be entitled to vote, order a meeting to be called, held and conducted in such manner as the Central Government thinks fit and may give such directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.

Any meeting called, held and conducted in accordance with any such order of the Central Government will, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

The word 'impracticable' may be taken to mean impossible to hold a peaceful or useful meeting. It has been held that the word 'impracticable' should be taken to mean impractical from a reasonable point of view.

In Opera Photographic Ltd. Re; 1989 BCL [763 (1989)] case, there were only two directors and one of them who was holding 51% of the shares wanted to remove his fellow director. The Articles required the quorum of two. The fellow director did not attend the meeting to frustrate him. The Central Government ordered a meeting to be called with the presence of one as a sufficient quorum.

CLASS MEETINGS

Class meetings are the meetings of the shareholders and the creditors. Class meetings are held to pass resolutions which will bind only the members of the particular class concerned. According to regulation 3(1), if the rights attached to any class of shares are to be varied, it can be done with the consent of the holders of 3/4 of the issued shares of that class in a separate meeting of that class of holders. Similarly, under Sec. 394, where a scheme of arrangement or compromise is proposed, the meetings of several classes of shareholders and creditors are required to be held. Class meetings can only be attended by the members of that class. Whenever it is necessary to alter or change the rights or privileges of a class as provided by the Articles, a class meeting must be called.

REQUISITES OF A VALID MEETING

A meeting to be in order must fulfil certain requirements.

1. Proper Authority

The Board of Directors is the proper authority to convene a general meeting of a company and for this purpose the board should pass a resolution at a duly convened meeting of the board. However, if the board fails to call a general meeting of the company, the members or the Central Government or the Central Government may call such a meeting. Some defects in appointment or qualification of the directors present at the meeting of the board will not necessarily be fatal to the validity of the resolution passed at the meeting provided the board has acted bonafide.

2. Notice of Meetings (Sec. 171)

A proper notice of the meetings must be given to the members of the company. The notice must be given 21 days before the date of the meeting. The period of 21 days excludes the day of service of the notice and also the day on which the meeting is to be held.

The length of the notice may be waived :

(a) in the case of an annual general meeting by the consent of all members;

(b) in the case of any other meeting by the consent of the holders of not less than 95% of the paid-up share capital or the total voting power where the company has no share capital.

Notice to whom (Sec. 172)

The notice is required to be given to

(a) all the members of the company who are entitled to vote on the

matters which are proposed to be dealt with at the meeting ;

(b) all the persons who are entitled to a share in consequences of the death and insolvency of a member ;

(c) the auditor or auditors of the company. Deliberate omission to give notice of the meeting to members or to a single member will make the meeting invalid, but an accidental omission to give notice to or the non-receipt of notice by any member will not invalidate the proceedings at the meeting [Sec. 172 (3)].

Contents of Notice

Every notice of a meeting is required to specify the place and the day and hours of the meeting and must contain a statement of the business to be transacted at the meeting. If the time of holding meeting and other essential particulars are not specified in the notice, the meeting will be invalid and all resolutions passed at the meeting will be of no effect.

The notice of general meeting must contain a statement of the business to be transacted at the general meeting of the company. The business to be transacted at a meeting may be general business or special business.

Section 173 provides (a) in the case of an annual general meeting, all business to be transacted at the meeting will be deemed special except the business relating to the consideration of accounts, Balance Sheet and reports of the Board of Directors and auditors, the declaration of dividends, the appointment of directors in the place of those retiring and the appointment of and the fixing of the remuneration of the auditors and

(b) in the case of any other meeting, all business will be deemed special.

If any special business is to be transacted at an annual general meeting a statement to that effect must be annexed to the notice of the

meeting. The statement must set out all material facts concerning each item of business including in particular the nature of the concern or interest therein of every director or other managerial personnel. Thus every notice calling a meeting is required to specify the business to be transacted at the meeting.

A notice of meeting must give a sufficiently full and frank disclosure to the members of the fact upon which they are asked to vote otherwise the resolution passed at the meeting will be invalid.

In Kaye v. Croydon Tramways Co., there was a provisional agreement between two companies for the sale of the undertaking of the one company to the other. Under the agreement the buying company agreed to pay, in addition to the sum payable to the selling company, certain amount to the directors of the selling company as compensation for the loss of office. The notice calling the meeting of the shareholders to consider the agreement for sale of the undertaking did not disclose that there was a provision in the agreement for the payment of compensation to the directors. The Court held that the notice could not make the full and fair disclosure of all the material facts to the considered and voted upon at the meeting and therefore the resolutions passed at the meting were invalid and ineffective.

3. Quorum

Quorum means the minimum number of members that must be present at the meeting. The quorum is generally fixed by the company's article. Unless the articles provide for a large number, five members personally present in the case of a public company (other than a public company which has become such by virtue of Section 43-A) and two members personally present in the case of any other company will be the

quorum for a meeting of the company. If within half an hour from the time appointed for holding a meeting of the company, a quorum is not present, the meeting will stand dissolved if it was called upon the requisition of members but in any other case it stands adjourned to the same day in the next week, at the same time and place or to such other day as the Board may determine. If at a adjourn meeting also the quorum is not present within half an hour from time appointed for holding the meeting the members present sufficient will be quorum [Section 174(5)].

Section 174 clearly indicate that the meeting must be attended by more than one member so as to constitute it as a meeting. But a few exceptions to this general rule may also be noted :

(a) Under Section 167, the Central Government may, on the application of any member of the company, call a general meeting of the company and may direct that even one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(b) Under Section 186, the Central Government may call a meeting of the company other than an annual general meeting and may give direction that even one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(c) In *East v. Bennet Bros. Ltd.*, one shareholder held all these preference shares in the company. A meeting of preference shareholders attended by him only was held to be a valid meeting.

4. Chairman of meeting

Before a meeting of a company can start its business, it is required to have a Chairman. It is the Chairman who is to preside at the meeting of the company. He is to conduct the meeting and to maintain the

order. It is the Chairman who is to put up the resolution, count the votes and declare the result. Usually the articles provide for the appointment of a Chairman but if there is no provision in the articles to this effect, the members present in the meeting shall elect one of themselves to be the Chairman of such meeting on a show of hands [Section 175(1)]. If a poll is demanded on the election of the Chairman, it shall be taken forthwith [Section 175(2)] and in such a case the Chairman elected on the show of hands will exercise all the powers of the Chairman. If some other person is elected Chairman as a result of the poll, he will be the Chairman for the rest of the meeting [Section 175(3)]. He can adjourn the meeting in the event of disorder but he should do so only as a last resort, if his attempts to restore order have failed.

A Chairman is not entitled to close the meeting prematurely and if he does so, a new Chairman may be elected and the meeting of the company may be continued. However, it is to be noted that where a meeting is called but it is not held due to pandemonium and confusion and a note to this effect is made in the minute book by the Chairman, the shareholders cannot elect a new Chairman because in such a case no meeting has actually been commenced and consequently no question of dissolving the meeting permanently by the Chairman arises.

Duties of the Chairman

(a) He must take care that the minority is not oppressed in any way.

(b) He must give the members who are present a reasonable opportunity to discuss any proposed resolution and it must be ensured that all the views are adequately aired. But at the expiry of a reasonable time, if he thinks fit, he should stop the discussion on any resolution.

(c) He must see that the meting is properly convened and constituted i.e. proper notice was given to every person entitled to attend the meeting and his own appointment is in order. It is the Chairman who is to see whether a quorum is present before proceeding with the business.

(d) The Chairman must conduct the proceedings in accordance with the provisions of the Act, the companies Articles of Association or Table A or in the absence thereof, the common law relating to themeetings.

(e) He should adjourn the meeting when it is impossible, by reason of disorder or other like cause, to conduct the meeting and complete its business. He must not use this power in a malafide manner.

(f) He must take care that the opinion of the meeting is properly ascertained with regard to the questions before it. He must do so by putting the resolution in a proper form before the members and then declaring the result.

(g) He must keep order in the meeting. He must decide all questions which arise at the meeting and which require decision at the time.

(h) He should exercise his casting vote, if any, provided by the articles for the benefit of the company.

(i) The minutes of the meeting should be properly recorded and signed by the chairman.

5. Minutes of the meeting :

Every company must keep a record of all proceedings of every general meeting and of all proceedings of every meeting of its Board of Directors and of every committee of the board.

These records are known as minutes and the books in which these records are written are called 'minute books'.

Rules of Keeping Minutes (Sec. 193-196)

(a) Within 30 days of every such meeting, entries of the proceedings must be made in the books kept for that purpose. [Sec. 193 (1-A)]

(b) Each page of minutes book which records proceedings of a board meeting must be initialled or signed by the Chairman of the same meeting or the next succeeding meeting. In the case of minutes of proceedings of a general meeting, each page of the minute book must be initialled or signed by the Chairman of the same meeting.

(c) The minutes of each meeting must contain a fair and correct summary of the proceedings at the meeting.

(d) All the appointments of officers made at any of the meetings aforesaid must be included in the minutes. In the case of a meeting of the Board of Directors or of a committee of the board, the minutes must contain the names of the directors present at the meeting and the names of the directors dissenting from or not concurring in the resolution passed at the meeting [Sec. 193 (4)].

(e) The Chairman may exclude from the minutes, matters which are defamatory of any person, irrelevant or immaterial to the proceedings or which are detrimental to the interests of the company. Minutes of meetings kept in accordance with the above provisions are evidence of the proceedings recorded therein.

(f) The minutes books must be kept (i) at the registered office of the company; and (ii) be open during business hours to the inspection of any member without charge subject to reasonable restrictions but at least two hours each day must be allowed for inspection.

Penalty

If default is made in complying with the provision of Section 193 in respect of any meeting, the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs. 50.

VOTING AND ROLL

A vote is the formal expression of the will of the members of the house either for or against a proposal. The matters proposed and duly recommended in a general meeting of the company are decided by the voting of the members of the company.

The procedure of voting is regulated by the Articles subject to the provisions of the Act. Members holding any share capital of the company have the right to vote on every motion placed before the company. However, the members holding preference shares can vote only on those motions which affect the rights attached to their capital. Share warrant holders, executors of a deceased member, receiver of an insolvent member can not exercise any voting right unless registered as members. The voting rights of an equity shareholder at a poll are in proportion to his share of the paid up equity capital.

Voting may take place in either of the following two ways :

1. Voting by a show of hands

At any general meeting, unless the Articles otherwise provide, a resolution put to the vote is in the first instance decided by a show of hands except when a poll is demanded [Sec. 177]. While voting by a show of hands, one member has one vote irrespective of the shares held by him. Proxies can not be counted unless the Articles otherwise provide. The

Chairman will count the hands raised and will declare the result accordingly. Chairman's declaration of the result of voting by the show of hands to be conclusive evidence [Sec. 178].

2. Voting by poll [Sec. 179]

If there is dissatisfaction among the members about the result of voting by the show of hands, they can demand a poll. 'Poll' means counting the number of votes cast for and against a motion. The voting rights of a member on a poll shall be in proportion to his share of the paid-up equity capital of the company. Before or on the declaration of the result of voting on any resolution by a show of hands, a poll may be ordered to be taken by the Chairman of the meeting of his own motion, and shall be ordered to be taken by him on a demand made in that behalf by the person or persons specified below :

(a) In the case of a public company having a share capital, by any member or members present in person or by proxy and holding shares in the company:

(i) which confer a power to vote on the resolution not being less than one tenth of the total voting power in respect of the resolution, or

(ii) on which an aggregate sum of not less than fifty thousand rupees has been paid-up,

(b) In the case of a private company having a share capital, by one member having the right to vote on the resolution and present in person or by proxy if not more than seven such members are personally present, and by two such members present in person or by proxy, if more than seven such members are personally present,

(c) In the case of any other company, by any member or members present in person or by proxy and having not less than one tenth of the total voting power in respect of the resolution [Sec. 179(1)].

The demand for a poll may be withdrawn at any time by the person or persons who made the demand. [Sec. 179(2)]. The provisions of Section 179 apply to a private company, which is not a subsidiary of a public company unless the articles provide otherwise.

A poll demanded on the question of adjournment or the election of the Chairman shall be taken forth with. A poll demanded on any other question shall be taken at such time not being later than forty eight hours from the time when the demand was made, as the Chairman may direct. Where a poll is taken, the meeting will be deemed to continue until the ascertainment of the result of the poll. Even a voter who was not present at the meeting when the poll was demanded to be taken, may vote personally in a poll held on the next day.

The Chairman of the meeting shall have the power to regulate the manner in which a poll shall be taken [Sec. 185(1)]. Where a poll is to be taken, the Chairman of the meeting shall appoint two scrutiniser to scrutinise the votes given on the poll and to report thereon to him [Sec. 184 (1)]. Of the two scrutiniser, one shall always be a member present at the meeting, provided such a member is available and willing to the appointed [Sec.184 (3)].

The Articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which calls or other sums presently payable by him have not been paid (Sec. 181).

Proxies

A meeting has right to vote either in person or by proxy. Any member of a company who is entitled to attend and vote at a meeting of the company can appoint another person (whether a member or not) as his proxy to attend and vote instead of himself but a proxy so appointed will have no right to speak at the meeting. Unless the articles otherwise provide, a proxy will not be allowed to vote except on a poll. A member of a private company, unless the articles provide otherwise is not entitled to appoint more than one proxy to attend on the same occasion. Besides unless the articles provide otherwise a member of a company not having a share capital is not entitled to appoint a proxy. The instrument appointing a proxy is required to be in writing and signed by the appointor or his attorney duly authorised in writing. A proxy is revocable but it should be revoked before the proxy has voted. If the member who has appointed a proxy personally attends and votes at the meeting, the proxy is revoked by such conduct of the member [Section 189]. Death of the member who has appointed a proxy revokes the authority of his proxy but if the company has no notice of such death, then the vote given by the proxy will be valid.

RESOLUTIONS

The decisions of a meeting take the form of resolutions carried by a majority of votes. A question on which a vote is proposed to be taken is called a 'motion'. Once a 'motion' has been put to the members and they have opted in favour of it, it becomes a resolution. A resolution may, thus, be defined as the formal decision of a meeting on a particular proposal before it.

Types of Resolutions

Resolutions are of the following types :

1. Ordinary Resolutions ;
2. Special Resolutions ; and
3. Resolutions requiring special notice.

Ordinary Resolution

At a general meeting of which notice has been given, if votes cast in favour of the resolution by members exceed the votes, if any, cast against the resolution by members, the resolution so passed is an ordinary resolution [Sec. 189(1)]

Unless the Companies Act or the memorandum or the articles expressly require a special resolution or resolution requiring special notice, an ordinary resolution is sufficient to carry out any matter.

Transactions where ordinary resolution is required

Important maters for which an ordinary resolution is enough are as follows :

(i) Issue of shares at a discount (Sec. 79)

(ii) Alteration of the share capital (Sec. 94)

(iii) Approval of the statutory report (Sec.165)

(iv) The consideration of accounts, the Balance Sheet and the report of the Board of Directors and of the auditors (Sec. 210)

(v) Appointment of auditors and fixation of their remuneration [Sec. 224(1)].

(vi) Appointment of the first directors who are to retire by rotation [Sec. 255(1)].

(vii) Increase or decrease in the number of directors within the limits prescribed by the Articles [Sec. 258].

(viii) Adoption of the appointment of sole selling agents [Sec. 294].

(ix) Removal of a director and appointment of another director in his place [Sec. 284(1)].

(x) Declaration of dividend [Sec. 205].

(xi) Appointment of liquidator in case of voluntary winding up and fixing his remuneration [Sec. 490(1)].

(xii) To rectify the name of company [Sec. 22].

(xiii) To cancel or redeem debentures [Sec. 21].

(xiv) To cancel directors by rotation [Sec. 256].

(xv) To approve the remuneration of directors [Sec. 309].

(xvi) To fill the vacancy in the office of Liquidator [Sec. 492].

Special Resolution

The resolution is a special resolution, if

(i) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting ;

(ii) the notice required has been duly given of the general meeting; and

(iii) the votes cast in favour of the resolution by members are three times the number of the votes, if any, cast against the resolution by the members [Sec. 189 (2)].

A copy of the special resolution must be filed with the Registrar within 30 days of its passing.

Special Resolution Matters

In addition to the matters given in the articles of the company, the Companies Act specifies certain matters for which a special resolution must be passed ; for example,

(i) to alter the memorandum of the company [Sec. 17];

(ii) to alter the articles of the company [Sec. 31];

(iii) to issue further shares without pre-emptive rights [Sec. 81];

(iv) for creation of a reserve capital [Sec. 99];

(v) to reduce the share capital [Sec. 100];

(vi) to pay interest out of the capital to members [Sec. 208],

(vii) for authorising a director to hold an office or place of profit [Sec. 314];

(viii) for voluntary winding-up of a company [Sec. 484].

Resolutions Requiring Special Notice

A resolution requiring special notice is not an independent class of resolutions. It is a kind of ordinary resolution, with the only difference that here the mover of the proposed resolution is required to give a special notice of 14 days to the company before moving the resolution, and the company shall then immediately give its members notice of the resolution in the same manner as it gives notice of the meeting. If that is not practicable, the company shall give not less than seven days notice before the meeting either by advertisement in a newspaper or in any other mode allowed by the articles (Sec. 190).

In addition to the purposes enumerated in the articles requiring special notice, under the Act, special notice has to be given for the following matters :

(a) for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor and for a resolution providing expressly that a retiring auditor shall not be re-appointed (Sec. 225).

(b) for certain persons who shall not be eligible for appointment as directors whose period of office is liable to determination by retirement of directors by rotation (Sec. 261).

(c) for removing a director before the expiry of his period of office; and

(d) of any resolution to appoint a director in place of a director so removed (Sec. 284).

MANAGERIAL REMUNERATION

Directors have no right to claim remuneration for their services unless there is a specific provision to that effect in the Articles or the company resolves for the same in a general meeting as per the provisions of Section 309. The resolution may be ordinary or special as the Articles may require.

As per Section 198, the total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company, to its directors and its managing agent, secretaries and treasurer or manager in respect of any financial year shall not exceed 11% of the net profit of that company for that financial year. This percentage shall be exclusive of the fees payable to the directors under Section 309.

If in any financial year, a company has no profits or its profits are inadequate, the company shall not pay any remuneration to its directors except with the previous approval of the Central Government. The word remuneration shall include the following :

(i) any expenditure incurred on providing free accommodation and other amenities connected therewith ;

(ii) any expenditure incurred on providing any other amenity either absolutely free or at a concessional rate ;

(iii) any expenditure incurred in providing any obligation or service which in the absence of provision by the company would have to be borne by that person ;

(iv) any expenditure incurred in providing life insurance, pension, annuity or gratuity to such person or his spouse or child.

According to Section 249, in computing the net profits of a company in any financial year for the purpose of Section 348, credit shall be given for bounties and subsidies received from any government, or any public authority constituted or authorised in this behalf, by anygovernment, unless and except in so far as the Central Government otherwise directs.

However credit shall not be given for the following sums :

(i) Profits, by way of premium, on the shares or debentures of the company, which are issued or sold by the company,

(ii) Profits on the sales by the company of the forfeited shares;

(iii) Profits of a capital nature including profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof ;

(iv) Profits from the sales of any immovable property or fixed assets of a capital nature comprising in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets.

In making the aforesaid computation, the following sums shall be deducted :

(i) all the usual working charges ;

(ii) director's remunerations ;

(iii) bonus or commission paid or payable to any employees of the company whether on a whole time or on a part time basis ;

(iv) any tax notified by the Central Government as being in the nature of a tax on excess or abnormal profits;

(v) any tax on business profits imposed for special reasons or in special circumstances;

(vi) interest on debentures issued by the company ;

(vii) interest on mortgages executed by the company and on loans and advances secured by a charge on its fixed or floating assets ;

(viii) interest on unsecured loans and advances ;

(ix) expenses on repairs to immovable or movable property provided the repairs are not of a capital nature ;

(x) contributions to charitable and other funds ;

(xi) depreciation to the extent specified in Section 350;

(xii) past losses arising after Ist April, 1956 to the extent not already deducted in any year preceding that in which net profits have to be ascertained ;

(xiii) any compensation or damages under a legal liability or arising from breach of contract ;

(xiv) any sum paid by way of insurance against the risk of meeting any liability as specified in clause (iii) above ; and

(xv) bad debts written off or adjusted during the year of account.

The following sums shall not be deducted in computing the profits :

(i) Income tax and super tax payable by the company or any other tax on the income of the company not falling under clauses (d) and (e) of Section 399 (4);

(ii) any compensation, damages or payments made voluntarily ;and

(iii) loss of a capital nature.

It is pertinent to note that according to Section 309, a whole time director or managing director may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company, or partly by one way and partly by the other. Except with the approval of the Central Government, such remuneration shall not exceed 5 per cent of the net profits for one such director, or 10 per cent for all of them in case there are more than one such director.

A part time director may be paid remuneration either by way of a monthly, quarterly, or annual payment with the approval of the Central Government, or by way of commission if the company by a special resolution authorises such payment with the approval of the Central Government, or by a special resolution authorises such payment.

The remuneration paid to part time directors shall not exceed per cent of the net profits of the company if the company has a managing or whole time director or a manager and 3 per cent of the profits in any other case. However, the company in a general meeting may, with the approval of the Central Government, increase these rates of remuneration.

SUMMARY

A meeting is a gathering or assembly of a number of persons for transacting any lawful business. But every gathering of persons does not constitute a meeting. A meeting would be valid if it is held by following the prescribed rules and regulations. The meetings of a company are of three kinds namely meetings of shareholders directors and creditors. Statutory meeting is the first meeting of the members of the company after its incorporations and must be held within six months from the date at which the company is entitled to start business. Annual general meeting is the regular meeting of the members of the company and the purpose of this meeting is to provide an opportunity to the members of the company express their views on the management of company's affairs. Any meeting other than the statutory and the annual general meeting of the company is known as extra-ordinary general meeting, class meeting is the meeting of a particular class of shareholders. The business of the meeting is conducted in the form of resolutions passed at the meeting and the resolutions proposed in the meeting are decided on the votes of the members of the company. The remuneration payable to directors is determined by the articles of association of the company, or by a resolution of the company passed in its general meeting. The overall maximum limit of management remuneration in fixed by Section 198 of the Companies Act.

LESSON : 7

WINDING UP OF A COMPANY

INTRODUCTION

Winding up (which is more commonly called liquidation in Scotland) is proceeding for the realisation of the assets, the payment of creditors, and the distribution of the surplus, if any, among the shareholders, so that the company may be finally dissolved. Professor Gover in his book *Principles of Modern Company Law* has described the winding up of a company in the following words :

''Winding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. An administrator called a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights.''

Thus winding up is the last stage in the life of a company. It means a proceeding by which a company is dissolved.

Winding up should not be taken as if it is dissolution of a company. The winding up of a company precedes its dissolution. Prior to dissolution and after winding up, the legal entity of the company remains and it can be sued in a Court of law. On dissolution the company ceases to exist, its name is actually struck off from the Register of Companies by the Registrar and the fact is published in the official Gazette.

MODES OF WINDING UP

A company can be wound up in three ways :

1. Compulsory winding up by the Court;
2. Voluntary winding up : (i) Members' voluntary winding up; (ii) Creditors' voluntary winding up;

3. Voluntary winding up subject to the supervision of the Court [Sec. 425].

WINDING UP BY THE COURT

A company may be wound up by an order of the Court. This is called compulsory winding up or winding up by the Court. Section 433 lays down the following grounds where a company may be wound up by the Court.

A petition for winding up may be presented to the Court on any of the grounds stated below :

1. Special resolution

A company may be wound up by the Court if it has, by a special resolution, resolved that it be wound up by the Court. But it is to be noted that the Court is not bound to order for winding up merely because the company by a special resolution has so resolved. Even in such a case it is the discretion of the Court to order for winding up or not.

2. Default in filing statutory report or holding statutory meeting

If a company has made a default in delivering the statutory report to the Registrar or in holding the statutory meeting, a petition for winding up of the company may be presented to the Court. A petition on this ground may be presented to the Court by a member or Registrar (with the previous sanction of the Central Government) or a creditor. The power of the Court is discretionary and generally it does not order for winding up in first instance. The Court may, instead of making an order for winding up, direct the company to file the statutory report or to hold the statutory meeting but if the company fails to comply with the order, the Court will wind up the company.

3. Failure to commence business within one year or suspension of business for a whole year

Where a company does not commence its business within one year from its incorporation or suspends its business for a whole year, a winding up petition may be presented to the Court. Even if the business is suspended for a whole year, this by itself does not entitle the petitioner to get the company wound up as a matter of right but the question whether the company should be wound up or not in such a circumstances entirely in the discretion of the Court depending upon the facts and circumstances of each case. Even if the work of all the units of the company has been suspended then too it will still be open to the Court to examine as to whether it will be possible for the company to continue its business. Before the order of winding up on this ground the Court is required to see what are the possibilities of resumption of the business of the company. The suspension of the business, for this purpose, must be the entire business of the company and not a part of it.

The Court will not order for winding up on the grounds, if :

(a) suspension of business is due to temporary causes ; and

(b) there are reasonable prospects for starting of business within a reasonable time.

4. Reduction of membership below the minimum

When the number of members is reduced, in the case of a public company, below 7 and in the case of a private company, below 2, a petition for winding up of the company may be presented to the Court.

5. Company's inability to pay its debts

A winding up petition may be presented if the company is unable

to pay its debt. 'Debt' means definite sum of money payable immediately or at future date. A company will be deemed to be unable to pay its loan in the following conditions (Section 434) :

(a) a creditor of more than Rs. 500 has served, on the company at its registered office, a demand under his hand requiring payment and the company has for three weeks thereafter neglected to pay or secure or compound the sum to the reasonable satisfaction of the creditor ; or

(b) execution or other process issued on a judgement or order in favour of a creditor of the company is returned unsatisfied in whole or in part ; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts, taking into account its contingent and prospective liabilities, i.e. whether its assets are sufficient to meet its liabilities.

6. Just and Equitable [Sec. 433(f)]

The Court may also order to wind up of a company if it is of opinion that it has just and equitable that the company should be wound up. What is 'just and equitable' depends on the facts of each case. The words 'just and equitable' are of wide connotation and it is entirely discretionary on the part of the Court to order winding up or not on this ground.

Thus the Court itself works out the principles on which the order for winding up under the section is to be made.

Winding up by the Court on 'just and equitable' grounds may be ordered in the cases given below :

(a) When the substratum of the company has gone : In the words of Shah, J. in *Seth Moham Lal v. Grain Chambers Ltd.* the "substratum of the

company is said to have disappeared when the object for which it was incorporated has substantially failed, or when it is impossible to carry on the business of the company except at a loss, or the existing and possible assets are insufficient to meet the existing liabilities.

The substratum of a company will be deemed to have gone when
(i) The object for which it was incorporated has substantially failed or has become impossible or (ii) it is impossible to carry on business except at a loss or (iii) the existing and possible assets are insufficient to meet the existing liabilities of the company.

(b) When there is oppression by the majority shareholders on the minority, or there is mismanagement.

(c) When the company is formed for fraudulent or illegal objects or when the business of the company becomes illegal.

(d) When there is a deadlock in the management of the company. When there is a complete deadlock in the management of the company, it will be wound up even if it is making good profits. In *Re Yenidjee Tobacco Co. Ltd.* A and B the only sharehodlers and directors of a private limited company became so hostile to each other that neither of them would speak to the other except through the secretary. Held, there was a complete deadlock and consequently the company be wound up.

(e) When the company is a 'bubble', i.e. it never had any real business.

PERSONS ENTITLED TO APPLY FOR WINDING UP

The Court does not choose to wind up a company at its own motion. It has to be petitioned. Section 439 of the Companies Act enumerates the persons those can file a petitionto the Court for the winding

up of a company. The petition for winding up may be brought by any one of the following :

1. Petition by Company

A company can make a petition only when it has passed a special resolution to that effect. However, it has been held that where the company is found by the directors to be insolvent due to circumstances which ought to be investigated by the Court, the directors may apply to the Court for an order of winding up of the company even without obtaining the sanction of the general meeting of the company.

2. Petition by Creditors

The word 'creditor' includes secured creditor, debentureholder and a trustee for debentureholder. A contingent or prospective creditor (such as the holder of a bill of exchange not yet matured or of debentures not yet payable) is also entitled to petition for a winding up of the company.

Before a petition for winding up of a company presented by a contingent or prospective creditors is admitted, the leave of the Court must be obtained for the admission of the petition. Such leave is not granted (a) unless, in the opinion of the Court, there is a prima facie case for winding up the company; and (b) until reasonable security for costs has been given.

Notice that a creditor has a right to winding up order if he can prove that he claims an undisputed debt and that the company has failed to discharge it. When a creditors' petition is opposed by other creditors, the Court may ascertain the wishes of the majority of creditors.

3. Contributory Petition

The term 'contributory' means every person who is liable to contribute to the assets of the company in the event of its being wound up.

Section 428 makes it clear that it includes the holder of fully-paid shares. A fully-paid shareholder will not, however, be placed on the list of contributors, as he is not liable to pay any contribution to the assets, except in cases where surplus assets are likely to be available for distribution.

A contributory is entitled to present a petition for winding up a company if :

(a) the number is reduced, in the case of a public company below seven and in the case of private company below two; and

(b) the shares in respects of which he is a contributory either were originally allotted to him or have been held by him; and

(c) the shares have been registered in his name, for at least six months during the period of 18 months immediately before the commencement of the winding up; and

(d) the shares have been devolved on him during the death of a former holder [Sec. 439(4)].

4. Registrar's Petition

The Registrar can present a petition for winding up a company only on the following grounds, viz.,

(a) if a default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(b) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;

(c) if the number of members is reduced, in the case of a public company below seven and in the case of a private company below two ;

(d) if the company is unable to pay its debts; and

(e) if the Court is of opinion that it is just and equitable that the company should be wound up.

Note that the Registrar can file a petition for winding up only with prior approval of the Central Government. The Central Government before sanctioning approval must give an opportunity to the company for making its represent actions, if any.

Again a petition on the ground of default in delivering the statutory report or holding the statutory meeting cannot be presented before the expiration of 14 days after the last day on which the statutory meeting ought to have been held.

5. Petition by any Person Authorised by the Central Government

If it appears to the Central Government from any report of the inspectors appointed to investigate the affairs of the company, that it is expedient to wind up the company because its business is being conducted with intent to defraud creditors, members or any other person, or its business is being conducted for a fraudulent or unlawful purpose, or the management is guilty of fraud, misfeasance or other misconduct, the Central Government may authorise any person to present to the Court a petition for winding up of the company that is just and equitable that the company shouldbe wound up.

COMMENCEMENT OF WINDING UP (SECTION 441)

Where before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the winding up of the company will be deemed to have commenced from the date of the resolution. In all other cases (i.e. where the company has not previously passed a resolution for voluntary

winding up), the winding up will be deemed to commence from the time of the presentation of the petition for the winding up.

The Court may dismiss or allow the petition for winding up and also can adjourn its hearing or pass conditional order of winding up. In the case of *Misrilal Dharamchand Ltd. v. B. Patnaik Mines Ltd. (1978)* the Court ordered for winding up but stayed the operation of the order for six months so as to enable the company to pay the petitioner, if it could do so within this period and in case of failure the order was to come in force.

Powers of the Court

On hearing a winding up petition, the Court may dismiss it or adjourn the hearing or make interim orders or make an order for winding up the company, with or without costs or any other order that it thinks fit (Section 443).

Consequences of winding up

(i) Where the Court makes an order for winding up of company, the Court must forthwith cause intimation thereof to be sent to the Official Liquidators and the Registrar (Section 444).

(ii) On the making of a winding up order it is the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a copy of the order of the Court within 30 days from the date of the making of the order [Section 445(1)].

(iii) The winding up order is deemed to be notice of discharge to the officers and employees of the company, except when the business of the company is continued [Section 445(3)].

(iv) When a winding up order has been made, no suit or other legal proceedings can be commenced against the company except with the

leave of the Court. Suits pending at the date of the winding up order cannot be further proceeded without the leave of the Court. According to sub-section (2) of Section 446 the Court which is winding up the company has jurisdiction to entertain or dispose of (a) any suit or proceeding by or against the company; (b) any claim made by or against the company; (c) any application made under Section 391 by or in respect of the company ; (d) any question of priorities or any other question whatsoever which may relate to or arise in course of the winding up of the company.

(v) An order for winding up operates in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory (Section 447).

(vi) According to Section 536 any disposition of the property (including actionable claims) of the company, any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall be void, unless the Court otherwise orders.

Thus the Court can direct that any such disposition of property or actionable claims or transfer of shares or alteration of status of the members will be valid. But unless the Court so directs, such disposition, transfer or alteration will be void.

(vii) Section 537 declares that any attachment and sale of the estate or effects of the company, after the commencement of the winding up, will be void. In the case of winding up by the Court any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company after the commencement of the winding up will be void. Similarly any sale held , without leave of the

Court, of any of the properties or effects of the company after the commencement of the winding up will be void. With leave of the Court, attachment and sale of the properties of the company will be valid even if such attachment and sale are made after the commencement of the winding up of the company. Besides this section does not apply to any proceedings for the recovery of any tax imposed or any dues payable to the Government. Thus I.T.O. can commence assessment proceedings without leave of the Court.

(viii) It is to be noted that winding up order does not bring the business of the company to an end. The corporate existence of the company continues through winding up till the company is dissolved. Thus the company continues to have corporate personality during winding up. Its corporate existence come to an end only when it is dissolved.

(ix) An order for winding up operates in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of contributory.

(x) On a winding up order being made in respect of a company, the Official Liquidator, by virtue of the office, becomes the liquidator of the company (Section 449).

OFFICIAL LIQUIDATORS

Under the present Act, the only person who is competent to act as the liquidator in a winding up is the official liquidator. For the purpose of winding up, there shall be attached to each high Court an official liquidator appointed by the Central Government, who may be either a whole time or part time officer depending upon the volume of work. In district courts the official receiver will be the official liquidator. The Central

Government may appoint one or more deputy or assistant official liquidators to assist the official liquidator in the discharge of his functions. There is no provision in the Act, for the removal of the official liquidator [Sec. 448(1) & (1-A)].

Liquidator

On a winding up order being made, the official liquidator, by virtue of his office, becomes the liquidator of the company (Sec. 449). Where the official liquidator becomes or acts as liquidator, there shall be paid to the Central Government out of the assets of the company such fees as may be prescribed.

A liquidator shall be described by the style of "The official liquidator" of the particular company in respect of which he acts and not by individual name [Sec. 452].

Provisional Liquidator

The Court may appoint the official liquidator to be the liquidator provisionally at any time after the presentation of the petition for winding up and before making winding up order [Sec. 450 (1)]. Before making such an appointment notice must be given to the company and a reasonable opportunity must be given to it to make representation. The Court may dispense with such notice where there are special reasons. Such reasons must be recorded in writing. A provisional liquidator is as much liquidator as a liquidator in the winding up of a company. But where a provisional liquidator is appointed by the Court, the Court may limit and restrict his powers. On a winding up order being made, the official liquidator shall cease to be provisional liquidator and shall become liquidator of the company.

General provisions for liquidators

The liquidator shall conduct the proceedings in winding up the company and perform such duties as the Court may impose. The official liquidator gets his remuneration from the Central Government and as such he is not entitled to any further remuneration. For the services rendered by the official liquidator to the company, the Central Government shall pay such fees out of the assets of the company as may be prescribed.

The acts of a liquidator shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification. But his acts shall not be valid if they are done after it has been shown that his appointment was invalid [Sec. 451].

Statement of Affairs [Sec. 454]

The company must make out and submit to the official liquidator a statement as to the affairs of the company in the prescribed form verified by an affidavit and containing the following particulars :

(a) The assets of the company, stating separately the cash balance in hand and at the bank and the negotiable securities held by the company;

(b) Its debts and liabilities;

(c) Names, residences and occupation of its creditors, stating separately the amount of secured and unsecured debts;

(d) In the case of secured debts, particulars of securities given, their value and the dates on which they were given;

(e) The debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised on account thereof; and

(f) Such further or other information as may be prescribed or as the official liquidator may require.

Note that the statement must be submitted and verified by one or more of the directors and by the manager, secretary or other chief officer of the company and it must be submitted within 21 days from the relevant date or within such extended time not exceeding three months [Sec. 454 (3)].

Duties of the Liquidator

They may be summarised as under :

(i) He must conduct equitably and impartially all proceedings in the winding up according to the provisions of the law.

(ii) He must submit a preliminary report to the Court as to :

(a) the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities, giving separately, under the heading of assets such as (i) cash and negotiable securities; (ii) debts due from contributories; (iii) debts due to the company and securities, if any available in respect thereof ; (iv) immovable and movable properties belonging to the company; and (v) unpaid calls.

(b) if the company has failed, as to the causes of the failure; and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the business thereof.

Note that the Court may extend the period of six months for the submission of the above report by the official liquidator. The Court may also order that no such statement need be submitted.

(iii) The official liquidator may, if he thinks fit, make further reports, stating the manner in which the company was promoted or formed. He may state in the reports whether in his opinion any fraud has been committed by any person in its promotion or formation, or since the formation thereof. He may also state any other matters which, in his opinion, it is desirable to bring to the notice of the Court [Sec. 455(2)].

(iv) He must take into his custody and control the property of the company.

Notice that so long as there is no liquidator, all the property and effects of the company are deemed to be in the custody of the Court [Sec. 456(2)].

(v) Control of powers : The liquidator must in the administration of the assets of the company and the distribution thereof among its creditors have regard to any directions which may be given by a resolution of the creditors or contributories at any general meeting or by the committee of inspection [Sec. 460(1)]. Any directions given by the creditors or contributories at any general meeting override any directions given by the committee of inspection.

(vi) To Summon Meetings of Creditors and Contributories : He may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes. But he shall be bound to summon such meetings, at such times, as the creditors or contributories may, by resolution, direct, or whenever requested in writing to do so by not less than one tenth in value of the creditors or contributories, as the case may be [Sec. 460 (3)].

(vii) Proper Books : The liquidator must keep proper books for making entries or recording minutes of proceedings at meetings and of such other matters as may be prescribed. Any creditor or contributory may, subject to the control of the Court, inspect any such books, personally or through his agent [Sec. 461].

(viii) He must, at least twice in each year, present to the Court an account of his receipts and payments as liquidator. The account must be in the prescribed form and must be made in duplicate. The Court gets the account audited, keeps one copy thereof in its records and delivers the other copy to the Registrar for filling. Each copy shall, however, be open to the inspection of any creditor, contributory or person interested. The liquidator must also send a printed copy of the accounts so audited by post to every creditor and to every contributory.

(ix) Within two months from the date of the direction of the Court, the liquidator must call a meeting of the creditors for determining the persons who are to be members of the committee of inspection, if such committee is to be appointed. Within 14 days of the meeting of the creditors, the liquidator must call a meeting of the contributories to consider the decision of the creditors.

(x) Within two months of the expiry of each year from the commencement of winding up, the liquidator must file a statement duly audited, by a qualified auditor with respect to the proceedings in, and position of, the liquidation. The statement must be filed :

(a) in the case of a winding up by or subject to the supervision of the Court, in the Court ; and

(b) in the case of voluntary winding up, with the Registrar.

Note that when the statement is filed in the Court, a copy must simultaneously be filed with the Registrar and must be kept by him along with the other records of the company [Sec. 551].

Powers of The Liquidator

A liquidator has two types of powers under the Act :

(a) Powers exercisable with the sanction of the Court ; and

(b) Powers exercisable without the sanction of the Court.

Powers with the Sanction of the Court

(a) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, on behalf of the company ;

(b) to carry on the business of the company for the beneficial winding up of the company ;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract ;

(d) to raise any money required on the security of the assets of the company ;

(e) to appoint an advocate, attorney or pleader to assist him in the performance of his duties ;

(f) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Note that the Court may by order provide that the liquidator may exercise any of the above powers without the sanction of the Court [Sec. 458).

Powers Without the Sanction of the Court

The liquidator may exercise the following powers without the sanction of the Court, namely, powers :

(a) to execute documents and deeds on behalf of the company and use, when necessary, the company's seal ;

(b) to inspect the records and returns of the company or the files of the Registrar without payment of any fee ;

(c) to draw, accept, make and endorse any bills of exchange, hundis or promissory notes with the same effect as if drawn, accepted, made, or endorsed by the company in the course of its business ;

(d) to prove, rank and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in respect thereof;

(e) to take out, in his official name, letters of administration to any deceased contributory ;

(f) to appoint an agent to do any business which he is unable to do himself [Sec. 457(2)]. For example, he can appoint any advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties [Sec. 459], but with the sanction of the Court.

Supervision and control over liquidators

1 Control by contributories and creditors

The contributories and creditors exercise control over the liquidator in the performance of his duties through the medium of the meetings which it is his duty to call from time to time. Any creditor or

contributory may, subject to the control of the Court inspect the books which are maintained by the liquidator. The liquidator is also required to print and send a copy of the audited accounts to each creditor and contributory.

2. Control by Court

The liquidator shall apply to the Court for directions in relation to any matter arising in the winding up. The Court has the powerto confirm, reserve or modify any act or decision of the liquidator if complained by any aggrieved person. The Court has the power to cause the accountsof the liquidator to be audited in such manner as it thinks fit.

3. Supervision by committee of inspection

The committee of inspection can inspect the accounts of the liquidator at all reasonable times. The liquidator is under an obligation to have directions from the committee of inspection.

4. Control by Central Government

Section 463 seeks to bring the conduct of the liquidators of companies under the control and scrutiny of the Central Government. Where a liquidator does not faithfully perform his duties and duly observe all the requirements imposed upon him by the Act or the rules thereunder with respect to the performance of his duties, or if any complaint is made to the Central Government by any creditor or contributory in regard thereto, the Central Government shall enquire into the matter, and take such action thereon as it may think fit . The power includes the power to remove the liquidator from office.

The Central Government may at any time require any liquidator of a company which is being wound up by the Court to answer any inquiry in

relation to any winding up in which he is engaged. It may also, if it thinks fit, apply to the Court to examine him or any other person on oath concerning the winding up. The Central Government may also direct a local investigation to be made of the books and vouchers of the liquidator.

The provisions of this section do not apply where the winding up has been completed after dissolution.

Committee of Inspection (Sections 464, 465)

The Court may, at the time of making an order for the winding up or at any time thereafter, direct that there shall be appointeda committee of inspection to act with the liquidator. Where such a direction is given by the Court, the liquidator is required to convene, within 2 months from the date of the direction, a meeting of the creditors to determine who are to be the members of the committee, within 14 days from the date of the creditors' meeting, the liquidator must call a meeting of the contributories to consider the creditors' decision with respect to the membership of the committee. Contributories may accept the decision of the creditors with or without modification or reject it. If the contributories at their meeting do not accept the creditors' decision in its entirely, the liquidator shall apply to the Court for directions as to what the composition of the committee should be and who shall be its members. The committee shall consist of not more than 12 members, being creditors or contributories of the company in such proportion as may be agreed on by the meetings of the creditors and contributories and in case of difference of opinion, as may be determined by the Court. The Committee may inspect the accounts of the liquidator at all reasonable time.

The committee will meet at such times as it may from time to time appoint and the liquidator or any member of the committee may also

call a meeting of the committee as and when he thinks necessary. The quorum for a meeting of the committee will be one-third of the total number of the members or two, whichever is higher. The committee may act by a majority of its members present at a meeting but shall not act unless a quorum is present. A member may resign by notice in writing signed by him and deliver to the liquidator. If a member of the committee is adjudged as insolvent or compounds or arranges with his creditor or is absent from five consecutive meetings of the committee without leave of those members, who together with himself, represent the creditors or contributories, his office shall become vacant. A member of the committee may be removed at a meeting of the creditors, if he represents creditors, or at a meeting of contributories if he, represents contributories, by an ordinary resolution of which seven days' notice has been given stating the objects of the meeting. When any vacancy has occurred in the committee, the liquidator will call a meeting of the creditors or contributories, as the case may be, and the meeting may reappoint the same person or appoint some other person in the vacancy. However, the liquidator may apply to the Court that the vacancy need not be filled in and if the Court is satisfied that in the circumstances of the case the vacancy need not be filled, it may make an order accordingly.

Dissolution of Company in Winding up by the Court

The Court may make an order for the dissolution of a company in the following conditions : (a) When the affairs of the company have been completely wound up ; or (b) when the Court is of opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets or for any other reason and it is just and equitable in the circumstances of the case that an order of dissolution of the company should be made. Where such an order is made by the Court, the company will be dissolved from the date of the order of the Court. Within 30 days from the

date of the order, the liquidator must send a copy of the order to the Registrar. On the dissolution, the corporate existence of the company comes to an end.

Company in liquidation exists as juristic personality until order of dissolution is based by the Court. After the order of dissolution, the legal personality of the company come to an end. The Court may declare the dissolution void within 2 years from the date of the dissolution.

VOLUNTARY WINDING UP

Winding up by the creditors or members without any intervention of the Court is called 'voluntary winding up'. In voluntary winding up, the company and its creditors are left free to settle their affairs without going to the Court, although they may apply to the Court for directions or orders if and when necessary.

A company may be wound up voluntarily under the circumstances given hereunder :

1. when the period fixed for the duration of the company by the articles has expired or the event has occurred on the occurrence of which the articles provide that the company is to be dissolved and the company in a general meeting has passed a special resolution to wind up voluntarily; or
2. the company has passed a special resolution to wind up voluntarily. Thus a company may be wound up voluntarily at any time and for any reason if a special resolution to this effect is passed in its general meeting.

When a company has passed a resolution for voluntary winding up, it must within 14 days of the passing of the resolution gives notice of

the resolution by advertisement in the official Gazette and also in some newspaper circulating in the district where the registered office of the company is situated.

Commencement of Voluntary Winding up

A voluntary winding up is deemed to commence at the time when the resolution for winding up is passed [Sec. 486]. The date of the commencement of the winding up is important for several matters such as liability of past members and fraudulent preferences, etc..

Consequences of Voluntary Winding up

The consequences of voluntary winding up are :

1. From the commencement of voluntary winding up, the company ceases to carry on its business, except so far as may be required for the beneficial winding up thereof [Sec. 487].
2. The possession of the assets of the company vests in the liquidator for realisation and distribution among the creditors. The corporate state and powers of the company shall, however, continue until it is dissolved (Sec 456 and 487).
3. On the appointment of a liquidator, all the powers of the board of directors cease and the liquidator may exercise the powers mentioned in Sec. 512 including the power to do such things as may be necessary for winding up the affairs of the company and distributing its assets. The liquidator appointed in a members' voluntary winding up is merely an agent of the company to administer the property of the company for purposes prescribed by the statue.

Kinds of Voluntary Winding up

Voluntary winding up may be :

(a) A members' voluntary winding up; or

(b) A creditors' voluntary winding -up.

Members' voluntary winding up

A members' voluntary winding up takes place only when the company is solvent. It is initiated by the members and is entirely managed by them. The liquidator is appointed by the members. No meeting of creditors is held and no committee of inspection is appointed. To obtain the benefit of this form of winding up, a declaration of solvency must be filed.

Declaration of solvency

Section 488 provides that where it is proposed to wind up the company voluntarily the directors or a majority of them, may, at a meeting of the board, make a declaration verified by an affidavit that the company has no debts or that it will be able to pay its debts in full within a period not exceeding 3 years from the commencement of winding up as may be specified in the declaration. Such declaration shall be made within five weeks immediately preceding the date of the passing of the resolution for winding up and shall be delivered to the Registrar before that date. It shall also be accompanied by a copy of the auditors on the Profit and Loss Account and the Balance Sheet of the company prepared upto the date of the declaration and must embody a statement of the company's assets and liabilities as on that date.

Where such a declaration is duly made and delivered, the winding up following shall be called members' voluntary winding up. Where

the same is not duly made, it shall be called creditors' voluntary winding up.

Sections 490-98 of the Act deal with provisions applicable to members' voluntary winding up. They are as follows :

1. Appointment and Remuneration of Liquidator

On the passing of the resolution for winding up, the company must in a general meeting appoint one or more liquidators and fix his or their remuneration. Any such remuneration cannot be increased at all, not even with the sanction of the Court and the liquidator cannot take charge of his office unless the remuneration is so fixed [Sec. 490].

2. Powers of the Board on Appointment of Liquidator

On the appointment of a liquidator, all the powers of the board and of a managing or whole-time director, and manager, if there be any of these, shall cease, except for the purpose of giving notice of such appointment to the Registrar or in so far as the company in a general meeting or the liquidator may sanction the continuance thereof [Sec. 491].

3. Office of the Liquidator Falling Vacant

If a vacancy occurs by death, resignation or otherwise in the office of any liquidator appointed by the company, the company in a general meeting may fill the vacancy [Sec. 492].

4. Notice of Appointment to Registrar

The company must, within 10 days of the appointment of the liquidator, or the filling up of the vacancy, as the case may be, give notice to the Registrar of the event. Default renders the company and every officer (or liquidator) who is in default liable to fine upto Rs. 100 for every day of default [Sec. 493].

5. Calling Meeting of Creditors

If the liquidator at any time is of opinion that the company is insolvent, he must summon a meeting of the creditors, and lay before the meeting a statement of the assets and liabilities of the company [Sec. 495]. Thereafter the winding up proceeds as if it were a creditors' voluntary winding up and not a members' voluntary winding up [Sec. 498].

6. Calling General Meeting at the End of one Year

In the event of the winding up continuing for more than one year, the liquidator must call a general meeting of the company at the end of the first year from the commencement of the winding up at the end of each succeeding year, or at the first convenient date within three months from the end of the year or such longer period as the Central Government may allow, and must lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year [Sec. 496].

7. Final Meeting and Dissolution

As soon as the affairs of the company are fully wound up, the liquidator makes up an account of winding up, showing how the winding up has been conducted and how the property of the company has been disposed of. He then calls a general meeting, of the company and lays before it accounts showing how the winding up has been conducted. This is called the final meeting of the company.

The meeting must be called by advertisement :

(a) specifying the time, place and object of the meeting ; and

(b) published not less than one month before the meeting in the official Gazette, and also in some newspaper circulating in the district where the registered office of the company is situated.

Within one week after the meeting, the liquidator is required to send to the Registrar and the official liquidator a copy of the accounts. He must also make a report to each of them of the holding of the meeting and of the date thereof. If at the final meeting no quorum was present, the liquidator is required to make a report that the meeting was duly called but no quorum was present at the meeting. On receipt of the accounts and the report, the Registrar will register them. On receipt of the accounts and report, the official liquidator will make a scrutiny of the books and papers of the company and make a report to the Court stating the result of the scrutiny. If the report shows that the affairs of the company have been conducted bonafide i. e. not in a manner prejudicial to the interests of its members or to the public interest, then from the date of the submission of the report to the Court, the company shall be deemed to have been dissolved. If the official liquidator in the report has stated that the affairs of the company have been conducted in a manner prejudicial to the interest of its members or to the public interest, the Court shall direct the official liquidator to make a further investigation of the affairs of the company and on the report of the official liquidator on such further investigation, the Court may either make an order that the company shall stand dissolved with effect from the date to be specified in the order of the Court or to make such other order as the circumstances of the case brought out in the report permit [Sec. 497].

Creditors' Voluntary Winding up (Sections 500-509)

In creditors' voluntary winding up, it is the creditors who move the resolution for voluntary winding up of a company, and there is no solvency declaration made by the directors of the company. In other words, when a company is insolvent, that is, it is not able to pay its debts, it is the creditors' voluntary winding up.

Special provisions Relating to Creditors' Voluntary Winding up

There are certain special provisions to be completed with creditors' voluntary winding up. They are :

1. Meeting of Creditors (Sec. 500)

The company must call a meeting of the creditors of the company on the same day or on the next following day on which the general meeting of the company is held for passing a resolution for voluntary winding up. The company must send the notice of the meeting to the creditors by post simultaneously with the sending of the notices of the meeting of the company. The company must also cause the notice of the meeting of the creditors to be advertised once at least in the official Gazettee and once at least in two newspapers circulating in the district where the registered office or principal place of business of the company is situated. At the creditors' meeting, one of the directors shall preside. The board of directors is required to lay before the meeting of the creditors(a) a full statement of the position of the company's affairs and (b) a list of creditors of the company with the estimated amount of their claims.

2. Notice of Registrar [Sec. 501]

Notice of any resolution passed at a creditors' meeting shall be given by the company to the Registrar within 10 days of the passing thereof.

3. Appointment of Liquidator (Sec. 502)

The creditors and the company at their respective meetings may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company. If the creditors and the company nominate different persons, the persons nominated by the creditors

shall be the liquidator. If no person is nominated by the creditors, the person, if any, nominated by the company shall be the liquidator.

4. Committee of Inspection

The creditors at their first or any subsequent meeting may, if they think fit, appoint a committee of inspection of not more than five members. If such committee is appointed, the company may, either at the meeting at which the winding up resolution is passed or at a later meeting, appoint not more than five persons to serve on the committee. If the creditors object to persons appointed by the company, then the matter will be referred to the Court for the final decision. The powers of such committee are the same as those of a committee of inspection appointed in a compulsory winding up.

5. Remuneration [Sec. 504]

The committee of inspection or if there is no such committee, the creditors may fix the remuneration to be paid to the liquidator or liquidators. Where the remuneration is not fixed, it will be determined by the Court. Any remuneration fixed by the committee of inspection or creditors or the Court shall not be increased.

6. Board's Power to Cease (Sec. 505)

On the appointment of a liquidator, all the powers of the board of directors shall cease, except in so far as the committee of inspection, or if there is no such committee, the creditors in a general meeting, may sanction the continuance thereof.

7. Vacancy in the Office of Liquidator (Sec. 506)

If a vacancy occurs by death, resignation, or otherwise in the office of the liquidator (other than a liquidator appointed by or by the

direction of the Court), the creditors in a general meeting may fill the vacancy.

8. Final Meeting and Dissolution (Secs 508-509)

The liquidator must call a general meeting of the company and a meeting of the creditors every year within three months from the close of the liquidation year, if the winding up continues for more than one year. He must lay before the meeting an account of his acts and dealings and of the conduct of winding up during the preceding year and position of winding up. He must call, in the same manner, a final meeting when the affairs of the company are fully wound up and place the same statements before it, as he does in the case of a members' meeting in a members' voluntary winding up under Sections 496 and 497.

Liquidators in Voluntary Winding Up Appointment of liquidator

In a members' voluntary winding up, the company in general meeting shall appoint one or more liquidators for the purpose of collecting the company's assets and distributing the proceeds among creditors and contributories. If a vacancy occurs by death or resignation or otherwise in the office of the liquidator the company in general meeting may fill the vacancy. [Section 490 and 492].

In the case of a creditors' voluntary winding up, the creditors and the members at their respective meetings, may nominate a person to be the liquidator of the company. However, the creditors are given a preferential right in the matter of the appointment of the liquidator with a power to the Court to vary the appointment on application made within seven days by a director, member or creditor. (Section 502).

Power of the Court to appoint liquidator

In a members' or creditors' voluntary winding up, if for any cause whatever there is no liquidator acting, the Court may appoint the official liquidator or any other person as a liquidator of the company. The Court may also appoint a liquidator on the application of the Registrar. (Section 515).

Body corporate not to be appointed as liquidator

A body corporate shall not be qualified for appointment as a liquidator of a company in a voluntary winding up. Any appointment of a body corporate as liquidator shall be void. (Section 513).

Corrupt inducement affecting appointment as liquidator

Any person who gives or agrees or offers to give, any member or creditor of the company any gratification with a view to securing his own appointment or nomination or to securing or preventing the appointment of someone else, as the liquidator is liable to a fine which may extend upto Rs. 1,000. (Section 514).

Notice by liquidator of his appointment

When a person is appointed as the liquidator and accepts the appointment, he shall publish in the official gazette a notice of his appointment, in the prescribed form. He shall also deliver a copy of such notice to the Registrar. The liquidator shall do this within 30 days of his appointment. When the liquidator fails to comply with the above provision, he is liable to a fine which may extend to Rs. 50 for each day of default. (Section 516).

Effect of the appointment of liquidator

On the appointment of a liquidator, in a members' voluntary winding up, all the powers of the directors, including managing director, whole time directors as also the manager shall cease except so far as the company in general meeting or the liquidator may sanction their continuance. (Section 491).

On the appointment of a liquidator in creditors' voluntary winding up, all the powers of the board of directors shall cease. The committee of inspection or if there is no such committee, the creditors' meeting by resolution may sanction continuance of the powers of the board. (Section 505).

Remuneration of liquidator

In a members' voluntary winding up, the general meeting shall fix the remuneration to be paid to the liquidators. Unless the question of remuneration is resolved the liquidators shall not take charge of the company. Once remuneration is fixed it cannot be increased. (Section 490).

In a creditors' voluntary winding up, the remuneration of the liquidator is fixed by the committee of inspection and if there is no committee of inspection then by the creditors. In the absence of any such fixation, the Court shall determine his remuneration. Any remuneration so fixed shall not be increased (Section 504).

All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall subject to the rights of secured creditors, be payable out of the assets of the company in priority to all other claims (Section 520).

Removal of Liquidator

In either kind of voluntary winding up, the Court may, on cause shown, remove a liquidator and appoint the official liquidator or any other person as a liquidator in place of removed liquidator. The Court may also remove a liquidator on the application of the Registrar.

Powers and Duties of Liquidator in Voluntary Winding Up Powers

The powers of the liquidator in voluntary winding up are just the same as those of the official liquidator in case of winding up by the Court. In the case of members' voluntary winding up with the sanction of a special resolution of the company and in the case of creditors' voluntary winding up with the sanction of the Court or committee of inspection or the meeting of the creditors if there is no committee of inspection, the liquidator may (a) institute or defend any suit, prosecution or other legal proceedings in the name and on behalf of the company ; (b) carry on the business of the company so far as may be necessary for the beneficial winding up of the company ; (c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract; and (d) raise any money required on the security of the assets of the company (Section 512). Besides, a liquidator in voluntary winding up may, without any sanction whatever, exercise any of the other powers given by this Act to the liquidator in a winding up by the Court. In addition to these powers, a liquidator in voluntary winding up exercise (i) the power of the Court of settling a list of contributories ; (ii) the power of the Court of making calls;

(iii) the power of calling general meetings of the company.

Duties

As Section 512 provides a liquidator in voluntary winding up is required to pay the debts of the company and to adjust the rights of the contributories among themselves.

WINDING UP SUBJECT TO SUPERVISION OF THE COURT

Voluntary winding up may be under the supervision of the Court. At any time after a company has passed a resolution for voluntary winding up, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court. The Court may give such liberty to creditors, contributories or others to apply to the Court and generally on such terms and conditions as the Court thinks just (Sec. 522).

A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall be deemed to be a petition for winding up by the Court (Sec. 523).

The Court will not in general make a supervision order on the petition of a contributory, unless it is satisfied that the resolution for winding up was so obtained that the minority of members were overborne by fraud or improper or corrupt influence. Where the company is insolvent, the wishes of the creditors only are regarded or the investigation is required.

If a company is being wound up voluntarily or subject to supervision of the Court, a petition for its winding up by the Court may be presented by :

(a) any person authorised to do so under Sec. 439 (which deals with provisions as to applications for winding up), or

(b) the official liquidator [Sec. 440(1)].

Where a supervision is made, the Court may appoint an additional liquidator or liquidators, or remove any liquidator at any time and fill any vacancy. The Court may also appoint the official liquidator as an additional liquidator or to fill any vacancy. The Registrar is also given power to apply to the Court for the removal of a liquidator and the Court may do so (Sec. 524). The liquidator appointed by the Court will act as a voluntary liquidator (Sec. 525). In a voluntary liquidation brought under the Court's supervision, the liquidator's remuneration cannot be increased.

A liquidator appointed by the Court has the same powers, is subject to the same obligations, and in all respects stand in the same position, as if he had been duly appointed in accordance with the provisions of the Companies Act with respect to the appointment of liquidators in voluntary winding up (Sec. 525).

Consequences of Winding up

The consequences of winding up may be discussed under the following heads :

1. Consequences as to Shareholders

A shareholder is liable to pay the full amount upto the face value of the shares held by him. Not only the present, but also the past members are liable on the winding up of the company. The liability of a present member is the amount remaining unpaid on the shares held by him, while a past member can be called upon to pay if the present contributory is unable to pay.

2. Consequences as to Creditors

A company, whether solvent or insolvent, can be wound up under the Act. In case of a solvent company, all claims of its creditors when

proved are fully met. But in case of an insolvent company, the rules under the law of insolvency apply.

A secured creditor need not prove his claim against the company. He may realise his security and satisfy the debts. For deficiency, if any, he may put his claim before the liquidator. The secured creditor has also the option to relinquish his security and to prove the amount as if he were an unsecured creditor.

Where an insolvent company is being wound up, the insolvency rules will apply and only such claims shall be provable against the company as are provable against an insolvent person. (Section 529).

When the list of claims is settled the liquidator has to commence making payments. The assets available to the liquidator are applied in the following order :

a. Secured creditors .

b. Cost of the liquidation.

c. Preferential payments.

d. Debentureholders secured by a floating charge.

e. Unsecured creditors

f. Balance returned to the contributories.

Preferential payment

Section 530 enumerates certain debts which are to be paid in priority to all other debts. Such payments are called preferential payments. It may however by noted that such payments are made after paying the secured creditors, and costs, charges and expenses of the winding up.

These preferential payments are : (a) All revenues, taxes, cesses and rates due from the company to the Central or State Government or to a local authority. The amount should have become due and payable within 12 months before the winding up. (b) All wages or salary of any employee in respect of services rendered to the company and due for a period not exceeding 4 months within 12 months, before the winding up and any compensation payable to any workman under any of the provision of Chapter V-A of the Industrial Disputes Act, 1947. The amount must not exceed Rs. 20,000 in the case of any one claimant. (c) All accrued holiday remuneration becoming payable to any employee or in the case of his death to any other person in his right, on the termination of his employment before or by the effect of the winding up. (d) All amounts due in respect of contributions payable by the company as employer but this is not payable if the company is being wound up voluntarily for the purpose of reconstruction and amalgamation (e) All amounts due in respect of any compensation or liability for compensation in respect of death or disablement of any employee under the Workmen's Compensation Act, 1923 but this is not payable if the company is being wound up voluntarily for reconstruction or amalgamation. (f) All sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employee maintained by the company. (g) The expenses of any investigation held in pursuance of Sections 235 and 237, in so far as they are payable by the company.

3. Consequences as to servants and officers

A winding up order by a Court operates as a notice of discharge to the employees and officers of the company except when the business of the company is continued. The same principle will apply as regards discharge of employees in a voluntary winding up. Where there is a contract of service

for a particular period, an order for winding up will amount to wrongful discharge and damages will be allowed as for breach of contract of service.

4. Consequences of proceedings against the company

When a winding up order is made, or an official liquidator has been appointed as provisional liquidator no suit or legal proceedings can be commenced and no pending suit or legal proceeding continued against the company except with the leave of the Court and on such terms as it may impose. In the case of a voluntary winding up, the Court may restrain proceedings against the company if it thinks fit.

It may be noted that law does not prohibit proceedings being taken by the company against others including directors, or officers or other servants of the company.

5. Consequences as to costs

Where the assets of the company are insufficient to satisfy the liabilities, the Court may make an order for payment out of the assets of the costs, charges and expenses incurred in the winding up. The Court may determine the order of priority in which such payments are to be made (Section 476).

6. Consequences as to documents

When a company is being wound up whether by or under the supervision of the Court or voluntarily, the fact must be made known to all those having any dealing with the company; every document in the nature of an invoice, order for goods or business letter issued in the name of the company, after the commencement of winding up must contain a statement that the company is being wound up (Sec. 547).

Where a company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be prima facie evidence of the truth of all matters recorded therein (Sec. 548).

Where an order for winding up of the company by or subject to the supervision of the Court is made, any creditor or contributory of the company may inspect the books and the papers of the company, subject to the provisions made in the rules by the Central Government in this behalf.

WINDING UP OF INSOLVENT COMPANIES

Section 529 of the Companies Act applies to winding up of the company which cannot pay all its debts i.e. to an insolvent company only in respect of the following :

(a) debts provable.

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors.

All persons who would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and made such claims against the company as they respectively are entitled to. But it is not necessary for a secured creditor to prove his debt in the winding up and he can stand wholly outside the winding up proceedings. However, if a secured creditor instead of giving up his security and providing for his debt proceeds to realise his security, he shall be liable to pay the expenses incurred by the liquidator for the presentation of the security before its realisation by the secured creditor.

The rules of insolvency in India are to be found in the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. Only such of the rules contained in these Acts as relate to the respective rights of the secured and unsecured creditors, and to debts provable and to the valuation of certain liabilities shall apply under Section 529. Apart from these provisions, in respect of other matters such as those relating to priority of debts, all questions have to be determined with reference to the Companies Act only.

Section 529 ceases to be applicable as soon as it is found the company in the course of winding up is not insolvent. The provisions of the laws of insolvency applicable to insolvent companies will not apply to such company and it will be treated as having been solvent throughout the winding up proceedings.

WINDING UP OF UNREGISTERED COMPANIES (SECTIONS 582-583)

The term "Unregistered Company" includes any partnership, association of company consisting of 8 or more members at the time when the petition for winding up is presented, but it does not include a railway company incorporated under any Act of Parliament or other Indian Law or any Act of Parliament of U.K., a company registered under the present Indian Companies Act or any of the previous Indian Companies Acts. An unregistered company may be wound up under the provisions of this Act and with some exception all the provisions relating to the winding up are applicable to it. However such a company can only be wound up by the Court and cannot be wound up voluntarily or subject to the supervision of the Court. Such a company may be wound up if (a) the company is dissolved or has ceased to carry on business or is carrying on business only to wind up its

affairs; (b) the company is unable to pay its debts; and (c) the Court is of opinion that it is just and equitable that the company should be wound up.

WINDING UP OF FOREIGN COMPANIES

Where a foreign company which has been carrying on business in India, cease to carry on business in India, it may be wound up as an unregistered company, not withstanding that the foreign company, has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated (Section 584).

EFFECTS OF WINDING UP ON ANTECEDENT AND OTHER TRANSACTIONS

The effects of winding up on antecedent and other transactions are as follows:

1. Fraudulent Preference (Sec. 531)

Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property, within six months before the commencement of its winding up, shall be deemed a fraudulent preference of its creditors and be invalid accordingly.

Fraudulent preference here relates similarly to fraudulent preference under insolvency law, where any individual transfers any property or makes any payment within three months before the presentation of an insolvency petition, such transfers shall be deemed a fraudulent preference in his insolvency. Under the Companies Act, 1956, the period is six months instead of three months.

2. Avoidance of the Voluntary Transfer

Section 531 A introduced by the Amendment Act, 1960, lays down that any transfer of property, movable or immovable, or any delivery

f ods made by a company within a period of one year before the commencement of its winding up shall be void against the liquidator unless such transfer or delivery is made in the ordinary course of business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration.

CODE OF CIVIL PROCEDURE (307)

UNIT 1

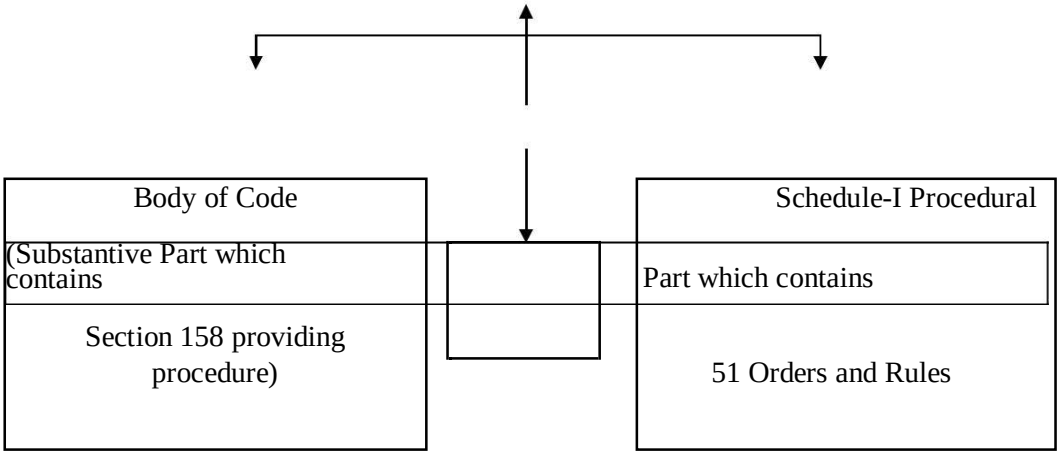
Introduction: The 'Code of Civil Procedure' is a procedure law, i.e., an adjective law. The Code neither

creates nor takes away any right. It only helps in proving or implementing the 'Substantive Law'. The Code contains 158 Sections and 51 Orders. The object of the Code is to consolidate (all the laws relating to the procedure to be adopted by the Civil Courts) and amend the law relating to the procedure of Courts of Civil Procedure. The procedural laws are always retrospective in operation unless there are good reasons to the contrary. The reason is that no one can have a vested right in forms of procedure. The Code of Civil Procedure is not retrospective in operation. - The Code is not exhaustive.

Extent, Applicability and Commencement: It extends to the whole of India, except the State of Jammu & Kashmir, and the State of Nagaland and Tribal Areas. It also extends to the Amindivi Islands, the East Godavari and Vishakhapatnam Agencies in the State of Arunachal Pradesh and the Union Territories of Lakshadweep. The provisions of the Code have also been extended to the Schedule Areas by the amendment Act of 1976. This Act is effective from 01 day of January 1909.

Composition of Code:

CODE OF CIVIL PROCEDURE



The body of the Code containing sections is fundamental and cannot be amended except by the Legislature while the First Schedule of the Code, containing Orders and Rules, can be amended by the High Courts. The sections and Rules must be read together and harmoniously construed, but if rules are inconsistent with the sections, the latter will prevail.

DEFINITIONS

Section-2(2) "Decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either Preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section-144, but shall not include: -

a) any adjudication from which an appeal lies as an appeal from an order, or

b) Any order for dismissal for default.

Explanation: A decree is preliminary where further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Decree [Section-2 (2)] and Order [Section-2 (14)]

Essential Elements of a decree: The decision of a Court can be termed as a "decree" upon the satisfaction of the following elements:-

I. There must be an adjudication i.

II. Such adjudication must have been given in a suit ii.

III. It must have determined the rights of the parties iii with regard to all or any of the matter in controversy in the suit.

IV. Such determination must be of a conclusive nature iv, and

V. There must be formal expression v of such adjudication.

a) An Adjudication: Adjudication means "the judicial determination of the matter in dispute". If there is no judicial determination of any matter in dispute or such judicial determination is not by a Court, it is not a decree; e.g., an order of dismissal of a suit in default for non appearance of parties, or of dismissal of an appeal for want of prosecution are not decrees because they do not judicially deal with the matter in dispute.

b) In a Suit: Suit means a civil proceeding instituted by the presentation of a Plaint. Thus, every suit is instituted by the presentation of Plaint. Where there is no Civil suit, there is no decree; e.g., Rejection of an application for leave to sue in forma pauper is is not a decree, because there cannot be a plaint in such case until the application is granted.

Exception: But where in an enactment specific provisions have been made to treat the applications as suits, then they are statutory suits and the decision given thereunder are, therefore, decrees; e.g., proceeding under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc.

c) Rights of the parties: The adjudication must have determined the rights i.e., the substantive

rights and not merely procedural rights of the parties with regard to all or any of the matter in controversy in the suit.

"Rights of the parties" under section 2(2).The rights of the parties inter se (between the parties) relating to status, limitation, jurisdictions, frame of

suit. accounts, etc.

"Rights in matters in procedure" are not included in section 2(2); e.g.,

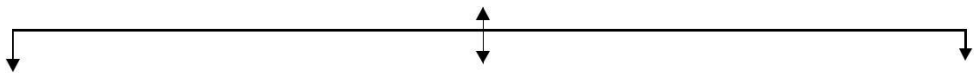
An order of dismissal for non-prosecution of an application for execution, or refusing leave to sue in forma pauperis, or a mere right to sue, are not decrees as they do not determine the rights of the parties.

d) **Conclusive Determination:** The determination must be final and conclusive as regards the Court, which passes it. An interlocutory order which does not finally decide the rights of the parties is not a decree; e.g., An order refusing an adjournment, or of striking out defense of a tenant under the relevant Rent Act, or an order passed by the appellate Court under Order 41, rule 23 to decide some issues and remitting other issues to the trial Court for determination are not decrees because they do not decide the rights of the parties conclusively.*But,*An order dismissing an appeal summarily under Order-41, or holding it to be not maintainable, or dismissal of a suit for want of evidence or proof are decrees, because they conclusively decide the rights of the parties to thesuit.

e) **Formal Expression:** There must be a formal expression of such adjudication. The formal expression must be deliberate and given in the manner provided by law.

Classes/ Types of Decrees

Decree



Final Decree *Partly Preliminary & Partly Final Decree*

I. **Preliminary Decree:** Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a ***Preliminary Decree.*** A preliminary decree is only a stage in working out the rights of the parties, which are to be finally adjudicated by a final decree.

Defined in	Section 2 (2) of the Code of Civil Procedure Act, 1908.	Section 2 (14) of the Code of Civil Procedure Act, 1908.
Ascertainment of rights	It clearly ascertains the rights of the parties concerned.	It may or may not clearly ascertains the rights of the parties concerned.
Number	There is only one decree in a suit.	There can be many orders in a suit.
Type	It can be preliminary, final or partly preliminary and partly final.	It is always final.
Appeal	It is normally appealable except if it is specifically barred by law.	It can be appealable or non-appealable.

The former part of the decree is finally while the later part is only preliminary because the Final Decree for mesne profits can be drawn only after enquiry and ascertainment of the due amount. In such a case, even though the decree is only one, it is Partly Preliminary and Partly Final.

Order: Section -2 (14)

An order means the formal expression of any decision of a Civil Court which is not a decree.

The adjudication of a court of law may be either Decree or Order; and cannot be both.

The essential ingredients of an order are as follows:-

- It should be as the formal expression of any decision.
- The decision should be pronounced by the Civil Court.
- The formal expression should not be a decree.

Judgment: Sec-2(9)

"Judgment" means the statement given by a judge of the grounds of a decree or order.

The essential element of a judgment is that there should be a statement for the grounds of decision.

As the Supreme Court in **Balraj Taneja V. Sunil Madan, AIR 1999 SC 3381** held, a Judge cannot merely say "Suit Dismissed" or "Suit Decreed". The whole process of reasoning has to be set out for deciding the case one way or the other.

So, Every Judgment other than that of a Court of Small Cause should contain

1. A concise statement of the case,
2. The points for determination,
3. The decision thereon, and
4. The reason for such decision.

A judgment of a Court of Small Cause may contain only point (2) and (3)

Mesne Profits : S. (12)

Section 2 (12) of the Code defines the term mesne profits as follows:

'Mesne Profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

General Explanation of Mesne Profits

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of a property owned by someone else. The mesne profits are nothing but a compensation that a person in unlawful possession of others property has to pay for such possession to the owner of the property.

According to the definition, mesne profit is the profit which the person who is in wrongful possession of a property has earned from that property.

Phiraya Lal alias Piara lal vs. Jia Rani [AIR 1973 DEL 186]

The Hon'ble Delhi high court while defining the term mesne profits observed that, "when damages are claimed in respect of wrongful possession of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of immovable property; these damages are called as mesne profits"

The mesne profits are compensation, which is penal in nature.

A decree for mesne profits is to compensate the person who has been kept out of possession even though he was entitled to possession thereof.

Against whom Mesne profits can be claimed?

The mesne profits can be claimed with regard to immoveable property only. Generally, person in wrongful possession and enjoyment of immoveable property is liable for mesne profits.

A decree for mesne profit can be passed against a tresspasser or a person against whom a decree for possession is passed, or against a mortgagee in possession of property even after a decree for redemption is passed or against a tenant holding over at will after a notice to quit has been served him.

To ascertain and provide mesne profits it is not what the plaintiff has lost by being out of possession but what the defendant gained or might reasonably and with ordinary prudence have gained by such wrongful possession. Since interest is an integral part of mesne profits, it has to be allowed in the computation of mesne profits itself

CAVEAT : S.148A

The term caveat has not been defined in the code. It is derived from Latin which means Beware. According to its dictionary meaning a caveat is an official request that a court should not take a particular action without issuing a notice to the party lodging the caveat and without affording an opportunity of hearing it.

In other words, a caveat is a caution or warning given by a party to the court not to take any action or grant any relief to the applicant without notice or intimation being given to the party lodging caveat and interested in appearing and objecting to such relief.

The person filing or lodging a caveat is called “Caveator”.

Section 148-A of the code of civil procedure provides for lodging of a caveat. This section applies only to trial courts, but not appellate courts.

Thus, a person who is the stranger to the proceeding cannot lodge a caveat. (**Kattil vs Mannil**).

The provision of section 148-A of the code can be attracted only in cases where the caveator is entitled to be heard before any order is made on the application already filed or proposed to be filed.

A caveat protects the caveator’s interest. The caveator is already ready to face the suit or proceeding which is expected to be instituted by the opponent. Hence no exparte order shall be passed against the caveator. The caveat avoids multiplicity of proceedings. Thus it saves the expenses costs and convinces of the courts.

The caveat will remain in force for 90 days from the date of filing.

Restitution S.144 C.P.C.

Restitution means 'restoring to the party what he has lost'. This doctrine of restitution is applicable in Civil courts in the following circumstances:

i) The trial court must have given a decree or order and in pursuance the plaintiff P must have received some benefit from the defendant D.

ii) ii) The appellate court on appeal from the trial court must have reversed the trial court order or decree in favour of D.

In such a case,. D may make an application under Sn.144. The court may make orders to restore D to his status ante. For this purpose it may order for refund of costs, for payment of interests, damages, Mesne profits as it may find proper. The court will not entertain any suit but an application for restitution will suffice.

Eg.: A obtains a decree against B for possession of 10 Metric Tonnes of timber, and in execution thereof obtains possession. This decree is reversed by the appellate court. B may make an application for the restoration of his 10 Metric Tonnes of timber. The doctrine of restitution is based on the rule that when a person has made a gain or benefit under a decree, and the appellate court reverses the decree, the law imposes an obligation on such a party to restore to the other who has lost i.e, Status quo ante is to be restored. It is for this reason that the trial court takes security from the party for restitution of the property, if the decree is reversed on appeal.

Foreign judgment. S. 13 & 14

Foreign judgment is defined as the judgment given by the Foreign Court i.e. a court situated beyond the territorial limits of India and which is not established or continued by the President of India. The rule is that a foreign judgment operates as a Res judicata between the parties except in the following cases ; i) The Courts in India will not give effect to a foreign judgment pronounced by a court without jurisdiction. The leading case is Gurdayal V. Raja of Faridkot (1895). A sued B in the Faridkot court to recover Rs.60,000/- misappropriated by B, when B was in A's services. B did not appear and hence an ex parte decree was passed. At the time of the suit B was not residing in Faridkot and had no domicile of that place. Thereupon, A sued B in British Indian Courts. Held, Faridkot Court's decree was a foreign judgment. As B had no residence or domicile and was not even present there the foreign decree was without jurisdiction and hence, would not be followed in India. ii) The foreign judgment must have been given on the merits of the case. The Indian courts have a right to examine the merits. iii) If the Indian court finds that the foreign judgment appears on the face of the record to be an incorrect view of International Law or Indian Law, it may refuse to follow that decision. iv) If the foreign judgment is

given in violation of the principles of Natural Justice, the Indian courts may refuse to follow it. v) Any foreign judgment obtained by fraud is void, and hence, not followed by Courts in India. vi) If the foreign judgment has decreed for a claim, which is a breach of any Indian Law, then the decision is not found. Hence, a foreign judgment for a gambling debt would not be enforceble in Indian courts. Presumptions as to foreign judgments : According to Sn.14, a certified copy of the foreign judgment is admissible in evidence in India, There is a presumption that the judgment is duly pronounced. This presumption is, of course, rebuttable.

Jurisdiction To Foreign Courts

The following circumstances would give jurisdiction to foreign courts:

1. Where the person is a subject of the foreign country in which the judgment has been obtained;
2. Where he was a resident in the foreign country when the action was commenced and the summons was served on him;
3. Where the person in the character of plaintiff selects the foreign court as the forum for taking action in which forum he issued later;
4. Where the party on summons voluntarily appeared; and
5. Whereby an agreement, a person has contracted to submit himself to the forum in which the judgment is obtained.

INHERENT POWERS OF THE COURT

Meaning: The word "Inherent" is very wide in itself. It means existing and inseparable from something, a permanent attribute or quality, an essential element, something intrinsic, or essential, vested in or attached to a person or office as a right of privilege.Hence, inherent powers are such powers which are inalienable from courts and may be exercised by a court to do full and complete justice between the parties before it.

There are many sections in the CPC that provides for the same i.e. Section 148, 148-A, 149, 150, 151, 152, 153 and 153-A of CPC.

Principle: In the cases where the C.P.C does not deal with, the Court will exercise its inherent power to do justice. If there are specific provisions of the C.P.C dealing with the specific issue and they expressly or by basic implication, then the inherent powers of the Court cannot be invoked as inherent powers itself means those which are not specified in C.P.C.

The section confers on the judges to make such orders that may be necessary to make justice achievable. The Power can be invoked to support the provisions of the code but not to override or evade other express provisions as C.P.C. is the basic law which governs the functioning of the courts.

Judicial Interpretations

1. Alternative for 'No other remedy:

In the absence of any special circumstances which amount to the abuse of the process of the Court, it cannot grant a relief in exercise of its inherent power when the justice can be served by another remedy is available to the party concerned provided by the Code.

No Powers over the Substantive Rights: The inherent powers saved by s. 151 of the Code are not over the substantive rights which any litigant possesses. Specific powers have to be conferred on the Courts for passing such orders.

In **Ram Chand and Sons Sugar Mills v. Kanhayalal**: the SC held that the Court would not exercise its inherent power under S.151 CPC if it was inconsistent with the powers expressly or impliedly conferred by other provisions of Code. It had opined that the Court had an undoubted power to make a suitable order to prevent the abuse of the process of the Court.

2. To Advance Interests of Justice:

In **M/s. Ram Chand & Sons Sugar Mills Pvt. Ltd. Barabanki (U.P.) v. Kanhayalal Bhargava**, the appellant contended that during the pendency of the first suit, certain subsequent events had taken place due to which the first was not fruitful and in law the said suit could not be kept pending and continued solely for the purpose of continuing an interim order made in the said suit. While examining the question the Supreme Court was to consider whether the court can take cognizance of a subsequent event to decide whether the pending suit should be disposed or not. The question arose was whether a defendant could make an application under Section 151 CPC for dismissing the pending suit on the ground that the said suit has lost its cause of action. The Court upheld the contention.

3. Restoration of Money Suit–

Bahadur Pradhani v. Gopal Patel– In this case, the plaint of a Money Suit was rejected for non-payment of deficit court fee within the time granted by the court. The plaintiff filed a petition under Section 151, C.P.C. for the restoration of the suit in the ends of justice. The court allowed the petition and the suit were restored to file. This Court examined the scope of the inherent powers of the Court and expressed that the provisions of the Code do not control the inherent powers of the court by limiting it or otherwise affecting it. It is a power inherent in the court by virtue of its duties to do justice between the parties before it.

When there is no scope for getting any relief:- It was held in the case of **Manoharlal v. Seth Hiralal** that the provisions of the Code are not exhaustive as the legislature is incapable of contemplating all possible circumstances which may arise in future litigation.

Enlargement of Time: Section 148

The court has the power to enlarge the said period even if the original period fixed has been expired. Where the court in the exercise of its jurisdiction can grant time to do a thing, in the absence of the specific provision to the contrary, denying or withholding such jurisdiction, the jurisdiction to grant time would include in its ambit the jurisdiction to extend time initially fixed by it. This power is discretionary and so the court is entitled to take into account the conduct of the party praying for such extension. The party cannot claim this power as their right.

Payment of Court Fees: Section 149

The Section 149 of the Code authorizes the court to allow a party to make up the deficiency of court fees payable on a plaint, memorandum of appeal, etc. even after the expiry of the period of limitation prescribed for the filing of such suit, appeal etc. Under the provisions of S. 149, C.P.C., as a practice, the courts' grant time for payment of the court-fee on coming to an adverse conclusion on a paper application. Section 4 of the Court Fees Act, 1870 provides that no document chargeable with court fee under the act shall be filed or recorded in any court of justice unless the requisite court fee ispaid.

WHAT IS THE SCOPE OF INHERENT POWER EXERCISED BY THE COURT UNDER SECTION 151 OF THE CPC?

More than seven decades back, the Privy Council in the case of **Emperor v. Khwaja Nazir Ahmed**, observed that Section 561A (corresponding to Section 482 of the Code of Criminal Procedure) had not given increased powers to the Court which it did not possess before that section was enacted. It was observed

"The section gives no new powers, it only provides that those which the court already inherently possess shall be preserved and is inserted lest, as their Lordships think, it should be considered that the only powers possessed by the court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of the Code."

In the very recent verdict of **K.K. Velusamy v. N. Palaanisamy**, the Supreme Court upheld that Section 151 of the Code recognizes the discretionary power inherited by every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong'. The Court summarized the scope of Section 151 of the CPC as follows:

(a) Section 151 is not a substantive provision which confers any power or jurisdiction over courts. It merely recognizes the discretionary power of every court for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) The provisions of the Code are not exhaustive; section 151 says that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used by the court to deal with such situation, to achieve the ends of justice, depending upon the facts and circumstances of the case.

(c) A Court has no power to do things which are prohibited by law or the Code, in the exercise of its inherent powers. The court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is expressly provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them and the court should exercise it in a way that it should not be in conflict with what has been expressly provided in the Code.

(e) While exercising the inherent power, there is no such legislative guidance to deal with those special situations of the case and so the exercise of power depends upon the discretion and wisdom of the court, and also upon the facts and circumstances of the case. So, such consequential situation should not, however, be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with care, only where it is absolutely necessary, when there is no provision in the Code governing the matter or when the bona fides of the applicant cannot be doubted or when such exercise is to meet the ends of justice and to prevent abuse of process of court.

LIMITATIONS

It can be clearly seen that the inherent powers of the court are extensively wide and residuary in nature. Though, one cannot rule out the fact that the same inherent powers can be exercised ex debito justitae only in the absence of express provisions in the code. The restrictions on the inherent powers are not there because they are controlled by the provisions of the Code, but because of the fact that it shall be presumed that the procedure provided by the legislature is dictated by ends of justice.

Suit of Civil Nature

Introduction: A litigant having a grievance of a civil nat.ure has a right to institute a civil suit in a civil Court competent to hear and decide the matter unless its cognizance is either expressly or impliedly barred by any statute. It is a fundamental principle of English law that whenever there is a right, there is a remedy.

The word "civil" relates to the community or to the policy and government of the citizens and subjects of a State. The word "civil" indicates a state of society reduced to order and regular government; as against

"criminal" it pertains to private rights and remedies of men and also used in contradistinction to military, ecclesiastical, natural, or foreign.

Generally, civil action is an action wherein an issue is presented for trial, formed by averments of complaint and denials of answer; or replication to new matter; or an adversary proceeding for declaration, enforcement, or protection of a right or redressal or prevention of a wrong. It is a personal action which is instituted to compel payment, or doing of some other thing which is purely civil.

Civil proceeding includes, at least, all proceedings affecting civil rights which are not criminal. It is a proceeding in which some rights to property or other civil rights are involved, no matter whether the jurisdiction of the court is ordinary, special or extraordinary. If the proceeding is in aid of establishing a civil right or for disputing one, it would be a civil proceeding.

Meaning: According to S.9 a Civil Court has jurisdiction to try a suit, when the following two conditions are satisfied:

i. the suit is of a Civil nature, and

ii. The cognizance of such a suit is neither expressly nor impliedly barred.

The word "civil" has not been defined in the Code. The word "civil" means "pertaining to the private rights and remedies of a citizen as distinguished from Criminal, political, etc." The expression "Civil Nature" is wider than the expression "Civil Proceedings". Thus a suit is of a civil nature if the private question therein relates to the determination of a civil right and enforcement thereof. It is not the status of parties to the “suit, but the subject matter of it which determines whether or not the suit is one of a civil nature. The expression is "suit of a civil nature will cover private rights and obligations of a citizen. Political and religious questions are not covered by that expression."

RES SUB JUDICE AND RES-JUDICATA

Res Sub Judice (Stay of Suit)

Section-10: Provides

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 other Court beyond the limits of India established or constituted by the Central Government and having like jurisdiction or before he Supreme Court.”

Explanation: 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.

Object: The object of S.1 0 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The section intends to prevent a person from multiplicity of proceedings and to avoid a conflict of decisions.

Conditions: This section will apply where the following conditions are satisfied:

The **OBJECT** of the section is to protect a person from a multiplicity of proceedings and to avoid a conflict of decisions. It also protects the litigant people from unnecessary harassment (***SPA Annamalay Chetty v. BA Thornlill,*** AIR 1931 PC 263).

CONDITIONS to be complied with before the application of the principle:

1. There must be two suits one previously instituted and the other subsequently instituted.
2. The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.
3. Both the suits must be between the same parties or their representatives.
4. The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in Bangladesh or in any court beyond the limits of Bangladesh established or continued by the Government or before the Supreme Court.
5. The Court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.

6. Such parties must be litigating under the same title in both the suits.

Provisions are Mandatory: The provisions contained in section-10 are mandatory and no discretion is left with the Court. The order staying proceedings in the subsequent suit can be made at any stage.

A suit pending in a Foreign Court: 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.

Inherent power to stay: A civil court has inherent power U/s 151 to stay a suit in the ends of justice or to consolidate different suits between the same parties containing the same matter in issue substantially.

Decree passed in contravention of S.10: It is the trial and not the institution of the subsequent suit which is barred under this section and therefore, a decree passed in contravention of S.10 is not a nullity, and the same can be executed.

Consent of parties: The provision of Section 10 is a rule of procedure which can be waived by a party and where the parties waive their right and expressly ask the Court to proceed with the subsequent suit, they cannot afterwards challenge the validity of the proceedings.

Res-Judicata

(A case or suit already decided)

(The rule of Conclusiveness of judgment)

Meaning: *"Res-judicata"* consists of two Latin Words, 'Res' means a thing or a matter or a question and 'Judicata' means adjudicated, adjudged or decided. Therefore, the expression 'Res-judicata" means "a thing or matter already adjudged or adjudicated or decided".

Res-judicata means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto."

The principal of Res judicata is based on the need of giving finality to judicial decisions. When a matter-whether on a question of fact or a question of Law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

The principle of the *Res Judicata* simply means that if a competent authority has already adjudicated upon an issue, the same parties which were party to the former suit, cannot file another second or third suit, asking the court to adjudicate upon the issue, which is similar to the issue already adjudicated upon in the former suit. The court then disallows the filing of the second matter. This principle facilitates 'judicial efficiency', and curbs the filing of 'frivolous and repetitive suits', on the same matter.

Object :

The doctrine of Res Judicata is based upon the following four maxims-

a. ***Nemo debet lis vexari pro una et eadem causa:*** no man should be vexed twice over for the: same cause;

b. ***Interest republicae ut sit finis Iitium:*** it is in the interest of the State that there should be an end to a litigation;

c. ***Res judicata pro veritate occipitur:*** an judicial decision must be accepted as correct.

d. ***Res judicata pro veritate habetur:*** *an adjudicated matter shall be deemed correct.*

The **SCOPE** of the principle of *res-judicata* is defined in the judgment of ***Satyadhan Ghosal & Ors. V. Smt. Deorajin Debi & Anr.,*** AIR 1960 SC 941. The Supreme Court held that *"The Principle of Res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies; Neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s. 11 of the Code of the Civil Procedure: but even where s.11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court, as well as any higher court, must in any future litigation proceed on the basis that the previous decision was correct."*

CONDITIONS to be complied with before the application of the principle are:-

1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and subsequently in issue, either actually or constructively, in the former suit.
2. the former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Res judicata not only affects the parties to the suit but his privies, i.e., persons claiming under them.
3. the parties must have litigated under the same title in the former suit. The expression "same title" means in the same capacity.
4. the court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised (This condition is done away by insertion of Explanation VIII in s.11).
5. The matter should be heard and finally decided. If an opinion is expressed on issues not material to the decision, then *res judicata* will not apply. (Matter be heard on merits and dismissal on

grounds of procedural infirmities will not attract the application of ‘res judicata’).

Constructive Res Judicata:-

A matter is actually in issue when it is alleged by one – party and denied by the other. It is constructively in issue when the matter might or ought to have been made a ground of attack or defense in the former suit.

Explanation IV to Section 11 says that any matter which might and ought to have been made a ground of defense or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

It may, therefore, happen that a matter though not actually in issue directly and substantially may nevertheless be regarded as having been in issue in a suit when the same might and ought to have been made a ground of attack or defense.

The test is whether the parties had an opportunity of controverting it and if they had, the matter will be treated as actually controverted and decided. When the matter is actually in issue the same is heard and decided, but when it is constructively in issue from its very nature it could not be heard and decided, for this was a matter which might and ought to have been made a ground of attack or defense in the suit. An illustration or two will make the point clear.

An issue which ought to have been raised earlier cannot be raised by the party in successive round of litigation. In the case of ***Tata Industries Ltd. v. Grasim Industries Ltd.,*** (2008) 10 SCC 187, the issue before the Supreme Court was that whether the jurisdiction to appoint the arbitrator u/s 11(6) of Arbitration and Conciliation Act, 1996, could be raised before the Supreme Court directly. The Supreme Court rejected argument by holding that, 'Question of *locus standi* not having been raised before the High Court could not survive in Supreme Court. *It amounted to an abandonment of the issue and cannot be raised before the Supreme Court.*" The Court applied the Principle of Constructive Res Judicata to question of *locus standi,* which was directly raised in the Supreme Court and had not been challenged in the High court earlier.

There are certain **Exceptions** when the principle cannot be applied:-

- If the decree has been obtained by practicing misrepresentation or fraud on the court, or where the proceedings had been taken all together under a special statute.
- Not every finding in the earlier judgment would operate as a *res judicata.* Only an issue, which is 'directly' and 'substantially' decided in the earlier suit, would operate as *res judicata.*
- Where the decision has not been given on merit, it would not operate, in case, the appeal of the judgement and decree of the court below is pending in the appellate court, as then the judgement of the court below cannot be held to be final, and the findings recorded therein would not operate as *res judicata*.
- When the judgment is non-speaking. (***Union of India v. Pramod Gupta (Dead) by LRs & Ors.,*** (2005) 12 SCC 1).
- Where the matter has not been decided on merit earlier, the doctrine of *res judicata* is not

applicable (***State of Uttar Pradesh & Anr. v. Jagdish Sharan Agrawal & Ors.,*** (2009) 1 SCC 689).

- It does not apply to criminal cases, where the entire proceedings have been initiated illegally and without jurisdiction. ***Fatima Bibi Ahmed Patel v. State of Gujarat*** (2008) 6 SCC 789.

- When a matter involves a pure question of law (***Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar,*** (2008) 9 SCC 54).

- In cases of Dismissal in limine or dismissal on default, the principle of res judicata does not apply.

The distinction between "*Res Subjudice*" and "*Res Judicata*".

1. *Res Subjudice* is discussed in s.10, CPC; while *Res Judicata* is discussed in s. 11, CPC.
2. *Res Subjudice* applies to the proceedings pending in the court, i.e., matters pending judicial inquiry; while *Res Judicata* applies to matters already adjudicated upon.
3. *Res Subjudice* stays the latter suit instituted in the court which has the same matter directly and substantially in issue in the previous suit; while *Res Judicata* bars the trial of a suit in which the matter is directly and substantially in issue has already been adjudicated upon in a previous suit.
4. In the case of *Res Subjudice,* the previously instituted suit must be pending in the same court in which the subsequent suit was brought or in a different court having jurisdiction to grant the relief claimed; while in *Res Judicata,* No such requirement is needed.

EXECUTION OF DECREES

S. 36 TO 74 AND O. 21: In a suit, after the pronouncement of judgment and passing of decree in respect of the relief given by the Court, the next step is the execution of decree or order.

Meaning: "Execution is the enforcement of decrees and orders of the Court by the process of the Court." As a matter of fact, execution is the formal procedure prescribed by law whereby the partly entitled to the benefit of a judgment may obtain that benefit.

Execution of Decree and Order: Section-36 of the Code lays down that the provision of the Code relating to execution of decrees (including provision relating to the payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).

Subject Matter of Execution: The subject matter of execution may be either a decree or an order of a Court of competent jurisdiction. Every decree or order of a Court cannot be the subject matter of an execution, but only those decrees and orders are executable which finally determine and enforce the rights of the parties at the date when the decree or order is made.

Decree which may be executed: Before a decree can be executed, it must be both valid and capable of execution. The decree put into execution must not be barred under any law. It is the decree passed by the Court of first instance which can be executed but when an appeal has been preferred against the original decree, it is the decree of the appellate Court, which alone can be executed. The decrees of the Court of

first instance become merged in the appellate Court's decree. The appellate decree whether it confirms, varies or reverses the decree of original Court, it is the only decree which can be executed.

Court by which decrees may be executed: Section 38

According to S. 38, an executing Court may be either the Court which passed the decree, or the Court to which the decree is sent for execution.

The expression "Court which passed a decree" means –

1) The Court of first instance -

   a) in case where the decree is passed by the Court of first instance, and

   b) in case of appellate decrees,

2) The Court at the time of execution would have had jurisdiction to try the suit where the Court of first instance has either ceased to exist or ceased to have jurisdiction to execute the decree.

Explanation to S.37 says that

The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred form the jurisdiction of that Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making application for execution of the decree it would have jurisdiction to try the said suit.

Application for Execution: The execution proceedings commence with the filing of an application for execution before the Court, which passed the decree, or before the Court to which the decree has been transferred for execution. Rules 10-25 and 105-106 of Order 21 deal with execution applications.

Who may apply for execution: Rule 10

An execution proceeding may be started on the application of the -

   i) Decree holder- Rule10 of Order 21

   ii) Where the decree-holder is dead, his legal representative-S 146.

   iii) Any other person claiming under the decree-holder-S. 146.

   iv) Representative of or a person claiming under the decree-holder - S. 146.

v) Transferee of decree-holder26, subject to the following-

a. Where the decree has been transferred by an assignment, in writing or by operation of law;

b. The application is to the Court which passed the decree;

c. Notice and after providing an opportunity of being heard to the transferor and the judgment debtor.

vi) One or more of the joint decree holders,27 subject to the fulfillment of the following conditions:

a. There is no contrary condition imposed by the decree.
b. The execution application is to the execution of the whole decree; and

c. The application is made for the benefit of all the joint decree holders; or if anyone of them is dead, for the benefit of the survivors and the legal representatives of the deceased decree holder.

Against whom an execution proceeding can be started: Execution proceeding may be started against

the following persons:-

a. Judgment debtor, S. 50, 0.21, R.15

b. When the judgment debtor is dead, against his legal representatives. But the legal representatives shall be liable only to extent of the property of the judgment debtor received by them. -So 50, 52, 53.

c. Representative of or the person claiming under the judgment debtor.-S.146.

d. Surety of the judgment debtor. S. 150.

Court to whom an execution application may be made: As per S. 38, an execution application may be filed either in the Court who passed the decree or in the Court to whom the decree has been transferred for execution.

Contents of Application: According to Rule 11 of 0.21, every application for execution, except in a case of a money decree, shall be in writing, signed and verified by the applicant or by some other person acquainted with the fact of the case and shall contain the particulars like the number of the suit, the name of the parties, the date of the decree, the amount of the decree etc Rules 11-A, 12, 13, 14 and R. 45(1) of 0.21 should be read together.

Procedure: Admission (Rule17) and Hearing (Rules 105-106)

Admission: According to Rule17 of 0.21, on receiving an application for execution of a decree, the Court must admit and register the application, if the Court is satisfied that the execution application complies with the requirements of Rule 11 to 14. Where such application does not comply with the above requirements then the Court shall allow the defect to be remedied then and there or within a time fixed by it, and if the defect is not remedied as specified then, the Court shall reject the application.

Hearing: Rules 105 and 106 deal with the hearing of an execution application and state that when an application is pending then, the Court shall fix a date of hearing and if the applicant is not present at the time of hearing, the Court may dismiss the application and when the applicant is present but the opposite party is not present, the Court may proceed ex-parte hearing and pass an appropriate order.

Under Rule 106, an order of dismissal for default or an ex-parte hearing may be set aside by the court on an application of the aggrieved party where there are sufficient causes shown to do so.

An order rejecting an application u/r 106(1) is appealable.

Limitation for Execution: Any" application for execution of a decree can be filed within 12 years from the date of the decree while the period of limitation for the execution of a decree for mandatory injunction is 3 years from the date of the decree.

Stay of Execution: Rules 26 to 29 of Order XXI deal with the stay of execution. The provisions of Rule 26 are mandatory and imperative while the provisions of Rule 29 are not mandatory but discretionary. But this discretion must be exercised judicially and in the interest of justice.

The execution proceeding may be stayed either by the executing Court i.e. the Court which passed the decree or the Court to: -which the decree has been transferred for execution or by the Court having appellate jurisdiction in respect of the decree or to which the decree has been transferred for the execution thereof.

The provisions regarding stay of execution of a decree are made in Rule 26, which lays down that the executing Court (the Transferee Court) shall, on sufficient cause being shown by the judgment-debtor, and after furnishing security or fulfilling the conditions, which may be imposed upon him by the Court, stay the execution of a decree for a reasonable time, to enable the judgment debtor to apply to the Court which has passed the decree or to the appellate Court for an Order to stay execution.

Provided that if the decree is one for payment of money, the Court shall if it grants stay without

requiring security, record its reasons for so doing.

Mode of execution: There are various modes of execution of decree provided in the Code. A decree may be enforced, as specified U/s 51 of the Code of Civil Procedure-

a. by delivery of any property specifically decreed;

b. by attachment and sale or by sale without attachment of any property.

c. by arrest and detention31 in prison for such period not exceeding the period specified in S. 58, where arrest and detention is permissible under that section;

d. by appointing a receiver; or

e. in such other manner as the nature of the relief granted may require.

Choice of mode of execution and simultaneous execution: As a general rule, it is for the decree holder to choose a particular mode of executing his decree and it is permissible too in law to opt for even a simultaneous execution, but the Court may in its discretion refuse execution at the same time against the person and property of the judgment debtor.

The Supreme Court in **Shyam Singh v. collector, Distt. Hamirpur 1993 Supp (1) SCC,** observed: "Section 51 of the Code gives an option to the creditor, of enforcing the decree either against the person or the property of the creditor; and nowhere it has been laid down that execution against the person of the debtor shall not be allowed unless and until the decree holder has exhausted his remedy against the property."

However, the discretion is with the Court to order simultaneous execution and that discretion must be exercised judicially. The Court can refuse simultaneous execution by allowing the decree holder to avail of only one mode of execution at a time[33].

Modes of Execution:

1. **By delivery of Property:** Section 51 (a) Rules 31, 35 and 36.

   a. **Specific moveable property:** The decree for any specific movable properties which do not include

   money and are in the possession of judgment debtor may be executed:-

i) by seizure and delivery of property; or

ii) by detention of the judgment debtor; or

iii) by attachment and sale of his property; or

iv) by attachment and detention both.

The provisions of Rule 31 of O. 21 are not applicable for the execution of a decree for money or where the property is not in possession of the judgment debtor but is in the possession of a third party.

b. Immovable property: Rules 35 and 36 Of O. XXI provide the mode of executing decrees, for possession of immovable property. Where the decree is for immovable property in the possession of judgment debtor or in the possession of any person bound by the decree35, it can be executed by removing the judgment debtor or any person bound by the decree and by delivering possession thereof to the decree holder.

2. Attachments and Sale of Property: Section 51(b) The Court is empowered to order execution of a decree by attachment and sale or by sale without attachment of any property36 and the sale of property without an attachment is merely an irregularity and such sale is not void or without jurisdiction and does not vitiate the sale.

Sections 60 to 64 and Rules 41 to 57 of Order XXI deal with the subject of attachment of property.

An executing Court is competent to attach the property if it is situated within the local limits of the jurisdiction of the Court and the place of business of the judgment debtor is not material37. The provisions of the Code, however, do not affect any local or special law.[38] The attachment and sale under any other statute can be made and the judgment debtor cannot claim benefit under the Code.

Modes of Attachment: Section 62 and Rules 43 to 54 of Order XXI lay down the procedure for attachment of different types of moveable and immovable properties. These are the provisions in the Code relating to mode of attachment of movable property,[40] Negotiable instruments,[41] Debt not secured by a Negotiable instrument,[42] Share in capital of a corporation,[43] Share or interest in movable property,[44] Salary or allowance of a Public Servant or a Private employee,[45] Partnership property,[46] Property in custody of Court or Public Officer,[47] Decree (i) for Payment of money or sale in enforcement of a mortgage or charge[48] and (ii) Decree other than that mentioned above,[49] Agricultural produce,[50] Immovable property[51] while S. 63 prescribes procedure to be followed in case the property is attached in execution of decrees by several Courts.

Properties, which can and cannot be attached: Section 60(1) of the Code specifies about the properties which can be attached and sold in execution of a decree while being subject to the provisions of sub-section (2) of section 60, the properties which can be attached and sold in execution of a decree are specified in proviso to s. 60(1) and s. 61 of the Code.

Determination of Attachment: Under the following circumstances, an order of attachment under the Code shall be determined -

i. On the satisfaction of the decree either by the payment of the decreetal amount or otherwise;

ii. On the reversal or setting aside of the decree:

iii. On an order to release the property;

iv. Dismissal of execution application after the attachment of property:

v. On withdrawal of attachment by attaching Creditor;

vi. On failure by decree-holder to do what he is bound to do under the decree; and

vii. Where the attachment order is made before judgment and the defendant furnishes the necessary security.

3. **Arrest and Detention:** Section 51 (c) One mode of the execution of a decree is arrest and detention[61] of a judgment debtor in the Civil Prison. The provisions stated in proviso to Section 51 are relevant in this regard and are as under:-

An order of arrest and detention of judgment debtor in civil prison can be passed by the Court while executing the decree for payment of money, or for specific moveable property, or for specific performance of a contract, or for an injunction, or where a decree for specific performance of a contract or for an injunction is against a corporation.

But the persons like a woman, judicial officers, the parties and their pleaders, members of Legislative Bodies, a judgment debtor etc., can not be arrested under curtain circumstances.

An order of detention of judgment debtor in civil prison shall not be passed, in execution of a decree for the payment of money, where the total amount of such decree does not exceed two thousand rupees.

Period of detention: According to S. 58(1), every person detained in the civil prison in execution of a decree shall be so detained, where the detention is for the payment of a sum of money –

i) exceeding five thousand rupees- for a period not exceeding 3 months, and

ii) Exceeding two thousand rupees, but not exceeding five thousand rupees - for a period not exceeding six weeks.

Release of person detained: A warrant for the arrest may be cancelled or an arrested judgment debtor may be released by the Court on the ground of his serious willness, while a judgment debtor, who has been committed to civil prison, may be release of therefrom, either by the State Government, on the ground of the existence of any infectious or contagious disease, or by the committing court or any superior court, on the grounds of his suffering from any serious iIIness.

A judgment debtor may also be released as specified under proviso to s. 58, Le.

i. on the, payment of amount mentioned in the warrant, to the officer in charge of the civil prison, or
ii. on the otherwise satisfaction (by an order of the Court) of the decree, or
iii. on the request to release of the person on whose application he has been so detained, or
iv. on the omission to pay subsistence allowance, by the person, on whose application he has been so detained.

But such release as specified in clause (iii) or on such omission shall noF1 be without an order of the Court.

Re-arrest: A judgment debtor released under section 58 shall not be discharged from his debt but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison and if he has been released under section 59, he may be re-arrested but the detention period in civil prison shall -not exceed the aggregate period specified in S. 58.

4. **By' Appointment of Receiver:** Section 51(d) The provisions relating to the execution by appointment of a Receiver are provided in Order XXI, Rule 11 (2) (J) (iv).

An execution of a decree by appointment of receiver is an equitable remedy which cannot be claimed as a right and is granted by the Court in its discretion, and the same is an exception to the general rule that a decree holder can choose the mode of execution and that the Court has no power to refuse the mode chosen by him. The provisions of section 51 (d) should be read with - the provisions of Order XL, Rule 1.

Questions to be determined by the Executing Court: Section 47 provides the provisions regarding the matters arising subsequent to the passing of a decree, and deals with objections to execution, discharge and satisfaction of a decree.

i. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
ii. Omitted
iii. Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation I: For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and (b) All questions relating to the Delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

In **Jugal Kishore V. Raw Cotton Com. Ltd, AIR 1955, SC,** the Court has decided that once the suit is decreed, S. 47 requires that the executing Court alone should determine all questions in execution proceedings and filing of separate suit is barred. It does not matter whether such questions arise before or after the decree has been executed. For the said purpose, the Court can treat a suit as an execution application or an application as a suit in the interest of justice.

But after the Amendment Act of 1976, which deleted sub-section (2) of section 47, by which the Court was empowered to treat an application U/S 47 as a suit, or a suit as an application, now the Court cannot treat an application U/S 47 as a suit, or a suit as an application.

An Executing Court Can not go behind the Decree: The duty of an executing Court is to execute the decree as it is. An executing Court cannot[7] go behind the decree. An executing Court has 'to take the decree as it stands and execute it according to its terms. The Court has no power to question the correctness of the decree.

Vague and Ambiguous Decree: But whenever a decree is found to be vague or ambiguous, it is within the power and duty of the executing Court to interpret the decree with the intent to find out the meaning of those terms.

Decree passed in Inherent lack of Jurisdiction: When the executing Court finds that there was an inherent lack of jurisdiction, the decree passed by a Court is a nullity and when such a plea is put forward by an aggrieved party, it is obligatory on the part of the executing Court to consider such an objection,[74] and such a decree cannot be executed, because there cannot be said to be a decree in such a case.

No Appeal against any determination U/s 47, but Revision Lies: Before the Amendment Act of 1976, the determination of any question U/s 47 was deemed to be a decree U/s 2(2) of the Code, but after the amendment, which deleted sub-section (2) of section 47, by which the Court was empowered to treat an application U/s 47 as a suit, or a suit as an application, and hence, now any determination U/ s 47 is not appealable U/s 96 or 100, but a revision lies, subject to the fulfillment of the conditions mentioned in s. 115 of the Code.

UNIT 2

PLACE OF SUING (SECTION 15 TO 20)

The first and the important thing is the place of suing in order that a Court can entertain, deal with and decide a suit. Section 15 to 20 of C.P.C. regulate the forum for the institution of suits.

Rules as to forum

The rules a to forum can be discussed under the following two heads-

a. **Rules as to pecuniary jurisdiction:** The rule about the pecuniary jurisdiction is that the "Every suit shall be instituted in the court of the lowest grade competent to try it."

   The above rule is one of procedure only and not of jurisdiction and therefore, exercise of jurisdiction by. a Court of higher grade than is competent to try the suit is mere irregularity covered by section 99 and the decree passed by the Court is not nullity while the exercise of jurisdiction by a Court of lower grade than the one which is competent to try it, is a nullity as being without jurisdiction.

b. **Rules as to nature of the suit:** Suits may be divided into three c1asses-

   i. Suits in respect of immoveable property,- section 16 to 18

   ii. Suit for compensation for wrong (for torts) to person or movable property,- Section 19, and

   iii. Suits of other kinds, - section- 20.

1) **Suits in respect of immoveable property:** Sections 16 to 18 deal with suits relating to immoveable property.

Suits to be instituted where subject-matter situate: Section 16 provides as Subject to the pecuniary or other limitations prescribed by any law, suits for the recovery of immoveable property with or without rent or profits-

a. for the partition of immoveable property;

b. for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

c. for the determination of any other right to or interest in immovable property;

d. for compensation for wrong to immovable property,

e. for the recovery of immovable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate.

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation: In this section "property" means property situate in India.

Suits for immoveable property situate within jurisdiction of different courts: Section 17 provides as

"Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situated within the jurisdiction of different Courts, the suits may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate:

Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.

Place of institution of suit where local limits of jurisdiction of Courts are uncertain: Section 18 provides as

1. Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, anyone of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction.

   Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suits to exercise jurisdiction.

2. Where a statement has not been recorded U/s 18(1), and the objection is taken before an Appellate Court or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the Appellate Court or Revisional Court shall not allow the objection unless in its opinion there was, at the time of institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

2) Suit for compensation for wrong to person or movableproperty: Section 19 provides as Where a suit is for compensation for wrong done to the person or to moveable 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 said courts.

Illustrations:

a. A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

b. A, residing in Delhi, publishes in Calcutta statements defamatory of B, B may sue A either in Calcutta or in Delhi.

3) Suits for other kinds: Section 20 provides as

Subject, to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

a. the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and 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 and voluntarily resides, or carries on business, or personally works for gains, provided that

in such case either the leave of the Court is given, or the defendant who does not reside, or carry on business, or personally work for gain, as aforesaid, acquiesces in such institution; or

c. the cause of action, wholly or in part, arises.

Explanation: A corporation shall be deemed to carry on business at its sole or principal office in India or in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustration:

1) A is a tradesman in Calcutta, B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East India Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business.

2) A resides at Shimla, B at Calcutta and C at Delhi. A, Band C being together at Banaras, Band C make a joint Promissory note payable on demand, and deliver it to A. A may sue Band C at Banaras, where the cause of action arose,. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these case, if the non-resident defendant objects, the suit can not proceed without the leave of the Court.

Objections to Jurisdiction - Section 21

Objections as to territorial (Place of suing) jurisdiction: "No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless -

a. Such objection was taken in the Court of first instance.

b. at the earliest possible opportunity and in all cases where issues are settled at or before such settlement,

c. and unless there has been consequent failure of justice".

All these three conditions must co-exist.

Objections as to pecuniary jurisdiction[47]: "No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court less-

1) such objection was taken in the Court of first instance,
2) at the earliest possible opportunity and in all cases where issues are settled at or before such settlement,
3) and unless there has been a consequent failure of Justice."

All these three conditions must co-exist.

Objections in execution proceedings: "No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction" shall be allowed by any Appellate or Revisional Court unless-

a. such objection was taken in the executing Court,
b. at the earliest possible opportunity,
c. and unless there has been a consequent failure of Justice."

Lack of jurisdiction and Waiver of defect as to place of suing: It is well settled principle of law that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court otherwise incompetent a try a suit.

An objection as to local jurisdiction of a Court can be waived and this principle has been given a statutory recognition in Section 21 of the Code of Civil procedure and provides that the defect as to the place of suing under 15 to 20 may be waived.

Objections as to jurisdiction both territorial, pecuniary and technical are not open to consideration by an Appellate Court unless there has been prejudice on merits and the section does not preclude objections as to the place of suing being taken in the Appellate Court or Revisional Court, if the trial Court has not decided the suit on merits.

The mere lack of territorial or pecuniary jurisdiction is considered as merely technical and it can be waived in the sense that if objection with regards to them is not taken at the earliest opportunity, at any stage, at or before the settlement of issues, the same cannot be allowed to be raised at a later stage unless it is established that there is a consequent failure of Justice.[52]

It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that invalidity could be set up wherever it is sought to be enforced or relied upon even at the stage of execution. The defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of the subject matter of the action strikes at the very authority of the Court to pass any decree and such defect cannot be cured even by consent of parties.

Section 21 is an exception and defect as to place of suing, that is to say, the local venue for suits cognizable by Courts under the Code may be waived under this section. Such waiver is limited to objections in the Appellate or Revisional Courts.

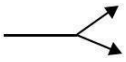
Bar of Fresh Suit - Section -21-A

Bar on suit to set-aside decree on objection as to place of suing: No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

Explanation: The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned.

PARTIES TO SUIT (ORDER-I)

Order I of the code provides the provisions with respect to the parties to suits and joinder, misjoinder and non-joinder of parties.

Joinder of Parties : 

Joinder of Plaintiff (Rule 1)

Joinder of Defendant (Rule 3)

The question of joinder of parties arises only when' an act is done by two or more persons Joinder of defendants) or it affects two or more persons Ooinder of plaintiffs)

1. **Joinder of Plaintiffs: (Rule 1) :** All persons may be joined in one suit as plaintiffs where-

   a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

   b) if such persons brought separate suits, any common question of law or fact would arise.

2. **Joinder of Defendants: Rule (3) :** All persons maybe joined in one suit as defendants where-

   1) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

   2) if separate suits were brought against such persons, any common question of law or fact would arise.

Example: An Altercation takes place between P on the one hand and Q and R on the other.

I. P assaults Q and R simultaneously. Q and R may join as plaintiffs in one suit for damages against P for that tortorious act.

II. Q and R simultaneously assault P. P may join Q and R as defendants in one suit for damages for that tortorious act.

Joinder of parties liable on same contract: The plaintiff may, at his option, join as parties to the same suit

all or any of the persons severally, or jointly and severally, liable on anyone contract, including parties to bills of exchange, hundis and promissory notes.

When plaintiff in doubt from whom redress is to be sought: Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

Separate tria[3]: Where it appears to the Court that any joinder of plaintiffs or defendants may embarrass delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interest of justice.

Judgment for or against one or more of joint parties: The Court may give judgment for one or more the plaintiffs as may be found to entitle to relief[4] or as against one or more of the defendants as may found to be liable.

Necessary and Proper Parties: A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be made. In the absence of a necessary party no decree can be passed, while a proper party is one in hose absence an effective order can be made, but whose presence is required for a complete and al decision on the question involved in the proceeding. In the absence of a proper party a decree can passed so far as it relates to the parties to the suit.

Example: In a petition for compensation in a road accident case, the claimant(s) may join three parties i.e. owner(s) of the vehicle(s) involved in the accident, the insurer(s) of the vehicle(s) and the driver(s) of the vehicle as respondents. The owner(s) and insurer(s), if any, are the necessary parties along with the claimant(s), while the driver(s) of the vehicle(s) involved is/are the formal/proper party whose presence enables the Court to adjudicate more "effectually and completely' but even in his absence the Court can ass a decree.

Non Joinder or misjoinder of parties: Non joinder means not joining proper or necessary parties to the suits, while mis-joinder is a state of joining two or more persons (whether necessary or proper arties) as plaintiffs or defendants on one suit in contravention of rules 1 and rule 3 respectively. As a general rule, a suit shall not be dismissed only on the ground of non-joinder or mis-joinder of parties, except in a case of non-joinder of a necessary party.

Objections as to non joinder or misjoinder of parties: As has been provided in Rule 13 of Order I, all objections on the grounds of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases in which issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Suit in the Name of Wrong parties: Order I, Rule 10 deals with the cases of striking out, addition or substitution of parties.

Addition or substitution of plaintiff: In a case where a suit has been instituted in the name of wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, e court may at any stage of the suit, on the satisfaction of the following:

i) that the suit has been instituted through a bona fide mistake, and
ii) that it is necessary for the determination of the real matters in disputed, order any other person to be added or substituted as plaintiff upon such terms as the Court may think just.

Court may strike out or add parties: The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order at the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff .or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent, i.e., no person can be added as a plaintiff without his consent.

On the addition of a defendant, the plaint shall unless the Court otherwise directs be amended and amended copies of the plaint shall be served on the new defendant and if required, on the original defendant. All proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Representative Suit:

(Order I, Rule 8)

Introduction: Order VIII, Rule 1 is an exception to the general rule that all persons interested in a suit ought to be joined as parties to it, in order to finally adjudicate all the matters involved therein and to avoid the fresh litigations over the same matters.

The rule is an enabling provision and neither compels anyone to represent many if, by himself, he has a right to suit nor vest a right of suit in a person and if he, by himself, has no right to sue, he cannot proceed

to sue on behalf of others by invoking the aid of Order 1 Rule 8 C.P.C.

Meaning: Representative Suit may be defined as under "A representative suit is a suit filed by or against one or more persons on behalf of themselves and others having the same interest in the suit."

Who may sue or defend in Representative Capacity:

1) Where there are numerous persons having the same interests in one suit

   a. One or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

   b. the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

   The Court shall, in every case where a permission or direction is given under Sub-rule (1), at the plaintiff expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

3) Any person on whose behalf, or for whose benefit, a suit is instituted or defended, under Sub-rule (1), may apply to the Court to be made a party to such suit.

4) No part of the claim in any such suit shall be abandoned under Sub- rule (1) and no such suit shall be withdrawn under Sub- rule (3) of Rule (1) of Order XXIII, Le. Order 23, Rule 1 (3), and no agreement, compromise or satisfaction shall be recorded in any such suit under Rule (3) of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

5) Where any person suing or defending in any suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation: For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of

action as the" persons on whose behalf, or for whose benefit, they sue or are sued or defend the suit, as the case may be.

Conditions to Apply Rule 8 : The Apex Court has decided in **T. N. Housing Board v. Ganapathy, AIR**

1990 SC that for the application of Rule 8 the following conditions must be fulfilled:-

a. the parties must be numerous; Rule 8(1)

b. they must have the same interest in the suit; Rule 8(1)

c. the permission must have been granted [Rule 8(1) (a)] or direction must have been given by the Court [Rule 8(1) (b)]; and

d. notice must have been issued to the parties whom it is proposed to represent in the suit. Rule 8(2)

1) **Numerous persons:** The word" numerous" means a group of persons. It is not necessary that the number of persons should be capable of being ascertained. But it is necessary that the body of persons represented by the plaintiffs or the defendants must be sufficiently definite so as to enable the Court to recognize as participants in the suit.

2) **Same Interest:** The persons on whose behalf the suit is instituted must have the same interest which is common to all of them or they must have a common grievance which they seek to get redressed.

For the purpose of this condition the above explanation to Rule 1 is relevant.

3) Permission or direction by the Court[13]

Notice 14: The fact about the representative nature of the suit must be stated in the body of theplaint as well as in the file of the suit. In a representative suit, even on the death of the person appointed to conduct such suit, such suit will not abate and other person or persons interested in the suits may proceed with the suit or may apply to be added as plaintiff.

PLEADING (ORDER VI)

Meaning: According to order VI Rule 1, pleading shall mean plaint or written statement.

"Pleadings are statements in writing drawn up and filled by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare

his case in answer.

In proceedings before a Civil Court pleading may include a petition and reply thereto by the respondent whether to the form of an affidavit or otherwise. Plaintiff's pleading is called a plaint while the defendant's pleading is called a Written Statement

Object: The object of pleading is to bring parties to definite issues and to diminish expense and delay and to prevent surprise at the hearing.

"The object of the rule is twofold. First is to afford the other side intimation regarding the particular facts of his case so that they may be met by the other side. Second is to enable the Court to determine what is really the issue between the parties."
"Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must lie The entire law

governing the "Pleading" is contained in the provisions of Order VI (Pleading), Order VII (Plaint) and Order VIII (Written Statement) of the Code. Apart from this some important fundamental procedural matters relating to the practice are the provisions of Order I (Parties to suit), as to the manner in which a suit should be framed Order II (Frame of suit), as to who should sign the pleading Order III and Order IV (Institution of suit) and as to taking out of summons and their services Order V.

Fundamental Rules of Pleading: The general rule regarding the pleadings is as under:

1) Pleading must state facts and not law;

2) Only the material facts must be stated;

3) Pleading should not include the evidence, and

4) The facts stated must be in concise form.

Material Facts: The facts are of two types:

1) Facts probanda: the facts required to be proved (material facts); and

2) Facts probantia: the facts by means of which they are to be proved (particulars or evidence).

It is the fundamental rule of pleading that pleadings must include the material facts a and not the facts by means of which they are to be proved i.e., evidence. The term material facts has not been defined in the code, but the expression "material facts" has been defined by the Hon'ble S.C. in ***Udhav Singh V/s Madhav Rao Scinda*** AIR 1977 that "all the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts."

It means all facts upon which the plaintiffs cause of action or the defendant's defence depends, or all those facts which must be proved in order to establish the plaintiff's right to relief claimed in the plaint or the defendant defence.

Striking out Pleading: (Rule 16) If the pleading is unnecessary, scandalous, frivolous; or vexatious or tends to prejudice, embarrass or delay the fair trial of the suits or is otherwise an abuse of the process of the Court the Court may, at any stage of the proceedings, order to be struck out or amended any matter in it.

Signing (Rule 14) and Verification Rule (15) of Pleadings: Every pleading shall be signed by the party and his pleaders (if any) or by any person duly authorized to sign the same or to sue or defend on his behalf[28] and every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the

case.The person verifying shall specify what he verifies to his own knowledge and what upon. information received he believes to be true. The person verifying shall furnish an affidavit in support of his pleading and the verification shall be signed with date and place at which it was signed

Amendment of Pleading (Order VI, Rule 17)

As a general rule, material facts and necessary particulars must be stated in the pleadings and the decision cannot be based on the grounds outside the pleadings. But due to various reasons parties have to amend their pleadings for which Order VI rule 17 states as under:

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties,

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the comencement of trial"

In order to try a case on its merits and for determining the real question in controversy between the parties the Courts are empowered under 'rule 17 to allow the amendment of the pleadings. Amendment in the pleading may be with the permission of the Court.

Permission to amend when granted: A leave to. amend the pleading will be granted by the Court whereby the amendment no injury will be caused to the opposite party and he can be sufficiently compensated for by costs or other terms to be imposed by the order and where the amendment is necessary for the determination of the real question in controversy and no injustice will be caused to the other party the Court may allow the amendment of the pleadings.

It is true that the courts have a very wide discretion in the matter of amendment of pleadings. In **Ganga Bhai V Vijay Kumar AIR 1974 SC 1126, the Supreme Court** has observed that "the power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations, and wider the discretion, greater alight to be the care and circumspection on the part of the Court."

Effect of amendment: Where an amendment is allowed, such amendment relates back to the date of e suit as originally filed. The court must look to the pleadings as they stand after the amendment and have out of consideration unamended ones.

Failure to amend: If a party remained failed to amend after the order of amendment, within the time specified for that purpose in the order or if no time is specified, then within 14 days from the date of the order, he shall not later on be permitted to amend after expiry of the specified time or of 14 days unless e time is extended by the court.

Failure to amend does not result in the dismissal of the suit and the court has discretion to extend the time even after the expiry of the period originally fixed.

Order under rule 17 is Revisable: An order granting or refusing amendment is a 'case decided' within the meaning of section 115 arid revisable by the Court. The above order is neither a decree nor appealable order and hence not appealable.

Plaint (Order VII)

Introduction: Every civil suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in that behalf. Plaint is a pleading of the plaintiff.

Meaning: The word has not been defined is the code but it can be said to be a statement of claim, a document, by presentation of which the suit is instituted
Plaint: ⟶ **Body of Plaint**

Relief Prayed for

Title of the suits Plaint: Body of Plaint Relief Prayed for

Title: Title of the suit consists of the name of the Court, case number to be given by the office of the Court and descriptions of parties.

Body of Plaint: In this part the plaint consists of the facts constituting the cause of action and when it arose.

Reliefs: The plaint shall finally contain the relief which the plaintiff claims either simply or in the end. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. 35 Generally, the plaintiff is not entitled to relief for which there is l0 foundation in the plaint, except in a case where on the pleadings, issues and evidence the relief is clear because the primary duty of the Court is to do justice and the rules of procedure are meant to advance the cause of justice and not to impeadit.

The plaintiff ought to be given such relief as he is entitled to get on the facts established on the basis of the evidence in the case even if the plaint does not contain a specific prayer for the relief. The equitable relief under Order VII, Rule 7 may be granted even though grounds on which relief is sought have not

been stated as required by the rule.

Particulars of Plaint: A plaint shall contained the following particulars:

a) the name of the Court in which the suit if brought;

b) the name, description and place of residence of the plaintiff;

c) the name, description and place of residence of the defendant, so far as they can be ascertained;

d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that affect;

e) the facts constituting the cause of action and when it arose;

f) the facts showing that the Court has jurisdiction;

g) the relief which the plaintiff claims;

h) where the plaintiff has allowed a set off or relinquished a portion of his claim the amount so allowed or relinquished, and

i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court fees, so far as the case admits.

3) In case of recovery suit the precise amount claimed or where it is for the accounts or mesne profits or for moveable in the possession of the defendant or for debts, which cannot be determined, the approximate amount or value thereof The description of the immovable property.

4) The interest and liability of the defendant.

5) If the suit is filed in the representative character it must state the facts about an actual existing interest of the plaintiff in the subject matter and that all steps necessary have been taken by him to institute such suit.

6) The grounds upon which the exemption from the law of limitation where the suit is time barred.

Return of Plaint (Order 7 Rule

10) Rule 10:

1) Subject to the provisions of Rule 1 GA, the plaint shall at any stage of the suit be returned to be presented to the Court in which it should have been instituted.
2) **Explanation:** For the removal of doubts, it is hereby declared that a Court of Appeal or Revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.
3) Procedure on returning plaint: On returning a plaint the judge shall endorse thereon the date of its presentation and return, the name of the party representing it, and a brief statement of the reasons for returning it.

Rejection of Plaint (Order 7 Rule 11)

Rule 11: The Plaint shall be rejected in the following cases:-

a. Where it does not disclose a cause of action.
b. Where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within the time to be fixed by the Court fails to do so.
c. Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp- paper within the time to be fixed by the Court, fails to do so.
d. Where the suit appears from the statement in the plaint to be barred by any law.
e. Where it is not filed in duplicate.
f. Where the plaintiff fails to comply with the provisions of Rule-9.

Provided that the time fixed by the Court for the correction of the valuation or for the supply of the requisite stamp- papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by the cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Rule 12: Procedure on rejecting plaint: Where a plaint is rejected the judge shall record an order to that effect with the reasons for such order.

Rule 13: Where rejection of plaint does not preclude presentation of fresh plaint: The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Procedure on Admitting Plaint: Where the plaint of plaintiff has been admitted and the Court directs that the summons be served on the defendant as provided in Order V, Rule 9, the Court will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within 7 days from the date of such order along with requisite fee for service of summons on the defendants.

Production of Documents on Which Plaintiff Sues or Relies

1. Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

2. Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

3. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court,. be received in evidence on his behalf at the hearing of the suit.

   But, the provision of Rule 14 shall not apply to the following documents:

   i) the document produced for the cross examination of the plaintiff witness, or

   ii) ii) handed over to a witness merely to refresh his memory.

-Written Statement (Order VIII)

Meaning: A Written Statement is a pleading of the defendant for submission of every material fact to answer the allegation made by the plaintiff in his plaint. The word has not been defined in the code, but the same may be defined as under:

A Written Statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff.

Preparation of Written Statement: All relevant rules of pleading apply to a Written Statement and it should be prepared with great caution. In the Written Statement firstly, the defendant should mention the name of the Court trying the suit, then-1the names of the parties. It is not necessary to mention the names, directions and place of residence of all the parties in the title of the Written Statement, but mentioning the name of the 1st plaintiff and 1st defendant is enough. The number of suit may be mentioned thereafter.

The defendant thereupon replies to each Para of the plaint except where any preliminary objection like maintainability of the suit, locus standi of the plaintiff to file suit, the non-joinder or misjoinder of parties

as to the jurisdiction of the Court or as to limitation, for consideration which is necessary in the 1st instance before the suit is tried on merits.

Rules of Defence: The denial in a Written Statement must be specific and not general. The grounds alleged by the plaintiff must be denied by a defendant specifically with each allegation of fact of which he does not admit the truth, except damages.

The denial should not be vague or evasive. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken o be admitted except as regards a person under disability.

In cases where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts in the plaint except as against a person under disability, but the Court, in its discretion, may require any such fact to be proved.[47] Whenever a judgment is pronounced under Rule 2, a decree shall be drawn up in accordance with such judgment.[48]

Time to File Written Statement: The defendant shall file his Written Statement of his defence within

30 days from the date of service of summons on him, but the above time may be extended by the Court further for a period, which shall not be later than 90 Days from the date of service of summons.[49]

Extension of time to Present Written Statement: Ordinarily the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired.

The extension of time shall be only by way of exception and for reasons to be recorded in writing, how soever brief they may be, by the Court.

Subsequent Pleadings: According to Order VIII, Rule 9, no pleading subsequent to the Written Statement of a defendant other than by way of defence to set off or counter - claim shall be presented except by the leave of the Court, but the Court may, at any time require a Written Statement or additional Written Statement from any of the parties and fix a time of not more than 30 days for presenting the same.

Failure to present Written Statement: Where a party fails to file a Written Statement as required under Rule 1 or Rule 9 within a time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order as it thinks fit and on such judgment a decree shall be drawn up.

The provisions regarding duty of defendant to produce documents upon which relief is claimed or relied upon by him have been given in Order VIII, Rule 1-A.

Set-Off (Order VIII, Rule 6)

Meaning: Set-off means a claim set up against another. It is a counter claim against the plaintiff but in essence it is a form of defence in which the defendant while acknowledging the justice of the plaintiffs claim sets up a demand of his own to counter balance it either in whole or in part.

The dorctrine of set – off is included in Order VIII, Rule 6 and is as under:

1. Where in a suit for 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 limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiffs suit, the defendant may, at the first hearing of the suit, but not afterwards unless

permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

2. **Effect of set-off:** 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 judgment in respect both of the original claim and of the set-off; but this not after the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

3. The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of a set-off.

Example[51]: A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1000. The two claims both definite, pecuniary demands may be set-off.

A sues B for compensation on account of trespass. B holds a promissory- note for Rs. 1,000, from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

Conditions[52]: A defendant may claim a set-off, if the following conditions are satisfied:-

I. The suit must be for the recovery of money.

II. The sum of money must be ascertained.

III. Such sum must be legally recoverable.

IV. It must be recoverable by the defendant or by all the defendants, if more than one.

V. It must be recoverable by the defendant from the plaintiff or from all plaintiffs'; if more than one.

VI. It must not exceed the pecuniary jurisdiction of the Court in which the suit is brought.

Both the parties must fill in the defendant's claim to set-off, the same character as they fill in the plaintiffs suit.

Counter-Claim (Rules 6-A to 6-G)

Meaning: It is a claim made by the defendant in a suit against the plaintiff and can be enforced by a cross action. Counter claim is a cause of action in favour of the defendant against the plaintiff.

A counter-claim is a weapon in the hands of a defendant to defeat the relief sought by the plaintiff against him and may be set-up only in respect of a claim for which the defendant can file a separate suit and therefore, it is substantially a cross action.

In Laxmidas VIs Nanabhai AIR 1984, 'SC. it was held that the Court has power to treat the counter claim as a cross suit and hear the original suit and counter claim together if the counter claim is properly stamped.

Order VIll, Rule 6-A deals with the counter claim, which is as under:

a. 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 filing of the suit but before the defendant has delivered defence or before the time limited for delivering his defence has expired whether such counter claim is in the nature of a claim for damages or not:

   Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

b. Such counter claim shall be the same effect as a cross- suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.

c. The plaintiff shall be at a liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

SUMMONS AND DISCOVERY, ISSUE OF SUMMONS (SECTION 27 TO 29)

(Intimation sent to the defendant/witness by the Court)
*To Defendant **(Order 5)** and To Witnesses **(Order 16)***

Meaning: The word summons has not been defined in the Code, but according to the dictionary meaning; [1] "A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or office of the court for a certain purpose."

Essentials of summons: Every summons shall be signed by the judge or such officer appointed by him

and shall be sealed with the seal of the court [Rule1 (3)] and every summons shall be accompanied by a plaint or if so permitted, by a concise statement thereof.[Rule 2] Contents of Valid Summons:

a. The summons must contain a direction whether the date fixed is for settlement of issues only or for final disposal of the suit (Rule 5).

b. In cases of summons for final disposal of the suit, the defendant shall be directed to produce his witnesses (Rule 8).

c. The Court must give sufficient time to the defendant to enable him to appear and answer the claim of the Plaintiff on the day fixed (Rule 6).

d. The summons shall contain an order to the defendant to produce all documents in his possession or power upon which he intends to rely on in support of his case (Rule 7).

Summons to Defendant:

Section 27: Where a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond 30 days from the date of the institution of the plaint.

Order V: Rule 1 (1)

Rule 1(1): When a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of the service of the summons on that defendant;
Provided that no such summon shall be issued when a defendant has appeared at the presentation of Plaint and admitted the plaintiff's claim;

Provided further that where the defendant fails to file the written statement within the said period of thirty ways, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later that ninety days from the date of service of summons.

Appearance of Defendant [Order V Rule 1 (2)]

Rule 1(2) - A defendant to whom a summons has been issued under sub-rule (1) may appear

a. in person, or

b. by a pleader duly instructed and able to answer all material questions relating to the suit, or

c. by a pleader accompanied by some person able to answer all such questions. The Court, however, may order the defendant or plaintiff to appear in person (Rule 3).

Rule 1 (3): Every such summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the Court.

Exemption from Personal Appearance : Order V Rule 4

No party shall be ordered to appear in person

1. unless he resides-
   a. within the local limits of the Court's ordinary original jurisdiction, or
   b. without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five- sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house. Or
2. Who is a woman not appearing in person (Section 132), or
3. Who is entitled to exemption under the Code (Section 132).

Mode of service of summons:[2] Service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the court. The Code prescribes four principal modes of serving a summons to a defendant:

i) Personal or direct service; (Rules 10 to 15 and 18)
ii) Substituted Service; (Rules 20, 17 and 19)
iii) Service by Court; (Rule 9) and
iv) Service by Plaintiff. (Rule 9-A)

1. **Personal or direct service:** This is an ordinary mode of service of summons. Under the following categories a service of summons should be made by delivering or tendering a copy thereof3 to the defendant personally or to his agent or other person on his behalf and for the proper service of summons following principles must be remembered-

a. Where there are two or more defendants, service of summons should be made on each defendant (Rule 11).

b. Wherever it is practicable, the summon must be served to the defendant in person or to his authorized agent (Rule 12).

c. In a suit relating to any business or work against a person, not residing within the territorial jurisdiction of the court issuing the summons, it may be served to the manager or agent carrying on such business or work (Rule 13).

d. In a suit for immoveable property, if the service of summons cannot be made on the defendant personally and the defendant has no authorized agent, the service may be made on any agent of the defendant in charge of the property (Rule 14).

e. Where the defendant is absent from his residence at the time of the service of summons and there is no likelihood of him being found at his residence within a reasonable time and he has no authorized agent, the summons may be served on any adult male or female member of the defendant's family residing with him (Rule 15).

The serving officer (a person to whom the copy is delivered or tendered to serve on the defendant) after making acknowledgment of service of summons[4] must make an endorsement on the original summons stating the time and" manner of service thereof and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of summons[5].

2. **"Substituted Service"**[6] means the service of summons by a mode which is substituted for the ordinary mode of summons. The circumstances for the substituted service are:-

a. i) Where the defendant or his agent refused to sign the acknowledgement or

ii) Where the serving officer, after. due and reasonable diligence cannot find the defendant, who is absent from his residence at the time when the service is sought to be effected on him at his residence and there is no likelihood of him being found at his residence within a reasonable time and there is no authorized agent nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain.

The serving officer shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating the fact about affixing the copy, the circumstances under which to do so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed (Rule 17). If the Court is satisfied either on the affidavit of the serving officer or on his examination on oath that the summons has been duly served; or may make further enquiry in the matter as it thinks fit, and shall either declare that the summon has been duly served or order such service as it thinks fit. (Rule19).

In the second mode as provided by Rule 17, the declaration by the court about the due service of the summons is essential. If the provisions of the Rule 19 have not been complied with, the service of summons cannot be said to be in accordance with law.

b. Where the Court is satisfied that there is a reason to believe that the defendant is avoiding the service of summons or for any other reason the summons cannot be served in the ordinary way, the Court shall order that the service may be effected in the following manner-

i. by affixing a copy of the summons in some conspicuous place in the court house; and also upon some conspicuous part of the house in which the defendant is known to have last resided, carried on business or personally worked for gain; or

ii. In such manner as the court thinks fit [(Rule 20(1)]; or

iii. By an advertisement in the daily newspaper circulating in the locality in which the defendant is last known to have actually or voluntarily resided, carried on business or personally worked for gain [(Rule 20(1-A)].

Substituted service Under Rule 20 is as effective as personal service [(Rule 20(2)].

3) By Court: Rule 9 of Order V deals with delivery of summons by Court and states that in cases, where the defendant or his agent, empowered to accept the service of summons, resides within the jurisdiction of the Court in which the suit was instituted, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer or to approved courier services to be served on thedefendant.

Declaration by Court: The Court issuing the summons shall declare that the summons had been duly served on the defendant, where

a. the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept that summons by any other means specified in subrule (3)

when tendered or transmitted to him,[7] and

b. Where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within 30 Days from the date of issue of summons.[8]

4) **By Plaintiff:**[9] In addition to the provisions of rule 9, the Court, on the plaintiffs application may permit and deliver the summons to such plaintiff for service on the defendant and the provisions of rule 16 and 18 shall apply to a summons personally served under rule 9-A as if, the person effecting service were a serving officer.

Service of smmons where defendant resides within jurisdiction of another Court:[10] A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Courts to any Court (not being the High Court) having jurisdiction in the. place where the defendant resides.[11]

Where a 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) of rule 9 (except by registered post acknowledgement due), he provision of rule 21 shall not apply.

PPEARANCE OF PARTIES AND EFFECT OF THEIR NON-APPEARANCE (Order IX)

Introduction: Order IX of the Code provides the law with regard to the appearance of the parties to the suits and the consequences of their non-appearance. Where a party (Plaintiff or Plaintiff and Defendant, both) does not appear when the suit is called on for hearing, the suit may be dismissed and where a party (Defendant) does not appear even when the summons is duly served on him, the Court may Order for the ex-parte hearing of the suit.

Therefore, Order IX can be discussed under the following heads:

a. Dismissal of Suit: The plaintiff's suit may be dismissed under rules 2, 3, 5(1) and 8 of Order IX of the Code, while the Court may order ex-parte hearing of the suit under rule 6(1) of Order IX.

Rule 2: A suit may be dismissed under rule 2 if the summons has not been served upon the defendant due to the failure of the plaintiff to pay Court-fee or Postal charges, if any chargeable for such service or

failure to present copies of the plaint as required by rule 9 of Order VII.

Rule 3: The Court may dismiss the suit under rule 3 where, both the parties are absent when the suit is called on for hearing.

Rule 5(1): The Court shall pass an order for dismissal of the suit under rule 5(1), where a summons has been returned unserved on the defendant(s) and the plaintiff fails to apply for a fresh summons for a period of seven days from the date of the return of summons made to the Court by the serving officer.

But, the Court shall not dismiss the suit under rule 5(1), if the plaintiff satisfies the Court that-

a. he has failed after using his best endeavors to discover the residence of the defendant who has not been served, or

b. such defendant is avoiding service of process, or

c. there is any other sufficient cause of extending the time, and may extend the time for making such application.

Rule 8: The Court shall make an order of dismissal of suit under rule 8, where the plaintiff remains absent and the defendant is present, when the suit is called on for hearing and the defendant does not admit the claim or part thereof.

Remedies against Dismissal: Where the suit has been dismissed under rule 2 or 3, the plaintiff has remedies either to file a fresh suit (subject to the law of limitation) under rule 4 or to make an application under rule 4 for restoration of the suit. When the suit has been dismissed under rule 5(1), the plaintiff may bring a fresh suit (subject to the law of limitation) under rule 5(2).

When a suit is dismissed under rule 8, the plaintiff shall be precluded to bring a fresh suit on the same cause of action but he may apply to set the dismissal aside under rule 9 of Order IX and the Court shall, after issuing a notice[20] of application on the opposite party set aside the order of dismissal, on being satisfied that there was sufficient cause for plaintiffs non-appearance when the suit is called on for hearing.

2) Ex- Parte Hearing : Where only the plaintiff appears and the defendant does not appear when the suit is called on for hearing, and the Court observed that the summons was duly served on defendant then the Court may pass an order that the suit be heard ex-parte.

Remedies: The defendant in the same manner may be allowed by the Court to be heard, as if he had

appeared on the day fixed for his appearance, where the Court has adjourned the ex parte hearing and he (defendant) appears on or before such adjourned date and satisfy the Court with good cause for his previous non-appearance.

Setting aside ex-parte hearing: Where in an ex-parte hearing, a decree is passed ex-parte against a defendant, he .has the following options -

a. To apply under rule 13 to set aside the ex-parte decree and the Court after service of Notice of such application on the opposite party and on being satisfied that the summons was not duly served on the defendant or he was prevented by any sufficient cause from appearing when the suit was called on for hearing. But no such decree shall be set-aside on the basis of irregularity in the service of summons,

   When the Court rejects an application under rule 13, such 3n order is appealable under Order XLI Rule 1(d).

b. To file appeal against ex-parte decree

   But when an appeal is preferred against ex-parte decree and the same is dismissed on any ground except as being withdrawn by the appellant, no application shall lie under rule 13 for setting aside

UNIT 3

Commission (Sections - 75 to 78 and Order 26)

Meaning: 'Commission' is a process through which the witnesses, who are sick or infirm and are unable to attend the Court, are examined by issuing a commission by the Court. Sections 75 to 78 and Order XXVI of the Code deal with the various provisions relating to the issue of Commission to examine witnesses who are unable to attend the Court for one or the other reasons.

Power of Court to issue Commissions: As a general rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open' Court and tested by cross-examination. The court has a discretion to relax the rule of attendance in Court, under some circumstances and may justify issue of a commission. Section 75 of the Code -specifies the powers of a Court to issue Commission.

Section 75: Subject to the conditions and limitations as may be prescribed, the Court may issue a commission:-

a. to examine any person; order XXVI, Rule 1 to 8
b. to make a local investigation; order XXVI, Rule 9 to 10
c. to examine or adjust accounts; order XXVI, Rule 11 to 12
d. to make a partition ; order XXVI, Rule 13 to 14
e. to hold a scientific, technical or expert investigation; order XXVI, Rule 10-A
f. to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; order XXVI, Rule 10-C
g. to perform any ministerial act; Rules 15 to 18- B deal with general provisions. order XXVI, Rule 10-B

Cases in which Court may issue Commission to examine a person (Witness): A commission may be issued in the following cases:

a. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person, if the person to be examined as a witness resides within the local limits of jurisdiction, and
   i. Is exempted under the Code from attending the Court, or
   ii. in the interest of justice, or for expeditious disposal of a case, or for any other reason his examination on commission will be proper; or
b. if he resides beyond the local limits of jurisdiction of the Court, or
c. he is about to leave the jurisdiction of the Court, or
d. If he is a Government servant and cannot in the opinion of the Court, attend without detriment to the public service, or

e. he is residing out of India and the Court is satisfied that his evidence is necessary.

Persons for whose examinations commission may be issued: Rule 4(1):

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person,

a. If he resides beyond the local limits of the jurisdiction of the court or [(Order XXVI, Rule4(1)(a)]

b. if he is about to leave the jurisdiction of the Court, or [(Order XXVI, Rule4(1)(b)]

c. if he is a Govt. servant and cannot, in the opinion of the court, attend without detriment to the public service, or [(Order XXVI, Rule4(1)(c)]

d. if he is residing out of India and the Court is satisfied that his evidence is necessary. Rule 5

To whom Commission may be issued: [Rule 4 (2) and (3)]

Rule 4(2): Such commission may be issued to any Court, not being a high Court, within the local limits of whose jurisdiction such person resides; or to any pleaded or other person whom the Court issuing the commission may appoint.

Rule 4(3): The Court on issuing any commission under this rule shall direct whether the commission hall be returned to itself or to any subordinate Court.

Order for Issue of Commission: (Rule-2)

The Court may issue such a commission –

a. either sue motu (of its own motion) or

b. on the application of any party to the suit, or

c. "ii) of the witness to be examined.

Evidence to be a part of Record: (Rule-7): The evidence taken on commission shall, subject to the provisions of rule 8, form part of the record.

When deposition may be read in evidence: (Rule-S) : Evidence taken under a commission shall not read as evidence in the suit without the consent of the party against whom the same is offered, unless.

a. The person, who gave the evidence, is beyond the jurisdiction of the Court or dead or unable for sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the Service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service; or
b. The Court in his discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in' the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Letters Of Request: (Section 77): In lieu of issuing a commission the Court may issue a Letter of Request to examine a witness residing at any place not within India.

READ ORDER 26 FROM BARE ACT FOR POWERS OF COMMISIONER

Receiver (Order 40 C.P.C.)

Meaning: The word has not been defined in the Code. The same may be defined as under:-

"The receiver is an important person appointed by the Court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the Court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled."

The receiver is appointed for the benefit of all concerned; he is the representative of the Court, and for all parties interested in the litigation, wherein he is appointed. He is an officer or representative of the Court and he functions under its directions.

Appointment: In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property. The remuneration for the services of the receiver shall be paid by the order of Court.

Order XL : Rule 1 (1) provides that:-

Where it appears to the court to be just and convenient, the court may by order-

a. appoint a receiver of any property, whether before or after decree;

b. remove25 any person from the possession or custody of the property;

c. commit the same to the possession, custody or management of the receiver; and

d. confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the '-':property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of

documents as the owner himself has, or such of those powers as the court thinks fit.

Duties and Enforcement thereof:

Rule 3: Duties : Every receiver so appointed shall-

a. furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property;

b. submit his accounts at such periods and in such form as the court directs;

c. pay the amount due from him as the court directs; and

d. be responsible for any loss occasioned to the property by his willful default or gross negligence.

e. fails to pay the amount due from him as the court directs, or occasions loss to the property by his willful default or gross negligence,

Rule 4: Enforcement of Receiver's Duties: Where a receiver-

a) Fails to submit his accounts at such periods and in such form as the court directs, or

b) Fails to pay the amount due from as the courts directs, or

c) Occasions loss to the property by his willful default or gross negligence,

the court may direct his property to be attached and may sell such property, and may apply the proceeds

to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

According to **rule 5**, a collector may be appointed as a receiver where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the court considers that the interests of those concerned will be promoted by the management of the Collector, the court may, with the consent of the Collector, appoint him to be receiver of such property.

TEMPORARY INJUNCTION (ORDER XXXIX RULES 1 TO 5)

Meaning of Injunction: An injunction is an order by the Court to a party to the effect that he shall do or refrain from doing a particular act.

"A judicial process, by which one, who has invaded or is threatening to invade the rights (legal or suitable) of another, is restrained from continuing or commencing such wrongful act."

According to Lord Halsbury: "An injunction is a judicial process whereby a party is ordered to refrain . am doing or to do a particular act or thing." In the former case it is called a Restrictive Injunction and the later case a Mandatory Injunction.

Characteristic of Injunction:

An injunction has three characteristics -

1. It is a judicial process,
2. The object thereby is restraint or prevention, and
3. The thing restrained or prevented is a wrongful act.

Classification of Injunction: The law relating to injunction is laid down in the Specific Relief Act, 1963 (Section 36 to 42)

An injunction may be classified according to the relief granted or according to its nature or according to the operation of Time

As regards the "time" of their operation the injunction may be divided into two categories-

i) Perpetual or (Permanent), and

ii) Interlocutory Or (Temporary)

i. Perpetual or (Permanent): A perpetual injunction restrains a party for ever from doing the specific act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suits. Section 37(2) of the Specific-Relief Act, 1963

ii. Interlocutory or (Temporary) :

Definition: A temporary injunction or interim injunction, restrains a party temporarily from doing the specified act and can be granted only until the disposal of the suit or until the _ further orders of the Courts. It is regulated by Order 39 rule 1 to 5 of the C.P.C. and may be granted at any stage of the suit.

Section 37(1) of the Specific Relief Act, 1963

Object: The primary object of granting temporary injunction is to maintain and preserve status quo at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit.

Grounds: [Order 39 Rule 1, 2 and also Sec. 94 (c)] A temporary injunction may be granted by the Court under the following cases:

1. Where in any suit it is proved by affidavit or otherwise:
    b. 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 Rule 1 (a) the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or Rule 1 (b)
    c. the defendant threatens to disposes the plaintiff in relation to any property in dispute in the suit, or Rule 1 (c)

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession 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 as the Court thinks fit, until the disposal of the suit or until further orders.

2. Where the defendant is about to commit a breach of contract, or other injury of any kind, or Rule 2(1)

3. Where the Court is of the opinion that the interest of justice so requires: Section 94(c)

Principles: The power to grant a temporary injunction is in the discretion of the Court, but this discretion, should be exercised reasonably, judiciously and on sound legal principles. Generally, before granting the injunction, the Court must be satisfied about the following conditions:

i) Prima facie case;

ii) Irreparable Injury; and

iii) Balance of convenience

i) Prima facie case: The applicant must make out a prima facie case in support of the right claimed by him. The Court must be satisfied that there is a bona fide dispute raised by the applicant and on the facts before the Court there is a probability of the applicant being entitled to the relief claimed by him.

In deciding prima facie case; the Court is to be guided by the Plaintiffs case as revealed in the plaint, affidavits or other materials produced by him... and "while determining whether a prima facie case had been made out, the relevant consideration is, whether' on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at that evidence."?

ii) Irreparable Injury: The applicant must further satisfy the Court that he will suffer irreparable injury if the injunction as prayed is not granted, and there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury.

The expression "irreparable injury" means that the injury must be material one, Le. which cannot be adequately compensated by damages.

iii) Balance of Convenience: The balance of convenience must be in favour of the applicant. In

other words the Court must be satisfied that the compensation, mischief or inconvenience which is likely to be caused to the applicant by withholding the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

Discretionary Remedy: Since grant of injunction is discretionary and an equitable relief, even if all the conditions are satisfied, the Court may refuse to grant it for some other reasons e.g., on the ground of delay, latches or acquiescence or where the applicant has not come with clean hands or has suppressed material

facts, or where monetary compensation is adequate relief.

Notice: The Court shall before granting an injunction, give notice to the opposite party, except where it appears that the object of granting the injunction would be defeated by the delay.[8]

According to proviso to Rule 3, when an ex parte injunction is proposed to be given the Court has to record the reasons for coming to the conclusion that the object of granting the injunction would be defeated by the delay and the Court shall order the applicant -

a. to deliver or to send by registered post a copy of the application for injunction together with -

i) a copy of affidavit filed in support of application,

ii) a copy of the Plaint, and

iii) copies of documents on which the applicant relies, and

b) to file, on the day on which injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent immediately to the opposite party.

In case of ex-parte injunction, the Court shall make an endeavour to finally dispose of the application within 30 days from the date on which the ex-parte injunction was granted. Where the Court finds it difficult to dispose of the application within the period of 30 days, the reasons are required to be recorded. (Rule 3-A)

An order of injunction may be discharged, varied or set aside by the Court on application being made by any party dissatisfied with such order;9 or where such discharged, variation or set aside has been necessitated by the change in the circumstances, or where the Court is satisfied that such order has caused undue hardship to the other side.

Provided that if an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without "giving" nonce to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary to do in the interest of justice." **First Proviso to Rule 4**

Provided further that where an order for injunction has been passed after giving a party an opportunity of being heard, the order shall not be discharged, varied or set-aside on the application of that party except where such discharged, variation or set aside has been necessitated by the change in the circumstances, or unless the Court is satisfied that" the order has caused hardship to that party. **Second Proviso to Rule 4**

Provided also that if at any stage of the suit it appears' to the Court that the Party" in whose favour the order of injunction exists is dilating the proceedings or is otherwise abusing the process of the Court, it shall set aside the order for injunction. **U.P. State Amendment**

Consequences Of Disobedience Or Breach Of Injunction: Section 94(c) and Rule 2-A of Order 39 provide for the consequences of disobedience or breach of an order of an injunction issued by the Court. The penalty for disobedience or breach of injunction may be either arrest or attachment of his property or both of the opposite party who has committed breach. However, the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year. [Rule 2-A (1)]

If the disobedience or breach still continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party. [Rule 2-A (2)]

The transferee Court can also exercise his power and can punish for breach of injunction granted by the transferor Court. [Rule 2-A (1)]

Injunction on insufficient grounds: When in any suit in which an order of temporary injunction has been obtained by the plaintiff on insufficient grounds, or where the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the Court may order the plaintiff to pay such amount not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury to reputation caused to him. [10]

An order declining to grant injunction and issuing notice to defendants V/s Rule 3 of Order 39 is not

appealable under Order 43 Rule 1 (2) of the Code but when the ex-parte interim injunction is refused illegally, the Court can in exercise of its power of Superintendence under Section 115 of the Code, grant ad-interim injunction.

Interlocutory Orders Under Order XXXIX:

1. Power of Court to Order Interim Sale: On the application of any party (an application by the plaintiff[11] under Rules 6 or 7 may be made at any time after the institution of the suit while by the defendant,[12] it may be made at any time after appearance) to the suit, the Court may, order the sale of any moveable property, being the subject-matter of such suit, or attach before judgment in such suit, which is subject to speedy and natural delay, or which for any just and sufficient cause it may be desirable to have been sold at once.

2. Detention, Preservation, Inspection, etc, of Subject-matter of Suit : The Court may make an order for detention, preservation and inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein;[14] and authorize any person to enter upon or into any land or building in the possession of any other party to such suit;[15] and authorize any sample 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.

a. **Notice to Opposite Party:** No order under rule 6 or 7 shall be made without giving notice to the opposite party, except where it appears to the Court that the object of making such order would be defeated by delay.

3. When party may be put in immediate possession of land, the subject matter of suit:

a. Where land paying revenue to government, or a tenure liable to sale, is the subject matter of a suit, or the party in possession of such land or tenure neglects to pay the government revenue, or the rent due to. the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the court), be put in immediate possession of the land or tenure; and the court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

b. **Deposit of money, etc., in 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 things as a true 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 the further direction of the court.

Interpleader suit: s.88 O.35

Inter-pleader suit is a suit filed by a person who has no direct interest in the subject-matter of the suit. In other words if the plaintiff is in possession of some article, things or property (in which he is not having direct interest or he may be a custodian or stake holder) and if he is in a dilemma over the rivals claims of the defendants, he may file inter-pleader suit in the competent court to have determination as to who is the actual owner of the article, things or property.

It is a suit where there must be more than one defendants and the defendants contest against each other for the disputed property. In an interpleader suit the plaintiff holds the movable or immovable property and files the suit only to ascertain as to whom he should deliver the property because the defendants claim the property against each other or they interplead against each other. In every interpleader suit, there must be some debt or sum of money or other property in dispute between the defendants only. And the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver the property to such of the defendants as may be decided by the court to be entitled to the property.

tion 88 of the Civil Procedure Code lays down that where two or more persons claim adversely to one another, the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself .

Proviso to section 88 further says that where any suit is pending in which the rights of all parties can properly be decided, no such interpleader suit shall be instituted.

In an interpleader suit, the contest is between the defendants for title and the plaintiff has got nothing to do with that contest. In this respect, Rule l (a) or Order 35 of the Code of Civil Procedure mandatorily requires the plaintiff to state that he claims no interest in the subject matter in dispute other than for charges or costs. [Mangal Bhikaji Nagpase vs State Of Maharashtra (1997) 99 BOMLR 91 a]

According to Order 35, Rule 1, of CPC, in every interpleader suit, in addition to other statements, the plaint shall state:-

1. That the plaintiff claims no interest in the subject matter in dispute other than the charges or costs. For example, when consigned goods are claimed by several parties, the railway can bring an interpleader suit claiming only a lien for freight, demurrage etc. ;
2. the claims made by the defendants severally , and
3. that there is no collusion between the plaintiff and any of the defendants .

Order 35, Rule 2, provides hat where the subject matter claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be

entitled to any order in the suit.

The provision is intended to protect a bona fide person from future list that he did not discharge his obligation. Order 36 obviates the difficulties of parties in locking themselves up in a lengthy legal battle when the crux of the dispute depends on a single or a few points.

SUITS BY INDIGENT PERSONS (ORDER XXXIII)

Introduction: The provision relating to suits by an indigent person is contained in Order XXXIII, having rules which provide various provisions regarding the purpose, procedure, examination of applicant, rejection of application etc. The general rule for the institution of a suit is that a plaintiff suing in a Court of law is bound to pay Court-fees prescribed under the Court Fees Act at the time of presentation of plaint. Order XXXIII is an exception to the above rule and exempts some (poor) persons from paying the Court fee at the time of institution of the suit i.e. at the time of presentation of plaint and allows prosecuting his suit in forma pauperis, subject to the fulfillment of the conditions laid down in this Order.

Meaning of Indigent Person: An indigent person is one who is not possessed of sufficient means due bad personal economic condition. The word 'person' includes juristic person. According to Explanation f Rule 1, Order XXXIII,

An indigent person is a person, who

a. if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

b. where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the Subject matter of the suit.

Explanations II and III read as under -

Explanation-II: Any property, which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III: Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity.

Procedure to sue as Indigent Person: Before an indigent person can institute a suit, permission 0 Court to sue as an indigent person is required. As per rule 3, the application for permission to sue as a indigent person, shall be presented to the Court by the applicant in person, unless he is exempted from appearing in court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person:

PROVIDED that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.

Contents of Application: Every such application shall contain the following particulars:-

a. the particulars required in regard to plaints in suits;

b. a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof; and

c. it shall be signed and verified as provided in Order VI rules 14 and 15.

The suit commences from the moment an application to sue in forma pauperis is presented

Rule 1-A : Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the court, unless the court otherwise directs, and the court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.

Examination of Applicant and Rejection of Application:

Examination: (Rule 4)

1. Where the application is in proper form and duly presented, the court may if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

2. If presented by agent, court may order applicant to be examined by commission - Where the application is presented by an agent, the court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

Rejection of Application: Rule 5: The court shall reject an application for permission to sue as an indigent person –

1. Where it is not framed and presented in the manner prescribed by rules 2 and 3, or

2. Where the applicant is not an indigent person, or

3. Where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person:

   PROVIDED that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person, or

4. Where his allegations do not show a cause of action, or

5. Where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter, or

6. Where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

7. Where any other person has entered into an agreement with him to finance the litigation.

Fixing of Date and Notice to the opposite Party and the Government Pleader· being of Where there is ground as stated in rule 5, to reject the application the Court shall fix a day (of which at least ten days' ear notice shall be given to the opposite party and the government pleader) for receiving such evidence as the applicant may adduce in proof of his indigency, and for hearing any evidence which may be adduced in disproof thereof.

Procedure at Hearing: On the date fixed, the Court shall examine the witness (if any) produced by either party to the matters specified in clause (b), clause (c) and clause (e) of rule 5, and may examine the applicant or his agent to any of the matters specified in Rule 5 the Court after hearing the argument hall either allow or refuse to allow the applicant to sue as an indigent person.

Procedure if Application Admitted[56]: Where the application is granted, it shall be deemed the plaint in . e suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except at the plaintiff shall not be liable to pay any court fee or fees payable for service of process in respect of any petition, appointment of a pleader or other proceedings connected with the suit.

Withdrawal of Permission: The Court may, on the application of the defendant, or of the government pleader and after giving seven days notice in writing to the plaintiff, withdraw the permission granted to he plaintiff to sue as an indigent person on the following conditions:

1. if he is guilty of vexatious or improper conduct in the course of the suit;
2. if it appears that his means are such that he ought not to continue to sue as an indigent person; or
3. if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter.

Realization of Court fees: (Rule 14)

a. **Where Indigent person succeeds:** (Rule 10) Where the plaintiff succeeds in the suit, the court

shall calculate the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person; such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit.

b. Where Indigent person fails: (Rule 11) Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-

I. because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or

II. because the plaintiff does not appear when the suit is called on for hearing, the court shall orderthe plaintiff, or any person added as a co-plaintiff to the suit, to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.

c. Where an indigent person's suit abates :(Rule 11.A) Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the court shall order that the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State government from the estate of the deceased plaintiff.

According to rule 15, where the application to sue as an indigent person is refused, it shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing in application.

When an application is either rejected under rule 5 or refused under rule 7, the Court will grant time to the applicant to pay the requisite Court fee within the specified time or within time extended by the Court from time to time, and upon payment of such Court fee and on payment of the costs referred to in rule 15 within that time, the suit shall be deemed to have been instituted on the date on which the application for permission to sue as an indigent person was pr.esented.

The costs of an application for permission to sue as an indigent person and of an inquiry into indigence shall be costs in the suit.[59]

Defence by an indigent person: Rule 17: Any defendant, who desires to plead a set off or counter claim, may be allowed to set up such claim as an indigent person, and the rules contained in this Order shall, so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint.

Subject to the provisions of this order, the Central or State Government may make such supplementary provisions for free legal services to those Who have been permitted to sue as indigent persons,60 and where an indigent person is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

Indigent Person: A person unable to pay Court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Ord.er XXXIII will be made before granting or refusing the prayer. But where the applicant was allowed to sue as an indigent person in the trial Court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.

Order 37, CPC (Summary Suits)

Civil litigation, especially recovery suits generally termed to be a long drawn battle and regarded as something best avoided, is not so. The general belief that by filing a recovery Suit against a Debtor will go on for years at large, is not so, if one knows the real scope of Order 37 of the Civil Procedure Code, 1908.

Introduction

Summary suit or summary procedure is given in order XXXVII of the Code of Civil Procedure, 1908. Summary procedure is a legal procedure used for enforcing a right that takes effect faster and more efficiently than ordinary methods. Its object is to summarise the procedure of suits in case the defendant is not having any defence.

A summary suit can be instituted in High Courts, City Civil Courts, Courts of Small Causes and any other court notified by the High Court. High Courts can restrict, enlarge or vary the categories of suits to be brought under this order.

Classes of suits where summary procedure is applied

Summary suits can be instituted in case of certain specified documents such as a bill of exchange, hundies, and promissory notes. Summary procedure is applicable to recover a debt or liquidated demand in money arising on a written contract, an enactment or on a guarantee.

What is a bill of exchange?

A bill of exchange is a written unconditional order by one party (the drawer) to another (the drawee) to pay a certain sum either immediately or on a fixed date for payment of goods and/or services received. If the sum is to be paid immediately it is called a sight bill. Term bill is the bill of exchange where the sum is to be paid on a fixed date.

Hundies :A Hundi is an unconditional order in writing made by a person directing another to pay a certain sum of money to a person named in the order. It is a financial instrument evolved on the Indian sub-continent and used for trade and credit purposes.

Promissory notes :A promissory note contains an unconditional promise to pay a certain sum to the order of a specifically named person or to bearer—that is, to any individual presenting the note. A promissory note can be either payable on demand or at a specific time.

Liquidated demand in money : Liquidated demand is a demand for a fixed sum e.g. a debt of Rs. 50. It is distinguished from a claim of unliquidated damages, which is a subject of the discretionary assessment by the court.

Order 37 CPC is one of the best provisions in the hands of a proposed Plaintiff, wanting to institute a Civil Suit. Broadly it states as under:

Rule 1, Sub-Rule 2 makes it applicable to all suits upon bills of exchange, hundies and promissory notes or the ones in which a Plaintiff seeks only to recover a debt or liquidated demand in money payable on a written contract, an enactment, where the sum to be recovered is a fixed sum of money or in nature of any debt except penalty, a guarantee - in respect of a debt or liquidated demand.

Rule 2 requires an Order 37 Suit to contain among others, a specific averment that the Suit is filed under this Order and no relief which does not fall within the ambit of this Rule is claimed.

Under Order 37, there are two stages of getting the Suit decreed. One is at the stage of Rule 2(3) and the other is at the stage of Rule 2(6).

Rule 2(3) states the procedure for appearance of Defendant which is within 10 days from the service of the summons on him. After entering appearance, the Plaintiff serves on the Defendant summons for judgment within ten days from the date of service supported by an Affidavit; verifying the cause of action, amount claimed and that in his belief there is no defence to the suit.

Rule 2(6) states that in case the Defendant does not apply for a leave to defend, (a) the Plaintiff shall be entitled to judgment immediately or (b) the Court may direct the Defendant to give such security as it may deem fit. Sub-clause 7 states that in case sufficient cause is shown, the delay in entering an appearance or in applying for leave to defend the Suit may also be excused.

Rule 2(5) further states that the Defendant may within 10 days from service of such summons for

judgment by Affidavit or otherwise disclose such facts as may be deemed sufficient to entitle him to defend, apply for leave to defend and it may be granted to him unconditionally or upon such terms as may appear to the Court to be just. Further, the proviso indicates that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed do not indicate a substantial defence or that the defence is frivolous or vexatious

Summary suits	**Ordinary suits**	
Matter	Only for suits related to bill of exchange, hundies, promissory notes and contracts, enactments, guarantees of specified nature.	For any matter of civil nature.
Applicability of *res sub-judice*	Not applicable if a summary suit can be filed on the matter directly and substantially in issue in a previous ordinary suit.	Applicable. One cannot file another suit on the matter directly and substantially in issue in a previous suit.
The right of the defendant to defend	The defendant will get a chance to defend only if leave to defend is granted.	The defendant has a right to defend the averments made in the suit.
Ease of getting decree	In case of non-appearance of the defendant or refusal of leave to defend, the plaintiff is entitled to decree forthwith.	Multiple summonses are served to the defendant when ex parte decree is passed.
Setting aside ex parte decree	More strict and stringent. Special circumstances for non-appearance has to be shown.	Sufficient cause for non- appearance needs to be shown.

UNIT 4

Appeals (Section 96 to 112, Order 41-45)

Introduction: The provisions relating to appeals are contained in Sections 96 to 112 and Orders XLI to XLV of the Code of Civil Procedure and can be summarized as under:

a.	First Appeal,	Sections 96 to 99-A, 107 and Order XLI
b.	Second Appeal,	Sections 100 to 103, 108 and Order XUI
c.	Appeals from Orders	Sections 104, 108 and Order XLIII
d.	Appeals by Indigent persons	Order XLIV
e.	Appeals to Supreme Court	Section 109 and Order 45

Meaning: The appeal means " the Judicial examination of the decisions by a higher Court of the. decisions of an inferior Court

Right to Appeal: The right to appeal is a vested right. The right to appeal is a substantive right and an appeal is a creature of statute and there is no right of appeal unless it is given clearly in express terms by a statute. Appeal is a vested right and accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced. The right of appeal is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.[27] This vested right can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication, and not otherwise.

First Appeal : (Sections 96 – 99-A, 107 and Order XLI)

Appeal from Original Decree:

S. 96 of the Code provides as:

1. Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized. to hear appeals from the decision of such Court.
2. An appeal may le from an original decree passed ex parte.
3. No appeal shall lie from a decree passed by the Court with the consent of parties.
4. No appeal shall lie, except on a question of law, from a decree 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.

Who may Appeal: The following persons are entitled to prefer an appeal :

1. A party to the suit who is adversely affected by the decree {Section 96(1)}, or his legal representative. (Section 146)

2. A person claiming under a title party to the suit or a transferee of interests of such party, who, so far as interest is concerned, is bound by the decree, provided his name is entered on the record of the suit. (Section 146)

3. A guardian ad litem appointed by the Court in a suit by or against a minor. (Section 147, Order 32, Rule 5)

4. Any other person, with the leave of the Court, if he is adversely affected by the decree.

An appeal may lie against an ex- parte decree {S- 96(2)}and no appeal shall lie from a decree passed with consent of parties {S- 96(3)}. The provision of S-96(3) is based upon principle of Estoppels. Once the decree is shown to have been passed with the consent of parties, Section 96(3) becomes operative and binds them. It creates and Estoppels between the parties as a judgment on consent.

There shall be no appeal in petty cases as provided in Section 96(4) and an appeal lies against preliminary decree as in the case of all decrees, unless a final decree has been passed before the date of filing an appeal, but there shall be no appeal against final decree when there was no appeal against preliminary decree. In fact, final decree owes its existence to the preliminary decree.[28]

Conditions before filing an appeal: An appeal can be filed against every decree passed by any Court in exercise of original jurisdiction upon the satisfaction of the following two conditions:

i) The subject matter of the appeal must be a "decree", and

ii) The party appealing must. have been adversely affected by such determination.

Order XLI - Appeal from Original

Decrees. Form of Appeal: Rule 1 to 4:

Memorandum of Appeal: Contains the grounds on which the judicial examination is invited. In order that an appeal may be validly presented, the following requirements must be compiled with:

a. It must be in the form of memorandum setting forth the grounds of objections to the decree appealed from.

b. It must be signed by the appellant Court or his pleader.

c. It must be presented to the Court.

d. The memorandum must be accompanied by a certified copy of the decree.

e. The memorandum must be accompanied by a certified copy of the judgment unless the Court dispenses with it; and

f. Where the appeal is against a money decree, the appellant must deposit-the decretal amount or furnish the security in respect thereof as per the direction of the Court.

Appeals From Appellate Decrees (Second Appeal Sections 100 to 103 and Order 42)

Section-100 Second Appeal:

1. Save as otherwise provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is, satisfied that the case involves a substantial question of law.

2. An appeal may lie under this section from an appellate decree passed ex- parte.

3. In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

4. Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate such question.

5. The appeal shall be heard on the question so formulated and the respondent shall, after hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Substantial Question of Law: Means a substantial question of law as between the parties in the case involved. A question of law is a substantial as between the parties if the decision turns one way or the other on the particular view of law. If it does not affect the decision, it cannot be said to be a substantial question of law. [29]

Form of Second Appeal; A memorandum of second appeal precisely states the substantial question of law involved, but, unlike the memorandum of 1st appeal, it need not set out the ground of objections to the decree appealed from. Order 41 Rule 1.

Appeal From Orders (Section 104 and Order 43)

Section 104: Orders from which appeal lies-

1. An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:

   I. An order under Section 35 A; [Sec. 104(1) (ff)]

   II. an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92 , as the case may be; [Sec. 104(1) (ffa)]

   III. an order under Section 95 ; [Sec.1 04(1) (g)]

   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; [Sec.104 (1) (h)]

   V. an order made under rules from which an appeal is expressly allowed by rules; [Sec. 104(1) (i)]

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no

order, or an order for the payment of a less amount, ought to have been made. {Proviso to, Section 1 04(1)}

2. No appeal shall lie from any order passed in appeal under this Section.

Section 105:

a. Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction but, where a decree is appealed from, any error defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

b. Notwithstanding anything contained in sub-section (1) where any party aggrieved by an order of remand from which an appeal lies does not appeal there from, he shall thereafter be precluded from disputing its correctness.

Section 106 : What Courts to hear appeals: Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction then to the High court.

REFERENCE (Section - 113 and Order XIII)

Section 113 provides provisions relating to reference and empowers any Court (subordinate Court) to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the Court itself feels some doubt about a question of law. The provisions are subject to such conditions and limitations as may be prescribed.

Object: The object for reference is to enable the subordinate Courts to obtain in non-appealable cases the opinion of the High Court, on a question of law and thereby avoid the commission of an error which could not be remedied later on.[30]

Conditions for Applications: (Order 46 Rule 1) The following conditions must be fulfilled, before High Court entertains a reference from a sub-ordinate Court, i.e.

1. **Pendency:** There must be pendency of a suit or appeal in which the decree is not the subject to appeal or a pending proceeding in execution of such decree.

2. **Question of law:** A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding ; and

3. **Doubt in mind of Court:** The Court trying the suit, appeal or executing the decree must entertain a reasonable doubt on such question.

Questions of law: The subordinate Court may be in doubt relating to the questions of law, which may be-

1. Those which relate to the validity of any Act, Ordinance or Regulation and the reference upon such questions of law are obligatory upon the fulfillment of the following conditions[31]:

    1. It is necessary to decide such question in order to dispose of the case;

    2. The Sub- ordinate Court is of the view that the impugned Act, Ordinance or Regulation is ultra vires; and
    3. That there is no determination by the Supreme Court or by the High Court, to which such Court is Subordinate that such Act, Ordinance or Regulation is ultra vires.

2. **Other Questions:** In this case the reference is optional.

Procedure:[32] Who can make Reference: A reference can be made by the Court suo-motu or on application of any party.

Rule 1: The Referring Court must formulate the question of law and give its opinion thereon.

Rule 2: The Court may either stay the proceeding or may pass a decree or order, which cannot be executed until receipt of judgment of High court on reference.

Rule 3: The High Court after hearing the parties, if it so desires, shall decide the point of reference and the Subordinate Court shall dispose of the case in accordance with the said decision.

Provision as in Section 113: The provisions relating to reference, as has been specified in s. 113 of the Code are as under-

Section 113: Reference to High Court: Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

PROVIDED that where the court is satisfied that a case pending before it involves a question 9S to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of, the High Court.

Explanation: In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code of Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in "the General Clauses Act of a State.

Powers and Duty of Referencing Court: A reference can be made on a question of law arisen between the parties litigating, in a suit, appeal or execution proceeding, during the pendency of such suit, appeal or proceeding and the Court is in doubt on such question of law.

Powers and Duty of High Court: The High Court entertains the consulting jurisdiction in cases of reference and can neither make any order on merits nor can it make suggestions. In case of reference the High Court may answer the question referred to it and send back the case to the referring Court for disposal in accordance with law.33 Where a case is referred to the High Court under Rule 1 of Order XLVI or under the proviso to section 113, the High Court may return the case for amendment, and may alter, cancel or set-aside any decree or order which the Court making reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Review (Section 114 and Order XLVII)

Meaning: Review means re-examination or reconsideration of the case by the same judge. It is a judicial re-examination of the case by the same Court and by the same Judge. In it, a Judge, who has disposed of the matter, reviews his earlier order in certain circumstances.

Section 114 and Order XLVII: The provisions relating to review are provided in S. 114 (substantive right) and Order XLVII (procedure). The general rule is that once the judgment is signed and pronounced or an order is made by the Court, it has no jurisdiction to alter it. Review is an exception to this general rule.

Section 114:

Review: Subject as aforesaid, any person considering himself aggrieved

a. by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred;

b. by a decree or order from which no appeal is allowed by this Code, or

c. by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order and the Court may make such order thereon as it thinks fit.

Who may apply to Review: Any person aggrieved by a decree or order may apply for a review of Judgment where no appeal is allowed or where an appeal is allowed but no appeal has been filed against such decree or order or by a decision on a reference from a small cause.[35]

An 'aggrieved person'. means a person who has suffered a legal grievance or against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused in something or wrongfully affected his title to something.[36]

A person who is not a party to the decree or order cannot apply for review since on general principle of B.W, such decree or order is not binding on him and therefore he cannot be said to be an aggrieved person within the meaning of section 114 and order 47 Rule (1).

A party who has a right to appeal but does not file an appeal, may apply for a review of judgment, even if notwithstanding the pendancy of an appeal by some other party, excepts?

i. Where the ground of such appeal is common to the applicant and the appellant, or

ii. When, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Grounds of Review: Order XLVII, Rule (1) provides the following grounds:

i. Discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his (aggrieved person's) knowledge or could not be produced by him (aggrieved person) at the time when the decree was passed or order made; or

ii. on account of some mistake or error appear on the face of the record; or

iii. for any other sufficient reason.

Explanation to section 114 specifically provides that "the fact that the decision on a question of law or which the judgment of the Court is based has been reserved or modified by the subsequent decision or a superior court in any other case, shall not be a ground for review of such judgment".

Procedure: Where the Court is of the opinion that there is not sufficient ground for a review, it shall reject the application[38] otherwise it shall grant the same[39] but no such application shall be grantee without previous notice to the opposite party; to enable him to appear and be heard in support of the decree or order, a review of which is applied for.[40] Where more than one Judge hears a review application and the Court is equally divided the application shall be rejected.[41]

Appeal Against Order on application U/s 114: An order of the Court rejecting the application shall no be appealable, but an order granting the application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.[42]

Bar of Certain Application: No application to review an order made on an application for a review or ' decree or order passed or made on a review shall be entertained.

REVISION (SECTION 115)

Meaning: 'Revision' means "the action of revising, especially critical or careful examination or perusal with a view to correcting or improving".[44] Revision is "the act of examining action in order to remove an defect or grant relief against the irregular or improper exercise or non- exercise of jurisdiction by a lower Court".

Object: The object of Section 115 is to prevent the subordinate Courts from acting arbitrarily, capricious and illegally or irregularly in the exercise of their jurisdiction. It enables the Court to correct, when necessary, errors of jurisdiction 'committed by the subordinate Courts and provides the means to G aggrieved party to obtain rectification of a non- appealable order. The powers U/s 115 are intended to meet the ends of justice and where substantial justice has been rendered by the order of the lower Court the High Court will not interfere.

Provision U/s 115:

1. The High Court may call for the record of any case which has been decided by any COl subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears-

    a. to have exercised a jurisdiction not vested in it by law, or

    b. to have failed to exercise a jurisdiction so vested, or

to have acted in the exercise of its jurisdiction illegally or with material irregularity, The High Court may make such order in the case as it thinks fit PROVIDED that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other 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.

2. The High Court shall not, under this section vary or reverse any decree or order against Which an appeal lies either to the High Court or to any court subordinate thereto.

3. A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the High Court.

Explanation: In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

Provision relating to Revision in Uttar Pradesh: For S. 115, the following sectio shall be substituted and be deemed to have been substituted with effect from July 1, 2002, namely:

"115. Revision -

1. A superior Court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate Court where no appeal lies against' the' order and where the subordinate Court has:

   a) exercised a jurisdiction not vested in it by law; or

   b) failed to exercise a jurisdiction so vested; or

   c) acted in exercise of its jurisdiction illegally or with material irregularity.

2. A revision application under sub-section (1), .when filed in the High Court. shall contain a certificate on the first page of such application, below the title .0Mhe' case, to the effect that no revision in the case lies to the district Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district Court.

3. The superior Court shall not, under this section, vary or reverse any order made except where-,

   a. the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

   b. the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

4. A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the superior Court.

Explanation I : In this section,-

a) the expression "superior Court" means-

   I. the district Court, where the valuation of a case decided by a Court subordinate to it does not exceed five lakh rupees;

   ii. the High Court, where the order sought to be revised was passed in a case decided by the district Court or where the value of the original suit or other proceedings in a case decided by a Court subordinate to the district Court exceeds five lakh rupees.

b) the expression "order" includes an order deciding an issue in any original suit or other proceedings.

Explanation II: The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement."-U.P. Act 14 of 2003, S.2 (w.e.f. 1-7-2002).

Conditions: The following conditions must be satisfied before the revisional power can be exercised:

a. a case must have been decided;

b. the Court deciding the case must be one which is a Court sub-ordinate to the High Court or the Session Courts, as the case may be;

c. the order should be one in which no appeal lies; and

d. the sub-ordinate Court must have

   i. exercised jurisdiction not vested in it by law; or

   ii. failed to exercise jurisdiction vested in it; or

   iii. acted in the exercise of its jurisdiction illegally or with material irregularity.

Application of S. 115: "……. While exercising its jurisdiction U/s 115, it is not competent to the High Court

to correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relations to the jurisdiction of the Court to try the dispute itself. As cis. (a), (b) and (c) of section 115 indicate, it is only in cases where the sub-ordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked "[45]

It was decided by the Supreme Court in re **Smt. Vidyavati Vs Shri Devidas** AIR 1977 S. C. 397, that a revision against order on review application by sub-judge to High Court directly without going into appeal to District Court, is maintainable.

Meaning of Expression "case Decided": Apex Court in ***Baldevdas v. Filmistan Distributors*** AIR 1970 SC, held that a case may be said to have been decided if the Court adjudicates for the purpose of the suit some right or obligation of the parties in controversy. Every order in the suit cannot be regarded as a case decided within the meaning of S. 115.

Explanation to S.115, which was added by the Amendment Act of 1976, makes it clear that the expression "case decided" includes any order made, or any order deciding an issue, in the course of a suit or proceeding. The expression 'any case which has been decided', now, after the Amendment Act means "each decision which terminates a part of the controversy involving the question of jurisdiction.

ALTERNATIVE DISPUTE RESOLUTION (409)

UNIT--1

A. Alternative dispute resolution

Alternative dispute resolution (**ADR**; known in some countries, such as Australia, **external dispute resolution**) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in the recent years. In fact, some courts now require some parties to resort to ADR of some type, generally mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (20080 expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). Additionally, parties to M&A transactions are increasingly turning to ADR to resolve post-acquisition disputes.

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favour of this (ADR) use of mediation to settle disputes

Salient features

ADR is generally classified into at least four types:negotiation, mediation, conciliation and arbitration .Sometimes a fifth type, good offices , is included as well. ADR can be used alongside existing legal systems such as sharia courts within common law jurisdictions such as the UK.

ADR traditions vary somewhat by country and culture. There are significant common elements which justify a main topic, and each country or region's difference should be delegated to sub-pages.

Alternative Dispute Resolution is of two historic types. First, methods for resolving disputes outside of the official judicial mechanisms. Second, informal methods attached to or

pendant to official judicial mechanisms. There are in addition free-standing and or independent methods, such as mediation programs and ombuds offices within organizations. The methods are similar, whether or not they are pendant, and generally use similar tool or skill sets, which are basically sub-sets of the skills of negotiation.

ADR includes informal tribunals, informal mediative processes, formal tribunals and formal mediative processes. The classic formal tribunal forms of ADR are arbitration (both binding and advisory or non-binding) and private judges (either sitting alone, on panels or over summary jury trials). The classic formal mediative process is referral for mediation before a court appointed mediator or mediation panel. Structured transformative mediation as used by the U.S. Postal Service is a formal process. Classic informal methods include social processes, referrals to non-formal authorities (such as a respected member of a trade or social group) and intercession. The major differences between formal and informal processes are (a) pendency to a court procedure and (b) the possession or lack of a formal structure for the application of the procedure.

For example, freeform negotiation is merely the use of the tools without any process. Negotiation within a labor arbitration setting is the use of the tools within a highly formalized and controlled setting.

Calling upon an organizational ombudsman's office is never, by itself, a formal procedure. (Calling upon an organizational ombudsman is always voluntary; by the International Ombudsman Association Standards of Practice, no one can be compelled to use an ombuds office.)

Organizational ombuds offices refer people to all conflict management options in the organization: formal and informal, rights-based and interest-based. But, in addition, in part because they have no decision-making authority, ombuds offices can, themselves, offer a wide spectrum of informal options.

This spectrum is often overlooked in contemporary discussions of "ADR." "ADR" often refers to external conflict management options that are important, but used only occasionally. An organizational ombuds office typically offers many internal options that are used in hundreds of cases a year. These options include:

- delivering respect, for example, affirming the feelings of a visitor, while staying explicitly neutral on the facts of a case,

- active listening, serving as a sounding board,
- providing and explaining information, one-on-one, for example, about policies and rules, and about the context of a concern,
- receiving vital information, one-on-one, for example, from those reporting unacceptable or illegal behavior,
- reframing issues,
- helping to develop and evaluate new options for the issues at hand,
- offering the option of referrals to other resources, to "key people" in the relevant department, and to managers and compliance offices,
- helping people help themselves to use a direct approach, for example, helping people collect and analyze their own information, helping people to draft a letter about their issues, coaching and role-playing,
- offering shuttle diplomacy, for example, helping employees and managers to think through proposals that may resolve a dispute, facilitating discussions,
- offering mediation inside the organization,
- "looking into" a problem informally,
- facilitating a generic approach to an individual problem, for example instigating or offering training on a given issue, finding ways to promulgate an existing policy,
- identifying and communicating throughout the organization about "new issues,"
- identifying and communicating about patterns of issues,
- working for systems change, for example, suggesting new policies, or procedures,
- following up with a visitor, following up on a system change recommendation. (See Rowe, Mary, Informality — The Fourth Standard of Practice, in JIOA, vol 5, no 1, (2012) pp 8–17.)

Informal referral to a co-worker known to help people work out issues is an informal procedure. Co-worker interventions are usually informal.

Conceptualizing ADR in this way makes it easy to avoid confusing tools and methods (does negotiation once a lawsuit is filed cease to be ADR? If it is a tool, then the question is the wrong question) (is mediation ADR unless a court orders it? If you look at court orders and similar things as formalism, then the answer is clear: court annexed mediation is merely a formal ADR process).

Dividing lines in ADR processes are often provider driven rather than consumer driven. Educated consumers will often choose to use many different options depending on the needs and circumstances that they face.

Finally, it is important to realize that conflict resolution is one major goal of all the ADR processes. If a process leads to resolution, it is a dispute resolution process.[5]

The salient features of each type are as follows:

1. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB – a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one or both of the parties behind the scene, a process called "Helping People Help Themselves" – see Helping People Help Themselves, in Negotiation Journal July 1990, pp. 239–248, which includes a section on helping someone draft a letter to someone who is perceived to have wronged them.)

2. In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties. In some countries (for example, the United Kingdom), ADR is synonymous with what is generally referred to as mediation in other countries.

3. In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.

4. In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements (e.g., credit card agreements), has drawn scrutiny from courts Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review.

Beyond the basic types of alternative dispute resolutions there are other different forms of

ADR:

- Case evaluation: a non-binding process in which parties present the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator.
- Early neutral evaluation: a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement.
- Family group conference: a meeting between members of a family and members of their extended related group. At this meeting (or often a series of meetings) the family becomes involved in learning skills for interaction and in making a plan to stop the abuse or other ill-treatment between its members.
- Neutral fact-finding: a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.
- Ombuds: third party selected by an institution – for example a university, hospital, corporation or government agency – to deal with complaints by employees, clients or constituents. The Standards of Practice for Organizational Ombuds may be found at.

"Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.

In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "**appropriate**" dispute resolution.

That is, some cases and some complaints in fact ought to go to formal grievance or to court or to the police or to a compliance officer or to a government IG. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need mediation or arbitration. Thus "alternative" dispute resolution usually means a method that is not the courts. "Appropriate" dispute resolution considers **all** the possible responsible options for conflict resolution that are relevant for a given issue.

ADR can increasingly be conducted online, which is known as online dispute resolution (ODR, which is mostly a buzzword and an attempt to create a distinctive product). It should be noted, however, that ODR services can be provided by government entities, and as such may form part of the litigation process. Moreover, they can be provided on a global scale, where no effective domestic remedies are available to disputing parties, as in the case of the UDRP and domain name disputes. In this respect, ODR might not satisfy the "alternative" element of ADR.

Benefits

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

- Suitability for multi-party disputes
- Flexibility of procedure - the process is determined and controlled by the parties to the dispute
- Lower costs
- Less complexity ("less is more")
- Parties choice of neutral third party (and therefore expertise in area of dispute) to direct negotiations/adjudicate
- Likelihood and speed of settlements
- Practical solutions tailored to parties' interests and needs (not rights and wants,as they may perceive them)
- Durability of agreements
- Confidentiality
- The preservation of relationships and the preservation of reputations

Modern era

Traditional people's mediation has always involved the parties remaining in contact for most or all of the mediation session. The innovation of separating the parties after (or sometimes before) a joint session and conducting the rest of the process without the parties in the same area was a major innovation and one that dramatically improved mediation's success rate.

Traditional arbitration involved heads of trade guilds or other dominant authorities settling disputes. The modern innovation was to have commercial vendors of arbitrators, often ones with little or no social or political dominance over the parties. The advantage was that such persons are much more readily available. The disadvantage is that it does not involve the

community of the parties. When wool contract arbitration was conducted by senior guild officials, the arbitrator combined a seasoned expert on the subject matter with a socially dominant individual whose patronage, good will and opinion were important.

Private judges and summary jury trials are cost- and time-saving processes that have had limited penetration due to the alternatives becoming more robust and accepted.

Latin has a number of terms for mediator that predate the Roman Empire. Any time there are formal adjudicative processes it appears that there are informal ones as well. It is probably fruitless to attempt to determine which group had mediation first.

India

Alternative dispute resolution in India is not new and it was in existence even under the previous Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 has been enacted to accommodate the harmonisation mandates of UNCITRAL Model. To streamline the Indian legal system the traditional civil law known as Code of Civil Procedure, (CPC) 1908 has also been amended and section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.

Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach.

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an

arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

Conciliation

Conciliation is a less formal form of arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.

Parties may submit statements to the conciliator describing the general nature of the dispute and the points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

When it appears to the conciliator that elements of settlement exist, he may draw up the

terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.

Note that in USA, this process is similar to Mediation. However, in India, Mediation is different from Conciliation and is a completely informal type of ADR mechanism.t

Lok Adalat

Etymologically, Lok Adalat means "people's court". India has had a long history of resolving disputes through the mediation of village elders. The current system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, whereby mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences.

While in regular suits, the plaintiff is required to pay the prescribed court fee, in Lok Adalat, there is no court fee and no rigid procedural requirement (i.e. no need to follow process given by [Indian] Civil Procedure Code or Indian Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 of the Constitution of India [which empowers the litigants to file Writ Petition before High Courts] because it is a judgement by consent.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.

Permanent Lok Adalat for public utility services

In order to get over the major drawback in the existing scheme of organisation of Lok

Adalats under Chapter VI of the Legal Services Authorities Act 1987, in which if the parties do not arrive at any compromise or settlement, the unsettled case is either returned to the back to the court or the parties are advised to seek remedy in a court of law, which causes unnecessary delay in dispensation of justice, Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services, as defined u/sec.22 A of the Legal Services Authorities Act, 1987, at pre-litigation stage itself, which would result in reducing the work load of the regular courts to a great extent. Permanent Lok Adalat for Public Utility Services, Hyderabad, India

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws, and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.

Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.

Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat as the scope for compromise through an approach of give and take is high in these cases.

Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

B. LEGAL AID :

CONCEPT,DIMENSIONS AND CONSTITUTIONAL PROVISIONS:

"Legal Aid scheme was first introduced by Justice P.N. Bhagwati under the Legal Aid Committee formed in 1971. According to him, the legal aid means providing an arrangement in the society so that the missionary of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to them by law" the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and illiterate. Legal aid as defined, deals with legal aid to poor, illiterate, who don't have access to courts. One need not be a litigant to seek aid by means of legal aid. Legal aid is available to anybody on the road.

Article 39A of the Constitution of India provides that State shall secure that the operation of the 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 disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society.}

The earliest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent. In Britain, the history of the organised efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State. Since 1952, the Govt. of India also started addressing to the question of legal aid for the poor in various conferences of Law Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes.

In different states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a Committee at the national level was constituted to oversee and supervise legal aid programmes throughout the country under the Chairmanship of Hon. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. Expert committees constituted, from 1950 onwards, to advise governments on providing legal aid to the poor have been unanimous that the formal legal system is

LEGAL LITERACY MISSION

About 70% of the people are living in rural areas and most of them are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even substantial number of the literate people living in the cities and villages do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits, from which the people suffer in the state. The miserable condition in which the people find themselves can be alleviated to some extent by creating legal awareness amongst the people.

Following steps have been taken by Haryana State Legal Services Authority for Legal Awareness Campaign in the State of Haryana :-

Legal Literacy/Legal Awareness Camps/Seminars

On the direction of this Authority, all the District Legal Services Authorities are organizing Legal Literacy/Legal Awareness Camps in the remote rural areas in the State of Haryana at least once in a week i.e. on Sunday/ holidays, on the topics concerning SC/ST, Women and children and general public, so that the common man may be made aware about his legal rights.

Implementation of Legal Literacy Missions

In order to achieve the objective of spreading Legal Literacy, Haryana State Legal Services Authority has implemented special Legal Literacy Missions.

Prisoners Legal Literacy Mission (PLLM)

Haryana State Legal Services Authority is implementing Prisoners Legal Literacy Mission. The main objective of the Prisoners Legal Literacy Mission (PLLM) is to provide access to justice and to eradicate the evils of exploitation, inequality and suffering with the lamp of literacy. The project envisions that legal literacy will reform the mindset of the prisoners and help them become responsible members of the society. The objectives of the mission

are to target the prisons and jails in a systematic manner and to hold Legal Awareness Camps in prisons, prepare and publish Legal Literacy Literature in local language and to circulate the same amongst the prisoners; to organize skits and audio/visual presentations for the prisoners to educate them about their rights; to co-ordinate with the prisons authorities to ensure that freedoms that belong to the prisoners are made available to them and to help improve prison conditions by setting up low cost programmes such as crafts, weaving, workshops etc. which are vacation oriented and self-financed. The project is being implemented and monitored at the district level by the District & Sessions Judge-cum-Chairman of the District Legal Services Authority through Co-ordination Committee and Haryana State Legal Services Authority is periodically reviewing the progress of the mission.

Legal Literacy Mission for empowerment of underprivileged (LLUP)

Haryana State Legal Services Authority has also launched Legal Literacy Mission for empowerment of underprivileged (LLUP). LLUP envisages creating awareness among neglected children, who are forced to take shelter in orphanage centres, helpless girls and women who are forced to take shelter in Nari Niketan or other such institutions, neglected old age people, disabled, mentally ill persons living under helpless situation under the care or control of government-run or non-government-run organizations. Such people have also guaranteed constitutional right to food, clothing and shelter and right to equality and equal access to justice and legal aid for enforcement of the said rights. The Haryana State Legal Services Authority through Legal Aid Panel Advocates or otherwise is coordinating with all such organizations running such homes with a view to ensure the fulfillment of constitutional rights of such persons.

STUDENTS LEGAL LITERACY MISSION

Publicity through print and electronic Media

Haryana State Legal Service Authority through the District Legal Services Authorities and Sub-Divisional Legal Services Committees distributes books, pamphlets, folders amongst

the masses and displayed flex banners/calendars/canopies on the different occasions so that they may be made aware about their legal rights and availability of free legal services under the Legal Services Authorities Act, 1987. Wide publicity is also given in the leading newspapers in the State of Haryana and on cable TV and Doordarshan.

Publicity regarding Lok Adalats, Legal Aid and Legal Literacy Programmes in the State of Haryana is also made by the Public Relations and Cultural Affairs Department, Haryana through electronic and print media by organizing skits and nukkar-nataks, displaying the documentary films "Savera", "Beti" and "Nasha Khori Se Nasha Mukti Ki Aur" through the local cable network and mobile vans of the Department.

Recently, on 9th November, 2011 i.e. Legal Services Day, Hon'ble Executive Chairman of this Authority attended a talk show on TV, highlighting activities of HALSA and explained the various schemes being run by HALSA for downtrodden people which was telecasted in all over Haryana through Doordarshan Kender, Hissar. Similar talk show was broadcasted on All India Radio, Chandiagarh.

PUBLICATION BY HARYANA STATE LEGAL SERVICES AUTHORITY

Exhibiting documentary films through EDUSAT:

The recent advances in telecommunication are also being utilized for achieving the object of spreading legal awareness. Documentary films on socially relevant issues, such as "Beti" (dealing with evils of female foeticide), "Nashakhori Sey Nashamukti Ki Aur" (dealing with evil of drug abuse) and "Savera" (dealing with legal services and Lok Adalats) have been shown to the students through EDUSAT.

STEPS TAKEN FOR LEGAL LITERACY CLASSES FOR WOMEN

Haryana State Legal Services Authority has requested all the Secretaries, District Legal Services Authorities, Director, Social Justice and Empowerment, Director, Women and Child Development Departments, Haryana to organize legal literacy classes for women in

small groups like neighborhood groups(NHG) and self-help groups(SHG) with the assistance of District Child Welfare Officers/ District Welfare Officers/Protection Officers and distribute the books published by this Authority on the topics of social and legal issues concerning women. A set of books has been sent to them with the request to get published sufficient number of theses books for distribution to the women who attend these classes. In this regard legal literacy classes for women are organizing by the District Legal Services Authorities.

STEPS TAKEN FOR STRENGTHENING AND TRAINING OF LEGAL AID LAWYERS.

Workshop for Training of the Empanelled Advocates of District Legal Services Authorities

The advocates were sensitized regarding the need for spreading legal literacy especially amongst the under privileged and regarding need to inform the weaker sections of the society about their rights and also about the mode for enforcing those rights. It was emphasized that HSLSA should become a household word. Everyone should know about it, and should rely upon it. The advocates were also asked to address the Legal Literacy Clubs set up in the schools and colleges, on the topics given in the list prepared for Legal Literacy Camps.

The Field Officer, Social Welfare Office, Protection Officers, Project Officers, MGNREGA also attended the Workshop. The Protection Officer addressed this Workshop on the provisions of 'Protection of Women from Domestic Violence Act, 2005'and shared her experiences while working as a Protection Officer. The Social Welfare Officer disclosed about the various welfare schemes of the Haryana Government, regarding compensation in cases of deaths and injuries from hit and run motor vehicle accidents as well as deaths due to snake bites etc. and also explained the Rajiv Gandhi Parivar Bima Yojna and Rashtriya Parivar Yojna.

Front Office

This Authority vide letter No.6524-6544 dated 18.5.2010 forwarded the Scheme for Free and Competent Legal Services – 2010 to all the District & Sessions Judges/Additional District & Sessions Judge(I)-cum-Chairmen, District Legal Services Authorities in the State of Haryana for taking appropriate action at the earliest. Again this Authority vide letter No.6028-6048 dated 26.5.2011 requested all the District & Sessions Judges/Additional District & Sessions Judge(I)-cum-Chairmen, District Legal Services Authorities in the State of Haryana to intimate this Authority whether the "Front Office" has been established by their District. They were also requested to send date wise schedule of Advocate/Retainers manning "Front Office".

In response thereto Front Office has been set up by 9 District Legal Services Authorities i.e. Faridabad, Fatehabad, Jhajjar, Kaithal, Karnal, Palwal, Panipat, Narnaul, Rewari and Rohtak. There are 21 Districts in Haryana and DLSAs of other districts have been requested to set up Front Office at the earliest under intimation to this Authority.

Panel of Lawyers

All the District Legal Services Authorities and Sub-Division Legal Committees have prepared panel of Lawyers as per Regulation 8 of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010.

Legal Practitioners to be designated as Retainers

As per Regulation 8 of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has designated ten empanelled advocates of DLSA/five empanelled advocates of SDLSC as Retainer on rotation basis in each District and in each Sub- Division of Haryana. The Retainers are available on rotation basis in the Front Office established in the Court Complexes during office hours for giving free legal aid and advice to any person who approach them with any legal problem.

Scrutinizing Committee

As per Regulation 7(2) of the National Legal Services Authority (Free Competent Legal

Services) Regulations, 2010, Haryana State Legal Services Authority has constituted a Scrutinizing Committee in each District and in each Sub-Division of Haryana to scrutinize and evaluate the applications for Legal Services under the said scheme.

Monitoring Committee

As per Regulation 10(3) of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has constituted a Monitoring Committee in each District and in each Sub-Division of Haryana for close monitoring of the court based legal services rendered and the progress of the cases in legal aid matters.

B) Haryana State Legal Services Authority has launched Legal Literacy Mission for empowerment of underprivileged (LLUP). LLUP envisages creating awareness about their rights among neglected children, who are forced to take shelter in orphanage centers, helpless girls and women who are forced to take shelter in Nari Niketan or other such institutions, neglected old age people, disabled, mentally ill persons living under helpless situation under the care or control of government-run or non-government-run organizations.

UNIT-2

TECHNIQUES OF ADR-I

NEGOTIATION

Negotiation can take a wide variety of forms, from a trained negotiator acting on behalf of a particular organization or position in a formal setting, to an informal negotiation between friends. Negotiation can be contrasted with mediation, where a neutral third party listens to each side's arguments and attempts to help craft an agreement between the parties.[1] It can also be compared with arbitration, which resembles a legal proceeding. In arbitration, both sides make an argument as to the merits of their case and the arbitrator decides the outcome. This negotiation is also sometimes called positional or hard-bargaining negotiation.

Negotiation theorists generally distinguish between two types of negotiation. Different theorists use different labels for the two general types and distinguish them in different ways.

One very common distinction concerns the distribution of gains (distributive versus integrative

models):[1]

Distributive negotiation

Distributive negotiation is also sometimes called positional or hard-bargaining negotiation. It tends to approach negotiation on the model of haggling in a market. In a distributive negotiation, each side often adopts an extreme position, knowing that it will not be accepted, and then employs a combination of guile, bluffing, and brinkmanship in order to cede as little as possible before reaching a deal. Distributive bargainers conceive of negotiation as a process of distributing a fixed amount of value. The term distributive implies that there is a finite amount of the thing being distributed or divided among the people involved. Sometimes this type of negotiation is referred to as the distribution of a "fixed pie." There is only so much to go around, but the proportion to be distributed is variable. Distributive negotiation is also sometimes called *win-lose* because of the assumption that one person's gain results in another person's loss. A distributive negotiation often involves people who have never had a previous interactive relationship, nor are they likely to do so again in the near future. Simple everyday examples would be buying a car or a house.

Integrative negotiation

Integrative negotiation is also sometimes called interest-based or principled negotiation. It is a set of techniques that attempts to improve the quality and likelihood of negotiated agreement by providing an alternative to traditional distributive negotiation techniques. While distributive negotiation assumes there is a fixed amount of value (a "fixed pie") to be divided between the parties, integrative negotiation often attempts to create value in the course of the negotiation ("expand the pie"). It focuses on the underlying interests of the parties rather than their arbitrary starting positions, approaches negotiation as a shared problem rather than a personalized battle, and insists upon adherence to objective, principled criteria as the basis for agreement.[3]

Integrative negotiation often involves a higher degree of trust and the forming of a relationship. It can also involve creative problem-solving that aims to achieve mutual gains. It is also sometimes called *win-win* negotiation

Tactics

There are many different ways to categorize the essential elements of negotiation.

One view of negotiation involves three basic elements: *process*, *behavior* and *substance*. The process refers to how the parties negotiate: the context of the negotiations, the parties to the

negotiations, the tactics used by the parties, and the sequence and stages in which all of these play out. Behavior refers to the relationships among these parties, the communication between them and the styles they adopt. The substance refers to what the parties negotiate over: the agenda, the issues (positions and - more helpfully - interests), the options, and the agreement(s) reached at the endAnother view of negotiation comprises four elements: *strategy*, *process*, *tools*, and *tactics*. Strategy comprises the top level goals - typically including relationship and the final outcome. Processes and tools include the steps that will be followed and the roles taken in both preparing for and negotiating with the other parties. Tactics include more detailed statements and actions and responses to others' statements and actions. Some add to this *persuasion and influence*, asserting that these have become integral to modern day negotiation success, and so should not be omitted

Adversary or partner

The two basically different approaches to negotiating will require different tactics. In the distributive approach each negotiator is battling for the largest possible piece of the pie, so it may be quite appropriate - within certain limits - to regard the other side more as an adversary than a partner and to take a somewhat harder line. This would however be less appropriate if the idea were to hammer out an arrangement that is in the best interest of both sides. A good agreement is not one with maximum gain, but optimum gain. This does not by any means suggest that we should give up our own advantage for nothing. But a cooperative attitude will regularly pay dividends. What is gained is not at the expense of the other, but with him.

Employing an advocate

A skilled negotiator may serve as an advocate for one party to the negotiation. The advocate attempts to obtain the most favorable outcomes possible for that party. In this process the negotiator attempts to determine the minimum outcome(s) the other party is (or parties are) willing to accept, then adjusts their demands accordingly. A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes their party desires, but without driving the other party to permanently break off negotiations, unless the best alternative to a negotiated agreement (BATNA) is acceptable.

Another negotiation tactic is bad guy/good guy. Bad guy/good guy is when one negotiator acts as a bad guy by using anger and threats. The other negotiator acts as a good guy by being considerate and understanding. The good guy blames the bad guy for all the difficulties while

trying to get concessions and agreement from the opponent.

Perspective taking for integrative negotiation

Perspective taking can be helpful for two reasons: that it can help self-centered negotiators to seek mutually beneficial solutions, and it increases the likelihood of logrolling (when a favor is traded for another i.e. quid pro quo). Social motivation can increase the chances of a party conceding to a negotiation. While concession is mandatory for negotiations, research shows that people who concede more quickly, are less likely to explore all integrative and mutually beneficial solutions. Therefore, conceding reduces the chance of an integrative negotiation.

Negotiation styles

Kenneth W. Thomas identified 5 styles/responses to negotiation These five strategies have been frequently described in the literature and are based on the dual-concern model. The dual concern model of conflict resolution is a perspective that assumes individuals' preferred method of dealing with conflict is based on two themes or dimensions A concern for self (i.e. assertiveness), and

1. A concern for others (i.e. empathy).

Based on this model, individuals balance the concern for personal needs and interests with the needs and interests of others. The following five styles can be used based on individuals' preferences depending on their pro-self or pro-social goals. These styles can change over time, and individuals can have strong dispositions towards numerous styles. 1. Accommodating: Individuals who enjoy solving the other party's problems and preserving personal relationships. Accommodators are sensitive to the emotional states, body language, and verbal signals of the other parties. They can, however, feel taken advantage of in situations when the other party places little emphasis on the relationship. 2. Avoiding: Individuals who do not like to negotiate and don't do it unless warranted. When negotiating, avoiders tend to defer and dodge the confrontational aspects of negotiating; however, they may be perceived as tactful and diplomatic. 3. Collaborating: Individuals who enjoy negotiations that involve solving tough problems in creative ways. Collaborators are good at using negotiations to understand the concerns and interests of the other parties. They can, however, create problems by transforming simple situations into more complex ones. 4. Competing: Individuals who enjoy negotiations because they present an opportunity to win something. Competitive negotiators have strong instincts for all aspects of negotiating and are often strategic. Because their style can dominate the bargaining

process, competitive negotiators often neglect the importance of relationships. 5. Compromising: Individuals who are eager to close the deal by doing what is fair and equal for all parties involved in the negotiation. Compromisers can be useful when there is limited time to complete the deal; however, compromisers often unnecessarily rush the negotiation process and make concessions too quickly.

Types of negotiators

Three basic kinds of negotiators have been identified by researchers involved in The Harvard Negotiation Project. These types of negotiators are: **Soft bargainers**, **hard bargainers**, and **principled bargainers**.

- **Soft**. These people see negotiation as too close to competition, so they choose a gentle style of bargaining. The offers they make are not in their best interests, they yield to others' demands, avoid confrontation, and they maintain good relations with fellow negotiators. Their perception of others is one of friendship, and their goal is agreement. They do not separate the people from the problem, but are soft on both. They avoid contests of wills and will insist on agreement, offering solutions and easily trusting others and changing their opinions.
- **Hard**. These people use contentious strategies to influence, utilizing phrases such as "this is my final offer" and "take it or leave it." They make threats, are distrustful of others, insist on their position, and apply pressure to negotiate. They see others as adversaries and their ultimate goal is victory. Additionally, they will search for one single answer, and insist you agree on it. They do not separate the people from the problem (as with soft bargainers), but they are hard on both the people involved and the problem.
- **Principled**. Individuals who bargain this way seek integrative solutions, and do so by sidestepping commitment to specific positions. They focus on the problem rather than the intentions, motives, and needs of the people involved. They separate the people from the problem, explore interests, avoid bottom lines, and reach results based on standards (which are independent of personal will). They base their choices on objective criteria rather than power, pressure, self-interest, or an arbitrary decisional procedure. These criteria may be drawn from moral standards, principles of fairness, professional standards, tradition, and so on.

Researchers from The Harvard Negotiation Project recommend that negotiators explore a number of alternatives to the problems they are facing in order to come to the best overall conclusion/solution, but this is often not the case (as when you may be dealing with an individual

utilizing soft or hard bargaining tactics) (Forsyth, 2010).

Bad faith negotiation

When a party pretends to negotiate, but secretly has no intention of compromising, the party is considered to be negotiating in bad faith. Bad faith is a concept in negotiation theory whereby parties pretend to reason to reach settlement, but have no intention to do so, for example, one political party may pretend to negotiate, with no intention to compromise, for political effect.

In international relations and political psychology

Bad faith in political science and political psychology refers to negotiating strategies in which there is no real intention to reach compromise, or a model of information processing. The "inherent bad faith model" of information processing is a theory in political psychology that was first put forth by Ole Holsti to explain the relationship between John Foster Dulles' beliefs and his model of information processing. t is the most widely studied model of one's opponent. A state is presumed to be implacably hostile, and contra-indicators of this are ignored. They are dismissed as propaganda ploys or signs of weakness. Examples are John Foster Dulles' position regarding the Soviet Union, or Hamas's position on the state of Israel.

Problems with laboratory studies

Negotiation is a rather complex interaction. Capturing all its complexity is a very difficult task, let alone isolating and controlling only certain aspects of it. For this reason most negotiation studies are done under laboratory conditions, and focus only on some aspects. Although lab studies have their advantages, they do have major drawbacks when studying emotions:

- Emotions in lab studies are usually manipulated and are therefore relatively 'cold' (not intense). Although those 'cold' emotions might be enough to show effects, they are qualitatively different from the 'hot' emotions often experienced during negotiations. In real life there is self-selection to which negotiation one gets into, which affects the emotional commitment, motivation and interests. However this is not the case in lab studies. Lab studies tend to focus on relatively few well defined emotions. Real life scenarios provoke a much wider scale of emotions. Coding the emotions has a double catch: if done by a third side, some emotions might not be detected as the negotiator sublimates them for strategic reasons. Self-report measures might overcome this, but they are usually filled only before or after the process, and if filled during the process might interfere with it

Barriers

- Lack of trust
- Informational vacuums and negotiator's dilemma
- Structural impediments
- Spoilers
- Cultural and gender differences
- Communication problems
- The power of dialogue

- **Tactics**

Tactics are always an important part of the negotiating process. But tactics don't often jump up and down shouting "Here I am, look at me." If they did, the other side would see right through them and they would not be effective. More often than not they are subtle, difficult to identify and used for multiple purposes. Tactics are more frequently used in distributive negotiations and when the focus in on taking as much value off the table as possible. Many negotiation tactics exist. Below are a few commonly used tactics.

Auction: The bidding process is designed to create competition. When multiple parties want the same thing, pit them against one another. When people know that they may lose out on something, they will want it even more. Not only do they want the thing that is being bid on, they also want to win, just to win. Taking advantage of someone's competitive nature can drive up the price.

Brinksmanship: One party aggressively pursues a set of terms to the point at which the other negotiating party must either agree or walk away. Brinkmanship is a type of "hard nut" approach to bargaining in which one party pushes the other party to the "brink" or edge of what that party is willing to accommodate. Successful brinksmanship convinces the other party they have no choice but to accept the offer and there is no acceptable alternative to the proposed agreement.[37]

Bogey: Negotiators use the bogey tactic to pretend that an issue of little or no importance to him or her is very important Then, later in the negotiation, the issue can be traded for a major concession of actual importance.

Chicken: Negotiators propose extreme measures, often bluffs, to force the other party to chicken out and give them what they want. This tactic can be dangerous when parties are unwilling to

back down and go through with the extreme measure.

Defence in Depth: Several layers of decision-making authority is used to allow further concessions each time the agreement goes through a different level of authority In other words, each time the offer goes to a decision maker, that decision maker asks to add another concession in order to close the deal.

Deadlines: Give the other party a deadline forcing them to make a decision. This method uses time to apply pressure to the other party. Deadlines given can be actual or artificial.

Good Guy/Bad Guy: The good guy/bad guy approach is typically used in team negotiations where one member of the team makes extreme or unreasonable demands, and the other offers a more rational approach This tactic is named after a police interrogation technique often portrayed in the media. The "good guy" will appear more reasonable and understanding, and therefore, easier to work with. In essence, it is using the law of relativity to attract cooperation. The good guy will appear more agreeable relative to the "bad guy." This tactic is easy to spot because of its frequent use.

Highball/Lowball: Depending on whether selling or buying, sellers or buyers use a ridiculously high, or ridiculously low opening offer that will never be achieved. The theory is that the extreme offer will cause the other party to reevaluate his or her own opening offer and move close to the resistance point (as far as you are willing to go to reach an agreement Another advantage is that the person giving the extreme demand appears more flexible he or she makes concessions toward a more reasonable outcome. A danger of this tactic is that the opposite party may think negotiating is a waste of time.

The Nibble: Nibbling is asking for proportionally small concessions that haven't been discussed previously just before closing the deal. This method takes advantage of the other party's desire to close by adding "just one more thing."

Snow Job: Negotiators overwhelm the other party with so much information that he or she has difficulty determining which facts are important, and which facts are diversions.[43] Negotiators may also use technical language or jargon to mask a simple answer to a question asked by a non-expert.

MEDIATION

Mediation is the attempt to help parties in a disagreement to hear one another, to minimise the harm that can come from disagreement (e.g. hostility or ‘demonising’ of the other parties) to

maximize any area of agreement, and to find a way of preventing the areas of disagreement from interfering with the process of seeking a compromise or mutually agreed outcome.

Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process.

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications and licensing followed, producing trained, professional mediators committed to the discipline.

The benefits of mediation include:

Cost

While a mediator may charge a fee comparable to that of an attorney, the mediation process generally takes much less time than moving a case through standard legal channels. While a case in the hands of a lawyer or a court may take months or years to resolve, mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs.

Confidentiality

While court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator or mediators know what happened. Confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators destroy their notes taken during a mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts.

Control

Mediation increases the control the parties have over the resolution. In a court case, the parties

obtain a resolution, but control resides with the judge or jury. Often, a judge or jury cannot legally provide solutions that emerge in mediation. Thus, mediation is more likely to produce a result that is mutually agreeable for the parties.

Compliance

Because the result is attained by the parties working together and is mutually agreeable, compliance with the mediated agreement is usually high. This further reduces costs, because the parties do not have to employ an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law.

Mutuality

Parties to a mediation are typically ready to work mutually toward a resolution. In most circumstances the mere fact that parties are willing to mediate means that they are ready to "move" their position. The parties thus are more amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.

Support

Mediators are trained in working with difficult situations. The mediator acts as a neutral facilitator and guides the parties through the process. The mediator helps the parties think "outside of the box" for possible solutions to the dispute, broadening the range of possible solutions.

Workplace matters

The implementation of human resource management (HRM) policies and practices has evolved to focus on the individual worker, and rejects all other third parties such as unions and AIRC. HRM together with the political and economic changes undertaken by Australia's Howard government created an environment where private ADR can be fostered in the workplace

The decline of unionism and the rise of the individual encouraged the growth of mediation. This is demonstrated in the industries with the lowest unionization rates such as in the private business sector having the greatest growth of mediation. The 2006 Work Choices Act made further legislative changes to deregulate industrial relations. A key element of the new changes was to weaken the AIRC by encouraging competition with private mediation.

A great variety of disputes occur in the workplace, including disputes between staff members, allegations of harassment, contractual disputes and workers compensation claims At large,

workplace disputes are between people who have an ongoing working relationship within a closed system, which indicate that mediation or a workplace investigation would be appropriate as dispute resolution processes. However the complexity of relationships, involving hierarchy, job security and competitiveness can complicate mediation.

Party-Directed Mediation (PDM) is an emerging mediation approach particularly suited for disputes between co-workers, colleagues or peers, especially deep-seated interpersonal conflict, multicultural or multiethnic disputes. The mediator listens to each party separately in a pre-caucus or pre-mediation before ever bringing them into a joint session. Part of the pre-caucus also includes coaching and role plays. The idea is that the parties learn how to converse directly with their adversary in the joint session. Some unique challenges arise when organizational disputes involve supervisors and subordinates. The Negotiated Performance Appraisal (NPA) is a tool for improving communication between supervisors and subordinates and is particularly useful as an alternate mediation model because it preserves the hierarchical power of supervisors while encouraging dialogue and dealing with differences in opinion.

Community mediation

Disputes involving neighbors often have no official resolution mechanism. Community mediation centers generally focus on neighborhood conflict, with trained local volunteers serving as mediators. Such organizations often serve populations that cannot afford to utilize the courts or professional ADR-providers. Community programs typically provide mediation for disputes between landlords and tenants, members of homeowners associations and small businesses and consumers. Many community programs offer their services for free or at a nominal fee.

Experimental community mediation programs using volunteer mediators began in the early 1970s in several major U.S. cities. These proved to be so successful that hundreds of programs were founded throughout the country in the following two decades. In some jurisdictions, such as California, the parties have the option of making their agreement enforceable in court.

Peer Mediation

A peer mediator is one who resembles the disputants, such as being of similar age, attending the same school or having similar status in a business. Purportedly, peers can better relate to the disputants than an outsider

Peer mediation promotes social cohesion and aids development of protective factors that create positive school climates The National Healthy School Standard (Department for Education and

Skills, 2004) highlighted the significance of this approach to reducing bullying and promoting pupil achievement Schools adopting this process recruit and train interested students to prepare them.

Peace Pals is an empirically validated peer mediation program. was studied over a 5-year period and revealed several positive outcomes including a reduction in elementary school violence and enhanced social skills, while creating a more positive, peaceful school climate. Peer mediation helped reduce crime in schools, saved counselor and administrator time, enhanced self-esteem, improved attendance and encouraged development of leadership and problem-solving skills among students. Such conflict resolution programs increased in U.S. schools 40% between 1991 and 1999

Commercial disputes

Mediation was first applied to business and commerce and this domain remains the most common application, as measured by number of mediators and the total exchanged value.[The result of business mediation is typically a bilateral contract.

Commercial mediation includes work in finance, insurance, ship-brokering, procurement and real estate. In some areas, mediators have specialized designations and typically operate under special laws. Generally, mediators cannot themselves practice commerce in markets for goods in which they work as mediators.

Procurement mediation comprises disputes between a public body and a private body. In common law jurisdictions only regulatory stipulations on creation of supply contracts that derive from the fields of State Aids (EU Law and domestic application) or general administrative guidelines extend ordinary laws of commerce. The general law of contract applies in the UK accordingly. Procurement mediation occurs in circumstances after creation of the contract where a dispute arises in regard to the performance or payments. A Procurement mediator in the UK may choose to specialise in this type of contract or a public body may appoint an individual to a specific mediation panel.

Process

Roles

Mediator

The mediator's primary role is to act as a neutral third party who facilitates discussions between the parties In addition, the mediator can contribute to the process ensuring that all necessary

preparations are complete

Finally, the mediator should restrict pressure, aggression and intimidation, demonstrate how to communicate through employing good speaking and listening skills, and paying attention to non-verbal messages and other signals emanating from the context of the mediation and possibly contributing expertise and experience. The mediator should direct the parties to focus on issues and stay away from personal attacks.

Parties

The role of the parties varies according to their motivations and skills, the role of legal advisers, the model of mediation, the style of mediator and the culture in which the mediation takes place. Legal requirements may also affect their roles. Party-Directed Mediation (PDM) is an emerging approach involving a pre-caucus between the mediator and each of the parties before going into the joint session. The idea is to help the parties improve their interpersonal negotiation skills so that in the joint session they can address each other with little mediator interference.

One of the general requirements for successful mediation is that those representing the respective parties have full authority to negotiate and settle the dispute. If this is not the case, then there is what Spencer and Brogan refer to as the "empty chair" phenomenon, that is, the person who ought to be discussing the problem is simply not present.

Preparation

The parties' first role is to consent to mediation, possibly before preparatory activities commence. Parties then prepare in much the same way they would for other varieties of negotiations. Parties may provide position statements, valuation reports and risk assessment analysis. The mediator may supervise/facilitate their preparation and may require certain preparations.

Disclosure

Agreements to mediate, mediation rules, and court-based referral orders may have disclosure requirements. Mediators may have express or implied powers to direct parties to produce documents, reports and other material. In court-referred mediations parties usually exchange with each other all material which would be available through discovery or disclosure rules were the matter to proceed to hearing, including witness statements, valuations and statement accounts.

Participation

Mediation requires direct input from the parties. Parties must attend and participate in the mediation meeting. Some mediation rules require parties to attend in person. Participation at one stage may compensate for absence at another stage.

Preparation

Choose an appropriate mediator, considering experience, skills, credibility, cost, etc. The criteria for mediator competence is under dispute. Competence certainly includes the ability to remain neutral and to move parties though various impasse-points in a dispute. The dispute is over whether expertise in the subject matter of the dispute should be considered or is actually detrimental to the mediator's objectivity.

Preparatory steps for mediation can vary according to legal and other requirements, not least gaining the willingness of the parties to participate. In some court-connected mediation programs, courts require disputants to prepare for mediation by making a statement or summary of the subject of the dispute and then bringing the summary to the mediation. In other cases, determining the matter(s) at issue can become part of the mediation itself.

Consider having the mediator meet the disputants prior to the mediation meeting. This can reduce anxiety, improve settlement odds and increase satisfaction with the mediation process. Ensure that all participants are ready to discuss the dispute in a reasonably objective fashion. Readiness is improved when disputants consider the viability of various outcomes.

Provide reasonable estimates of loss and/or damage.

Identify other participants. In addition to the disputants and the mediator, the process may benefit from the presence of counsel, subject-matter experts, interpreters, family, etc.

Secure a venue for each mediation session. The venue must foster the discussion, address any special needs, protect privacy and allow ample discussion time.

Ensure that supporting information such as pictures, documents, corporate records, pay-stubs, rent-rolls, receipts, medical reports, bank-statements, etc., are available.

Have parties sign a contract that addresses procedural decisions, including confidentiality, mediator payment, communication technique, etc.

Meeting

The typical mediation has no formal compulsory elements, although some elements usually occur:

- establishment of ground rules framing the boundaries of mediation

- parties detail their stories
- identification of issues
- clarify and detail respective interests and objectives
- search for objective criteria
- identify options
- discuss and analyze solutions
- adjust and refine proposed solutions
- record agreement in writing

Individual mediators vary these steps to match specific circumstances, given that the law does not ordinarily govern mediators' methods.

Criteria

The following are useful criteria for selecting a mediator:

- Personal attributes—patience, empathy, intelligence, optimism and flexibility
- Qualifications—knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills.
- Experience— mediation experience, experience in the substantive area of dispute and personal life experience
- Training
- Professional background
- Certification and its value
- Suitability of the mediation model
- Conflicts of interest
- Cost/fee

Third party nomination

Contracts that specify mediation may also specify a third party to suggest or impose an individual. Some third parties simply maintain a list of approved individuals, while others train mediators. Lists may be “open” (any person willing and suitably qualified can join) or a “closed” panel (invitation only).

In the UK and internationally, lists are generally open, such as The Chartered Institute of Arbitrators, the Centre for Dispute Resolution. Alternatively, private panels co-exist and compete for appointments e.g.,Savills Mediation

Liability

Legal liability may stem from a mediation. For example, a mediator could be liable for misleading the parties or for even inadvertently breaching confidentiality. Despite such risks, follow-on court action is quite uncommon. Only one case reached that stage in Australia as of 2006. Damage awards are generally compensatory in nature. Proper training is mediators' best protection.

Liability can arise for the mediator from Liability in Contract; Liability in Tort; and Liability for Breach of Fiduciary Obligations.

Liability in Contract arises if a mediator breaches (written or verbal) contract with one or more parties. The two forms of breach are *failure to perform* and *anticipatory breach*. Limitations on liability include the requirement to show actual causation.

Liability in Tort arises if a mediator influences a party in any way (compromising the integrity of the decision), defames a party, breaches confidentiality, or most commonly, is negligent. To be awarded damages, the party must show actual damage, and must show that the mediator's actions (and not the party's actions) were the actual cause of the damage.

Liability for Breach of Fiduciary Obligations can occur if parties misconceive their relationship with a mediator as something other than neutrality. Since such liability relies on a misconception, court action is unlikely to succeed.

Tapoohi v Lewenberg (Australia

As of 2008 Tapoohi v Lewenberg was the only case in Australia that set a precedent for mediators' liability.

The case involved two sisters who settled an estate via mediation. Only one sister attended the mediation in person: the other participated via telephone with her lawyers present. An agreement was executed. At the time it was orally expressed that before the final settlement, taxation advice should be sought as such a large transfer of property would trigger capital gains taxes.

Tapoohi paid Lewenberg $1.4 million in exchange for land. One year later, when Tapoohi realized that taxes were owed, she sued her sister, lawyers and the mediator based on the fact that the agreement was subject to further taxation advice.

The original agreement was verbal, without any formal agreement. Tapoohi, a lawyer herself, alleged that the mediator breached his contractual duty, given the lack of any formal agreement; and further alleged tortious breaches of his duty of care.

Although the court dismissed the summary judgment request, the case established that mediators owe a duty of care to parties and that parties can hold them liable for breaching that duty of care. Habersberger J held it "not beyond argument" that the mediator could be in breach of contractual and tortious duties. Such claims were required to be assessed at a trial court hearing.[*clarification needed*]

This case emphasized the need for formal mediation agreements, including clauses that limit mediators' liability.

Mediation with arbitration

Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. The process begins as a standard mediation, but if mediation fails, the mediator becomes an arbiter.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor—rendering what, in Western European court procedures, would be considered an arbitral (even 'arbitrary') decision.

Mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields no coercive power over the parties or the outcome. The parties awareness that the mediator might later act in the role of judge could distort the process. Using a different individual as the arbiter addresses this concern.

Alternatives

Mediation is one of several approaches to resolving disputes. It differs from adversarial resolution processes by virtue of its simplicity, informality, flexibility, and economy.

Not all disputes lend themselves well to mediation. Success is unlikely unlessAll parties' are ready and willing to participate.

- All (or no) parties have legal representation. Mediation includes no right to legal counsel.
- All parties are of legal age (although see peer mediation) and are legally competent to make decisions.

Conciliation

Conciliation sometimes serves as an umbrella-term that covers mediation and facilitative and advisory dispute-resolution processes. Neither process determines an outcome, and both share

many similarities. For example, both processes involve a neutral third-party who has no enforcing powers.

One significant difference between conciliation and mediation lies in the fact that conciliators possess expert knowledge of the domain in which they conciliate. The conciliator can make suggestions for settlement terms and can give advice on the subject-matter. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute the conciliator has a duty to provide legal information. This helps ensure that agreements comply with relevant statutory frameworks. Therefore, conciliation may include an advisory aspect.

Mediation is purely facilitative: the mediator has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution

Both mediation and conciliation work to identify the disputed issues and to generate options that help disputants reach a mutually satisfactory resolution. They both offer relatively flexible processes. Any settlement reached generally must have the agreement of all parties. This contrasts with litigation, which normally settles the dispute in favour of the party with the strongest legal argument. In-between the two operates collaborative law, which uses a facilitative process where each party has counsel.

Counselling

A counsellor generally uses therapeutic techniques. Some—such as a particular line of questioning—may be useful in mediation. But the role of the counsellor differs from the role of the mediator. The list below is not exhaustive but it gives an indication of important distinctions:

- A mediator aims for clear agreement between the participants as to how they will deal with specific issues. A counsellor is more concerned with the parties gaining a better self-understanding of their individual behaviour.
- A mediator, while acknowledging a person’s feelings, does not explore them in any depth. A counsellor is fundamentally concerned about how people feel about a range of relevant experiences.
- A mediator focuses upon participants' future goals rather than a detailed analysis of past events. A counsellor may find it necessary to explore the past in detail to expose the origins and patterns of beliefs and behaviour.

- A mediator controls the process but does not overtly try to influence the participants or the actual outcome. A counsellor often takes an intentional role in the process, seeking to influence the parties to move in a particular direction or consider specific issues.
- A mediator relies on all parties being present to negotiate, usually face-to-face. A counsellor does not necessarily see all parties at the same time.
- A mediator is required to be neutral. A counsellor may play a more supportive role, where appropriate.
- Mediation requires both parties to be willing to negotiate. Counselling may work with one party even if the other is not ready or willing to participate.
- Mediation is a structured process that typically completes in one or a few sessions. Counselling tends to be ongoing, depending upon participants' needs and progress.

Confidentiality

One of the hallmarks of mediation is that the process is strictly confidential. Two competing principles affect confidentiality. One principle encourages confidentiality to encourage people to participate, while the second principle states that all related facts should be available to courts.

The mediator must inform the parties of their responsibility for confidentiality.

Steps put in place during mediation to help ensure this privacy include:

1. All sessions take place behind closed doors.
2. Outsiders can observe proceedings only with both parties' consent.
3. The meeting is not recorded.
4. Publicity is prohibited.

Confidentiality is a powerful and attractive feature of mediation . lowers the risk to participants of disclosing information and emotions and encourages realism by eliminating the benefits of posturing. In general, information discussed in mediation cannot be used as evidence in the event that the matter proceeds to court, in accord with the mediation agreement and common lawFew mediations succeed unless the parties can communicate fully and openly without fear of compromising a potential court case. The promise of confidentiality mitigates such concerns Organisations often see confidentiality as a reason to use mediation in lieu of litigation, particularly in sensitive areas. This contrasts with the public nature of courts and other tribunals. However mediation need not be private and confidential In some circumstances the parties agree to open the mediation in part or whole. Laws may limit confidentiality. For example, mediators

must disclose allegations of physical or other abuse to authorities. The more parties in a mediation, the less likely that perfect confidentiality will be maintained. Some parties may even be required to give an account of the mediation to outside constituents or authorities. Most countries respect mediator confidentiality.

UNIT-3

Techniques of ADR-II

Conciliation is a process through which two or more parties may explore and reach a negotiated solution to their conflict with the help of a third neutral and disinterested party, the conciliator.

The conciliation process finds its most solid foundation and eventual success on the will of the parties to engage in a meaningful dialogue regardless of the depth of their differences. Anyone wishing to explore a negotiated solution to a problem -whatever its nature-should do so with an open mind, for conciliation intends to explore common grounds upon which the parties may build an agreement acceptable to all involved.

Because of his impartiality, independence, and professional experience, the conciliator can help the parties understand the motives and needs of all involved. However, the conciliation process does not seek a solution at any cost, nor may a conciliator impose a solution upon the parties.

The difference between conciliation and mediation lies in that the conciliator may offer an opinion and alternatives with respect to proposals advanced by any one party to the other. The process itself does not vary when compared to the mediation process.

It is notable that the terms mediation and conciliation are often used interchangeably and are accorded the same meaning, mediation. Most Latin American countries, for example, refer to mediation as conciliation; they mean mediation. It is also noteworthy that an increasing number of countries are prohibiting the making of a legal distinction between conciliation and mediation because there have been instances where mutually acceptable agreements were later successfully challenged in court on the bases that the accord was reached through conciliation, not mediation

Conciliation is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, encouraging parties to explore potential solutions and assisting parties in finding a mutually acceptable outcome.

Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.

Conciliation differs from mediation in that in conciliation, often the parties are in need of restoring or repairing a relationship, either personal or business.

Effectiveness

Recent studies in the processes of negotiation have indicated the effectiveness of a technique that deserves mention here. A conciliator assists each of the parties to independently develop a list of all of their objectives (the outcomes which they desire to obtain from the conciliation). The conciliator then has each of the parties separately prioritize their own list from most to least important. He/She then goes back and forth between the parties and encourages them to "give" on the objectives one at a time, starting with the least important and working toward the most important for each party in turn. The parties rarely place the same priorities on all objectives, and usually have some objectives that are not listed by the other party. Thus the conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop.

Most successful conciliators are highly skilled negotiators. Some conciliators operate under the auspices of any one of several non-governmental entities, and for governmental agencies such as the Federal Mediation and Conciliation Service in the United States

Historical conciliation

Historical conciliation is an applied conflict resolution approach that utilizes historical narratives to positively transform relations between societies in conflicts. Historical conciliation can utilize many different methodologies, including mediation, sustained dialogue, apologies, acknowledgement, support of public commemoration activities, and public diplomacy.

Historical conciliation is not an excavation of objective facts. The point of facilitating historical questions is not to discover all the facts in regard to who was right or wrong. Rather, the objective is to discover the complexity, ambiguity, and emotions surrounding both dominant and non-dominant cultural and individual narratives of history. It is also not a rewriting of history. The goal is not to create a combined narrative that everyone agrees upon. Instead, the aim is to create room for critical thinking and more inclusive understanding of the past and conceptions of "the other."

Conflicts that are addressed through historical conciliation have their roots in conflicting identities of the people involved. Whether the identity at stake is their ethnicity, religion or culture, it requires a comprehensive approach that takes people's needs, hopes, fears, and concerns into account.

---ARBITRATION: Arbitration agreement/clause

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts. The parties to a dispute refer it to *arbitration* by one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), and agree to be bound by the arbitration decision (the "award"). A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. In certain countries such as the United States, arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration can be either voluntary or mandatory (although mandatory arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur) and can be either binding or non-binding. Non-binding arbitration is similar to mediation in that a decision cannot be imposed on the parties. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of

damages payable. By one definition arbitration is binding and non-binding arbitration is therefore technically not arbitration.

Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding. There are limited rights of review and appeal of arbitration awards. Arbitration is not the same as:

- judicial proceedings, although in some jurisdictions, court proceedings are sometimes referred as arbitrations[2]
- alternative dispute resolution (ADR) expert determination
- mediation (a form of settlement negotiation facilitated by a neutral third party)

Advantages and disadvantages

Parties often seek to resolve disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

- In contrast to litigation, where one cannot "choose the judge arbitration allows the parties to choose their own tribunal. This is especially useful when the subject matter of the dispute is highly technical: arbitrators with an appropriate degree of expertise (for example, quantity surveying expertise, in the case of a construction dispute, or expertise in commercial property law, in the case of a real estate dispute) can be chosen.
- Arbitration is often faster than litigation in court. Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied.
- Because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court verdicts.
- In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability.

Some of the disadvantages include:

- Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.
- If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case.
- If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee
- There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.
- Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.
- In some legal systems, arbitration awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect.
- Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavorable ruling.
- Discovery may be more limited in arbitration or entirely nonexistent.
- The potential to generate billings by attorneys may be less than pursuing the dispute through trial.
- Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award.

Arbitrability

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedures cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters

were not arbitrable in the United States . Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.

Arbitration agreement

Arbitration agreements are generally divided into two typesAgreements which provide that, if a dispute should arise, it will be resolved by arbitration. These will generally be normal contracts, but they contain an arbitration clause

- Agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (sometimes called a "submission agreement")

The former is the far more prevalent type of arbitration agreement. Sometimes, legal significance attaches to the type of arbitration agreement. For example, in certain Commonwealth countries (not including England and Wales), it is possible to provide that each party should bear their own costs in a conventional arbitration clause, but not in a submission agreement.

In keeping with the informality of the arbitration process, the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts. Clauses which have been upheld include:

- "arbitration in London - English law to apply
- "suitable arbitration clause
- "arbitration, if any, by ICC Rules in London"

The courts have also upheld clauses which specify resolution of disputes other than in accordance with a specific legal system. These include provision indicating:

- That the arbitrators "must not necessarily judge according to the strict law but as a general rule ought chiefly to consider the principles of practical business
- "internationally accepted principles of law governing contractual relations"

Agreements to refer disputes to arbitration generally have a special status in the eyes of the law.

For example, in disputes on a contract, a common defence is to plead the contract is void and thus any claim based upon it fails. It follows that if a party successfully claims that a contract is void, then each clause contained within the contract, including the arbitration clause, would be void. However, in most countries, the courts have accepted that:

1. A contract can only be declared void by a court or other tribunal; and
2. If the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not, is the arbitration tribunal.
3. Arguably, either position is potentially unfair; if a person is made to sign a contract under duress, and the contract contains an arbitration clause highly favourable to the other party, the dispute may still referred to that arbitration tribunalConversely a court may be persuaded that the arbitration agreement itself is void having been signed under duress. However, most courts will be reluctant to interfere with the general rule which does allow for commercial expediency; any other solution (where one first had to go to court to decide whether one had to go to arbitration) would be self-defeating.

International

History

The United States and Great Britain were pioneers in the use of arbitration to resolve their differences. It was first used in the Jay Treaty of 1795, and played a major role in the Alabama Claims case of 1872 whereby major tensions regarding British support for the Confederacy during the American Civil War were resolved. At the First International Conference of American States in 1890, a plan for systematic arbitration was developed, but not excepted. The Hague Peace Conference of 1899, saw the major world powers agreed to a system of arbitration and the creation of a Permanent Court of Arbitration. President William Howard Taft was a major advocate. One important use came in the Newfoundland fisheries dispute between the United States and Britain in 1910. In 1911 the United States signed arbitration treaties with France and Britain

Arbitration was widely discussed among diplomats and elites in the 1890-1914 era. The 1895 dispute between the United States and Britain over Venezuela was peacefully resolved through arbitration. Both nations realized that a mechanism was desirable to avoid possible future conflicts. The Olney-Pauncefote Treaty of 1897 was a proposed treaty between the United States and Britain in 1897 that required arbitration of major disputes. The treaty was rejected by the

U.S. Senate and never went into effect.[24]

American Secretary of State William Jennings Bryan (1913-1915) worked energetically to promote international arbitration agreements, but his efforts were frustrated by the outbreak of World War I. Bryan negotiated 28 treaties that promised arbitration of disputes before war broke out between the signatory countries and the United States. He made several attempts to negotiate a treaty with Germany, but ultimately was never able to succeed. The agreements, known officially as "Treaties for the Advancement of Peace," set up procedures for conciliation rather than for arbitration. Arbitration treaties were negotiated after the war, but attracted much less attention than the negotiation mechanism created by the League of Nations.

International agreements

By far the most important international instrument on arbitration law[is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, usually simply referred to as the "New York Convention". Virtually every significant commercial country is a signatory, and only a handful of countries are not parties to the New York Convention.

Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The Washington Convention (ICSID) of 1996 for investment arbitration
- The UNCITRAL Model Law on International Commercial Arbitration of 1985, (revised in 2006).[26]
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

International enforcement

It is often easier to enforce arbitration awards in a foreign country than court judgments.[*citation needed*] Under the New York Convention 1958, an award issued in a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. Only foreign arbitration awards are enforced pursuant to the New York Convention. An arbitral decision is foreign where the award was made in a state other than the state of recognition or where foreign procedural law was used.[27]

Virtually every significant commercial country in the world is a party to the Convention while relatively few countries have a comprehensive network for cross-border enforcement of judgments their courts. Additionally, the awards not limited to damages. Whereas typically only monetary judgments by national courts are enforceable in the cross-border context, it is theoretically possible (although unusual in practice) to obtain an enforceable order for specific performance in an arbitration proceeding under the New York Convention.

Article V of the New York Convention provides an exhaustive list of grounds on which enforcement can be challenged. These are generally narrowly construed to uphold the pro-enforcement bias of the Convention.

Government disputes

Certain international conventions exist in relation to the enforcement of awards against states.

- The Washington Convention 1965 relates to settlement of investment disputes between states and citizens of other countries. The Convention created the International Centre for Settlement of Investment Disputes (or ICSID). Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.[28]
- The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. The tribunal has not been a notable success, and has even been held by an English court to be void under its own governing law.[29]

Arbitral tribunal

The arbitrators which determine the outcome of the dispute are called the arbitral tribunal. The composition of the arbitral tribunal can vary enormously, with either a sole arbitrator sitting, two or more arbitrators, with or without a chairman or umpire, and various other combinations. In most jurisdictions, an arbitrator enjoys immunity from liability for anything done or omitted whilst acting as arbitrator unless the arbitrator acts in bad faith.

Arbitrations are usually divided into two types: *ad hoc* arbitrations and administered arbitrations.

In *ad hoc* arbitrations, the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties. After the tribunal has been formed, the appointing authority will normally have no other role and the arbitation will be managed by the tribunal.

In administered arbitration, the arbitration will be administered by a professional arbitration institution providing arbitration services, such as the LCIA in London, or the ICC in Paris, or the

American Arbitration Association in the United States. Normally the arbitration institution also will be the appointing authority. Arbitration institutions tend to have their own rules and procedures, and may be more formal. They also tend to be more expensive, and, for procedural reasons, slower.

Duties of the tribunal

The duties of a tribunal will be determined by a combination of the provisions of the arbitration agreement and by the procedural laws which apply in the seat of the arbitration. The extent to which the laws of the seat of the arbitration permit "party autonomy" (the ability of the parties to set out their own procedures and regulations) determines the interplay between the two.

However, in almost all countries the tribunal owes several non-derogable duties. These will normally be:

- to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent (sometimes shortened to: complying with the rules of "natural justice"); and
- to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute.[31]

Arbitral awards[

Although arbitration awards are characteristically an award of damages against a party, in many jurisdictions tribunals have a range of remedies that can form a part of the award. These may include:

1. payment of a sum of money (conventional damages)
2. the making of a "declaration" as to any matter to be determined in the proceedings
3. in somejurisdictions, the tribunal may have the same power as a court to:
    1. order a party to do or refrain from doing something ("injunctive relief")
    2. to order specific performance of a contract
    3. to order the rectification, setting aside or cancellation of a deed or other document.
4. In other jurisdictions, however, unless the parties have expressly granted the arbitrators the right to decide such matters, the tribunal's powers may be limited to deciding whether a party is entitled to damages. It may not have the legal authority to order injunctive relief, issue a

declaration, or rectify a contract, such powers being reserved to the exclusive jurisdiction of the courts.

Nomenclature

As methods of dispute resolution, arbitration procedure can be varied to suit the needs of the parties. Certain specific "types" of arbitration procedure have developed, particularly in North America.

- **Judicial Arbitration** is, usually, not arbitration at all, but merely a court process which refers to itself as arbitration, such as small claims arbitration before the County Courts in the United Kingdom
- **Online Arbitration** is, a form of arbitration that occurs exclusively online There is currently an assumption that online arbitration is admissible under the New York Convention and the E-Commerce Directive, but this has not been legally verified Since arbitration is based on a contractual agreement between the parties, an online process without a regulatory framework may generate a significant number of challenges from consumers and other weaker parties if due process cannot be assured.
- **High-Low Arbitration**, or **Bracketed Arbitration**, is an arbitration wherein the parties to the dispute agree in advance the limits within which the arbitral tribunal must render its award. It is only generally useful where liability is not in dispute, and the only issue between the party is the amount of compensation. If the award is lower than the agreed minimum, then the defendant only need pay the lower limit; if the award is higher than the agreed maximum, the claimant will receive the upper limit. If the award falls within the agreed range, then the parties are bound by the actual award amount. Practice varies as to whether the figures may or may not be revealed to the tribunal, or whether the tribunal is even advised of the parties' agreement.
- **Binding Arbitration** is a form of arbitration where the decision by the arbitrator is legally binding and enforceable, similar to a court order.
- **Non-Binding Arbitration** is a process which is conducted as if it were a conventional arbitration, except that the award issued by the tribunal is not binding on the parties, and they retain their rights to bring a claim before the courts or other arbitration tribunal; the award is in the form of an independent assessment of the merits of the case, designated to facilitate an out-of-court settlement. State law may automatically make a non-binding arbitration binding, if, for

example, the non-binding arbitration is court-ordered, and no party requests a trial *de novo* (as if the arbitration had not been held).

- **Pendulum Arbitration** refers to a determination in industrial disputes where an arbitrator has to resolve a claim between a trade union and management by making a determination of which of the two sides has the more reasonable position. The arbitrator must choose only between the two options, and cannot split the difference or select an alternative position. It was initiated in Chile in 1979. This form of arbitration has been increasingly seen in resolving international tax disputes, especially in the context of deciding on the Transfer Pricing margins. This form of arbitration is also known (particularly in the United States) as **Baseball Arbitration**. It takes its name from a practice which arose in relation to salary arbitration in Major League Baseball.
- **Night Baseball Arbitration** is a variation of baseball arbitration where the figures are not revealed to the arbitration tribunal. The arbitrator will determinate the quantum of the claim in the usual way, and the parties agree to accept and be bound by the figure which is closest to the tribunal's award.

  Such forms of "Last Offer Arbitration" can also be combined with mediation to create MEDALOA hybrid processes (Mediation followed by Last Offer Arbitration).[42]

----JURISDICTION OF ARBITRAL TRIBUNAL

aa The Judiciary's Role In American Government

Judicial Review was established by the U.S. Supreme Court in Marbury v. Madison(1803) where Chief Justice Marshall wrote:

"It is emphatically the province and duty of the judiciary to say what the law is…."

Basic Judicial Requirements

Jurisdiction:

"Juris" (law) "diction" (to speak) is the power of a court to hear a dispute and to "speak the law" into a controversy and render a verdict that is legally binding on the parties to the dispute.

Jurisdiction over Persons

Power of a court to compel the presence of the parties (including corporations) to a dispute to appear before the court and litigate.

Courts use long-arm statutes for non-resident parties based on “minimum contacts” with state.

Case 2.1: Cole v. Mileti (1998).

Jurisdiction over Property

Also called “in rem” jurisdiction.

Power to decide issues relating to property, whether the property is real, personal, tangible, or intangible.

A court generally has in rem jurisdiction over any property situated within its geographical borders.

Subject Matter Jurisdiction

This is a limitation on the types of cases a court can hear, usually determined by federal or state statutes.

For example, bankruptcy, family or criminal cases.

General (unlimited) jurisdiction.

Limited jurisdiction.

Original and Appellate Jurisdiction

Courts of original jurisdiction is where the case started (trial).

Courts of appellate jurisdiction have the power to hear an appeal from another court.

Federal Court Jurisdiction

“Federal Question” cases in which the rights or obligations of a party are created or defined by some federal law.

“Diversity” cases where:

The parties are not from the same state, and,

The amount in controversy is greater than $75,000.

Exclusive vs. Concurrent Jurisdiction

Exclusive:

only one court (state or federal) has the power (jurisdiction) to hear the case.

Concurrent:

more than one court can hear the case.

Venue

Venue is concerned with the most appropriate location for the trial.

Generally, proper venue is whether the injury occurred.

Standing

In order to bring a lawsuit, a party must have "standing" to sue.

Standing is sufficient "stake" in the controversy; party must have suffered a legal injury.

Case 2.3: High Plains Wireless LP vs. FCC (2002)

Trial Courts

Courts of record-court reporters.

Opening and closing arguments.

Juries are selected.

Evidence, such as witness testimony, physical objects, documents, and pictures, is introduced.

Witnesses are examined and cross-examined.

Verdicts and Judgments are rendered.

Appellate Courts

Middle level of the court systems.

Review proceedings conducted in the trial court to determine whether the trial was according to the procedural and substantive rules of law.

Generally, appellate courts will consider questions of law, but not questions of fact.

Supreme Courts

Also known as courts of last resort.

The two most fundamental ways to have your case heard in a supreme court are:

Appeals of Right.

By Writ of Certiorari.

Alternative Dispute Resolution

Trials are a means of dispute resolution that are very expensive and sometimes take many months to resolve.

There are "alternative dispute resolution" (ADR) methods to resolve disputes that are inexpensive, relatively quick and leave more control with the parties involved.

ADR

ADR describes any procedure or device for resolving disputes other than the traditional judicial process.

Unless court-ordered, there is no record which is an important factor in commercial litigation due to trade secrets.

Most common:

negotiation, mediation, arbitration.

Negotiation

Less than 10% of cases reach trial.

Negotiation is informal discussion of the parties, sometimes without attorneys, where differences are aired with the goal of coming to a "meeting of the minds" in resolving the case.

Successful negotiation involves thorough preparation, from a position of strength.

Assisted Negotiation

Mini-Trial: Attorneys for each side informally present their case before a mutually agreed-upon neutral 3rd party (e.g., a retired judge) who renders a non-binding "verdict." This facilitates further discussion and settlement.

Expert evaluations.

Conciliation:

3rd party assists in reconciling differences.

Mediation

Involves a neutral 3rd party (mediator).

Mediator talks face-to-face with parties (who typically are in different adjoining rooms) to determine "common ground."

Advantages:

few rules, customize process, parties control results (win-win).

Disadvantages:

mediator fees, no sanctions or deadlines.

Arbitration

Many labor contracts have binding arbitration clauses.

Settling of a dispute by a neutral 3rd party (arbitrator) who renders a legally-binding decision; usually an expert or well-respected government official.

Recall the 1997 UPS strike when US. Labor Secretary Alexis Herman helped arbitrate the strike.

Arbitration Disadvantages

Results may be unpredictable because arbitrators do not have to follow precedent or rules of procedure or evidence.

Arbitrators do not have to issue written opinions.

Generally, no discovery available.

Arbitration Process

Case begins with a submission to an arbitrator. Next comes the hearing where parties present evidence and arguments. Finally, the arbitrator renders an award.

Courts are not involved in arbitration unless an arbitration clause in a contract needs enforcement.

Providers of ADR Services

Non-profit organizations:

American Arbitration Association.

Better Business Bureau.

Online Dispute Resolution

Also called ODR

Uses the Internet to resolve disputes.

Still in its infancy but is gaining momentum.

UNCITRAL International agreements

By far the most important international instrument on arbitration law[is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, usually simply referred to as the "New York Convention". Virtually every significant commercial country is a signatory, and only a handful of countries are not parties to the New York Convention.

Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The Washington Convention (ICSID) of 1996 for investment arbitration
- The UNCITRAL Model Law on International Commercial Arbitration of 1985, (revised in 2006).[26]
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

International enforcement

It is often easier to enforce arbitration awards in a foreign country than court judgments.[*citation*

needed] Under the New York Convention 1958, an award issued in a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. Only foreign arbitration awards are enforced pursuant to the New York Convention. An arbitral decision is foreign where the award was made in a state other than the state of recognition or where foreign procedural law was used.[27]

Virtually every significant commercial country in the world is a party to the Convention while relatively few countries have a comprehensive network for cross-border enforcement of judgments their courts. Additionally, the awards not limited to damages. Whereas typically only monetary judgments by national courts are enforceable in the cross-border context, it is theoretically possible (although unusual in practice) to obtain an enforceable order for specific performance in an arbitration proceeding under the New York Convention.

Article V of the New York Convention provides an exhaustive list of grounds on which enforcement can be challenged. These are generally narrowly construed to uphold the pro-enforcement bias of the Convention.

Government disputes

Certain international conventions exist in relation to the enforcement of awards against states.

- The Washington Convention 1965 relates to settlement of investment disputes between states and citizens of other countries. The Convention created the International Centre for Settlement of Investment Disputes (or ICSID). Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.[28]

The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. The tribunal has not been a notable success, and has even been held by an English court to be void under its own governing law.**ation Clause**

When parties agree to use UNCITRAL Arbitration Rules in arbitration, they typically specify this in the arbitration clause of their business contract. Below is the model UNCITRAL arbitration clause.

Model UNCITRAL Arbitration Clause

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."

(a) The appointing authority shall be … [name of institution or person];
(b) The number of arbitrators shall be … [one or three];
(c) The place of arbitration shall be … [town and country];
(d) The language(s) to be used in the arbitral proceedings shall be …"
(e) The law governing the proceedings shall be…"

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a

party can appeal to the principal civil court of original jurisdiction for setting aside the award.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

UNIT-4

RECOGNITION AND ENFORCEMENT

Globalization has been a great stimulation in the process of integration of economies and societies of different countries across the globe. It has been a great tool for breaking economic barrier and envisioning world as a market for trade.

When economies and societies integrate it indubitably leads to the rise in various types of disputes such as:-

a) Industrial disputes,

b) Commercial disputes,

c) International disputes etc.

The remedy is not in avoidance of these disputes but rather in building mechanisms to resolve

these disputes amicably. It is a sine qua non for growth and for maintaining peace and harmony in every society.

ubi jus ibi remedium – This legal maxim rightly laid down the foundation of legal system in every human society. It means whenever any wrong is done to a person, he has a right to approach the court of law. This legal pattern of resolving dispute has resulted in abundance of pending cases, which rightly justifies the cliché "justice delayed is justice denied". The legal proceedings in a court of law get stretched down the years consuming oodles of money and which ultimately leads to disruption in business and career.

These interminable and complex court procedures have propelled jurists and legal personalities to search for an alternate to conventional court system. The search was a great success with the discovery of alternate forum known as Alternate Dispute Resolution, which is commonly called by its generic acronym "ADR".

ADR is being increasingly acknowledged in the field of law and commercial sectors both at national and international levels. Its diverse methods have helped parties to resolve their disputes at their own terms cheaply and expeditiously.

At National Level

Benjamin Franklin once said; "when will mankind be convinced and settle their difficulties by arbitration". I think Indian community can aptly answer him by providing the example of Panchayat System, which in reality is not very different from modern ADR system. Infact, panchayat system is vogue in India from centuries. It is a process by which a neutral third party usually a person of higher stature and reputation deemed to be unbiased during adjudication will be rendering legally binding decision. Unfortunately, this system has lost its credibility due to intervention of politics and communal hatred among people.

Litigation in India is generally longitudinal and expensive. Hence, there has been considerable amount of efforts by legislature and judiciary to make ADR more prevalent among societies.

Legislative efforts towards ADR in India:

In India credit for springing up ADR goes to East India Company. It gave the statutory recognition to the said forum under various acts such as:

• Bengal Regulation Act of 1772 and Bengal regulation act of 1781 which provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties.

Alternate dispute redressal received legislative recognition in India, after the enactment of Civil Procedure Code, 1859 which provided –

Sec 312 - reference to Arbitration in pending suit.

Sec 312 – 325 – laid down the procedure for arbitration.

Sec 326 – 327 – provided for arbitration without courts intervention.

#Arbitration is also recognized under Indian Contract Act, 1872 as the first exception to Section 28, which envisages that any agreement restraining legal proceedings is void.

The Legal Service Authorities Act, 1987 brought another mechanism under ADR with the establishment of Lok Adalat system.

The Industrial Dispute Act, 1947 statutorily recognized conciliation as an effective method of dispute resolution.

Indian Electricity Act, 1910 and A.P Co-operative Societies Act, 1964 are few more examples in this regard.

The Arbitration Act of 1899 was the first exclusive legislation on arbitration. Subsequently the said act was repealed and was replaced by Arbitration Act 1940. Arbitration Act of 1940 also failed to give desired result and in realizing its objective of enactment. Then various recommendations of successive Law Commissions and policy of liberalization in the field of commerce acted as a catalyst in the growth of ADR mechanism. After the liberalization of Indian economy which opened the gates for inflow of foreign investment; Government of India on the UNCITRAL model enacted the Arbitration and Conciliation Act 1996 which repealed the 1940 Act.

The main objectives of the Act are:-

A) To cover international and domestic arbitration comprehensively.

B) To minimize the role of courts and treat arbitral award as a decree of court.

C) To introduce concept of conciliation.

D) Lastly, to provide speedy and alternative solution to the dispute.

Code of Civil Procedure 1908 carries section 89 which formulates four methods to settle disputes outside the court. These are:-

a) Arbitration (b) Conciliation (c) Lok adalat (d) Mediation.

At the same time the Constitution of India puts arbitration as a Directive Principle of State Policy. Article 52(d) provides that the state should encourage settlement of international disputes

by arbitration.

Judicial effort towards ADR in India:

Indian judiciary has also played a substantial role in upgradation of ADR mechanism. The apex court has recognized the alternate forum in its various decisions.

In In Guru Nanak Foundation V/S Rattan & Sons court observed that "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedure claptrap…"

The realization of concepts like speedy trial and free legal aid by apex court in various cases has also helped in the upgradation of alternate dispute redressal mechanism. One of the biggest step in the lines of development of the said machinery was maintaining the validity of "fastrack courts" scheme as laid down in Brijmohan v/s UOI.

Fastrack court scheme has done wonders in disposing number of pending cases. These courts have disposed of 7.94 lakh cases out of 15.28 lakh cases transferred at the rate of 52.09% and recent statistics show that the number of pending cases has reduced to 6 lakhs.

Another major step in the growth of ADR services in India is the establishment of institutions such as:

• IIAM - Indian Institute of Arbitration and Mediation

• ICA - Indian Council for Arbitration

• ICADR – International Centre for Alternate Dispute Resolution.

These institutions provide services of negotiation, mediation, conciliation, arbitration, settlement conferences etc. They also help in finding lacunae in existing ADR laws and recommended reforms to overcome them.

At INTERNATIONAL LEVEL

The history of Alternate dispute resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as arbitrators in conflicts between European countries. One of the successful examples of the said mechanism is the international mediation conducted by former U.S President Jimmy Carter in Bosnia. ADR has given fruitful results not only in international political arena but also in international business world in settling commercial disputes among many corporate houses for e.g. Settlement of a longstanding commercial dispute between General Motors Co. and Johnson Matthey Inc., which was pending

in US District Court since past few years.

The biggest stepping stone in the field of International ADR is the adoption of UNCITRAL [United Nation Commission on International Trade Law] model on international commercial arbitration. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism. Other important international conventions on arbitration are:-

· The Geneva Protocol on Arbitration clauses of 1923.

· The Geneva Convention on the execution of foreign award,1927

· The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In India Part III of Arbitration and Conciliation Act, 1996 provides for International Commercial Arbitration

Another step in strengthening the international commercial arbitration is the establishment of various institutions such as:-

A) ICC – International Court of Arbitration of the International Chamber of Commerce.

B) Arbitration and mediation centre of World Intellectual Property Organization.

C) AAA – International centre for dispute resolution of the American Arbitration Association and others have explored new avenues in the ADR field.

Alternate Dispute Resolution Mechanism

Ø Arbitration – It is one of the cardinal mechanism in alternate dispute machinery. Whereby the dispute is submitted to one or more arbitrators, who is duly appointed by both the parties.

They give their verdict in the form of "Arbitral Award", which is legally binding on disputed parties. Arbitration is very common in business transactions, but unknown to many that it is the oldest method of resolving disputes, which had been enshrined since ancient history.

Ø Mediation – It is a non binding process in which a third party called "Mediator" helps the disputed parties to reach a settlement.

"Mediation is the technical term in international law which signifies the interposition by a neutral and friendly state between two states at war or on the eve of war with each other, of its good offices to restore or to preserve peace"<!--[if !supportFootnotes]-->[1]<!--[endif]-->

Ø Conciliation – This mechanism is also non binding on the parties. It is a process by which a third party called "Conciliator" meets disputed parties separately in order to resolve their differences. He neither gives verdict nor makes any award.

It is also called "Shuttle diplomacy". Most mediators consider it as a specific type of mediation practice. Part III of Arbitration and Conciliation act, 1996 provides for this mechanism.

Ø Lok Adalat – Lok Adalat is also called "people's court". It was established by the Government under Legal Services Authorities act, 1987 to facilitate inexpensive and prompt settlement of pending suits by conciliation and compromise. This forum is very effective in settlement of money claims, partition suits, matrimonial cases etc.

Ø Ombudsman – It is an external agency appointed by government to probe into administrative mishaps. It is a mechanism by which an aggrieved party can claim relief against abuse of discretionary power by government authority. Sweden was the first country to adopt this institution in 1809 A.D followed by Finland, Denmark, Norway, New Zealand, Australia and Scandinavian countries.

Ø Negotiation – It is a non binding process of resolving disputes, by which parties to dispute interact with one another and try to work out a settlement without the intervention of third party. Importance of Negotiation in concise can be aptly put in words of former US President John F. Kennedy – "Let us negotiate with fear but let us not fear to negotiate".

Ø Collaborative Law – It is a voluntary dispute resolution process by which parties to dispute are represented by their own lawyers, to facilitate the discussion in accordance with an agreement. It has been an effective mechanism in the context of divorce and family law. Collaborative law is practiced internationally in countries like USA, UK and the list goes on with the inclusion of countries such as France, Germany, Austria, Australia, Scotland, Switzerland, Hong Kong etc.in number of law school courses, diplomas, seminars, etc. focusing on alternate dispute resolution and rationalizing its effectualness in processing wide range of dispute in society.