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## **Topic - I**

# **Introduction**

This Planet, called the Earth, is divided into seven continents. They are: Africa, Antarctica, Asia, Europe, North America, South America, and Oceania (including Australia).

Politically, the world is divided into so many territorially defined states/countries. At present, there are 193 independent and sovereign member-states in the United Nations Organisation.

A state is the largest association of people who are living within the defined boundary. There are permanently settled people in every state. The people living in a state/country are governed by an agency of the State called the Government. One of the main functions of every state is maintenance of 'peace and order' in the society. Protecting the society from external aggression, maintaining good relations with other states, looking after welfare of the people living within the state, etc., are the other functions of the state.

The modern state has the following four constituent elements.

- (1) Permanently settled people or Population.
- (2) Fixed or defined Territory.
- (3) Government or an organisation for uniting and governing the people.
- (4) Sovereignty or supremacy in internal matters and independence of external control

### **Population**

The state is a human institution and is the highest of all human associations. There can be no state without human beings. No state can exist in an uninhabited land. A definite piece of land without human habitation cannot be called a State. There cannot be a state of animals and beasts. An uninhabited portion of the earth cannot form the State.

### **Territory**

The second essential constituent of the State is "territory". The word territory covers the surface of the land within well defined boundaries, the

sub-soil, lakes and rivers and also air space above the land. The people do not become a state until they have acquired a territory. Without territory a modern state cannot exist.

### Government

The Government is an indispensable element of the State. No state can exist in the absence of the Government. An aggregation of people permanently settled in a fixed territory cannot constitute a state in the absence of the Government. The Government is the political organisation through which the collective will of the people is formulated, expressed and executed. The state operates through the government machinery. The government functions through its three agencies, i.e., the Legislature, the Executive and the Judiciary. The legislature enacts laws. The executive rules over the country and enforces the laws. The judiciary interprets the laws and adjudicates the disputes.

### Sovereignty

Sovereignty is the fourth essential constituent of the State. It is the life and soul of the State. There can be no state without sovereignty. It is the supreme element of statehood. It is the supreme power to control internal and external matters. It refers to supremacy in internal matters and independence of external control. Through the government, the state exercises its supreme power of sovereignty. A sovereign state is not subject to any external control. The power of sovereignty can be used to make laws, maintain law and order, regulate the conduct of people and activities of other organisations within the territory, formulate external policy, enter into military agreements with other states. Sovereignty is the supreme political power of the state.

### Functions of State

The major functions of every government can broadly be classified into three heads. They are:

- (i) legislative function,
- (ii) executive function, and
- (iii) judicial function.

The legislative function ( i.e. the function of law making) of the government is carried out by the legislative organ of the government. Each

independent and sovereign state has its own legislative organ, known by a separate name. In the United Kingdom of Great Britain and Northern Ireland, the legislative organ of the government is known as the British Parliament. In the United States of America, the legislative branch of the federal government is known as the United States Congress. In India, the legislative function of the union government is carried out by the central legislature, known as the Parliament of India.

The executive function (i.e. implementation of laws and policies) of the government of a state is performed by the executive branch of the government. In the United Kingdom the executive power of the government is vested in the Crown. The Crown exercises the executive powers on the aid and advice of the British Cabinet headed by the Prime Minister. In the United States of America, the executive power of the federal government is vested in the President of the United States. In India, the executive powers of the Union Government is vested in the President of India. The President of India exercises the executive powers on the aid and advice of a Council of Ministers with the Prime Minister at the head.

The judicial function (i.e. adjudication of disputes) of the government is discharged by the judicial branch of the government. In the United Kingdom, the judicial function is being performed by the Supreme Court of the United Kingdom and courts subordinate to it. In the United State of America, the judicial function is being carried out by the Supreme Court of America and its subordinate courts. In India, the judicial function of the government is being performed by the Supreme Court of India and various subordinate courts.

## Topic - II Meaning of Law

In any society, the human conduct is regulated by a set of "rules of conduct". The 'rules of conduct' that are to be followed by the people who are living in the society in their mutual intercourse can be called 'law'. The term 'law' is used to denote "a body of rules or principles" to guide and regulate human action. The law regulates and controls the external human conduct, backed by the sovereign political authority. The term 'law' has been defined by different authorities in different ways. Some of the definitions are given below.

**Wilson** : "Law is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rule backed by the authority and power of government."

**J.E.Holland** : "Law is a general rule of external human action enforced by a sovereign political authority."

**Green** : "The law is a system of rights and obligations which the State enforces."

**John Erskine** : "Law is the command of a sovereign, containing common rule of life for his subjects, and obliging them to obedience."

**Jeremy Bentham** : Law is the will or command of the legislator.

**Pound** : "The law constitutes body of principles recognized or enforced by public and regular tribunals in the administration of justice."

**John Salmond** : "Law may be defined as the body of principles recognized and applied by the State in the administration of justice".

**Prof.Gray** : "The law of the State or of any organized body of men is composed of the rules which the courts - that is, the judicial organs of that body - lay down for the determination of legal rights and duties."

**Austin** : Law is the command of the sovereign to his subjects obliging them to a course of conduct.

## **Topic - III**

### **Relevancy of Law in the Society**

**or**

### **'Law is an instrument of Social Changes.' Comment**

**or**

### **'Law is a catalytic change agent.' Comment**

The role that is being played by the law in any society has many facets. It is an instrument to maintain law and order. It secures protection to the life, property and reputation of people. It has the capacity to bring about positive social changes. It has the capacity to confirm social arrangements. It has, *inter alia* ( among other things), the capacity to resist social changes.

The main function and object of law has been stated to be:

- (i) maintain law and order in the society;
- (ii) ensure justice; and
- (iii) a stable, steadfast and peaceful change in society.

Law provides principles for conflict resolution between individuals and groups within a society. Law also provides procedures for conflict resolution.

A study of history of any society would go to show that law was an instrument of positive social changes. The role of law to bring about social changes cannot be brushed aside.

#### **Social Change - Meaning**

The word "change" means becoming different from the old one. Change is the law of nature. Change is the law of life. Change is inevitable. Change occurs in all fields. The reasons change, the man changes and the societies change. Social change denotes the variations that occur in social life, social relationships and social behaviour. Social changes result in the change in people's conditions of living, their attitudes and beliefs. Social Changes occur due to so many reasons.

If we examine the history of India, we would find the role that was played by the law in bringing about positive social changes. Many historic changes took place by introduction of legal measures and made possible by legal instruments.

### Abolition of Sati ( Suttee )

The word *suttee* (it was so written by old English writers) means " a virtuous woman". The history of India shows of an evil practise that prevailed among the Hindus called "Sati". As per this practice, a widow had to immolate (burn herself) at the funeral pyre of her husband. The widow, who burnt herself voluntarily at the funeral pyre of her husband (lord) as her last devotion, was called *Sati*.

This evil custom was mostly prevalent in Bengal and North India. It is unknown when this custom began. In 1818 there were about 839 cases of *Sati* in Bengal Presidency. There were 722 such cases in 1829.

Lord William Bentink was the Governer General of India during the period 1828 to 1835.

Lord William Bentink abolished the practice of *Sati* and declared that the burining of a widow a crime, punishable as culpable homicide. The persons who compelled the widow to immolate; and those who administered drugs to influence the free will of the widow to burn herself; were punished with death. This was done by a Regulation of December 1829, declaring the practice of *suttee* illegal.

Rajaram Mohan Roy, who voiced against the practice of *sati*, was a strong supporter of Lord Willam Bentink. One of the greatest acts of humanity for which Lord Willam Bentink deserves eternal honour is the abolition of *Suttee*. The abolition of practice of *suttee* proved highly beneficial to a large section of the Indian poplulation.

### Abolition of Thuggee through Law

**Thugee** was a notorious profession prevalent alike among the Hindus and Muslims during the period when Lord William Bentink became Governer General of India. The Thugs (gang of robbers) moved about in gangs, strangled

the travellers and robbed all their properties. Travelling was absolutely insecure in those days. The lack of police force and proper law to punish their notorious acitivities, encouraged them in their notorious activities.

Lord William Bentink established a seperate department for the detection and punishment of Thugs. During the years 1831-1837, it is estimated that about 3266 Thugs were disposed of, and 412 were hanged to death. Through the operation of law, the whole organisation was broken up and the country was saved from this pest.

#### Hindu Widow Re-marriage - Legalised

The Hindu widows were not permitted to re-marry. They, *if not immolated on their husbands' funeral pyres*, had to live as widows of the deceased husbands' till their death. Lord Dalhousie, who was the Governor General between 1848 to 1856 enacted a law called the Hindu Widow Re-marriage Act,1856 and legalised the re-marriage of Hindu widows.

#### Dissolution of Muslim Marriages

As per the Muslim law, that was applicable to Muslims living in British India, the husband could divorce her wife by pronouncing *talak*. There was no provision in the Muslim law enabling a married Muslim wife to pronounce *talak*. She could obtain a decree of divorce only on some limited grounds.

Even if the husband-

neglected to maintain her; or  
made her life miserable by deserting her; or  
persistently maltreated her; or  
absconded her

she could not obtain a decree for divorce from a civil court.

The absence of such a provision had entailed unspeakable misery to innumerable Muslim women in British India. It was under the above said circumstances the Dissolution of Muslim Marriages Act, 1939 was enacted to relieve the sufferings of countless Muslim women.

By virtue of this Act, now, a Muslim wife can file a suit for divorce on the grounds available under this Act. Section 2 of the Dissolution of Muslim

Marriages Act, 1939 provides nine grounds under which a Muslim Wife can obtain a decree for dissolution of her marriage. They are the following:

1. Absence of Husband : The wife married under Muslim law is entitled to obtain a decree for the dissolution of her marriage if the whereabouts of her husband has been not known for a period of four years.
2. Failure to provide Maintenance : If the husband has refused or has failed to provide maintenance to his wife for a period of two years, the Muslim wife can obtain a decree for divorce.
3. Imprisonment of Husband : A wife is entitled to claim divorce on the ground that her husband is sentenced to imprisonment for a period of seven years or upward.
4. Impotency of Husband : If the husband was impotent at the time of marriage and continues to be so, the wife can claim a decree for divorce.
5. Insanity or Leprosy : If the husband has been insane for a period of two years or is suffering from Leprosy or a virulent venereal disease, the wife can claim divorce.
6. Option of puberty : If the marriage of a girl who has not attained puberty is contracted by her father or other guardian, she can repudiate the marriage before attaining 18 years and claim divorce. She is not entitled to repudiate the marriage after consummation.
7. Cruelty : A Muslim Wife can claim a decree for divorce if the husband treats her with cruelty. The following acts of husband are treated as cruelty.
  - 1) Habitually assaulting her.
  - 2) Associating with women of evil repute.
  - 3) Attempts to force her to lead an immoral life.
  - 4) Disposing of her property without her consent.
  - 5) Obstructing her from observing religious practices.
  - 6) He has more wives than one and does not treat them equally.
- 8) Failure to perform marital obligation : If the husband has failed to perform his marital obligations for three years, the wife is entitled to a decree for divorce.

9. Other grounds : A Muslim wife is entitled to seek for decree of divorce on any other grounds which is recognised under Muslim Law.

This enactment, in fact, resulted in the social change among the Muslim community in India.

In the post-independant period, the major legal instrument that caused, and is being caused, the social change is our Constitution. The working of the Constitution could bring about many changes in the Indian society. The post-independent legislations such as the Hindu Marriage Act, the Hindu Succession Act, Land Reforms Laws, Dowry Prohibition Law, Laws to give protection to the Scheduled Castes and Scheduled Tribes, Laws to provide Free and Compulsory Education etc., are all working as instrumentals of social change. The history and the present would give a definite picture that the law is, and continue to be, one of the **major instrumentals of social change**.

## **Topic IV Sources of Law**

The main function and object of law has been stated to be:

- (i) maintain law and order in the society;
- (ii) ensure justice; and
- (iii) a stable, steadfast and peaceful change in society.

Law provides principles for conflict resolution between individuals and groups within a society. Law also provides procedures for conflict resolution.

In India, one who tries to find out the law applicable to a given situation can see that the 'rules of conduct' may be contained in -

- (i) the **Constitution of India**,
- (ii) the **Legislations**,
- (iii) the **Precedents**,
- (iv) the **Customs** and
- (v) the **Conventional laws**.

We have a written constitution, known as the **Constitution of India**. It is the fundamental law of our country.

The laws enacted by the legislature of the state are called **legislations**. **Legislations are also known as Statute laws, Acts, or Codes**. In India the law making power is vested in the Parliament and State Legislatures. These bodies can enact laws. They can delegate law making power to the executive government or some other agency, like Bar Council. When the government or the other agencies make rules, regulations, or notifications in exercise of their powers conferred by the Act, the rules, regulations, or notifications so made are known as **delegated legislations** or subordinate legislations.

The laws declared by the judiciary of the state in the course of adjudication of disputes are called **precedents**.

A rule of conduct which is followed by the people voluntarily is called custom.

The rules of conduct made by the people in their agreements are called **conventional laws**. A bye-law of a club or society, a Partnership Deed, a Memorandum of Association, and an Articles of Association of a Company are examples of Conventional Laws.

Thus the constitution of India, the legislations ( it includes subordinate legislations, such as rules, regulations, notifications etc.) the precedents, the custom, and the conventional laws are the primary material sources of law in India.

## Topic - V

# The Constitution of India - the Fundamental Law of India

We were under the governance of British till 1947. Our country India that is *Bharat*, was a colony of Britain for a long period. On fifteen day of August, 1947, after a long freedom struggle, she became independent. It was the day of 'dawn' after the long period of 'dusk'. Every year we celebrate the 15th day of August as our "Independence Day".

Now we have a written constitution, known as the Constitution of India. It is the fundamental law of our country. The Constitution of India was adopted and enacted by the Constituent Assembly on twenty-six November 1949. We celebrate that day as "**Constitution Day**" in every year. It came into force on 26th day of January, 1950. We celebrate that day as the "**Republic Day**" in every year.

### The Preamble to Our Constitution

The preamble to the Constitution declares that the people of India have resolved to constitute India into a **Sovereign Socialist Secular Democratic Republic**.

The main objective of the Constitution of India is to secure to all its citizens :

**Justice**, social, economic and political;

**Liberty** of thought, expression, belief, faith and worship;

**Equality** of status and of opportunity;

and to promote among them all

**Fraternity** assuring the dignity of the individual and the unity and integrity of the Nation.

A Christian always try to follow *verses* in the **Bible** with due respect or reverence. A Mussalman tries to live in accordance with the *verses* that are contained in the **Quran**. A Hindu tries to lead a life in terms of

the **verses** which are adumbrated in the **Vedas**, the **Smritis**, the **Sruthis** and the **Puranas**. These Holy Books may have a role in the private life of every one. But in the public life, he has to follow certain principles outside these Holy Books. Our public life is governed by the **Constitution of India**, the **Legislations** (other laws enacted by the legislature ( a body created to enact laws), the **Precedents** (law declared by judiciary), the **Custom** ( rules of conduct voluntarily followed by the people) and the **Conventional law** ( rules made by the people in their agreements).

The Constitution is a document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the Government within the State and declares the principles by which those organs must operate. The Constitution refers to the whole system of the governance of a country and the collection of rules which establish and regulate or govern the government. India is a country with a written constitution. *The people of the country, the organs of the Government, Legislature, Executive and Judiciary are all bound by the Constitution* :  
*(B.R. Kapur v. State of T.N. (2001) 7 SCC 231)*

The Constitution of India is the lengthiest and the most detailed of all the written constitutions of the world. The Constitution of India originally consisted of only 395 Articles (**not sections**) divided into 22 Parts and 8 Schedules. But after the Constitution (100 th Amendment) Act,2014, the Constitution now consists of 465 Articles divided into 25 Parts and 12 Schedules. It is to be noted that even now the last article is 395, and we arrive at the figure 465 only when we count all the articles one by one, taking into account the newly inserted articles and repealed articles.

By Clause 1 of Article 1 of the Constitution of India, India, that is **Bharat**, is a Union of States. At present there are 29 states in this Union. India can be treated as a federation of states.

The Constitution of India, in fact, declares names, powers and functions of various organs of government. In addition to that it also declares various rights available to citizens and non-citizens. It further declares the great objectives that the governments in power have to achieve, known as the 'directive principles of state policy'. The

Constitution also provides in Part IVA , a list of 'fundamental duties' which the citizens are obliged to follow.

The authorities created by the Constitution are bound to act in accordance with the provisions contained in the Constitution. If they act against the Constitutional provisions, their action will be declared unconstitutional and void. The power to declare an unconstitutional act as void is conferred to the Supreme Court and various High Courts.

The following are the main authorities created by our Constitution.

(1) **The President of India** - He is elected by the elected members of the Parliament and state legislatures. He can hold his office for a period of 5 years. He is the executive head of the Union Government (Central Government). In the exercise of his powers, he is advised by the Council of Ministers headed by the Prime Minister. A 'Bill' passed by the Parliament will become an 'Act' only if the President gives his assent to it. He has power to promulgate 'Ordinances' (laws). He can give pardon to a convicted person.

2. **The Vice -President of India** - He is elected by the members of the Parliament. He is the *ex-officio* Chairman of the Council of States (the *Rajya Sabha*). When there is casual vacancy in the office of the President, the Vice-President acts as President and discharges his functions. He can also discharge the functions of the President during the temporary absence of the President.

3. **The Council of Ministers for the Union** - In order to advise and aid the President of India, the Constitution of India provides for establishment of a Council of Ministers for the Union. It is headed by the Prime Minister. The Prime Minister is appointed by the President. On the advice of the Prime Minister, the other Ministers are appointed by the President. The Prime Minister and other ministers should be members of the Parliament.

4. **The Parliament of India** -The Parliament of India consists of the President and two Houses - the Council of States ( *Rajya Sabha* ) and the House of the People ( *Lok Sabha* ). The members of *Rajya Sabha* are

elected by the members of State Legislatures. The members of Lok Sabha are elected by the people of India. The main function of the Parliament is to enact laws for the whole of India.

**5. Governors of States** - India, that is Bharat, is a Union of States. At present there are 29 states in this Union. As per the Constitution there shall be a Governor for each State. He is appointed by the President. He acts as the executive head of the State. In the exercise of his powers, he is aided and advised by a Council of Ministers headed by the Chief Minister. He can promulgate Ordinances. He can also grant pardon to a convicted person. A 'Bill' passed by the State Legislature will become an 'Act' only if the Governor gives his assent to it.

**6. The Council of Ministers for the States** - In order to advise and aid the Governors, the Constitution of India provides for establishment of a Council of Ministers for each State. It is headed by the Chief Minister. The Chief Minister is appointed by the Governor. On the advice of the Chief Minister, other Ministers are appointed by the Governor. The Chief Minister and other Ministers should be members of the legislature of the state.

**7. The State Legislatures** - In every state, there is a Legislature. It shall consist of the Governor and either one House ( known as Legislative Assembly) or two Houses ( known as Legislative Assembly and Legislative Council). In the States of Andra Pradesh, Bihar, Maharashtra, Karnataka, Tamil Nadu, Telengana and Utter Pradesh there are two Houses. In other states there is only one House( the Legislative Assembly). The main function of the State Legislature is to enact laws applicable to the state.

**8. The Supreme Court of India** - It is the apex court in India. It is the final appellate court in civil and criminal matters. It situates at Delhi. It has very wide powers in the field of administration of justice. A citizen can directly approach the Supreme Court in case his fundamental rights are violated by the State. In the enforcement of fundamental rights it can issue Writs ( *habeas corpus, mandamus, certiorari, prohibition and quo warranto* ). These writs are in the nature of prerogative orders and

the authority against whom writs are issued is bound to follow the directions contained in the writ. In case the authority fails or refuses to follow the directions /orders contained in the writ, he will be punished for contempt of the court. The Supreme Court can while deciding disputes declare laws, and such laws shall be binding on all courts and tribunals established in India.

**9. The High Courts for States** - The High Courts stand at the head of judiciary in every state. It can issue writs (*habeas corpus, mandamus, certiorari, prohibition and quo warranto*) to enforce fundamental rights and other constitutional rights. In civil and criminal matters it hears appeals from subordinate courts.

**10. The Election Commission** - India is a democratic country. The President of India, the Vice- President, the Members of the Parliament and the Members of State Legislature are elected by the people or representatives of the people. In order to conduct the election to these offices, the Constitution provides for establishment of an Election Commission.

In addition to the above stated authorities, there are some more authorities established by the Constitution. They are:

**Union Public Service Commission** - to select suitable candidates for Union Services

**State Public Service Commissions** - to select suitable candidates for state services.

**Attorney General for Union** - to appear in courts for the Union Government.

**Advocate General for State** - to appear in courts for the State Government.

**Comptroller and Auditor General of India** - to conduct audit of accounts of the union government and state governments.

**The Indian Legal System**, in fact, is based on and revolving around the Constitution of India. So you should have a thorough knowledge of the Constitutional provisions to succeed in the field of law.

## Topic - VI

# Legislation as a Source of Law

The term Legislation is derived from two Latin words, 'Legis' and 'Latum'. The word *legis* means law and the word *latum* means to make. Etymologically, legislation means the making or setting of laws.

The term legislation can be used in two senses. In its widest sense, it includes all types of law making including declaration of the law by the judiciary. In its narrow sense, the term legislation is used to denote law making by the legislature.

According to Salmond, legislation is the declaration of legal rules by a competent authority.

According to Gray, legislation is the formal utterance of the legislative organs of the society.

Legislation is the promulgation of legal rules by an authority duly empowered in that behalf. In other words it is the enunciation of legal rules by a competent authority in a State established for the purpose of law making. The laws enacted by the legislature of the state is known as 'Enacted Law', 'Statute', 'Act', 'Code', or 'Written law'. Legislation is an important source of law.

### Supreme Legislation and Subordinate Legislation

According to Salmond, legislation may either be Supreme or Subordinate.

A Supreme Legislation is that which proceeds from the sovereign power in the State. A Supreme Legislation cannot be repealed, amended, modified, annulled or controlled by any other legislative authority. A law enacted by the Parliament of India is a Supreme Legislation.

A Subordinate Legislation is that which proceeds from any authority other than the legislature of the State. A subordinate legislation is

dependent for its continued existence and validity on some superior authority. A Subordinate Legislation is made under the powers delegated by the supreme authority.

When the Parliament of India or a State Legislature (example-Legislative Assembly of Kerala) enacts a law and confers to an authority (government or some named authority) the power to make rules or orders or to issue notifications, the Act which confers such power is known as 'Parent Act' or 'Enabling Act'. If the provisions in a subordinate legislation is in violation of the provisions in the Parent Act, the subordinate legislation will be declared *ultra vires* (beyond powers of ) and void by the Supreme Court or the High Courts. So also, if the provisions in the Subordinate Legislation is violative of the Constitution of India, such law can be declared void. If an Executive Authority makes a rule, bye-law, regulation or notification without specific delegation of power in the Parent Act, the rule, bye-law etc., will be declared void.

Subordinate Legislation may be divided into the following classes.

### 1. Autonomous Legislation

When the supreme authority (legislature) confers powers upon an autonomous body to legislate on a matter entrusted to them, the law made by the autonomous body is called "Autonomous Law". The Kerala University is an autonomous body. It is created by the Kerala University Act. The statute confers power on the Senate to make rules. The rules and regulations made by the Senate is known as 'Autonomous law'.

### 2. Colonial Law

The countries which are not independent and are under the control of some other state have no supreme power to make laws. When such a colonial state makes laws by exercising the power conferred to it by the controlling state, it is known as 'Colonial law'. The laws made by the colonies are subject to the supreme legislation of the state under whose control they are.

### 3. Executive legislation (Delegated Legislation)

The legislature may delegate power to make rules to the executive branch of the government. The Act by which the power is delegated to

the government is known as Parent Act. When the executive branch make rules by exercising the powers conferred to them, it is known as 'delegated legislation'.

#### 4. Judicial legislation

The legislature may confer power to the court to make rules for procedures and practice in the courts. When the judiciary make the rules, in exercise of its powers, for the practice and procedures, it is known as 'Judicial legislation'. The Supreme Court Rules of Practice and the Kerala High Court Rules of Practice are examples of judicial legislation.

#### 5. Municipal legislation

The legislature may confer power to the local bodies such as Municipalities and Panchayats to make Bye-laws, Rules or Regulations. When the local bodies make bye-laws, rules or regulations, they are known as 'Municipal legislation'.

### Legislative Power of the Parliament and the State Legislatures in India

In a Country, the authority to make laws may be vested in a person or a few or a body of persons or different bodies of persons.

In Unitary States, normally there will be only one authority to enact laws. In England the Parliament is authorized to enact laws.

In Federal States such as USA and INDIA, there are different authorities who are empowered to enact laws. In a Federal State, there will be a written Constitution clearly demarcating the law making powers of each body or authority.

India has a written Constitution known as the Constitution of India. The VII<sup>th</sup> Schedule to the Constitution classifies the subjects for law making into three heads:

List 1 (Union list) contains subjects on which the Parliament can enact laws.

List II (State list) contains subjects on which the State legislatures can enact laws.

List III (Concurrent list) contains subjects on which both the Parliament and State Legislatures can enact laws.

Sometimes, the State legislature may enact laws on a subject included in the Union list or Parliament may enact laws on a subject in the State list. If a State legislature enacts law on a subject in the Union list, the Supreme Court or High Court can declare that law as *ultra vires* (beyond the powers of) the Constitution. If the Parliament enacts a law in the State list, then also the court can declare that law as *ultra vires* the Constitution.

Both the Parliament and the State Legislature can enact laws on a matter enumerated in Concurrent list. By virtue of Article 254 of the Constitution of India if a law made by the Legislature of a State with respect to a matter enumerated in Concurrent List contains any provision repugnant to the provision contained in the law made by parliament, the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

The State legislature is competent to enact a law on a matter enumerated in the Concurrent List only if it is not occupied by Union Legislation. If the field is already occupied by Union Legislation, the State Legislature can enact only on matters as to which the Union Legislation is silent.

A state law which is conflicting with a Central Law is void only to the extent of the repugnancy. So the entire law is not void. Those provisions which are conflicting with Central law will only be void. In order to save non-conflicting provisions the court will apply the *doctrine of severability* and strike down only those provisions which are conflicting with Central Law.

Article 245 of the Constitution of India clearly says that the Parliament can make laws for the whole or any part of the territory of India. The Parliament shall also have the power to make laws having

extra-territorial operation. The state legislature (eg., Kerala Legislative Assembly ) may make laws for the whole or any part of the State (Kerala).

## Legislation in violation of Fundamental Rights

The Constitution of India recognizes and protects several rights of citizens and aliens. Some of the Constitutional Rights have been given special legal sanctity and included in Part III (Articles 12 to 35) of the Constitution. Those constitutional rights included in Part III of the Constitution are known as Fundamental Rights. Any other right recognized by the Constitution is called Constitutional Right. The fundamental rights and other constitutional rights are available against state.

### **Example**

(1) A citizen of India who has attained the age of 18 years is entitled to vote at an election to the Lok Sabha or Legislative Assembly of a State, if his name is included in the electoral roll for the territorial constituency. This right is recognized under Article 325 of the Constitution of India. It is a constitutional right but not a fundamental right.

In India, the Parliament and State Legislatures are competent to enact laws. The law making power of these bodies is subject to the restriction that they cannot enact laws in violation of fundamental rights adumbrated in Part III (Articles 12-35) of the Constitution of India.

Part III of the Constitution provides for the right to equality (Articles 14-18), right to freedom (Articles 19-22), right against exploitation (Articles 23-24), right to freedom of religion (Articles 25-28), Cultural and Educational rights (Articles 29-30), Right to Constitutional Remedies (Article 32-35).

If the Parliament or a State Legislature enacts a law in violation of any of the fundamental rights adumbrated in Part III of the Constitution of India, the Supreme Court or a High Court can declare such law as unconstitutional.

## The Power of "Judicial Review"

By virtue of Article 13(1) of the Constitution of India, all laws in force in the territory of India at the commencement of the Constitution shall be void to the extent to which they are inconsistent with the Fundamental Rights.

Article 13(2) says that the State shall not make any law which takes away or abridges any of the Fundamental Rights. Any law made in contravention of fundamental rights shall be void to the extent of contravention.

Article 13 in fact provides for the 'Judicial Review' of all the legislations in India whether they are passed before or after the coming into force of the Constitution. The power of judicial review has been conferred on the High Courts and Supreme Court of India. By virtue of the power of judicial review these courts can pronounce or declare a law as unconstitutional if it is inconsistent with any of the fundamental rights.

## Doctrine of Eclipse

By virtue of Article 13 of the Constitution, if a pre-constitutional law (a law that was enacted before the Constitution of India came into force i.e., 26-01-1950) or a post constitutional law is found to be violative of Fundamental Rights, the Supreme Court and the High Courts can declare such law as unconstitutional. When such a declaration is made by the Court, the law will not become *ab initio* void. The only effect of such a declaration is that the law will become unenforceable. It will remain in a moribund or dormant condition. It is not dead but only overshadowed by the fundamental rights. It is eclipsed by the fundamental rights. Such a law will not be wiped out entirely from the statute book. The said law can be implemented against any person who has no fundamental right. The law which is declared unconstitutional can be revived by an amendment to the Constitution or the Act so as to remove the eclipse or shadow of fundamental right. Once an amendment is effected for removing the unconstitutionality, the law will become enforceable from the date of amendment.

## Enforcement of Fundamental Rights – The Writs

If a person's fundamental right is violated by the State, he can directly approach the Supreme Court of India or High Court of a State to get his right enforced.

Article 32 of the Constitution empowers the Supreme Court to issue writs in the nature of *habeas corpus*, *certiorari*, prohibition, *mandamus* or *quo warranto* for the enforcement of the fundamental rights.

Article 226 of the Constitution empowers the High Courts to issue writs in the nature of *habeas corpus*, *certiorari*, prohibition, *mandamus* or *quo warranto* for the enforcement of fundamental rights or for any other purpose.

### Different Writs

The Supreme Court and High Courts can issue the following writs for the enforcement of fundamental rights.

#### 1. Habeas Corpus

Habeas Corpus literally means 'produce the body'. The writ of *habeas corpus* is issued when a person is detained by another illegally or without any lawful justification. It is issued to release the detained person from illegal detention. The writ of *habeas corpus* is issued in the form of an order directing the person who has detained another to bring that person before the court and inform the court by what authority he has detained that person. If the cause shown for detention is not justifiable according to law, the court will order immediate release of the person under detention. If the cause shown are justifiable the court will reject the application.

In *Kanu Sanyal v. District Magistrate, Darjeeling* (AIR 1974 SC 510), the Supreme Court held that while dealing with an application for a writ of *habeas corpus* the production of the contained person in the court is not essential. When an application for a writ of *habeas corpus* is filed, the court will first issue a *rule nisi* (preliminary order) to the authority who has detained the applicant to show cause the legality of detention.

If the causes shown are not justifiable, the court will order immediate release of the detenu.

## 2. Mandamus

The writ of mandamus is an order of the Court commanding a person or a public authority to do or to refrain from doing something in the nature of a public duty or a statutory duty. If a public authority who has to perform a public duty fails to do his duty and which has violated a persons fundamental right the court will issue the writ of mandamus to that authority and command the authority to perform his function.

## 3. Certiorary

A writ of Certiorari is issued by the Supreme Court or High Court to quash or nullify an order made without jurisdiction or in violation of the rules of natural justice by an inferior court or body exercising judicial or quasi-judicial function.

In *Prabodh Verma v. State of U.P.* (AIR 1985 SC 167), the Apex Court held that a writ of certiorari cannot be issued for declaring an Act or an Ordinance as unconstitutional or void. A writ of certiorari can only be issued by the Supreme Court under Article 32 of the Constitution or a High Court under Article 226 of the Constitution to direct inferior courts, tribunals or authorities to transmit to the court the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. If the court finds that an Act or Ordinance is unconstitutional or void, the Court can declare the Act or Ordinance as unconstitutional and issue a writ of mandamus to the Government and its officers not to enforce the provisions of the Act or Ordinance.

In *Murali v. Returning Officer* (2001 (1) KLT 854, the Kerala High Court held that a writ of certiorari will not lie for quashing a legislation. The whole purpose of that prerogative writ is for correcting mistakes committed by courts or tribunals or authorities on scrutiny of records in the impugned proceedings. The Legislature is not an inferior court or tribunal. It is a co-ordinate branch. The High Court is competent to examine the Constitutional validity of legislation and entitled to declare the legislation as ultra vires the Constitution if it is found to be offensive of Part III of the Constitution. The High Court can issue a writ of

mandamus to the Government not to enforce the unconstitutional legislation. The Courts cannot issue a writ of mandamus to the Legislature to enact a statute. The Courts cannot issue a writ of certiorari to quash a legislation. What the court can do is to declare the legislation as unconstitutional and issue a writ of mandamus to the government not to enforce the legislation.

#### **4. Prohibition**

A writ of prohibition is issued to prevent an inferior court or tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice. It is issued by the Supreme Court or High Court to keep the inferior courts within the limits of their jurisdiction. It is issued to judicial and quasi judicial bodies for preventing them from exercising jurisdiction which is not vested in them or to prevent them from abusing the jurisdiction.

#### **5. Quo Warranto**

The words *quo warranto* means 'what is your authority'. This writ is issued to a person who holds a public office to show the court under what authority he holds the office. When an application for a writ of quo warranto challenging the authority of a person holding a public office is filed the court will issue a show cause notice to the person holding the public office. The holder of office can show the authority under which he holds the office. If the enquiry leads to the finding that the holder of office has no valid authority to hold it, the court may pass an order preventing the holder from continuing in office and may also declare the office vacant.

The object of the writ of quo warranto is to prevent a person from holding an office which e is not legally entitled to hold.

#### **Ordinance making power of the President of India and Governors of States**

The Indian Constitution provides for the making of law *temporarily* by the executive when the Legislature is not in session and it becomes urgently necessary to make the law. This legislative power of the executive enables it to make Ordinances. In the case of the Union, the

power is to be exercised by the President. In the case of States it is to be exercised by the Governor.

Article 123 of the Constitution deals with Ordinance making power of President.

Article 213 deals with Ordinance making power of Governors.

If at any time when the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate necessary ordinances. It is to be noted that the President exercises his power to make ordinances only on the advice of Council of Ministers headed by the Prime Minister. The President can promulgate an ordinance only when both the Houses of Parliament are not in session. If only one House is in session, then also, the President can promulgate an ordinance. It is because one House of the Parliament alone cannot enact a law. When both the Houses are in session, the President cannot promulgate an ordinance. The Governor of a state can promulgate ordinance when the legislature of the state is not in session.

An ordinance promulgated by the President shall have the same force and effect as an Act of the Parliament.

An ordinance promulgated by the Governor shall have the same force and effect of an Act of the legislature of the state.

An ordinance promulgated by the President shall be laid before both the Houses of the Parliament and shall cease to operate on the expiration of 6 weeks from the re-assembly of Parliament. If before six weeks the ordinance is disapproved, it shall cease to operate upon the passing of the second resolution. An ordinance promulgated by the President may be withdrawn at any time by the President.

A Governor's ordinance ceases to operate on the expiration of six weeks from the re-assembly of the legislature.

The President can promulgate ordinance on any subject for which the Parliament can enact laws. The Governor can promulgate ordinance

on any subject for which state legislature can enact laws.

It is to be noted that an ordinance in violation of fundamental rights guaranteed in Part III of the Constitution will be declared void by the Supreme Court or the High Court.

## Topic - VII

# Precedents as a Source of Law

Judicial Precedent is an important source of law. A 'Precedent' means a previous decision of court of law. It is a judicial decision which contains in itself a 'legal principle' or 'law'. It is cited as an authority for the legal principle embodied in it.

Judicial Precedents have high authority in England and other countries which have been influenced by English (Anglo-Saxon) Jurisprudence. The reason for the high place for judicial precedent in English legal system is that the English Judges have occupied a very high position in the country. They have been eminent in their line and consequently their decisions have enjoyed high reputation. The vast majority of Common law is almost entirely the product of decided cases.

In England, all the courts are bound to follow the law declared by the House of Lords. In India also judicial precedents are treated as one of the main sources of law. It is to be noted here that decisions of all the courts are not treated as precedent. In India the decisions of the Supreme Court and High Courts alone are treated as precedents.

### Doctrine of 'Stare Decisis'

In England the binding nature of precedent is established by the doctrine of 'Stare decisis'. The maxim means that a precedent which is long-standing should not be disturbed. This doctrine added strength and respect to a precedent which stood for a pretty long time.

In England a long standing decision will not be disregarded or overruled. Over-ruling is effected only in the case of a recent precedent. If old precedents are over-ruled by declaring it as incorrect or bad, it would cause grave inconvenience to the community. Because the over-ruling may disappoint or disturb the legitimate expectations of the people. Thus the doctrine of 'Stare decisis' has been observed by the courts.

The recent view of English Courts is that undue respect need not be given to a long standing precedent which is doing injustice.

In **Reg v. Button** (1966 AC 591) the English Court over-ruled a precedent that stood for a century and a half. The court observed that lapse of a long time is not a good reason to continue a wrong principle.

### **Ratio-decidendi**

The expression *ratio-decidendi* literally means "reasons for the decision".

Whenever a case comes before a judge for adjudication, he is bound to decide the whole matter before him. He cannot leave a case undecided on the ground that there is no law covering the point. If the case before him is not covered by an existing law, then he will have to make a legal principle and apply the same to decide the case in hand. The principle which governs his decision is called *ratio-decidendi*. The *ratio decidendi* in the decision becomes the law for subsequent cases.

*Ratio-decidendi* is the legal principle which was formulated and applied by the judge to decide a case in hand. It is the principle enunciated or declared by the judge in the course of his decision and actually made use of for deciding the point in dispute in the case. In the field of Law of Torts, several new principles are enunciated and applied by the English and Indian Judges to decide cases.

The following decisions are examples of cases in which new principles are enunciated by the judges.

#### **Donogue v. Stevenson** (1932) AC 562

In this case the English court established a new principle that manufacturers of consumable items are under a duty to see the consumable items should not contain noxious substances. If the manufacturer violates this principle, he is liable to compensate the ultimate consumer.

The facts of the case were like this:

A company manufactured ginger beer. The beer was put in opaque bottles and were sold to retailers. "A" purchased a bottle of beer from the retailer and gave it to his lady friend. She poured some of the contents in a tumbler and consumed the same. When the remaining contents of the bottle were poured into the tumbler, the decomposed body of a snail floated out with the ginger beer. She had a shock and fell ill. She filed a case claiming compensation against the manufacturer for negligence. The House of Lords held that the manufacturers owed a duty to take care that the bottle did not contain noxious matter, and that he was liable for the breach of that duty.

#### **Rylands v. Fletcher (1868 L.R. 3 HL 330)**

In this case the House of Lords laid down the rule of "no fault liability" or "strict liability".

The facts of the case were like this: The defendant (Rylands) employed an independent contractor to construct a reservoir on his land. In the course of the work the contractor came upon old shafts and passages on Ryland's land. They communicated with the mines of Plaintiff (Fletcher), a neighbour of Rylands. The contractor did not block them up and when the reservoir was filled, the water from it burst through the old shafts and flooded Fletcher's mines and that resulted in damage to the plaintiff. Fletcher sued Rylands for compensation. The House of Lords held the defendant liable though the defendant was not at fault. While deciding the case the court enunciated the following principle.

*"If a person for his own purposes collects and keeps on his land anything likely to do mischief by its escape, he does so at his own peril and is answerable for all the damage which is the natural consequence of its escape".*

#### **M.C.Metha v. Union of India (1987) 1 SCC 395**

The Supreme Court of India has declared the 'Rule of Absolute Liability'. The rule of absolute liability propounded by the Supreme Court is an extension of Rule in Rylands v. Fletcher.

The facts of the case were like this: On 4<sup>th</sup> and 6<sup>th</sup> December, 1985 some leakage of oleum gas occurred from Shriram Foods and Fertilisers Industries in the city of Delhi. As a consequence of this leakage, one

advocate practicing in the Tis Hazari Court had died and several others were affected by the same. The action for compensation was brought through a writ petition under Article 32 of the Constitution by way of Public Interest Litigation.

It was in the mind of the court that just a Year earlier there was a disaster in Bhopal when MIC gas had leaked from one of the plants belonging to Union Carbide, resulting in the death of atleast 2500 persons and creating various kinds of ailments to lakhs of others. The court found that victims of the leakage of dangerous substances like that could not be provided relief by applying the rule of strict liability laid down in *Rylands v. Fletcher*. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. For instance, when the escape of gas was due to the act of a stranger or Act of God, the defendant was not liable under the rule.

In this background the Supreme Court held that it was not bound by the rule of English law formulated in a different context in 19<sup>th</sup> Century, and evolved 'a new rule, the rule of 'Absolute Liability'.

According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons it owes an absolute and non-delegatable duty to ensure that no harm results to anyone due to such activity. The enterprise must be absolutely liable to compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the rule of Absolute Liability is not subject to any of the exceptions to the rule in *Rylands v. Fletcher*.

### Methods to Identify or Extract Ratio Decidendi

It is a difficult task to identify or extract the ratio decidendi in a case. There are two tests to identify ratio decidendi.

#### Test suggested by Dr. Goodhart / Material Facts Test

According to this test, to extract *ratio decidendi* in a precedent, one has to identify the *facts of the case treated by the judge as material*

and then look at the decision on material facts. The difficulty with this method is that there is no ascertainable yardstick to find out the material facts. What appears to be material fact to one person may appear to be immaterial to another.

### Professor Wambaugh's Test / Reversal Test / Inversion Test

According to this test, first of all one has to formulate a proposition, which he consider as the *ratio*. Then a word is to be added which will have the effect of reversing or negating the meaning of the proposition. Then consider whether the reversed proposition would have altered the actual decision. If the reversal would have altered the actual decision, it is the *ratio*. If the reversal would have made no difference, it is not the *ratio*. In other words, if it is possible to reach the same conclusion with the second proposition (reversed proposition) also, the original proposition cannot be treated as the *ratio*. This method considers *ratio* as the principle or principles without which the court could not have reached the decision that it reached.

### Obiter-dictum

The expression 'obiter dictum' literally means "a mere say by the way".

**Obiter dictum** are legal principles discussed in the judgment but not applied to the case. In the course of a judgment, the judge may declare certain principles to be applied in a hypothetical situation. An *obiter dictum* is a legal principle enunciated by the judge but not applied by him for deciding the case in hand. When comparing with *ratio decidendi*, the *obiter dictum* has only little legal authority. It shall have only a persuasive effect. Nevertheless, an *obiter dictum* of the Supreme Court of India will be followed by the subordinate courts in India.

## Classification of Precedents

### 1. Authoritative precedent and Persuasive Precedent

An authoritative precedent is one which the judges must follow whether they approve of it or not. A decision of House of Lords of England is an authoritative precedent as far as subordinate English courts are concerned.

Decisions of Supreme Court of India are authoritative precedents as far as other courts in India are concerned. Authoritative precedents are legal source of law.

A persuasive precedent is one which the judges are under no obligation to follow. Foreign judgments have only persuasive effect in India. Decision of Supreme Court of America or House of Lords need not be followed by the Indian judges.

Authoritative Precedents are of two types, they are

1.     Absolutely Authoritative Precedent
2.     Conditionally Authoritative Precedent

Absolutely Authoritative Precedent is one which is absolutely binding and must be followed at all circumstances, even though it is unreasonable or erroneous. A precedent of Supreme Court of India is to be followed by the lower courts even though it is unreasonable.

In **P.Ramachandra Rao v. State of Karnataka** (2002) 4 SCC 578, a Seven Judges Bench of the Supreme Court held that a Bench of lesser strength is bound by the view expressed by a Bench of larger strength and cannot take a view in departure or in conflict with the decision of larger Bench.

In **Pandurang Kalu Patil v. State of Maharashtra** (2002) 2 SCC 490, the Supreme Court held that a High Court in India is bound to follow a ratio laid down by the Privy Council the final , unless a contrary decision of the Supreme Court is shown to it. (**During British Rule in India, the decisions**

of Indian courts were appealable to the Privy Council in England. The Privy Council heard appeals from colonies of Britain)

A conditionally Authoritative precedent is one which is normally binding on the judge, but he may disregard it in limited circumstances. When he disregards it, he has to show reason for rejecting it. A Madras High Court's decision is conditionally authoritative precedent for Sessions judge of Kerala. He can reject the decision of Madras high Court after showing reasons for it.

The distinction between persuasive precedent and conditionally authoritative precedent is that in the case of persuasive precedent, the judge who accepts it has to state reasons for it. In the case of conditionally authoritative precedent the judge has to show reason for rejecting it.

## 2. Original Precedent and Declarative Precedent

Original Precedents are those which lay down original or new principle of law. The Original Precedents light for the original development of law. An Original Precedent is a source of law for subsequent conduct.

The rule declared in **Donogue v. Stevenson** (1932) AC 562 is an example of Original Precedent. In this case the court held that the manufacturers of consumable items are under a duty to see that the consumable items which they manufacture should not contain noxious substance. If the manufacturer violates this principle, he is liable to compensate the ultimate consumer.

Declarative precedents are those which merely reiterate a recognized principle of law. In **Mohri Bibi v. Dhamadas Ghosh** 1903 ILR 30 Cal 539 (PC), the Privy Council held that a minor's contract is *ab initio* void. The very same principle has been reiterated by different courts in India in different cases. All those decisions are only declaratory precedents.

## **Judicial Techniques of Using a Precedent**

There are several judicial techniques of using precedents. They are:

### **1. Dissent / Refusal to follow a Precedent**

Dissent is a mere refusal to follow a precedent. It arises when one judge refuses to accept the ruling of another judge having equal jurisdiction.

When a decision of a single bench of Kerala High Court is rejected by another judge of the Kerala High Court it is called dissent. Here the judge who refuses to follow the ruling declares his own ruling on the point.

When dissent is expressed, law becomes unsettled and uncertain. There will be two independent and conflicting precedents on the same point. It, therefore, requires settlement by a superior authority.

### **2. Distinguishing a Precedent**

The doctrine of precedent is based on the principle that like cases should be decided alike. Once a case is decided by a judge by applying a principle, a case on similar facts which may arise in future must also be decided by applying the same principle. Thus applying precedent is a process of matching the facts of the precedent and the ruling thereon with the facts of the instant case. If the facts of both the cases match, the ruling in the precedent is applied. If not, it is distinguished. The decision whether the facts match is to be taken by the judge.

### **3. Reversing a Precedent**

Reversal of a decision takes place on appeal. The effect of reversal is normally that the first judgement ceases to have any effect at all. It amounts to a nullification of the decision as well as the principle which formed the basis of the decision.

#### **4. Over-ruling a Precedent**

Over-ruling involves disapproval of the principle laid down in a decision of the lower court or a Bench of lesser strength. It never affects the decision in the earlier case, and the parties in the over-ruled case continue to be bound by the decision under the doctrine of *res judicata*.

Reversal takes place in an appeal from a decision, whereas over-ruling takes place in some other case of similar nature.

#### **Prospective Over-ruling**

Over-ruling of a decision means declaring a precedent as invalid. When a decision is over-ruled, it will have retrospective effect. Over-ruling a decision with retrospective effect may cause injustice. To avoid hardships resulting from retrospective over-ruling Justice Cardozo of the Supreme Court of America enunciated the doctrine of prospective over-ruling while deciding the case, **Great Northern Rly v. Sun Burst Oil and Refining Co.**

When a Precedent is over-ruled by applying this doctrine, the court which decides the case will apply the principle evolved in the precedent which is over-ruled in deciding the case in hand and declaring a new principle for future transactions.

The doctrine of prospective over-ruling says that a judge who overrules an old precedent has to apply the old precedent for deciding the case in hand, and declare a new principle for future transactions.

The Supreme Court of India has for the first time applied the Principle of Prospective over-ruling in deciding the case **I.C.Golaknath v. State of Punjab** (AIR 1967 SC 1648). The Supreme Court held that amendments of fundamental rights which were made before the judgment is valid but prohibited the Parliament from amending the fundamental rights in future. In **Kesavananda Bharati case** the Supreme Court overruled the decision in I.C.Golakh Nath's case and held that Parliament can amend any part of the Constitution including fundamental rights. However basic structure of the Constitution should not be offended.

In **Kailash Chand Sharma v. State of Rajasthan** (2002) 6 SCC 562, the Supreme Court explained the doctrine of prospective over-ruling as follows:

"The sum and substance of the doctrine of prospective over-ruling is that when the court finds or lays down the correct law, in the process of which the prevalent understanding of the law undergoes a change, the court, on consideration of justice and fair deal, restricts the operation of the new-found law to the future so that its impact does not fall on the past transactions. The doctrine recognizes the discretion of the court to prescribe the limits of retrospectivity of the law declared by it. It is a great harmonizing principle equipping the court with the power to mould the relief to meet the ends of justice."

### **Decisions not Binding on Subordinate Courts**

#### **1. Decision per incuriam**

A decision *per incuriam* means a decision of a court in ignorance of an authoritative precedent, or binding law. If a precedent is a *per incuriam* decision it is not binding on subordinate courts. A *per incuriam* decision can be over-ruled by superior authority with justification.

In **Municipal Corporation of Delhi v. Gurnam Kaur** (1988 (2) KLT SN.90 P.63), the Supreme Court held that a decision should be treated as given *per incurium* when it is given in ignorance of the terms of a statute or of a rule having the force of a statute.

In **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd** (2001) 6 SCC 356, the Supreme Court held that a prior decision of the Supreme Court on identical facts and law binds the courts on the same points of law in a latter case. In exceptional instances, if by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of *per incurium* may apply. Unless it is a glaring case of obstructive omission, it is not desirable to depend on the principle of judgment "*per incuriam*". It has to be shown that some part of the decision

was based on a reasoning which was demonstrably wrong, for applying the principle of *per incuriam*.

## 2. Decision sub silentio

When a particular point of law involved in a decision is not perceived by the court or presented to its mind, the decision is said to be *sub silentio*. A decision *sub silentio* is a decision arrived at by the court without considering all points. The court may consciously decide in favour of one party because of 'point A' which it considered and pronounced upon. It may be shown that logically the court should not have decided it in favour of a particular party unless it also decided 'point B' in his favour. But point B was not argued or considered by the court. In such circumstances, the decision is said to have passed *sub silentio* on point B. A "precedent *sub silentio* or not fully argued" is not binding on subordinate court.

## Law Declared by the Supreme Court of India

A Precedent is a previous decision of a superior court, which contains a 'legal principle'. Like England, in India also judicial precedents have been recognized as a source of law. The subordinate courts follow the previous decisions of the Supreme Court and the High Courts.

Article 141 of the Constitution of India declares that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus all courts in India are bound by the law declared by the Supreme Court.

The decisions of our High Courts are being followed by subordinate courts not because of any statutory sanction, but because our legal system accepts precedent as a source of law.

While deciding cases, the Supreme Court of India may declare a new law or give an interpretation to a legislation. The law declared by the Supreme Court and the interpretation that has been given to the legislation shall be binding on all the High Courts and subordinate courts within the territory of India.

When there is conflict between the two decisions of the Supreme Court given by the judges of equal strength, the decision of the later bench will be binding on the courts within the territory of India.

In **Union of India v. Subramanian** (AIR 1976 SC 2433), it was held that when there is conflict between the decision of the larger Bench and of the smaller Bench of the Supreme Court, the decision of the larger Bench would be binding on the courts within the territory of India.

In **Sub-Inspector Rooplal v. Lt.Governor** (2000) 1 SCC 644, the Supreme Court observed thus: "Precedents which enunciate rules of law form the foundation of administration of justice under our system. Consistency in interpretation of law alone can lead to public confidence in our judicial system. Precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A co-ordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement."

In **Delhi Administration v. Manoharlal** (2002) 7 SCC 222, it was held that the High Courts and all other courts in the country are ordained (under an obligation) to follow and apply the law declared by the Supreme Court. Although law declared by Supreme Court is binding, High Court or any other court, instead of mechanically applying a decision of the Supreme Court, should first find out the *ratio* of the decision on a careful reading of the judgment and then consider its applicability to the case in hand. If the Supreme Court in a case only gave certain directions to dispose of the matter in the peculiar facts and circumstances of that case and did not decide and declare any law, the same cannot be adopted as a routine matter to dispose of all cases.

## Whether the Supreme Court is Bound by its Earlier Decision?

The doctrine of *stare decisis* says that the earlier long standing decisions should be respected and allowed to continue. In other words long standing decisions should not be over-ruled. The question whether the Supreme Court is bound by its own decision has come up for decision of the Supreme Court in a number of cases.

In **Bengal Immunity Company v. State of Bihar** (AIR 1955 SC 661) the Supreme Court held that the Supreme Court is not bound by its earlier decisions and in proper cases may over-rule them. If the Supreme Court is convinced of its error and its beneficial effect, it may depart from its earlier decision.

The general rule is that the Supreme Court is not bound by its earlier decisions and in appropriate cases it may over-rule its earlier decisions.

The following decisions would establish the proposition that the Supreme Court is not bound by its decision.

In **Sankari Prasad v. Union of India** (AIR 1951 SC 458), the Supreme Court held that in exercise of the constituent power of the Parliament under Article 368 of the Constitution any part of the Constitution can be amended including fundamental rights.

In **Sajjan Singh v. State of Rajasthan** (AIR 1965 SC 845), the Supreme Court approved the majority judgment given in Sankari Prasad's case and held that the Parliament can amend any part of the Constitution.

The above two decisions were over-ruled by the Supreme Court in **I.C.Golak Nath v. State of Punjab** (AIR 1967 SC 1648). The Supreme Court by *prospective over-ruling* held that the Parliament has no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights in future. The Court held those amendments already effected to the fundamental rights are valid. However from the date of this decision the Parliament has no power to amend Part-III of the Constitution.

**In Kesavanatha Bharati v. State of Kerala** (AIR 1973 SC 1384) the Supreme Court over-ruled the decision in Golakh Nath's case which denied Parliament's power to amend the fundamental rights of the citizens. However the court ruled that the power of the Parliament to amend the Constitution is not absolute or unqualified. The Parliament can amend any part of the Constitution including fundamental rights without offending the basic features of the Constitution.

**In Union of India v. Raghubir Singh**, 1989 (2) KLJ 168, it was held by the Supreme Court that it should not depart from an interpretation given in an earlier judgment of the Supreme Court unless there was a fair amount of unanimity that earlier decision was manifestly wrong.

**In Gain Kaur v. State of Punjab** (1996 2 SCC 648) a five judge constitutional Bench of the Supreme court has held that the right to life under Article 21 does not include "right to die", or "right to be killed". This decision has over-ruled the Supreme Court's decision in **P.Rathinam v. Union of India** (1994 3 SCC 394). In that case it was held that right to life in Article 21 include right to die and thus section 309 of I.P.C was declared as unconstitutional. The new decision in Gain Kaur's case changed the position and now Section 309 is constitutionally valid.

The above decisions make it clear that the Supreme Court is not rigorously bound by the doctrine of **stare decisis**.

### **Concurrent Judgement, Majority Judgement & Dissenting Judgement**

In the Indian Legal System, the decisions of the Supreme Court and the High Courts are recognised as Precedents. The decisions of subordinate courts are not treated as precedents. The decisions of the Supreme Court are absolutely binding on all the High Courts, subordinate courts and tribunals in India. The decisions of a State High Court is absolutely binding on all subordinate courts and tribunals established in the State.

In the High Court of Kerala, a case may be heard and decided by a Single Judge. The Single Judge who hears and decides the case may declare a "new principle" or "rule of law". The "principle" or the "law" so declared will become a precedent, a *ratio decidendi*, an authoritative precedent, for Subordinate Courts and Tribunals. Many a time, the same decision would be approved and applied by another Single Judge of the High Court, while deciding a future case. Such a decision may withstand the onslaughts of time. A decision of such a kind is to be treated with reverence because of its vintage.

There are instances where a case may be heard by a Bench of two or more Judges. In such a case each Judge is free to give his own judgement in the matter. If all the Judges have unanimity of opinion, and hold the same view in the matter, they may give a single judgement, concurring each other. Then it is called a Concurrent Judgement.

Sometimes, a Bench of two Judges ( called a **Division Bench**) hearing the case may hold divergent views. They may not have unanimity in their opinion. In such a case the matter will be referred to the Chief Justice of the High Court for placing it before a bench consisting of three or more Judges. When a Bench consisting of three or more judges (called a **Full Bench** ) considers the very same matter, the majority opinion will be taken as final decision. It is known as "majority judgement". The minority decision will be treated as a "dissenting judgement". The view expressed in the "dissenting judgement" will not have no legal sanctity and the law declared in it will not be treated as *ratio decidendi*. The subordinate courts are not bound to follow, or not justified in following, the principles contained in the dissenting judgements.

In our Supreme Court, normally a case is heard and decided by a Division Bench consisting of 2 Judges. Sometimes it may be heard by a Bench of three Judges. If the questions involved in the case is relating to the Constitution of India, the matter will be heard and decided by a 'Constitutional Bench' of minimum five Judges.

A Bench of two Judges is bound to follow the earlier decision rendered by another Bench of two Judges. In case the Bench of two Judges doubts the correctness of earlier decision rendered by a

coordinate Bench (Bench of two Judges), it has to place the matter before the Chief Justice of India as "Master of the Roster" to refer the matter to a larger Bench for adjudication. A Bench of Three Judges can over-rule a decision rendered by a Bench of two Judges. But a Bench of two Judges cannot over-rule a decision rendered by another Bench of two Judges.

## Topic - VIII

# Custom as a Source of Law

Custom occupies an important place in the regulation of human conduct in almost all the societies. Custom is one of the oldest sources of law. The term custom has been defined by various jurists.

### Salmond

Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.

### Austin

Custom is a rule of conduct which the people observe spontaneously and not in pursuance of law settled by a political superior.

### Halsbury

Custom is a particular rule which has existed from time immemorial and has obtained the force of law in a particular locality.

Custom is the 'habitual course of conduct or rule of action' which the people in a locality 'voluntarily follow' in their mutual intercourse.

The reason for recognizing custom as law, are the following:

1. "Via trita via tuta". The maxim means, "frequented path is reliable path". If the people in a locality have been following a particular course of conduct it can be allowed to continue.
2. When people in a locality have been leading life on the basis of certain rules which they have voluntarily adopted and followed it for a long period, a legitimate expectation of its continuance in future would arise. If such practices are not recognized as law, it will injure the legitimate expectation of the people.

According to Salmond, in the ancient society, custom was the main and only source of law. In those days, custom was having much

importance as in the case of legislation in the modern state.

Custom has grown as a result of the intelligence of the people. Custom is derived from the common conscience of the people. It springs from an inner sense of right. "Custom is to the Society, what law is to the State" – Salmond.

### Requisites of a Valid Custom

Custom is the usage which has crystallised in itself. Usage is the early stage of custom. In order to crystalise a usage into custom, the following conditions are to be satisfied (recognition of custom by judiciary).

1) A custom to be valid, it must be proved to be immemorial. A custom to be valid, the practice of the people should have begun at a time when the living memory does not know.

Ancient Indian Law giver Manu had said: "Immemorial custom is transcendental (going beyond human knowledge) law."

2) A custom to be valid, it must be reasonable.

3) The custom should be useful and convenient to the society.

4) Custom must not be unreasonable.

In **Balu Swami Reddyar v. Balakrishna** (AIR 1957 Mad 9) the Madras High Court had not recognized the practice of marrying grand daughter by the grand father as a custom on the ground that it is unreasonable and opposed to morality and public policy.

5) A Custom to be valid; it must be continuously observed without any interruption from time immemorial.

6) The practice should be peaceful and people should voluntarily follow it.

7) The custom should be certain and definite. Consistency is thus an essential condition.

8) A custom must not be opposed to public policy or the principles of morality.

9) The Custom must not conflict with the statute law of the country.

10) A state can abrogate a custom but not *vise versa*

11) Custom must have an obligatory force being supported by a majority of people.

In **Surajmani Stella Kujur v. Durga Charan Hansdah** (2001) 3 SCC 13, the Supreme Court held that for custom to have the colour of a rule of law, it is necessary for the party claiming it, to plead and thereafter prove that such custom is ancient, certain and reasonable.

In **N.Adithayan V. Travancore Devaswom Board** (2002) 8 SCC 106, the Supreme Court held that a custom or usage, even if proved to have existed in pre-constitution period, cannot be accepted as a source of law, if such custom violates human rights, human dignity, concept of social equality and the specific mandate of the Constitution and law made by Parliament.

## Topic - IX

### Classification of Law

Based on the objects and purposes, laws can broadly be classified into the following heads:

- (i) Constitutional Law
- (ii) Civil Law
- (iii) Criminal Law
- (iv) Substantive Law
- (v) Procedural Law
- (vi) Public Law
- (vii) Private Law
- (viii) Labour Law
- (ix) Taxation Law
- (x) Family Law
- (xi) Service Law
- (xii) Administrative Law
- (xiii) International Law
- (xiv) Common Law
- (xv) Natural Law

#### i. Constitutional Law

**Hibbert** defines Constitutional Law as "the body of rules governing the relation between the sovereign and his subjects and the different parts of the sovereign body".

According to **A.V.Diecy**, Constitutional Law includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power of the State. Hence it includes all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power or the members thereof, exercise their authority.

The following are the views of John Austin regarding Constitutional Law.

(a) Constitutional Law is that body of rules which fixes structure of the supreme government.

(b) Constitutional Law is not positive law or law in the strict sense but is merely positive morality. Positive law is the command of the sovereign and the sovereign himself is not bound by law.

(c) Constitutional Law derives its force only from public opinion regarding its expediency and morality. It belongs to the class of moral rules and cannot be regarded as a part of positive law.

According to Salmond, law is the body of principles applied by the court in the administration of justice. Constitutional law are true laws when they are enforced in courts of justice.

Constitutional Law is the fundamental law reflecting the will of the people. It determines powers and responsibilities of the state. It describes the functions and inter-relation of the major governmental institutions. The Constitution reflects the political philosophy of the people upheld by them at a particular time.

The Constitutional Law of a state may be written or unwritten. Written constitution is one which is found in one or more legal documents duly enacted in the form of laws. It is precise, definite, and systematic. It is the result of the conscious and deliberate efforts of the people. It is framed by a representative body duly elected by the people at a particular period in history. The Constitution of India is a written constitution. An unwritten constitution is one in which most of the principles of the government have never been enacted in the form of laws. It consists of customs, conventions, traditions and some written laws bearing different dates. It is unsystematic, indefinite and un-precise. Such a constitution is not the result of conscious and deliberate efforts of the people. It is generally the result of historical development. The constitution of England is a classical example of an unwritten constitution.

India has a written Constitution known as the Constitution of India. The Constitution of India is the fundamental law of the land. It was enacted by the Constituent Assembly on twenty-sixth day of November, 1949. The Constitution of India came into force on the twenty-sixth day of January, 1950.

In **B.R. Kapur v. State of T.N.** (2001) 7 SCC 231, the Supreme Court held that the Constitution is a document having a special legal sanctity which sets out the framework and the principal functions of the organs of the Government within the State and declares the principles by which those organs must operate. The Constitution refers to the whole system of the governance of a country and the collection of rules which establish and regulate or govern the government. India is a country with a written constitution. The people of the country, the organs of the Government, Legislature, Executive and Judiciary are all bound by the Constitution.

The Constitution of India is the lengthiest and the most detailed of all the written constitutions of the world. The Constitution of India originally consisted of only 395 Articles divided into 22 parts and 9 Schedules. But after the Constitution (Ninety-eighth Amendment) Act, 2012 (the amendment has yet to come into force), the Constitution now consists of 448 Articles divided into 26 Parts and 12 Schedules. It is to be noted that even now the last article is 395, and we arrive at the figure 448 only when we count all the articles one by one.

## 2 Civil Law

Civil Law refers to that branch of law of a country which declares rights of human beings and imposes obligations or duties upon persons. It does not prescribe punishments in the form of imprisonment or fine, in case of its violations. Persons who violate civil law will not be punished. The only remedy available to a person whose right is violated is to approach a civil court to get his right enforced.

The aggrieved person who intends to approach a civil court has to initiate a **suit** (civil case) by presentation of a **plaint** (a complaint in writing). Then he is called "**plaintiff**". The person who has violated the plaintiff's right is to be shown in the plaint as the opposite party. He is known as

"defendant". The defendant can give his reply in writing. It is known as "written statement" ( reply to the plaint).

The civil court then takes evidence of both the parties. After considering the evidence adduced by the parties, if it is found that there is violation of plaintiff's right, it will pronounce its decision, known as judgement and decree. If there is no evidence, the court will dismiss the suit. The judgement will contain reasons for decision. The decree is the final decision. The person in whose favour judgement and decree is pronounced is known as decree holder. The person against whom the judgement and decree is passed is known as judgement debtor. The decree will be executed by the court on the application of the decree holder.

The following example will make the point more clear.

X is a wholesale dealer of rice. Y is a retail dealer dealing with rice and other provisions. Y purchased rice for Rs.11000/- from X on credit and promised to pay the price within one month. Y did not pay the price. Then X can file a suit against Y for recovery of money (price). It is because in the Sale of Goods Act,1930, there is a principle that an unpaid seller can recover the price from the purchaser.

The following Acts / Statutes ( law enacted by the legislature is known as Act or Code) contain civil laws of India. It is to be noted that these are only illustrative and not exhaustive.

1. The Religious Endowments Act,1863
2. The Indian Contract Act, 1872
3. The Christian Marriage Act,1872
4. The Indian Majority Act, 1875
5. The Negotiable Instruments Act,1881
6. The Indian Easements Act,1882
7. The Transfer of Property Act,1882
8. The Indian Trust Act, 1882
9. The Powers of Attorney Act,1882
10. The Banker's Books Evidence Act,1891
11. The Partition Act, 1893

12. The Sale of Goods Act, 1930
13. The Partnership Act, 1932
14. The Indian Succession Act, 1925
15. The Hindu Marriage Act, 1955
16. The Hindu Adoption and Maintenance Act, 1956
17. The Hindu Succession Act, 1956

It will be wrong to say that the entire civil law of India is contained in legislations - ie., Acts / Codes / Statutes. Civil law of India can also be found in **precedents** (previous decisions of Court), **custom** ( habitual course of conduct of people) or **conventional law** ( agreements between persons). Law of Torts is a branch of civil law and major portion of law of torts are contained in judicial precedents.

### 3. Criminal Law or Penal Law

All the activities of human being are not useful or beneficial to the society. Some of them may be useful. Some may be injurious to the society. Those activities ( acts or omissions ) which are injurious to the society at large are treated as "crimes" and the State, by law, prohibits such acts or omissions. It is done with the object of "maintaining law and order" in the society.

The Criminal Law refers to that part of the law of a State which prohibits certain activities ( acts and omissions ) of human beings and prescribes punishments for violations of such prohibitions. Criminal law defines "offences" and "prescribes punishments" for such offences.

The punishments that are usually provided for crimes are:

- (i) Death
- (ii) Imprisonment for life - it is a rigorous imprisonment for the remaining period of life.
- (ii) Imprisonment for a specific period - it may be "rigorous" or "simple" imprisonment
- (iii) Fine
- (iv) Forfeiture of property

The Indian Penal Code, 1860 is the "major" criminal law of India. There are some other Central and State Acts containing penal provisions.

They are popularly called "Criminal Minor Acts" Some of them are shown below:

- (1) The Arms Act, 1959
- (2) The Explosive Substances Act, 1908
- (3) The Food Safety and Standards Act, 2006
- (4) The Immoral Traffic ( Prevention) Act, 1956
- (5) The Juvenile Justice ( Care and Protection of Children) Act, 2000
- (6) Narcotic Drugs and Psychotropic Substances Act, 1985
- (7) Drugs and Cosmetic Act, 1940
- (8) Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954
- (9) The Abkari Act ( Act 1 of 1077)( It is a State Act applicable only in the State of Kerala)
- (10) The Kerala Prohibition of Ragging Act, 1998
- (11) The Prevention of Damages to Public Property Act, 1984
- (12) The Kerala Police Act, 2011
- (13) The Kerala Gaming Act, 1960
- (14) The Kerala Forest Act, 1961

The above list is only illustrative and not exhaustive.

#### **4. Substantive Laws**

The expression Substantive Laws refers to that part of the law which 'declares rights' and 'imposes duties or obligations' of the people. Substantive laws declare the rights and obligations of persons. They may be civil law or criminal law. They may not state the procedures for enforcing the rights. They may not state the name of any authority who is competent to enforce the rights in case of violation.

The Indian Penal Code, 1860 is an example of substantive criminal law. The Transfer of Property Act, 1882, the Partnership Act, 1932 The Sale of Goods Act, 1930 etc., are examples of substantive civil law.

#### **5. Procedural Laws**

The expression procedural law refers to that part of the law which prescribes the procedures to be followed by various authorities in the enforcement of rights and obligations declared by substantive law.

Procedural law governs the process of litigation. It is otherwise known as Adjective Law.

The Code of Civil Procedure, 1908, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872, the Limitation Act, 1963 etc are examples of Procedural Laws.

The Code of Civil Procedure, 1908 contains provisions intended to be followed by the civil courts in the process of administration of civil justice.

The Code of Criminal Procedure, 1973 directs the procedures to be followed by the police during investigation of crimes. It also prescribes the rules of procedure that are to be followed by the criminal courts in the process of administration of criminal justice. It prescribes powers and functions of police, public prosecutors and criminal courts.

#### **6. Public Law**

That part of the laws of a state which deals with the rights, duties, powers and functions of public authorities including the State is called public law.

The Land Acquisition Act, 1894 is an example of public law. It confers power on the State Government to acquire private land for public purpose. The procedures to be followed by the State and its officials when acquiring the land are provided in the Act. It also provides for the reliefs that are available to the person whose land is acquired for public purpose.

#### **7. Private Law**

Private law is that part of the laws of a State that exclusively deals with the rights, duties and obligations of private individuals. The Partnership Act, 1932 is an example of Private Law. It declares the rights and liabilities of partners of a firm. The Transfer of Property Act, 1882 can also be treated as a private law as it exclusively deals with rights and liabilities of transferor and transferee of property.

## **8. Labour Law**

Labour law deals with rights and duties of employers and employees. It confers several rights to employees working in industries. It imposes corresponding duty upon the employers. It may also provide for settlement of disputes between employers and employees.

The Employees Compensation Act, 1923, the Factories Act, 1948, the Industrial Disputes Act, 1947, the Payment of Wages Act, 1936, the Payment of Bonus Act, 1965, the Payment of Gratuity Act, 1972 etc., are examples of labour laws. The labour laws are treated as welfare legislations as they are intended to give protection to the employees working in the industries.

## **9. Taxation Law**

The taxation laws are enacted by the legislature for imposing tax on various activities of people. It imposes obligation upon the people to pay tax to the Government. The tax so collected will be used by the government for public purposes. The Income Tax Act, 1961, the Wealth Tax Act, 1957, the Central Excise Act, 1944, the Central Sales Tax Act, 1956 etc., are examples of taxing statutes.

## **10. Family Law**

Family laws are intended to regulate the relationship of members of family. It may be related to the marriage, divorce, adoption of children, right of maintenance, right of succession of property on the death of owner of the property, partition of family property and so on.

The Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Adoption and Maintenance Act, 1956, the Hindu Minority and Guardianship Act, 1956 etc., are examples of family laws applicable to the Hindus.

The Christian Marriage Act, 1872, the Indian Divorce Act, 1869, the Indian Succession Act, 1925 etc., are the statutes intended to regulate the family matters of Christians.

In the case of Muslims in India, the laws relating to the marriage, maintenance, guardianship, inheritance and some other areas are not

yet codified. Even now they are governed by the principles contained in the Holy Quran.

## 11. Service Law

The law that governs the relationship of government and its employees is popularly known as service law. It provides for selection, appointment, conditions of service, misconduct and disciplinary proceedings, punishments, and retirement of government servants. Major part of the service laws are contained in the Rules framed by the government.

## 12. Administrative Law

The functions of a state are basically classified into three heads. They are:

1. Legislative Function
2. Executive Function
3. Judicial Function

The legislative function of the state is carried out by the legislature. The legislature of the state enact laws which are required for regulating conduct of people living in the society.

The executive branch of the government (known as 'administrative authorities' or 'executive authorities') implement those laws enacted by the legislature.

The judicial function is exercised by the judiciary and it settles disputes between individuals. The judiciary also decide disputes between individual and Government.

Administrative Law deals with the powers and functions of the administrative authorities (executive authorities), the manner in which the powers are to be exercised and the remedies which are available to the aggrieved persons when those powers are abused by these authorities or where quasi-judicial functions are exercised without complying with natural justice.

According to Justice C.K.Thakker ( Takwani), "administrative Law is that branch of Constitutional Law which deals with powers and duties of administrative authorities, the procedure followed by them in exercising the powers and discharging the duties and the remedies available to an aggrieved person when his rights are affected by any action of such authorities."

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### 13 International Law

International law contains a set of rules and regulations which the States or Nations have to follow in their mutual intercourse. These rules are intended to set up an orderly and peaceful world. The following are the salient features of International Law

- (i) International Law is a body of rules and principles which regulate the conduct and relationship of members of International Community.
- (ii) International Community includes States, International Organizations, non-state entities and individuals.
- (iii) The State is not the only subject of International Law. International institutions, non-state entities and individuals have also come within the purview of International law. They are also treated as subjects of International law.
- (iv) Greater part of International Law is dealing with the conduct and relation of states in their mutual intercourse.
- (v) International Law includes rules of law relating to the constitution and functions of international organisations such as UNO, WHO, IMF etc.
- (vi) International Law regulates the relation between International institutions *inter se* and their relation with states and individuals.
- (vii) International Law deals with the rights and duties of non-state entities such as protectorates and individuals in the international sphere.

#### **14. Common Law**

The Law of England is composed of three great elements:

- (i) Legislation
- (ii) Common Law
- (iii) Equity

An Act of British Parliament is called Legislation. It is otherwise called a *statute*. As it is directly enacted by the British Parliament, it is known as primary legislation. Delegated legislation or Statutory instruments are also forming part of legislation. They are promulgated by the executive government for adding details to the Act of the Parliament.

That part of English law that is *not the result of Legislation or forming part of Equity* can be called Common Law. The precedents of Common Law Courts form the major portion of the common law of England. The laws developed by the old Court of Chancery is called Equity. The law of torts in England, developed through judicial precedents, is nothing but part of common law of England.

#### **15. Natural Law**

The history of natural law can be traced back to 2500 to 3000 years. The Greek thinkers were mainly responsible for the growth of the natural law. According to Herclitus (540-470 BC) in nature all things such as sun, moon, seasons, plants and animals follow a certain definite order. Such orders are prescribed for them by the nature. In the same way nature has also set laws for orderly conduct of men too and that must be the ideal law. This led to the concept of natural law as the ideal law. Socrates declared such laws of nature to be immutable principles. According to Aristotle man is endowed with "power of reason" and it enables him to differentiate between good and evil or right conduct from wrong conduct. The reason of mind which, distinguish good and evil or right from wrong is the instinctive law of nature. That law inspired by reason is the natural law and it is inherent in the nature of man.

The expression Natural Law refers to the principles based on reason, fairness and justice. It includes all forms of righteous action. It embodies the principles of morality. Natural law recognizes all those acts which are just, fair and reasonable. Any act which is unjust, unfair and unreasonable is against natural law.

There is no definite meaning to the expression natural law. It has many colours and shades. Natural law embodies the principles of natural justice. There are several principles of natural justice. No one shall be a judge in his own cause (*memento debet esse judex propria causa*), no one shall be condemned unheard (*audi alteram partem*), no one shall be punished twice for the same offence (*double jeopardy*), no one shall enrich at the expense of another (doctrine of unjust enrichment) etc, are considered to be the principles of natural justice.

Natural law is considered to be of divine origin. Many laws of modern time are founded on the basis of natural law. The principles of international law are mainly based on natural law.

Natural law has great influence on the U.S Constitution. From early days the natural law had its great influence on English law also.

The natural law has great influence on the Indian Constitution and legal system. In the Constitution of India, Article 311 provides that no civil servant can be dismissed, removed or reduced in rank without giving him a reasonable opportunity of showing cause against the proposed action. Part III of the Constitution of India contains a long list of fundamental rights. Many of the rights adumbrated in Part III of the Constitution are the rights recognized by natural law.

In the leading case of **Maneka Gandhi v. Union of India** (AIR 1978 SC 597), the Supreme Court of India held that impounding of petitioners passport without giving her an opportunity of being heard is violative of principles of natural justice and fair play. The court pointed out that the soul of natural justice is fair play in action. The law must be just, fair and reasonable.

*Annetta Josyph*

The Principles of 'quasi contractual obligations' incorporated in the Indian Contract Act are the principles of natural law. The legal obligation of father to provide maintenance to his minor children, husband's obligation to maintain his wife and the children's obligation to maintain their aged parents are examples of statutory recognition of natural law.

## Topic - X

# Classification of Statutes

The laws enacted by the legislature of the state is called 'Act', 'Code' or 'Statute'. Statutes can be classified into different heads on the basis of their duration, method, object, extent and nature of application. The following are the main classification of statutes.

### 1. Temporary Statutes

If an Act is passed for a temporary period or the period of operation is limited by the terms of statute, it is called temporary statute. The operation of the temporary statute comes to an end on the expiration of the fixed period. Its operation can be extended only if the legislature passes a new Act. The Annual Finance Act is an example of temporary statute. It is intended for a financial year and is required to be enacted every year.

### 2. Permanent Statute

If an Act does not prescribe the period of operation, it is called Permanent Statute. It will continue to be in operation until it is repealed or replaced by another statute. The Indian Penal Code, 1860 is an example of Permanent Statute.

### 3. Mandatory or Imperative or Obligatory Statute

Imperative Statutes prescribe peremptory rules which are to be followed by the people. The violation of provisions of a mandatory statute will invite penal consequences. The Indian Penal Code, 1860 is an example of Mandatory Statute.

### 4. Directory Statute

A directory statute is one which contains provisions which are not obligatory to follow. Even if a person does not follow the provisions of a Directory Statute there will be no penal consequences.

### 5. Codifying Statute

When a Statute is enacted with the object of codifying the whole of

the law relating to a particular subject, it is known as codifying statute. It would contain the pre-existing laws enacted by legislature, customary principles, common law and precedents relating to a particular subject.

The Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956 are examples of codifying statutes.

#### 6. Consolidating Statute

A consolidating statute is one which is enacted with the object of consolidating different statutes dealing with same subject. It collects all statutory enactments on a specific subject and give the shape of one statute. When a consolidating statute is enacted by the legislature to deal with a subject, several enactments dealing with the same subject matter will be repealed by the consolidating statute.

The Hindu Marriage Act, 1955 is an example of consolidating statute.

#### 7. Declaratory Statute

When an Act is enacted to remove some doubts in an existing statute it is called declaratory statute. A declaratory statute becomes necessary when certain expressions in the provisions of an existing statute are being misunderstood. A declaratory statute shall have retrospective operation. However cases already decided under the existing statute cannot be reopened. If during the pendency of an appeal, a declaratory statute is passed, the appeal will be decided on the basis of such declaratory statute.

#### 8. Amending Statute

When an Act is passed to make some changes in an existing statute it is known as Amending Statute. An amending statute becomes necessary when there is some omission or ambiguity in the original Act. It can also be used to incorporate new provisions in the original statute. It can also be used to repeal some provisions in the original statute. As a general rule an amending statute would only be prospective in operation. However there can be an amendment with retrospective operation.

**9. Prospective Statute**

When a statute is enacted to regulate future transactions , it is called prospective statute. Both civil and criminal laws can be enacted with prospective operation.

**10. Retrospective Statute**

When the legislature enacts a law to regulate transactions already completed, it is known as Retrospective Statute. It shall have retrospective operation. Civil laws can be enacted with retrospective operation. Criminal laws cannot be enacted with retrospective operation. It is because an *ex post facto* law is unconstitutional.

## Topic - XI

### Structure of Statutes

#### Different Parts of a Statute - Its use in Interpretation

In a statute there will be different parts. The main parts of statute are:

- |   |                      |
|---|----------------------|
| 1. Long title                                     | 2. Preamble          |
| 3. Enacting Clause                                | 4. Short Title       |
| 5. Extent and Commencement Clause                 | 6. Definition Clause |
| 7. Main Provisions                                | 8. Illustrations     |
| 9. Explanations                                   | 10. Proviso          |
| 11 Headings (chapter heading and section heading) |                      |
| 12 Saving Clause                                  | 13 Repeal Provision  |
| 14 Schedule                                       |                      |

The parts of a statute are treated as "intrinsic aids" to interpretation. The Court refers one part to find out meaning of another part of the statute.

#### 1. Title (Long title and Short title)

All the modern statutes have both the 'long title' and 'short title'.

#### Long Title

The long title of an Act is set out at the head of the statute. It gives a full description of the 'general purpose' of the Act. The long title of a statute is an important part of the Act. It may be referred for the purpose of ascertaining the general scope of the Act.

The long title of the Limitation Act, 1963 runs as follows : "An Act to consolidate and amend the law for the limitation of suits and other proceeding and for purposes connected therewith".

#### Short title

Short title is given to an Act for the purpose of reference. Its object is clarification and not description. The authorities suggest that

the short title may not be taken into account in construing or interpreting a statute.

In modern statutes, section 1 provides the short title. Section 1 of the Limitation Act, 1963 provides the short title in these words: "This Act may be called the Limitation Act, 1963. The main purpose of short title is easy identification. It is the name that is given to a statute.

## 2. Preamble

In an Act, the preamble is given next to the long title. The preamble to the Employee's Compensation Act, 1923, reads as follows: "Whereas it is expedient to provide for the payment by certain classes of employers to their employees of compensation for injury by accident."

The 'main object' of the Act is set out in the preamble. It is a legitimate aid in construing the main provision. The preamble is an intrinsic aid to find out the purpose of the Act. The preamble of a statute is 'a part of the Act' and is an admissible aid to construction.

In **Sussex Peerage Claim** (1844) 11 Cl and F. 85), the Court held that a preamble to an Act is 'a key to open the mind of the makers' of the Act and the mischief which they intended to redress.

In **Motipu Zamindari Co. v. State of Bihar** (AIR 1962 SC 660), the court held that it is a key to the construction of a statute, and should be resorted to, "to unlock the mind of its makers".

In **Re Berrubury Case** (AIR 1960 SC 845) the Supreme Court held that the preamble to an Act is a key to open the mind of the legislature.

When the language of an Act is clear and plain, the preamble has no use. If the meaning of a word used in the statute is doubtful, the court can refer the preamble in order to interpret it properly. When two interpretations are possible, the court must adopt that which is in accordance with the purpose set out in the preamble.

The Supreme Court observed: "The preamble suggests what the Act was intended to deal with. If the language used by the Parliament is ambiguous the court is permitted to look into the Preamble for construing the provisions of an Act. The preamble is a key to unlock the legislative intent. If the words employed in an enactment spell a doubt as to their meaning, it would be useful to so interpret the enactment as to harmonise it with the object which the legislature had in its view".

**3. Headings - (Section Headings and Chapter Headings)**

The headings of a group of section will be an useful aid. The headings pre -fixed to sections are considered as preamble to those sections. Headings are not voted on or passed by the Parliament. They are inserted after the bill has become law. The heading in an Act of parliament may be used to resolve any doubt when the words in the section are ambiguous. Headings cannot control the plain meaning of the section. The court cannot use such headings to give a different effect to the clear words in the section.

In **Oriental Insurance Co. Ltd. v. Hansrajbhai** (2001) 5 SCC 175, the Supreme Court held the language of the heading cannot be used to control the operation of the section. But in case of ambiguity or doubt it can be referred to as an aid in interpreting the section. It *prima facie* furnishes clues as to the meaning and purpose of the section.

**4. Definition Clause or Interpretation Clause**

In modern statutes a section is provided in defining some words used in the statute. The definition clause used in the statute is the 'statutory dictionary'. When a word or phrase is defined as having a particular meaning in an enactment it is that meaning and that meaning alone which must be given to it in interpreting a section of the Act. In interpreting statutes the legislative intent has to be gathered by reading all the provisions of the statute including the interpretation or the definition clause. If the legislative intent cannot be given effect to because of the legislative definition, the legislative intent must prevail over the legislative definition.

In **S.K.Gupta v. K.P.Jain** (1979) 3 SCC 54, the Supreme Court

pointed out that, if in a definition section of a statute, a word is defined to mean a certain thing, wherever that word is used in the statute, it shall mean what is stated in the definition unless the context otherwise requires.

### **Example**

In section 25 of the Indian Contract Act, it is stated that a contract without consideration is void. The word 'consideration' is defined in section 2(d) of the Indian Contract Act. The word "consideration" should mean what is stated in section 2(d) of the Act.

### **5. Illustrations**

Illustrations appended to a section are treated as part of a statute. They are given to make clear the intention of the legislature. They are useful in finding out the intention of the legislature. They should be disregarded if they are repugnant to the section.

In construing a section, an illustration to it is not to be ignored or brushed aside. An illustration in an enactment provided by the legislature is a valuable aid in understanding the real scope of the section. If the section is clear and an illustration is beyond it, the illustration cannot be taken as extending or limiting the scope of the section. But in all other cases illustration shall be taken as explanatory to the section.

### **6. Explanation**

The object of an explanation is to make the meaning of the section more clear and beyond dispute. The section and explanation are two inseparable parts. They move in a body if they move at all. Explanation attached to a section explains what is said in the substantive provision. Explanation must be read in order to clear up the ambiguity in the main section.

The purpose of an Explanation is to make plain or elucidate what is enacted. An explanation is given to explain some concept or expression or phrase occurring in the main provision.

### **Example**

Section 6 of the Limitation Act, 1963 declares 'minority' as a legal

disability. Explanation 1 to section 6 says that a child in the mother's womb is a minor for the purpose of section 6.

It is a well settled principle of statutory construction that the Explanation must be read so as to harmonise with and clear any ambiguity in the main provision.

## 7. Proviso

A proviso is a clause added to a statutory provision in order to qualify or limit the operation of the main section. A proviso is normally used to remove special cases from the general enactment. A proviso qualifies the generality of the main enactment by taking out from the main provision a portion which would be a part of the main provision. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment.

In **J.K.Industries Ltd. v. Chief Inspector of Factories and Boilers** ((1996) 6 SCC 665 ) the Supreme Court observed, "A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully scrutinise and find out the real object of the proviso appended to that provision. An accepted rule of interpretation is that a section and the proviso thereto must be construed as a whole. A proviso is appended to the main provision in order to qualify the generality of the main provision.

A proviso to a section is not independent of the section calling for construction detached from the construction to be placed on main section. It is merely subsidiary to the main section and it is to construe in the light of the main section. If there is a direct conflict between the main provision and the proviso, the proviso shall stand. The reason is that the proviso speaks the latter intention of the legislature.

In **Jallaluddin v. Kerala Agricultural University** (1999 (3) KLT 781), the Kerala High Court held that the proper function of a 'proviso' is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of proviso to read it as some-

thing by way of an addendum or dealing with a subject which is foreign to the main enactment. When one finds a proviso to a provision, the normal presumption is that, but for the proviso, the enacting part of the provision would have included the subject matter of the proviso.

## 8. Exception

Exception to a section exempts something from the operation of the main provision. An exception operates to affirm the operation of the section to all other than those exempted.

Example:- A particular section in a statute impose punishment on all offenders. In the exception it is stated that Muslim women are not liable to be punished under this section. In such a case other than Muslim women all persons are liable to be punished under this section. While interpreting the main provision the judge should examine whether the section is applicable to a person who claims exception. If it is found that the person who claims exemption comes within the exception, the court should exempt him from the liability.

## 9. Saving Clause

If an Act is passed to repeal an earlier Act, a saving clause may be provided in the new Act in order to safeguard the rights which otherwise would be lost. Saving clause does not confer any new right. They protect those rights which the parties already had.

A Saving Clause is used to protect something from immediate destruction. If the main enactment is clear a Saving Clause can have no effect on the interpretation.

## 10. Schedules

Schedule to statutes are part of an Act. In order to interpret a section which is connected with the schedule given in the Act, both section and schedule should be read together. Schedules appended to statutes are parts of an Act and may be used in construing provisions in the body of the Act. In the same way provision in a schedule will be interpreted in the light of what is enacted in the section. It is an accepted rule of construction that the schedules form part of statute. They must be read together with the section for all purposes of interpretation.

If there is any inconsistency between the schedule and the section, the section shall prevail.

### Nomenclature for the sub-divisions of the Constitution of India and other forms of Legislative Instruments

One who reads the Constitution of India or a Bill or an Act/Code or a subordinate legislation like Order or Regulation will find sub-divisions in such legislative instrument. The sub-divisions of the various forms of legislative instruments are known by different nomenclature. They are given below:

<b>Bills</b>	Clause	Sub-clause	Paragraph
<b>Constitution of India</b>	Article	Clause	Sub-clause
<b>Acts /Codes</b>	Section	Sub-section	Paragraph
<b>Ordinance</b>	Section	Sub-section	Paragraph
<b>Rules</b>	Rule	Sub-Rule /Paragraph	Sub-Paragraph
<b>Orders</b>	Article	Paragraph	Sub-Paragraph
<b>Regulation</b>	Regulation	Paragraph	Sub-Paragraph
<b>Notification</b>	Paragraph	Sub-paragraph	(None)
<b>Schedule</b>	Paragraph / Article / Clause/ Entry	Sub-Paragraph / Sub-Clause / Sub-entry	(None)

## Topic - XII

# Rules of Interpretation of Statutes or Canons of Construction

The functions of a state are basically classified into three. They are:

1. Legislative
2. Executive
3. Judicial

The legislative function of the state is carried out by the legislature. The legislature of the body politic enact laws required for regulating conduct of people living in the society. The executive branch of the government implement those laws enacted by the legislature. While implementing laws there may be disputes between executive and the citizens. The disputes are to be settled by judiciary.

While deciding disputes between the executive and the citizen or between citizens, the court has to apply the laws enacted by the legislature. The laws enacted by the legislature are conveyed to the people through the medium of words. The words used in the statutes may be ambiguous. If there is ambiguity the judges or citizens cannot approach the legislature for getting clarification as to what is meant by a particular provision or a word used in the statute. It is the duty of the judges to find out the real meaning of a particular provision in the statute. In order to find out the real meaning, the judge has to apply certain rules. These rules are called "Rules of Interpretation" or "Canons of Construction".

The process by which the courts of law try to ascertain or understand the meaning of the legislation through the wording of enactment is technically called interpretation. The aim of interpretation of statute is to find out the legislative intention.

In **Shaym Sunder v. Ram Kumar** (2001) 8 SCC 24, the Supreme Court held that the rules of interpretation are meant to assist the court in advancing the ends of justice.

The aim of interpretation of statute is to find out the legislative intention. In the interpretation of a statute, the basic rule is that the statute has to be read as the whole. The intention of the legislature is to be gathered from the language used.

The following are the main rules of interpretation.

1. Literal Rule of Interpretation / Grammatical Interpretation

A verbis legis non est residendum / Verbis Standum Ubi Nulla Ambiguitas

All rules of interpretation or canons of construction have one aim in view ie., to ascertain the legislative intention of the statute. The literal rule of interpretation is one of the basic rules of construing a statute. The literal rule of interpretation gives much importance to the words and phrases used in the statute. According to this rule, words, phrases and sentences are to be given their ordinary natural meaning. If the language used in the statute is clear, unambiguous and admits only one meaning, the judge should accept it and enforce it even though the result is harsh, unjust or absurd. This is the basic rule of construction. The court has to expound the law as it stands. The judge has to give due respect to the *letira legis*, the letter of the law.

There are two maxims which constitute the basis of literal interpretation. They are:

1. *A verbis legis non est residendum* - It means "from the words of the law there should not be any departure".
2. *Verbis standum ubi nulla ambiguitas* - It means "one must abide by the words where there is no ambiguity"

The following illustration from Maxwell's Interpretation of Statutes elucidate the literal rule.

**Short v. Mc.Carthy** (1820) 3 B& Ald. 626

The Statute of Limitation provided that "an action should not be brought after the lapse of one year from the accrual of the cause of action and actions brought after the time of limit are barred". The court applied the literal rule for interpreting the above stated provision and dismissed the suit filed after the period of one year from the date of accrual of the cause of action. Actually the injured party could have discovered the cause of action because of the fraud on the part of the wrongdoer within the period of one year. Nevertheless court has not entertained the suit. The result was unjust and harsh.

In **Dental Council of India v. Hari Prakash** (2001) 8 SCC 61, the Supreme Court observed that "the intention of the legislature is primarily to be gathered from the language used in the statute, paying attention to what has been said and also to what has not been said. When words used are not ambiguous, literal meaning has to be applied."

## 2. Golden Rule of Interpretation / Baron Parke's Rule

The 'Golden Rule of Interpretation' is a modification of Literal Rule of Interpretation. The Golden Rule enables the court to modify the language of statute if it is found that the literal interpretation would result in absurdity or inconvenience or injustice.

The Golden Rule of Interpretation is also known as Baron Parke's Rule.

Baron Parke explained the golden rule of interpretation in **Becks v. Smith** (1836) 2 M&W 191. According to Baron Parke, "it is a very useful rule in the construction of a statue to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.

The 'Golden Rule of Interpretation' was stated by Lord Wensleydale in **Grey v. Pearson** (1857) 6 HLC 61. According to Lord Wensleydale "in construing statutes, as in construing all other written instruments the grammatical and ordinary sense of the words is to be adhered to"

unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and the ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further".

The Golden Rule of Interpretation states that, while interpreting statutes, the court has to adopt literal or grammatical interpretation. If such an approach leads to some absurdity, repugnancy or inconsistency, the court can modify the words for the purpose of avoiding such absurdity, repugnancy or inconsistency, but no further.

#### **Lee v. Knappi (1967) 2 Q.B. 442**

The Road Traffic Act, 1960 required the drivers of motor vehicles to stop the vehicle after an accident. In this case the driver of the vehicle involved in the accident had stopped the vehicle for a moment and driven away. The court held that if 'Literal Rule of Interpretation' is followed, the driver is not responsible since he has stopped the vehicle after the accident. But following the 'Literal Rule' would lead to absurdity and injustice. In order to avoid the absurdity, the court held that 'the driver of motor vehicle shall stop' means that 'the driver of vehicle shall stop and remain there for such sufficient period of time so as to enable authorities who have a right to collect sufficient information about the accident'. The court thus adopted Golden Rule of Interpretation and modified the language of the statute in order to avoid absurdity.

#### **Day v. Simpson (1865) 18 C.B (N.S) 680**

The Theatres Act, 1843 prescribed a penalty for the performance of plays without licence on stage. A group of players performed the play in a chamber below the stage. The figures were reflected by mirrors so that it appeared to the spectators that the players are on the stage. The court held that though the players were not playing on the stage, they were bound to take licence under the Act.

### **3. Mischief Rule of Interpretation / Rule in Heydon's Case**

The Mischief Rule of Interpretation is otherwise known as 'Rule in Heydons case'. The Mischief Rule of Interpretation was propounded by Lord Coke in 1584 while deciding the Heydon's case. The Mischief Rule

of Interpretation insists that the court should adopt that construction which would suppress the mischief and advance the remedy.

While deciding the Heydons case, Lord Coke stated the Mischief Rule. According to him for the interpretation of all statutes four things are to be considered by the Judge.

1. What was the law before the present Act was passed ?
2. What was the mischief and defect for which there was no law?
3. What is the remedy provided by the legislature for avoiding the disease or mischief ?
4. The true reason of the mischief.

After considering these four aspects, the judge has to make such a construction which would suppress the mischief and advance the remedy.

**Smith v. Hughes (1960) 1 W.L.R 830**

The Street Offence Act prohibited by prescribing penalty the practice of soliciting on streets by prostitutes. Thereafter the prostitutes started to solicit the passers-by from balconies. The court held that the soliciting from balcony is also a mischief and for that practice also they are liable to be punished.

#### **4. Ut res magis valeat quam pereat**

The maxim *Ut res magis valeat quam pereat* means that the thing may have effect rather than be destroyed. There is a presumption that a word or words used in a statute is not unnecessary or without any purpose to serve. In the field of interpretation of statutes, one of the basic rules is that the courts should not consider any word or provision in the statute as redundant or superfluous or unnecessary. It could not be assumed that the legislature had used any word without any purpose. The legislature is deemed not to waste its words or to say anything in vain. In the interpretation of statutes, the courts should always presume that the legislature inserted every part of the statute for a purpose and the legislative intention is that every part of the statute should have an effect.

**In Sankar Ram&Co. v. Kasi Naicker, (2003) 11 SCC 699, th**

Supreme Court observed that it is a cardinal rule of construction that normally no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute. In the field of interpretation of statutes, the courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should have effect. It may not be correct to say that a word or words used in a statute are either unnecessary or without any purpose to serve, unless there are compelling reasons to say so looking to the scheme of the statute and having regard to the object and purpose sought to be achieved by it.

##### 5. Rule of *Eiusdem Generis*

The Rule of *Eiusdem Generis* literally means '*of the same kind or species*'. The rule says that when there is a general word following particular and specific words, the general word must be confined to the things of the same kind.

According to Maxwell, the general word which follows particular and specific words takes its meaning from them and is presumed to be restricted to the same genus of those words.

In order to apply the rule of *Eiusdern Generis* the following conditions are to be satisfied:

- 1      The sections should contain an enumeration of specific words.
- 2      The members of the enumeration (specific words) should constitute a class.
- 3      The class should not be exhausted by the enumeration.
- 4      A general term should follow that enumeration.

If all the above conditions are satisfied the meaning of the general term is to be ascertained with respect to the specific terms.

**Clark v. Gaskarth (1618) 8 Taunt 431**

Section 8 of the Distress for Rent Act, 1737, authorised the distress for rent of all types of corn and grass, hops, root, fruits, pulses and other products whatsoever growing on the demised land. The expression 'other products whatsoever' was held to include only products

similar to grass and corn. Trees and shrubs are not coming within the expression 'other products whatsoever' even though they are products of land. They are of different characters from the products specified by earlier words. Corn, grass, hops, fruits etc., can be cut gathered and removed easily. Trees and shrubs cannot be easily cut and removed. So they do not come within the same family of the specified item.

In **Ratansi Hirji v. Emperor** (1937) B.274, Section 412-A of the Bombay Municipal Act required a person to acquire a license before he could use any place for the sale of milk, butter or other milk products. Ratansi Hirji was a merchant who was dealing with ghee without obtaining license. The state prosecuted him for not obtaining license. The question before the court was whether ghee would come within the expression 'other milk products' and whether a person does obtain a license for the sale of ghee. The court held that the words, 'other milk products' should be construed with reference to what preceded those words. By applying the Rule of Ejusdem Generis the court held that ghee is not of the same kind or in the nature of milk or butter. The milk and butter are liable to speedy decay. Ghee is not liable to speedy decay. Thus it is not of the same kind or nature as milk or butter.

## Topic - XIII

# Hierarchy of Criminal Courts in India

In India, for the administration of civil and criminal justice, various courts are established.

### **Classes of Criminal Courts and their Powers**

In order to conduct inquiry and trial of various offences, the following criminal courts have been established under the Constitution of India and the Code of Criminal Procedure, 1973.

#### **(a) The Supreme Court**

Article 124 of the Constitution of India provides for establishment of the Supreme Court. It is the apex court in this country. By virtue of Article 134 of the Constitution an appeal lies to the Supreme Court from the judgment, final order or sentence of the High Court in a criminal case and it can pass any sentence in accordance with law.

#### **(b) The High Court**

Article 214 of the Constitution provides for establishment of a High Court in every State. The High Court stands at the head of judiciary in the State. Any offence under the Indian Penal Code or any other law can be tried by the High Court. It can pass any sentence authorized by law.

#### **(c) Sessions Judge & Additional Sessions Judge**

By virtue of section 9 of the Code of Criminal Procedure, 1973, the State Government is required to establish a Court of Sessions for every sessions division. The Judge of the Sessions Court will be appointed by High Court. The Sessions Judge can pass any sentence authorized by law. However a sentence of death passed by a Sessions Judge shall be subject to the confirmation of High Court.

The High Court can appoint Additional Sessions Judge to perform the functions of Sessions Judge. Such an Additional Session Judge can also pass any sentence authorized by law. The sentence of death, however, will be subject to the confirmation of High Court.

(d) Assistant Sessions Judge

By virtue of Section 9 of the Code, the High Court may appoint Assistant Sessions Judge. An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

(e) Chief Judicial Magistrate & Additional Chief Judicial Magistrate

By virtue of section 12 of the Code, the High Court shall appoint for every district a Judicial Magistrate of first class as Chief Judicial Magistrate. The High Court can also appoint Additional Chief Judicial Magistrates. They can award a sentence of imprisonment up to 7 years and fine of any amount authorized by law.

(f) Judicial Magistrate of First Class

The State Government may establish, in consultation with the High Court, courts of Judicial Magistrates of First Class. The Judicial Magistrates of such Courts shall be appointed by the High Court. The Judicial Magistrate of First Class can pass a sentence of imprisonment for a term not exceeding three years and of fine not exceeding Rs. 10,000/-.

(g) Judicial Magistrate of Second Class

The State Government can establish second-class Judicial Magistrates courts in consultation with High Court. The presiding officers of such Courts will be appointed by the High Court. They can pass sentence of imprisonment for a term not exceeding one year and fine not exceeding Rs. 5000/-.

In the State of Kerala, the Second Class Judicial Magistrate Courts were abolished and now the powers of such courts are being exercised by Judicial Magistrates of the First Class.

(h) Chief Metropolitan Magistrates

In Metropolitan area, the State Government may after consultation with High Court, establish courts of Chief Metropolitan Magistrates. The presiding officers of such court shall be appointed by the High Court.

from among Metropolitan Magistrates. Such a court can pass sentence of imprisonment for a period not exceeding seven years and any amount as fine authorized by law. There can also be Additional Chief Metropolitan Magistrates.

The expression "Metropolitan Area" is defined in section 2 (k) of the Code of Criminal Procedure. It means the area declared, or deemed to be declared, under section 8 of the Code to be metropolitan area.

By virtue of section 8 (1) of the code, the State Government may, by notification, declare any area in the State comprising a city or town whose population exceeds one million shall be a metropolitan area for the purpose of this Code.

By virtue of section 8 (2) of the Code, the presidency towns of Bombay, Calcutta and Madras and the city of Ahmadabad shall be deemed to be declared under sub-section (1) of section 8 to be a metropolitan area.

Thus the presidency towns of Bombay Calcutta, Madras, and the city of Ahmadabad are treated as metropolitan area. The State Governments are empowered to declare by notification any other city or town as metropolitan area, if the population of such city or town exceeds one million.

#### (i) Metropolitan Magistrates

In Metropolitan area the State Government can establish Metropolitan Magistrates Court in consultation with High Court. The Metropolitan Magistrate is appointed by the High Court. They can pass sentence of imprisonment for a period not exceeding three years and fine up to Rs. 5000/-.

## Topic - XIV

# Classes of Civil Courts and Their Powers

In order to administer civil justice the following courts are established.

### (a) The Supreme Court of India

Article 124 of the Constitution of India provides for establishment of the Supreme Court. It is the apex court in this country. As per the provision of Articles 132, 133 and 134-A of the Constitution of India the Supreme Court is authorised to hear appeals with regard to civil matters. Subject to the provisions of the Constitution, an appeal shall lie to the Supreme Court, if the High Court certifies-

- (A) that the case involves 'a substantial question of law of general importance'; and
- (B) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

### (b) The High Court

Article 214 of the Constitution provides for establishment of a High Court in every State. The High Court stands at the head of judiciary in the State. The High Court can entertain appeals from the judgments of subordinate civil courts.

### (c) The District Courts

In the State of Kerala, the District Courts are established in every district as per the provisions of the Kerala Civil Courts Act, 1957 for trying civil suits and to hear appeals from subordinate civil courts. The District Courts have unlimited pecuniary jurisdiction and so they can try any civil suit. They can hear appeals from the judgments of Munsiffs Courts and Subordinate Judges Court upto the value of rupees two lakhs. If the value of the suit exceeds two lakh rupees, the appeal is to be preferred to the High Court.

**(d) The Subordinate Judge's Courts (Sub - Court)**

In the State of Kerala, the Subordinate Judge's Courts are established as per the provisions of the Kerala Civil Courts Act,1957 for trying civil suits. The Subordinate Judges have unlimited pecuniary jurisdiction and hence they can hear and decide a suit irrespective of its value.

**(e) The Munsiff's Courts**

In the State of Kerala, Munsiff's Courts are established as per the provisions of the Kerala Civil Courts Act,1957 for trying civil suits. A Munsiff's Court is competent to try a suit if the amount or value of the subject matter does not exceed **ten lakhs** rupees. Thus if a person wants to institute a suit for recovery of ten lakh rupees or lesser amount, he can institute a suit in the Munsiff's Court.

## Topic - XV

# Advisory Jurisdiction of Supreme Court

Article 143 of the Constitution of India authorises the President of India to refer, a question of law or fact which has arisen or likely to arise, to the Supreme Court for its opinion. When a question of law or fact is referred to the Supreme Court for its advisory opinion, the court may after conducting necessary inquiry, report to the President its opinion.

Article 143 of the Constitution has been invoked on several occasions. Up to the year 2002 the President has made 12 references to the Supreme Court.

**In Re The Kerala Education Bill**, (AIR 1958 SC 956), the Supreme Court held that the President can refer to the Supreme Court questions arising out of legislative bills even before they have become legislative enactments.

**In Re Berubari Union** ( AIR 1960 SC 845), the opinion of the Supreme Court was sought to find out the manner in which the territory of India could be transferred to Pakistan.

**In Re Kavery Dispute Tribunal**, (AIR 1992 SC 522), a tribunal was appointed by the Central Government to decide the dispute of water of the river Kavery which flows through the State of Tamil Nadu and Karnataka. Tribunal gave an *interim* order directing the State of Karnataka to release a particular quantity of water to State of Tamil Nadu . The Karnataka Government resented the decision of the tribunal and promulgated an ordinance empowering the Government not to honour the decision. The Tamil Nadu Government protested against the action of Karnataka Government. Hence the President made a reference to the Supreme Court under Article 143 of the Constitution. The Court held that the Karnataka Ordinance was unconstitutional because it nullifies the tribunal appointed by the Central Government under the Inter-state Water Dispute Act. The ordinance was held to be against principle of Rule of law.

**In Ismail Faruqui Vs Union of India** (1994) 6 SCC 360, the Supreme Court refused to answer the Presidential reference on the question whether a temple originally existed at the site where the Babri Masjid subsequently stood. It was held that the question does not require to be answered as it was superfluous and unnecessary and opposed to secularism and favoured to one religious community.

**In Re Gujarat Assembly Election Matter** (2002) 8 SCC 237 the Supreme Court held that Presidential reference can be made at an anterior stage on President being satisfied that the question of public importance is likely to arise in future if that has not arisen in present. In this case the President sought for the opinion of Supreme Court in regard to the interpretation of Article 174 (1) of the Constitution. The Supreme Court held that if Legislative Assembly is dissolved, no period of limitation is provided for holding election for constituting fresh Legislative Assembly under Article 174(1).

## Topic - XVI

# Special Leave Appeal to Supreme Court (SLP)

Article 136 of the Constitution of India confers discretionary jurisdiction to Supreme Court to entertain appeals from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Even if there is no regular right of appeal or even if the High Court has not granted a certificate, an appeal may be carried to the Supreme Court by **special leave** of Supreme Court.

The power under Article 136 cannot be exercised in the case of judgement or determination passed or made by any court or tribunal constituted by or under any law relating to Armed Forces.

In **Pritam Singh v. State** (AIR 1950 SC 169), the Supreme Court held that the court will not grant special leave unless it is shown that exceptional and special circumstances exist and substantial and grave injustice have been done by the decision against which the appeal is preferred.

In **Mohinder Singh v. State** (AIR 1953 SC 415), 'M' was charged with the offence of murder. It was alleged that he has shot the deceased with a gun on the chest. He was convicted by Sessions Judge and the conviction was upheld by the High Court of Punjab. In appeal to Supreme Court by Special leave, it was pointed out that the High Court was doubtful where the injuries of the deceased was caused by a gun or rifle. This doubt would be removed only by evidence of a duly qualified expert. The prosecution in those circumstances cannot be said to have proved the guilt of the accused beyond doubt. In such a situation interference by Supreme Court against the order of the High Court confirming the sentence of the Session Judge was held to be warranted.

In **State of Bihar v. Basavan Singh** (AIR 1958 SC 500), a Police Officer was convicted on a charge of bribery by a trial court. On appeal the High Court of Patna set aside the conviction under the impression that

according to the decisions of Supreme Court evidence of witnesses of police traps should not be accepted unless corroborated by independent witnesses. The Supreme Court held that the evidence of bribe givers (trap witness) and officials of Anti-corruption Department would have been accepted by the High Court. The High Court erred in arriving at the conclusion that corroboration is required. The Supreme Court admitted the appeal preferred by the State with the observation that it is a fit case for the exercise of Jurisdiction under Art. 136 of the Constitution.

In **A.P.H.L Conference, Shillong v. W.H Sangma** ( AIR 1977 SC 2155), the Supreme Court held that the Election Commission is a tribunal invested with certain judicial power. The Commission exclusively resolves disputes between rival parties regarding allocation of electoral symbols. Thus the Commission is a tribunal and its decision is appealable under Article 136 of the Constitution.

In **Delhi Judicial Service Association v. State of Gujarat** (1991) 4 SCC 406, the Supreme Court held that under Article 136 the court has made power to interfere and correct the judgement and orders passed by the any Court or tribunal in the Country.

## Topic - XVII Public Interest Litigation - *Locus Standi*

The general rule is that only a person whose fundamental rights are infringed has *locus standi* or 'the right to move' the Supreme Court or High Court for a writ to enforce his fundamental rights.

In the case of a petition for a writ of *habeas corpus* the above stated general principle is not applicable. A petition for the writ of *habeas corpus* may be made by the person illegally detained or if he is not in a position to make the application, it can be made by a near relative or a friend who has interest in his welfare.

In the case of writ of *quo warranto* also an individual whose rights have not been infringed can approach the court to challenge the holding of a substantive public office by an usurper.

The acceptance of **Public Interest Litigation (Social Action Litigation)** as a legitimate method to enforce the fundamental rights has practically made the conventional approach to *locus standi* irrelevant. In a large number of cases the Supreme Court and various High Courts have issued writs allowing the petitions filed by voluntary associations, lawyers, journalists, and social workers for the enforcement of fundamental rights. The petitions filed by these 'public spirited citizens' are entertained by the Courts for vindicating the rights of the poor, weak and exploited sections of the community.

In **S.P. Gupta and Others v. President of India and others (A.R. 1982 SC 149)** (popularly known as Judges Transfer Case) the Supreme Court held that if a legal wrong or legal injury is caused to a person by reason of violation of any fundamental right and such person is by reason of poverty, helplessness or disability unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 or in the Supreme Court under Article 32 of the Constitution.

In this case the Supreme Court upheld the right of a practising lawyer to maintain a writ petition under Article 32 challenging the validity of transla-

of High Court Judges which affected independence of judiciary.

In **People's Union for Democratic Rights v. Union of India** (A I R 1982 SC 1473), the People's Union for Democratic Rights, an organisation striving for protecting democratic rights, wrote a letter to Sri. Justice Bhagawati pointing out that the provisions of various labour laws were not being observed in relation to the workmen employed in the construction work of various projects connected with Asian Games which were held at Delhi in 1982 and thereby fundamental rights of those workers were being violated. The letter was treated as a writ petition and the court directed the Government to see that various labour laws are followed by the contractors who are engaged by the government for the construction work of various projects. The contractors engaged workers through Jamedars without paying minimum wages and giving medical aid and other facilities. Children below 14 years were also employed in the construction work. The court recognised the competence of voluntary organisation to entertain writ petitions to enforce fundamental rights of the poor workers.

In **Olga Tellis v. Municipal Corporation of Bombay** (1985) 3 SCC 545 the Supreme Court entertained the petition filed by a journalist who challenged the order for eviction of pavement dwellers in Bombay.

In **Upendra Baxi and others v. State of U.P** (AIR 1987 SC 191), a letter written by two law professors to the Supreme Court was treated as a writ petition and gave directions to the Government to give sufficient protection to those girls who had been remanded to a Protective Home set up under the Suppression Of Immoral Traffic in Women and Girls Act, 1956.

In **M.C. Mehta v. State of Tamil Nadu** (AIR 1997 SC 417), the Supreme Court entertained a petition filed by a social activist-lawyer to protect interest of children employed in match factories.

In **Indian Council for Enviro-legal Action v. Union of India** (1996) 5 SCC 281, a public interest litigation for proper implementation of environment protection laws was entertained by the court at the instance of a voluntary association.

In **Murali S. Deora v. Union of India** (2001) 8 SCC 765, a public interest litigation was filed by the Congress leader Murali S. Deora against 'public smoking'. The Supreme Court held that 'public smoking' is injurious to health of non-smokers and passive smokers. Non-smokers and passive smokers are compelled to be victims of pollution caused by cigarette smoke. It is indirect deprivation of their right to life guaranteed under Article 21 of the Constitution. The Court directed Central and State Governments to prohibit smoking in public places, namely

1. Auditoriums
2. Hospital Buildings
3. Health Institutions
4. Educational Institutions
5. Libraries
6. Court Buildings
7. Public Offices
8. Public Conveyances including Railways.

While it is true that social action litigation is an important instrument of social justice, it should be ensured that it is not abused. Public interest litigation should not be used as a mask for frivolous litigation.

In **B.Singh v. Union of India** ( AIR 2004 SC 1923) the Supreme Court observed as follows:

"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and /or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. The Court must be careful to see that a body of persons or member of public who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations by masked phantoms who moniter at times from behind. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy -bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

## Topic - XVIII

# Special Courts, Tribunals and other Forums for Adjudication of Disputes

There are Civil Courts to decide disputes which are of civil nature. The Criminal Courts are established to decide criminal cases.

These courts are bound to follow the procedures prescribed in the procedural laws such as Code of Civil Procedure, Code of Criminal Procedure, the Limitation Act, the Evidence Act and so on. The procedures of these courts are time consuming and expensive. Further, the number of cases pending adjudication before these courts are more than what these courts can adjudicate. They are over-burdened. This also constitute another cause for delay. The Indian Legal System is slow, costly, complex and formalistic. The delay in deciding disputes, in fact, results in denial of justice.

The ordinary judicial system of India failed in disposing of very important matters speedily and efficiently. The disputes between employers and employees (leading to strike and lock-out), family disputes, disputes relating to tax and the claims arising from motor accidents required special treatment and speedy disposal. The burning problems like this required consideration of various other factors and it could not be done by the ordinary courts of law.

As the ordinary judicial system proved inadequate to decide and settle all types of disputes, special courts and tribunals were established. They are possessed of the techniques and expertise to handle complex problems. The Tribunals are not bound to follow the procedural laws which the ordinary courts are bound to follow. They can render justice in a speedy manner. Though they are not bound to follow the procedural laws, they have to follow the "principles of natural justice".

The following are some of the special courts, tribunals & forums for adjudication of special types of disputes.

### (1) The Family Courts

The Family Courts are established as per the provisions of the Family Courts Act, 1984. They are established to decide family disputes such as claim for maintenance, restitution of conjugal rights, judicial separation, divorce, custody of children etc.. Before the establishment of these courts, the disputes relating to family was to be adjudicated by ordinary civil courts. The Family Courts always try to settle the disputes amicably, so that family relationships do not break. Though Family Courts are established with the object speedy and inexpensive justice, due to the increased number of cases, there is still delay in rendering justice.

### (2) Motor Accident Claims Tribunals (MACT)

The MACT exclusively deals with claims for compensation arising from motor accidents. There are huge number of claim cases pending before these Tribunals. Though Motor Accident Claims Tribunals are established mounting arrears of claim cases could not be reduced and the delay avoided. The only way open is to establish more number of Tribunals.

### (3) Consumer Disputes Redressal Forum (DISTRICT FORUM )

Consumer Disputes Redressal Commission  
( STATE COMMISSION)

&

National Consumer Disputes Redressal Commission  
( NATIONAL COMMISSION)

The Consumer Protection Act, 1986 provides for the establishment of a three -tire Quasi Judicial system for the purpose of rendering speedy and inexpensive remedy to the aggrieved consumer of goods or services.

The District Forum is the lowest in the hierarchy of the three- tire quas

judicial system. The other two are State Commission and National Commission.

The District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed does not exceed rupees twenty lakhs.

A person who is aggrieved by the order of the District Forum may prefer an appeal against such order to the **State Commission** within 30 days from the date of the order.

The **State Commission** shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds rupees twenty lakhs but does not exceed rupees one crore.

A person who is aggrieved by the order of the State Commission may prefer an appeal against such order to the **National Commission** within 30 days from the date of the order.

The **National Commission** shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds rupees one crore.

A person who is aggrieved by the order of the National Commission may prefer an appeal against such order to the **Supreme Court** within 30 days from the date of the order.

#### 4. The Labour Court

&

#### The Industrial Tribunal

**Labour Courts** are established as per the provisions of section 7 of the Industrial Disputes Act,1947. Labour Courts are competent to adjudicate the following:

1. Industrial disputes relating to the propriety or legality of an order passed by an employer under the "standing orders"
2. Industrial disputes relating to the application and interpretation of standing orders.

3. Industrial disputes relating to the discharge or dismissal of workmen including reinstatement of workmen wrongfully dismissed;
4. Industrial disputes relating to the withdrawal of any customer, concession or privilege.
5. Industrial disputes relating to the illegality or otherwise of a strike or lock-out.

When an industrial dispute has been referred to a Labour Court for adjudication, it shall hold its proceedings expeditiously and shall, within the period specified in the order referring such industrial dispute, submit its award to the appropriate Government.

Industrial Tribunals are established as per the provisions of section 7 of the Industrial Disputes Act, 1947. The Industrial Tribunals are competent to adjudicate the following matters.

- (1) Industrial disputes relating to wages including the period and mode of payment;
- (2) Disputes relating to the compensatory and other allowances.
- (3) Disputes relating to the hours of work and rest intervals.
- (4) Disputes relating to leave with wages and holidays.
- (5) Disputes relating to bonus, profit sharing, provident fund and gratuity.
- (6) Disputes relating to shift working otherwise than in accordance with standing orders.
- (7) Disputes relating to classification by grades.
- (8) Disputes relating to rules of discipline;
- (9) Disputes relating to rationalisation;
- (10) Disputes relating to retrenchment of workmen and closure of establishment.

In **Workmen of Williamson Magor and Company Ltd v. Williamson Magor and Company Ltd** (1982), it has observed that "the Industrial Tribunals are intended to adjudicate industrial disputes between the management and the workmen. The Tribunal has to settle the disputes and pass effective award in such a way that Industrial peace between the employers and the employees may be maintained so that there can be more production to benefit all concerned."

## **5. The Central Administrative Tribunal & The State Administrative Tribunals**

The Administrative Tribunals Act, 1985 provides for establishment of Central Administrative Tribunal and State Administrative Tribunals. The main object of establishing Administrative Tribunal is to decide disputes between the government employees and their master, the Government.

As per the provisions of the Act, the Central Administrative Tribunal is established. A Bench of Central Administrative Tribunal is functioning at Kochi, Kerala. The main function of the CAT is to adjudicate disputes between the Central Government and its employees.

In the State of Kerala, a state administrative tribunal known as the Kerala Administrative Tribunal is established to adjudicate disputes between the Government of Kerala and its employees.

## **6. The Income Tax Appellate Tribunal**

It is established as per the provisions of the Income Tax Act, 1961 to decide disputes between the income tax department and assessees ( persons liable to pay income tax).

The list of special courts and tribunals does not end here. There are some more.

When we examine the working of the ( listed and unlisted) special courts and tribunals, we find that these courts and tribunals also could not come up to the expectation. There is still delay in adjudication. The mounting arrear of cases mount day by day.

## Topic - XIX Alternate Dispute Resolution (ADR)

### **or** **Arbitration, Negotiation and Conciliation/Mediation**

#### **Arbitration**

Arbitration is a method of resolving disputes through an arbitrator appointed by the parties. It is an alternative to proceedings in regular courts. It is a species of privatization of the official dispensation of justice. In India, the system of settlement of disputes by referring to an arbitrator began prior to the establishment of ordinary Courts. In ancient India disputes were primarily settled by Panchayats. The head of a family or the chief of a community or select inhabitants of a town or village acted as Panchayat or arbitrator. The decisions of Panchayats were accepted as binding.

In ancient period and modern times disputes between persons are quite common. A person who has agreed to construct a building for another may commit a breach of contract by using inferior quality materials in the construction of the building. In such a case the person for whom the building is to be constructed may raise a dispute and refuse to make the full payment. Similarly owner of an immovable property may have a dispute with his neighbour as to the right of way. So also the partners of a dissolved firm may have dispute as to the division of partnership property. There are courts established by the state to decide such types of disputes. Litigation in ordinary Courts of law is expensive and time consuming. Law wishes to reduce the litigation to the minimum. With this object law encourages and allows parties to the dispute to settle their disputes or differences through the mediation of a third person chosen by them. When the parties to the dispute refer their dispute, as per the terms of agreement, to a third person called arbitrator for his decision, it is called arbitration.

#### **Negotiation**

Negotiation is a non-binding procedure involving direct interaction of the disputing parties wherein a party approaches the other with the offer of negotiated settlement based on an objective assessment of each other's position.

## Conciliation / Mediation

Conciliation is a non-binding procedure in which an impartial third party, the conciliator, assists the parties to a dispute in reaching a mutually agreed settlement of the dispute. Mediation and Conciliation are interchangeable expressions.

Conciliation is a non-contentious and non-binding procedure in which an impartial third party - the conciliator- assists in reaching an amicable settlement of dispute. Conciliation is a process of persuading parties to reach a mutually agreed settlement of their dispute. In conciliation the conciliator acts as mediator in helping the parties to reach a negotiated settlement of their dispute. The conciliator makes no decision. He only assists the parties to reach at a settlement of their dispute.

## **Topic - XX**

### **Lok Adalat**

The expression 'Lok Adalat' refers to a summary procedure for disposal of cases pending in various courts through the process of arbitration and settlement between the parties at the instance of the institution called Lok Adalat. Thus the expression Lok Adalat can be used in the following two senses:

- (1) The process by which the cases pending in various courts are settled with the consent of the parties in a summary way.
- (2) The institution which take initiative for arriving at a settlement of the case.

By virtue of section 19 of the Legal Services Authorities Act, 1987 every State Authority, District Authority, Supreme Court Legal Services Committee or High Court Legal Services Committee or the Taluk Legal Services Committee may organise Lok Adalats for settlement of cases pending in courts.

In Kerala, by virtue of rule 26 of the Kerala State Legal Services Authority Regulations, 1998 the Member Secretary of State Authority, the Secretary of the High Court Legal Services Committee or the District Authority or the Chairman of the Taluk Legal Services Committee shall convene and organise Lok Adalats at regular intervals.

The members of the legal profession, college students, social organisations, charitable and philanthropic institutions and other similar organisations may be associated with the Lok Adalats.

#### **Composition of the Lok Adalat**

The Secretary of the High Court Legal Services Committee organises the Lok Adalat shall constitute Benches of the Lok Adalat. Each Bench shall comprise of two or three of the following -

- (i) A sitting or retired Judge of the High Court
- (ii) A serving or retired Judicial Officer

- (iii) A member of the Legal Profession
- (iv) A Social Worker.

The Secretary of the District Authority organising the Lok Adalats shall constitute Benches of the Lok Adalat. Each Bench shall comprise of two or three of the following :-

- (i) A sitting or retired Judicial Officer
- (ii) A Member of the Legal Profession
- (iv) A Social Worker

The Chairman of the Taluk Legal Services Committee organising the Lok Adalat shall constitute Benches of the Lok Adalat. Each Bench shall comprise of two or three of the following :-

- (i) A sitting or retired Judicial Officer
- (ii) A Member of the Legal Profession
- (iii) A Social Worker

Both Civil and Criminal cases which are pending before the courts can be brought before the Lok Adalat for settlement and award. However the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

A case pending in a court may be referred to Lok Adalat on an agreement between parties or on an application made by one of the parties to the court for referring the case to Lok Adalat for settlement. So also the court can *suo moto* refer a pending case to Lok Adalat.

When cases are referred to a Lok Adalat, it shall make sincere efforts to bring about a conciliatory settlement in every case put before it without bringing about any kind of coercion, threat or undue influence, allurement or misrepresentation. Every Lok Adalat shall, while determining any reference before it, act with utmost expedition to arrive at a compromise of settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

If the parties arrive at a compromise, the Lok Adalat has to make an Award. If no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the

case shall be returned by it to the court from which the reference has been made for disposal in accordance with law.

An Award of the Lok Adalat shall be deemed to be a decree of a civil court. Every Award made by a Lok Adalat shall be final and binding on all the parties to the dispute and no appeal shall lie to any court against the award.

### Advantages of Lok Adalat

The following are the advantages of settlement of disputes through Lok Adalat

1. It reduces the burden of arrears of work in regular courts.
2. It makes justice quicker.
3. It avoids the regular procedures in court and helps to arrive at a decision in agreed terms.
4. Since there is no provision for appeal against the award, the award becomes final and binding from the date of award.

## Topic - XXI

### Permanent Lok Adalat

The Legal Services Authorities Act, 1987 provides for conduct of Lok Adalats. Lok Adalats can deal with pending cases which are referred to it for determination. Lok Adalats are organised at regular intervals. Thus the Lok Adalat is not a permanent institution. The Legal Services Authorities Act has been amended in 2002 with the object of establishing Permanent Lok Adalats.

Section 22 B of the Act provides for establishment of Permanent Lok Adalats. The Central Authority or every State Authority shall, by notification, establish Permanent Lok Adalats.

Every Permanent Lok Adalat established for an area shall consist of the following persons:

- (i) A person who is, or has been, a District Judge or Additional District Judge or has held judicial office higher in rank than that of a District Judge. He shall be the Chairman of the Permanent Lok Adalat.
- (ii) Two persons having adequate experience in public utility Service. They are to be nominated by the Central Government or State Government on the recommendation of the Central Authority or the State Authority.

Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute. The Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law. It shall not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees.

After an application is made to the Permanent Lok Adalat a party to that application shall not invoke jurisdiction of any court in the same dispute.

When an application is made to the Permanent Lok Adalat, it shall direct each party to file written statement stating the facts and nature of dispute. After filing of written statements the Permanent Lok Adalat shall conduct conciliation proceedings. The Permanent Lok Adalat shall assist the parties to reach an amicable settlement of the dispute. If a settlement arrived at in the conciliation proceedings, the Permanent Lok Adalat shall formulate a settlement agreement and obtain signature on the settlement agreement and pass an award in terms of that agreement. A copy of the award shall be furnished to each of the parties to the dispute. If the parties fail to reach at an agreement, the Permanent Lok Adalat shall decide the dispute. The award of the Permanent Lok Adalat shall be final and binding on all the parties thereon and on persons claiming under them. Every award shall be deemed to be a decree of a Civil Court. The Permanent Lok Adalat shall transmit any award made by it to a Civil Court having local jurisdiction to execute the same.

## **Topic - XXII**

### **Law Library**

Advocates are the only recognised class of persons entitled to practice the profession of law. In order to practice the profession, one should know the law applicable to each case. A lawyer should know "how and where" to find the law, for its application to the fact situations. He should be familiar with the technique of locating relevant provisions of the law applicable to the facts of the case. The law applicable to a particular case may be contained in statutes, precedents or conventions. It may be a custom.

Statutory laws and Judicial Precedents are available in written form. They are available in **Manuals, Law Reports, Law Digests, Law Books, Official Gazette etc.**, The library of a lawyer should be equipped with the following basic materials.

#### **1. Central and State Statutes, Rules made under the Statutes, Notifications and Orders issued under the Statutes and Ordinances promulgated by the President or Governor of State**

These legislative materials (primary materials) are published in the Official Gazettes.

**India Code** is an official publication containing all the Acts in India without commentaries. This is kept upto date by issuing correction slips from time to time.

**Acts of Parliament** is another official publication containing all Acts enacted by the Parliament in a year.

**The Gazette of Kerala** is the official publication of the State enactments. Ordinances, Orders, Rules and Notifications.

There are private publications dealing with Central and State enactments. **AIR Manual** and **Civil Court Manual** are the most popular private publications dealing with parliamentary enactments.

Manual all Acts enacted by the Parliament and are still in force are included. In Civil Court Manual only civil Acts are included. It does not deal with criminal Act. The Kerala Laws Manual contains all the enactments of Kerala Legislature and rules made thereunder.

## 2. Previous Decisions of the Courts

Precedents are considered to be one of the sources of law. The decisions of the Supreme Court of India are binding on all courts established in the territory of India. So also the decisions of the High Court are binding on all courts subordinate to it. The decisions of the Supreme Court and High Courts are published by the Government as well as private publishers.

**Supreme Court Reports ( SCR)** - is a monthly official publication reporting cases decided by the Supreme Court of India.

**Indian Law Reports ( ILR)** - is an official publication reporting cases decided by the High Courts.

**All India Reporter (AIR)** - is a private publication reporting cases decided by the Supreme Court and High Courts.

**Supreme Court Journal ( SCJ)** - is another private publication reporting only decisions of the Supreme Court.

**Supreme Court Cases ( SCC)** - is yet another private publication exclusively reporting the decisions of the Supreme Court.

There are some specialised law reports. They report decisions related to a particular branch of law. **Criminal Law Journal ( C. L. J), Income Tax Reports ( ITR), Company Cases ( CC), Accidents Claims Journal ( ACJ), Labour and Industrial Cases ( Lab. I. C) etc** are examples of specialised law reports.

There are some private publications reporting only decisions of particular High Court and of the Supreme Court. **Kerala Law Times ( KLT), Kerala Law Journal ( KLJ), Kerala High Court Cases ( KHC) etc** are examples of such law reports. The Kerala Law Times and the Kerala

Law Journal report only decisions of the Kerala High Court and some decisions of the Supreme Court.

There are **Digests**, containing summary of decisions, published by private as well as official authority. **Supreme Court Yearly Digest** and **KLT Digest** are examples of such digests published by private publishers.

#### Important Reports and Periodicals and their Abbreviations

Accident Claims Journal	-	A.C.J
All India Reporter	-	A.I.R
Administrative Tribunal Cases	-	A.T.C
All England Law Reports	-	All. E. L.R
Bombay Law Reporter	-	Bom. L.R.
Calcutta Weekly Notes	-	C.W.N
Criminal Law Journal	-	Cr. L. J
Current Civil Cases	-	C.C.C
Harward Law Review	-	Harv. L. Rev.
Indian Judicial Reports	-	I.J.R
Indian Law Reports	-	I.L.R
Indian Law Review	-	I.L.Rev.
Income Tax Reporter	-	I.T.R.
Journal of Bar Council of India	-	J.B.C.I
Journal of Indian Law Institute	-	J.I.L.I
Kerala Law Journal	-	K.L.J
Kerala Law Notes	-	K.L.N
Kerala Law Reports	-	K.L.R
Kerala Law Times	-	K.L.T
Labour Law Journal	-	L.L.J
Madras Law Journal	-	M.L.J
Supreme Court Cases	-	S.C.C
Supreme Court Journal	-	S.C.J
Supreme Court Reports	-	S.C.R.
Supreme Court Weekly Reporter	-	S.C.W.R
Service Law Journal	-	S.L.J
U.S. Supreme Court Report	-	U.S
Yale Law Journal	-	Y.L.J

Some of the Abbreviations used in the Indian Legal System while Reporting Decisions of the Supreme Court and various High Courts

C.J.I.

- Chief Justice of India  
Hon'ble Mr. Chief Justice R.M. Lodha  
(R.M. Lodha, C.J.I. )

C.J.

- or
- Chief Justice of a High Court  
(Hon'ble Chief Justice Dr. Manjula Chellur)  
(Dr. Manjula Chellur, C.J. )

Ag. C.J.

**Acting Chief Justice**

Hon'ble Acting Chief Justice Mr. Justice Asokh Bhushan  
(Asokh Bhushan, Ag. C.J.)

- Justice - of the Supreme Court or High Court  
Hon'ble Mr. Justice H.L. Dattu  
(Mr. H.L.Dattu, J. )

J.J.

**Justices**

(H.L.Dattu & K.S. Radhakrishnan, J.J.)

DB

- Division Bench - (Two Judges )

FB

- Full Bench - ( Three Judges)

SC

- Supreme Court

In the Judgements relating to **civil cases**, we find the following abbreviations

PW1, PW2 - Witnesses examined in the court will be numbered as PW1, PW2, PW3 and so on. Thus PW1 means first witness of plaintiff

DW1, DW2 - They are witnesses examined in the court for defendant.

Ext. A1, Ext..A2 - They are documents produced by the Plaintiff to prove his case. Documents produced by the plaintiff will be marked as Exhibits A1, A2 and so on.

Ext. B1, B2, B3 - They are documents produced by the defendant to prove his case.

In Judgements relating to **criminal cases** we find the following abbreviations

P.W.1, P.W.2 - Prosecution Witnesses examined by court

D.W.1, D.W.2 - Defence Witnesses examined by court

Ext. P1, Ext. P2 -	Documents produced by prosecution as evidence
Ext. D1,D2 -	Documents produced by accused as evidence.
M.O.1, M.O.2 -	They are Material Objects like knief, revolver etc., produced for inspection of court.

### Law Books and Law Magazines

Law books with commentary, written by jurists or experts and published by various publishers, are also constitute useful weapons of a lawyer to ascertain the legal proposition. They are the secondary material sources of law. In addition to all these, there are law magazines dealing with current legal problems. The legal magazines play an important role in spreading legal awareness. These magazines contain articles meant for lawyers, law students and general public.

When we read text books and articles on law subjects, we find case names with citation. For example, Muhammed Abdul Razakh and Anr. v. Priyadarshini and Ors.(2013 (3) KLT 104 : 2013 (3) KLJ 377)

Here Muhammed Abdul Razakh is the appellant. "Anr." is the short form of another. Thus in addition to Muhammed Abdul Razakh there was one more appellant.

"v." is the abbreviation of the word *versus*. Versus means 'against somebody'. "vs" can also be used as abbreviation of the word *versus*.

Priyadarshini and Ors. are the respondents. Priyadarshini is the first respondent. "Ors." denotes others. There are more than two respondents in addition to the first respondent.

In the bracket we find "2013 (3) KLT 104 : 2013 (3) KLJ 377 ". It means, the decision was reported in two reports. They are (i) Kerala Law Times (KLT) and (ii) Kerala Law Journal (KLJ). It was reported in the year 2013. It was reported in the third volume of both the reports. In KLT it is reported at page 104 and in KLJ it is reported at page 377.

## Topic - XXIII

### Legal Doctrines and Maxims

There are some general and fundamental principles of common law. Those fundamental principles of common law expressed in Latin language is known as 'legal maxims'. The following are some of the legal doctrines and maxims.

#### 1    *Actio personalis moritur cum persona*

According to the Common Law rule of England a personal action dies with the parties to the cause of action. This rule is contained in the maxim "*actio personalis moritur cum persona*", which means that a personal cause of action dies with the person. So the death of either the plaintiff or the defendant in a suit claiming compensation for a tort comes to an end of the suit. The legal representatives of the deceased could not sue or be sued for any tort committed against or by the deceased in his lifetime.

The above stated general rule was not applicable if someone before his death, had wrongfully appropriated the property of another person. The law did not allow the benefit of that wrongfully appropriated property pass on to the legal representatives of the deceased. The person entitled to the property could bring an action against the legal representatives of the deceased and to recover such property or its value.

In 1934 the Law Reform (Miscellaneous Provisions) Act was enacted in England. This enactment made changes in the common law rule. By virtue of this enactment the death of the plaintiff or the defendant in a suit does not result in end of the suit. The cause of action would survive to the legal representative of the deceased except in the

case of action for **defamation**, in which case the cause of action comes to an end on the death of either parties.

In India the maxim *actio personalis moritur cum persona* has no application. This would be clear from section 326 of the Indian Succession Act, 1925. The effect of that section is that in tort, death of the victim of defamation, assault or personal injuries which have not caused the death, puts an end to tortious liability. Liability in regard to other torts can be enforced by the legal representatives of the injured party.

## 2 ***Actus non facit reum nisi mens sit rea***

The fundamental principle of penal liability is contained in the maxim " *actus non facit reum nisi mens sit rea*". The maxim means an act does not amount to crime unless done with a guilty intention. In other words the act alone does not amount to guilt, it must be accompanied by a guilty mind. The *intent* and the *act* must both concur to constitute the crime.

There are two essential conditions of criminal liability. They are :

- (1) *Actus reus* ,and
- (2) *Mens rea*

### **(a) *Actus reus* (Result of Human Conduct)**

*Actus reus* is the first essential element or ingredient of a crime. An act is any event which is subject to the control of human will. An act is a conscious movement. It is the conduct which results from the operation of will. *Actus reus* refers to the result of humanconduct which the law seeks to prevent. If the human conduct (*actus*) is not prohibited by law, the act or conduct will not be termed as a crime and the person who commits such an act is not liable for crime. Any movement of the body which is not a consequence of the determination of the will is not an act. Thus involuntary actions will not become criminal act. If a somnambulist sets fire to a house during his sleepwalk, he will not be liable under

criminal law.

Actus reus may be negative or positive.

'X' shoots 'Y' and kills him. It is a positive *actus reus*.

The mother of a child does not feed the child and causes the death of the child by starvation. The *actus reus* is negative. Thus, *actus reus* in this illustration is omission to act.

In order to be liable for a crime, the act or omission should be one prohibited by law. The following illustrations will make the point more clear.

(i) 'A' who is having sufficient means, failed to help a starving man. The man dies due to starvation. A is not criminally liable since his omission is not prohibited by law.

(ii) 'A', who knows swimming, failed to save the life a drowning child and the child died as a result of the omission. The omission is not prohibited by law and 'A' is not liable for crime. If 'A' was a coast-guard the omission to act would have been a crime.

(iii) A is a Jail warden. He failed to supply food to the prisoners in the jail and several prisoners died due to starvation. 'A' is liable for murder as he violated a prohibited omission.

(iv) 'A' shoots 'B' and resulted in the death of 'B'. 'A' is liable for murder since he violated a prohibited act.

**(b) *Mens rea* (Guilty Mind)**

A prohibited act will become crime when it is accompanied by a certain state of mind. There must be a mind at fault before any crime can be committed. An act or omission alone is not sufficient to constitute a crime. The act or omission should have followed by an evil intent. Thus we may say,

A crime = A prohibited act or omission + guilty mind.

The combination of an act and intent make a crime. An act by

itself is not a wrong. An act done with guilty mind makes it criminal if the act is prohibited by law. *Mens rea* is an evil intention or knowledge of the wrongfulness of the act.

- 3 I. Audi alteram partem  
ii. Nemo debet esse Judex in propria causa  
III. Nemo judex in causa sua

According to the traditional theory of Separation of Powers, the Judiciary was entrusted with the monopoly of adjudication. The modern state is a 'welfare state'. As a result of the transformation of the negative 'Police State' into the positive 'Social Welfare State', the governmental functions have multiplied by leaps and bounds. The inevitable result of the change was an increase of the state powers. The increase in the functions and powers of the state was reflected in the three organs of the Government viz, the legislature, the judiciary and the executive. The judicial organ of the State which was already over-burdened with its duties and functions had to delegate its judicial functions to the executive authority. When the executive authority (administrative authority) to whom adjudicatory function is delegated exercises such function, it is known as quasi-judicial function.

The administrative authorities entrusted with quasi-judicial functions are required to act with fairness and in a just and equitable manner. They should follow the principles of natural justice. The principles of natural justice are not embodied rules. It has many colours, shades, shapes and forms. However the following three principles are considered to be integral part of natural justice.

1. Rule against bias
2. *Audi alteram partem* (Hear the other side)
3. Reasoned Decision or Speaking Order

#### A. Rule against Bias

( *Nemo debet esse Judex in propria causa / Nemo Judex in causa sua* )

The first principle of natural justice is that the administrative authority who exercises quasi-judicial function should be impartial. He should not have any interest in the subject-matter or in the parties to the dispute. He should be free from bias.

The principle of rule against bias is based on three maxims:

1. No man shall be a judge in his own cause. This principle is contained in the maxim *Nemo debet esse Judex in propria causa*. The very same principle is also contained in the maxim *Nemo Judex in causa sua*.
2. Justice should not only be done, but manifestly and undoubtedly be seen to be done.
3. Judges, like Caesar's wife should be above suspicion.

The rule against bias disqualifies an authority from deciding any dispute if he has any interest in the subject matter or in the parties to the dispute. Bias is of three types. They are discussed below:

#### 1. Pecuniary Bias

The administrative authority exercising quasi judicial function should not have pecuniary interest in the subject-matter of the litigation. Even the least pecuniary interest in the cause will disqualify the authority from acting as a judge. If an authority who has pecuniary interest in the subject-matter of the dispute decides the case, the court will quash his decision on the ground that the authority has acted against the principles of natural justice.

**Mohapatra & Co. v. State of Orissa (1984) 4 SCC 103**

A committee was constituted by the Government for selecting some books for educational institutions. Some of the members of the committee were authors of some books. The committee selected books of author-members. The court held that there was possibility of pecuniary bias and the selection was set aside.

## 2. Personal Bias

Personal bias may arise from friendship, relationship, enmity, personal grudge or professional rivalry. A person who is a relative, friend or enemy of disputing parties is disqualified from acting as a judge.

### **A.K. Kraipak v. Union of India (1969) 2 SCC 262**

Mr. N was a candidate for selection to the Indian Foreign Service. He was also a member of the Selection Board. Mr. N did not sit on the Board when his own name was considered. The Selection Board has recommended the name of Mr. N for selection to the I.F.S. and he was selected by the Public Service Commission. A. K. Kraipak was another candidate who was not selected by the P.S.C. He challenged the selection of Mr. N on the ground that the principles of natural justice were violated. The selection of Mr. N was quashed by the Court.

## 3 Bias as to Subject - matter ( Official Bias)

If the authority who has power to decide a dispute has a general interest in the subject-matter of the dispute he is disqualified from acting as a judge. The quasi-judicial authority should not have any interest in the subject -matter of the dispute.

### **Gullapalli Nageswara Rao v. A.P.S.R.T.C(AIR 1959 SC 308)**

The Petitioners were carrying on motor transport business. The Andra Pradesh State Transport Undertaking published a scheme for nationalisation of motor transport in the State and invited objections. The objections filed by the petitioners were received and heard by the Secretary and thereafter the Scheme was approved by the Chief Minister. The validity of the scheme was challenged on the ground that the person who heard the objections , viz., the Secretary to Government, was the same person who had initiated the scheme and therefore he was biased. The Supreme Court observed that the official who heard the objections was in substance a party to the dispute and hence the principles of natural justice were violated.

**B. Audi alteram partem**  
**(Hear the other side)**

The second essential condition of natural justice is that the person against whom an action is proposed to be taken should be given reasonable opportunity to defend himself. Before passing an order against any person, reasonable opportunity of being heard must be given to him. This principle is contained in the maxim "Audi alteram partem". The maxim means hear the other side. The maxim says that no man should be condemned unheard or both sides should be heard before passing an order.

A man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him. A party is not to suffer in person or in prison without an opportunity of being heard. A decision taken without affording both the parties an opportunity to be heard violates natural justice.

The ingredients of a fair hearing are:

1. Notice
2. Opportunity of Hearing

**1. Notice**

The first requirement of a fair hearing is reasonable notice. Before any action is taken, the affected party must be given a notice to show cause against the proposed action and seek his explanation.

A notice should contain the time, place and nature of the hearing. It should be clear and unambiguous. The proposed action and the allegations or charges levelled against the person should be explained in clear terms. The notice should give reasonable time to show cause against the proposed action.

In *V. Kumaran Erady V. General Manager* (AIR 1994 Ker 118) it was held that disconnection of a telephone without any valid

notice to the subscriber was violative of the principles of natural justice.

## 2. Opportunity of Hearing

The second requirement of *audi alteram partem* is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him. The following are some of the established principles of opportunity of hearing.

1. The adjudicating authority must give full opportunity to the affected person to produce all the relevant evidence in support of his case.

2. The adjudicating authority must disclose all evidences or materials placed before it in the course proceedings.

3. Any material or evidence adduced by one party cannot be utilised against the other party unless the opportunity to explain, criticise or rebut the evidence is given to the other party.

4. The adjudicating authority who wants to utilise an evidence against a person should disclose it to the person against whom it is to be utilised and give him an opportunity to rebut the same. However the *right to cross - examination* of the witnesses need not always be given to the concerned person. The right to Cross-examination of the witnesses depends upon the facts and circumstances of each case and the statutory provisions.

## C. Speaking Order or Reasoned Decision

Speaking Order means an order which contains reasons for the decision. The administrative authority exercising quasi-judicial function should give a 'reasoned decision' or 'speaking order'.

Giving reasons in support of an order is considered to be a third principle of natural justice. A party to the dispute has a right to know the result of the inquiry and the reasons in support of the decision. The requirement of reasoned decision is a safeguard against possible injustice and arbitrary exercise of powers by quasi-judicial authority.

**De minimis non curat lex**

The maxim "de minimis non curat lex" means that law does not concern with offences of a trivial character or trifles.

The principle contained in the maxim *de minimis non curat lex* is recognised in section 95 of the Indian Penal Code, 1860. By virtue of Sec. 95 of the Code, an act is not an offence if the harm is so slight that no person of ordinary sense and temper would complain of such harm. The defence is available to the accused even though he has intended to inflict such a harm.

In **Veeda Menezes v. Yusuf Khan** (1966 Cr. L.J 1489), at the end of a heated quarrel the accused threw a file of papers which caused a scarch to the complainant. The lower court acquitted the accused since the harm is trivial. The Supreme Court confirmed this finding.

In **Narayanan v. State of Kerala** (1987 Cr. L. J 741), Sarvodaya workers conducted a campaign to educate people about the evils of alcohol and during the campaign liquor shops were picketed to prevent people from going there. They were prossecuted for causing wrongful restraint (under section 341). The Kerala High Court quased the prosecution on the ground that the harm is only trivial.

In **Anoop Krishan Sharma v. State of Maharashtra** (1992 Cr. L.J 1861 (Bom)), the accused locked the complainant inside the factory by pulling down the shutter. He was prossecuted for wrongful confinement (under section 342). The accused was acquitted since the complainant regained his freedom within a very short time and only a minimal harm was caused.

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5. i. **Quid pro quo**  
ii. **Ex nudo pacto non oritur actio**

An agreement enforceable through court of law is a contract.

In order to enforce an agreement through court of law, there should be lawful consideration. By virtue of section 10 of the Indian Contract Act, 1872 an agreement for a lawful consideration only will become a contract. Thus an agreement without consideration will not become a contract.

Consideration is a technical term used in the sense of *quid pro quo* (i.e., something in return). When a party to an agreement promises to do something, he must get something in return. If he does not get something in return, the promise is not enforceable through court of law. The 'something in return' is the consideration for the promise.

The maxim "*ex nudo pacto non oritur actio*" means no action arises from a nude agreement or an agreement without consideration. In other words, no action arises from an agreement without consideration. An agreement without consideration (*nudum pactum*) is void and unenforceable. There are certain exceptions to this general rule. Section 25 of the Indian Contract Act gives three exceptions to the general rule that a contract without consideration is void. They are:

#### (1) Love and Affection

A written and registered agreement based on natural love and affection between near relatives is enforceable, though there is no consideration.

#### Example

F, for natural love and affection, promises to give his son, S, Rs.1000/- F, for natural love and affection, promises to give his son, S, Rs.1000/- F puts his promise in writing and registers it. This is a contract.

Poonoo Bibi v. Faiez Baksh (1875) 15 Bom. LR 5

A Hindu husband, after referring to quarrels and disagreement between him and his wife, executed a registered document in favour of his wife agreeing to pay her for maintenance. Subsequently he failed to

act as per agreement. The wife claimed before a court of law the agreed amount. The court held that there was no consideration. It was because the agreement was not a result of natural love and affection. Thus nearness of relationship does not necessarily imply natural love and affection.

(2) Compensation for Voluntary Service

A promise to pay for a past voluntary service is binding even though there is no consideration.

**Examples**

- (a) A finds B's lost purse and gives it to him. B promises to give Rs.50/- This is a contract.
- (b) A voluntarily rescued B from death. B said "At the risk of your life you saved me from a serious accident. I promise to pay you Rs.1000/-". This is a contract between A and B.

(3) Promise to pay a time barred debt

A promise by a debtor to pay a time barred debt is enforceable. The promise should be in writing and signed by the debtor or his agent authorised in that behalf. The promise may be to pay the whole or any part of the debt.

**Example**

D owes C Rs. 1000/- but the debt is barred by the Limitation Act. D signs a written agreement to pay C Rs.500 on account of the debt. This is a contract.

Further, as per section 185 of the Indian Contract Act, 1872, "no consideration is necessary to create an agency". Again, according to Explanation I to sec.25 of the Indian Contract Act, 1872, the rule "No consideration, no contract" does not apply to completed gifts.

6. i. *Ex turpi causa non oritur actio*

ii. *In turpi causa non oritur actio*

If the "consideration" or "object" of an agreement is unlawful or illegal the agreement is void and unenforceable.

An illegal contract is totally unenforceable. The court will not recognise any cause of action founded upon it. In the case of illegal agreements, the law gives no assistance to the guilty party. Any money paid or goods supplied under such a contract cannot be recovered. The maxim applicable to an illegal agreement is *ex turpi causa non oritur actio*. The maxim means out of a bare cause or illegal consideration, an action does not arise. A person who approaches the court should come with clean hands.

Another maxim applicable to an illegal agreement is *in pari delicto potior est conditio defendantis*. The maxim means if both are equally in fault and an action is brought, the condition of the defendant is better because the action will definitely be dismissed.

In **Pears v. Brooks** (1866) 1 Ex. 213, the plaintiff had given a coach for hire to the defendant, a prostitute, for using it for her immoral trade. The defendant used the carriage in furtherance of her immoral trade. The purpose was known to the plaintiff. The defendant failed to pay the rent. The plaintiff filed a suit for recovery of the rent. The court held that the plaintiff cannot recover the amount as the object of the agreement was immoral.

7. *Falsus In Uno Falsus In Omnibus*

A fact can be proved or disproved in the court by oral evidence of witnesses. The testimony of a witness may seem to be partly true and partly untrue. In such a case the question that would arise is whether that part which is proved to be true can be relied upon.

The maxim *Falsus in uno falsus in omnibus* means false in one

thing is false in every thing. In England some importance is attached to the principle underlying the maxim *falsus in uno falsus in omnibus*, and if the testimony of a witness is seem to be partly false the entire evidence would be rejected.

In India the maxim is not blindly invoked in appraising evidence adduced in our courts.

In **Ugar Ahir v. State of Bihar** (AIR 1965 SC 277), the Supreme Court held that the maxim is neither a sound rule of law nor a rule of practice for the reason that one cannot see a witness whose evidence does not contain a grain of untruth, exaggeration, embroidery or embellishment. It is the duty of the court to scrutinise the evidence carefully and separate the grain (truth) from the chaff (untruth).

In **Hamsa v. State of Kerala** (AIR 1974 SC 902), the Supreme Court held that the maxim *falsus in uno falsus in omnibus* should not be mechanically applied in India. The mere fact that the evidence of some witnesses was unsafe for convicting one of the accused was not ground for rejecting the whole body of their testimony with regard to other accused.

#### **8. Fiat Justitia Ruat Coelum**

The maxim *fiat justitia ruat coelum* means 'justice should be done even if the heavens fall down'. The Judges are appointed to administer justice. The judges should act without fear or favour, affection or ill-will. A judge should be absolutely free from all sorts of pressures and influences of any kind or from any source whatsoever. In the matter of administration of justice, he shall be guided by the well established principles of law and justice only.

**Prathibha Rani v. Suraj Kumar ( AIR 1985 SC 628)**

The Supreme Court observed "administration of justice and judges are open to public criticism and public scrutiny. Judges have their

accountability to the society and their accountability must be judged by their conscience and oath of their office, that is to defend and uphold the Constitution and the laws without fear or favour".

#### 9. Generalia Specialibus Non Derogant

The maxim '*generalia specialibus non derogant*' contains a rule of interpretation of statutes. If the legislature passes a special statute dealing with a particular subject and thereafter makes a general Act which by its terms would include the subject of the special Act and is in conflict with the special statute, the rule to be adopted in such a case is that the provisions of the general Act shall not override the special Act. This general principle is contained in the maxim *generalia specialibus non derogant*. The maxim means 'general things do not derogate from special things'.

The justification for this rule is that the legislature had in mind the special Act when they made the general Act and if they intended to abrogate the special one, it would have done so in express words.

If there are general words in an Act capable of extending them to subject specially dealt with by earlier legislature the judge should not hold that the earlier and special legislation is indirectly repealed or repealed by implication.

#### Example

Suppose there is a statute which deals only with leasing of 'buildings'. Further suppose the legislature thereafter enacted a new statute to deal with leasing of all types of 'immovable property'. The expression 'immovable property' is a wide term and it includes 'buildings'. There is conflict between the provisions of new statute and the old one. In such a case the provisions of old statute will be given effect to in the case of leasing of buildings.

## **10. *Ignorantia Juris Non Excusat***

The maxim '*ignorantia juris non excusat*' means 'ignorance of law is not an excuse'. If a person has committed an act against law, he cannot avoid the liability arising from such breach by pleading that he does not know the law. In criminal cases, the accused cannot avoid his liability even if he has done the act without knowledge of law.

It is to be noted that 'mistake of fact' is a good defence and an act done under mistake of fact will be excused. The maxim is *ignorantia facti doth excusat*. Sections 76 and 79 of the Indian Penal Code deal with the defence of mistake of fact.

In **State of Maharashtra v. M.H. George** (1965), the accused was arrested on 28-11-1962 at Bombay Air Port since he was found possessing some gold bars. He was a transit passenger. He left Zurich on 27 -11-1962 for Manila. As per the notification published in the Gazette dated 24-11- 1962, any one who bring gold into India should give certain signed declarations. He was prosecuted for violating Foreign Exchange Regulation Act and notification published in the official gazette on 24-11-1962. His defence was that he was unaware of the Notification. The Supreme Court rejected the plea of ignorance of law and held that the accused was liable to be punished.

## **11. *Lex Injustitia non est lex***

The maxim *lex injustitia non est lex* means 'unjust laws are not laws'. Law can be found in legislations, precedents, custom and conventions (agreements). If a particular legislation is found to be operating as injustice, the legislature should repeal it and enact a new legislation to confer justice. If the legislature fails to repeal such an act, the Courts should strike it down. If a precedent is found to be operating as injustice, the Superior Court should over-rule it. If a custom is found to be unreasonable the courts should not recognise it as law. If any unjust, unconscionable or unreasonable terms are found in an

agreement, the courts should not enforce such agreement. This is the basic principle of the maxim *lex injustitia non est lex*.

## 12. Nemo Dat Quod Non-habet

In the case of sale of goods or other property, if the seller is not an absolute owner of the goods, the buyer cannot acquire a better title than what the seller has. This general rule is expressed in the Latin maxim "nemo dat quod non-habet" - ie., no one can pass a better title than he himself has.

### Example

If 'X' steals a watch and sells it to 'Y', Y does not become the owner of the watch for the reason that X has no title to the watch.

Section 27 of the Sale of Goods Act, 1930 says that if goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer gets no better title to the goods than the seller has. Thus section 27 of the Act recognises the maxim *nemo dat quod non-habet*. However there are some exceptions to this rule, and sale by non-owners would confer title to the buyer.

### Exceptions under the Sale of Goods Act, 1930

#### 1) **Sale by a Mercantile Agent (Section 27)**

A buyer will acquire a good title if he purchases in good faith from a mercantile agent who is in possession of the goods or documents of title to goods with the consent of the owner, and who sells the goods in the ordinary course of his business.

#### 2) **Sale under Estoppel (Section:27)**

If goods are sold by a person other than the true owner, but the real owner is prevented by the conduct to deny the seller's authority to sell the goods, the buyer acquires a good title to the goods.

#### 3) **Sale by Co-owner (Section 28)**

When a co-owner having possession of the goods with the

permission of the other co-owner sells the goods, the buyer in good faith acquires a good title to those goods.

**4) Sale by a person with voidable title (Section 29)**

A person in possession of goods under a voidable contract can transfer a good title to the buyer who buys the goods in good faith and without notice of the seller's defect of title, provided the sale takes place before the voidable contract is rescinded.

**5) Sale by seller in possession of goods after sale (Section 30(1))**

Where a seller who having once sold the goods continues to be in possession of the goods or of the document of title to the goods, sells them either himself or through a mercantile agent to a person who purchases them in good faith and without notice of the previous sale, the buyer acquires a good title.

**6) Sale by buyer in possession before sale (Section 30(2))**

Where a buyer in possession of the goods with the consent of the seller, sells them, the new buyer who acts in good faith and without notice of the lien or any other right of the first seller will acquire a good title.

**7) Sale by an Unpaid Seller (Section 54(3))**

Where an unpaid seller who has a right of lien or stoppage in transitu resells the goods, the buyer gets a good title to the goods as against the original buyer.

**Exceptions under other Acts:**

1) Sale by a finder of lost goods (Section 169 of the Indian Contract Act, 1872)

2) Sale by a pawnee or pledgee under certain circumstances (Section 176 of the Indian Contract Act, 1872).

3) Sale by an Official Receiver or Official Assignee or Liquidator of companies.

5. Sale of immovable property by an ostensible owner (Section 41 of)

the Transfer of Property Act, 1882).

In all the above cases, the buyer acquires a better title.

13. i. Nemo debet bis vexari pro una et eadem causa  
ii. Doctrine of Double Jeopardy  
iii. Autrefois convict and Autrefois acquit  
iv. Res Judicata  
v. Doctrine of 'Issue Estoppel'

The maxim "*nemo debet bis vexari pro una et eadem causa*" means 'no one shall be vexed twice for the same cause'. This principle is recognised in civil and criminal prosecution.

By virtue of Article 20 ( 2) of the Constitution of India, no person shall be prosecuted and punished for the same offence more than once. Thus Article 20(2) recognises protection against double jeopardy as a fundamental right of accused persons.

Section 300 of the Code of Criminal Procedure 1973 also recognises the very same principle and bars a second trial. If a person is tried and acquitted or convicted for an offence he shall not be prosecuted for the same offence second time. The second prosecution is barred by the doctrine of *autrefois convict* (formerly convicted) and *autrefois acquit* (formerly acquitted).

By virtue of section 300 of the Code of Criminal Procedure, 1973 if a person has once been tried and convicted or acquitted of an offence, he cannot again be tried for the same offence or for any other offence which is not distinct from one previously tried. This section is based on the ancient maxim *nemo dabit bis vexari pro eadem causa* (no person should be vexed twice for the same cause)

Section 300 incorporates the common law principle of well known pleas of *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted). No person shall be punished or put in peril or

jeopardy twice for the same offence.

Article 20 of the Constitution of India also provides that no person shall be prosecuted and punished for the same offence more than once.

Section 300 of the Code in fact recognises the "**doctrine of issue estoppel**". "Issue Estoppel" is a well known doctrine which controls the re-litigation of issues (whether of fact or law) which are settled in a previous litigation between parties. The findings on an issue of facts or law in a previous criminal proceedings preclude the re-agitation of the same issue based on same facts in any subsequent litigation.

In **Mohammad Shafi V. State of West Bengal** (1966) their Lordships of the Supreme Court held that section 300 comes into operation if the following conditions are satisfied.

- 1) The case should have been tried by a Court.
- 2) The Court which tried the case should be a competent Court.
- 3) The Court tried the case should have acquitted or convicted the accused.
- 4) The acquittal or conviction should be in force.

If all the above stated conditions are satisfied a second trial is barred.

#### **Illustrations**

1) A is tried upon a charge of theft as a servant and acquitted. He **cannot** afterwards, while the acquittal remains in force, be charged with theft as a servant or upon the same facts, with theft simply or with criminal breach of trust.

2) A is charged by a Magistrate for voluntarily causing hurt and convicted him. A **may not** afterwards be tried for voluntarily causing grievous hurt on the same facts.

3) A is charged before a Court of Session and convicted of culpable homicide of B. A **may not** afterwards be tried on the same fact for the murder of B.

Section 300(1) thus bars a fresh trial if a person had been tried and convicted or acquitted by a court of competent jurisdiction for the same offence. A discharge does not amount to acquittal and second trial is not barred.

#### **Exceptions to the General Rule**

There are three exceptions to the general rule that a person tried and convicted or acquitted of an offence cannot be tried again for the same offence. They are:-

##### **Exception (1)**

A person acquitted or convicted of an offence may afterwards be tried for any distinct offence to which a separate charge might have been made against him at the former trial. It can only be with the previous permission of the State Government.

##### **Illustrations**

1) A is tried on a charge of murder and acquitted. There was no charge of robbery. It appears from the facts that A committed robbery at the time when murder was committed. He may afterwards be charged with and tried for robbery with the previous permission of the State Government.

2) A was tried on a charge of rape and convicted. There was no charge of robbery. It appears from the facts that 'A' committed robbery at the time when rape was committed. He may afterwards be charged with and tried for robbery with the previous permission of the State Government.

##### **Exception (2)**

A person convicted of an offence may afterwards be tried for another offence which is the consequence of the convicted offence. The consequence should have been happened after the time when he was convicted of first offence.

##### **Illustration**

'A' was tried for causing grievious hurt and convicted. After the conviction the person injured dies as a consequence of grievious hurt.

'A' may be tried for culpable homicide since the consequence of previous hurt (i.e., death) did not happen until the conclusion of the first trial.

### Exception (3)

A Court tried and convicted or acquitted an accused of an offence. The fact of that offence constitute another offence. The other offence constituted by the same facts cannot be tried by the court which already tried the first offence. In such a case on the basis of the same facts which constituted the first offence the accused can again be charged and tried for another offence by a competent Court.

### **Illustration**

A, B and C were charged by a Magistrate of the First Class with, and convicted by him of robbing D. A,B,C, E & F may afterwards be charged with and tried for dacoity on the same facts by Court of Session. It is because the offence of dacoity can be tried only by a Court of Session.

### Res Judicata

By virtue of section 11 of the Code of Civil Procedure, 1908, if a civil case is finally heard and decided by a competent court, a second suit between the same parties on the same issue is barred by the doctrine of *res judicata*. If a second suit is instituted the court has to dismiss the suit.

Thus Article 20(2) of the Constitution of India, Section 300 of the Code of Criminal Procedure and section 11 of the Code of Civil Procedure, 1908 recognise the maxim: "*nemo debet bis vexari pro una et eadem causa*".

14. i. *Doctrine of Vicarious Liability*
- ii. *Qui facit per alium facit per se*
- iii. *Respondeat Superior*

Under Law of Torts, normally a person will be liable only for his

own wrongful acts. But sometimes a person may become liable for the wrongful acts of another. Such liability is called vicarious liability. In order to fix liability upon a person for the wrongful acts of another, there should exist a certain kind of relationship between them and the wrongful act should in a certain way be connected with that relationship.

Under law of torts the master(employer) is vicariously liable for the wrongful acts of his servant. Vicarious liability of a master for the wrongful act of his servant is based mainly on two maxims. They are the following.

(1) *Qui facit per alium facit per se*

Master's responsibility for his servant's act has its origin in the maxim '*Qui facit per alium facit per se*'. The maxim means 'one who has done an act through another will be deemed to have done it himself'. If I engage a servant to drive my car and an accident results due to the negligence of my servant, it will be deemed that I myself have driven the car. Master will be responsible for all authorised acts of his servant. Their liability is joint and several. Thus when the servant commits a tortious act the master and servant will be jointly and severally liable for the same.

The maxim *qui facit per alium facit per se* is also applicable in the case of contract of agency. A principal is liable to third person for the acts of his agent. The liability of the principal for the acts of his agent is based on the maxim *qui facit per alium facit per se*.

(2) *Respondeat Superior*

Another maxim which supports the liability of master for the acts of his servant is *respondeat superior*. The maxim '*respondeat superior*' means 'let the principal be liable'. This maxim puts the master in the same position as if he had done the act himself. The liability of master and servant is joint and several as they are considered to be joint tort

feasors. The reason for the maxim *respondeat superior* seems to be the better position of the master to meet the claim because of his larger pocket.

#### **Mackean v. Rayno Brothers Ltd. (1942)**

X was the workman of D. 'D' directed 'X' to go to a particular place by taking C's lorry. X proceeded on his journey by using a private car instead of D's lorry. While driving negligently car collided and killed P's husband. P filed a suit against D claiming compensation for the negligent act of 'X' on the principle of vicarious liability. The court held that the workman was doing an *authorised act in an unauthorised way*. The act of the workman was within the scope of his employment and D is vicariously liable as the master of X .

#### **Century Insurance Co. v. Northern Ireland Road Transport Board(1942)**

A's servant, the driver of a petrol lorry, while transferring petrol from the lorry to an underground tank struck a match to light a cigarette and threw it on the floor. This resulted in a fire and an explosion causing damage to B's property. B filed a suit against A for the negligent conduct of his servant. The court held that though the driver lighted the cigarette for his own comfort, yet it was a negligent method of conducting his work. The act being in the course of employment, A was liable for the drivers negligence.

#### **State of Rajasthan v. Vidhyavathi (1962)**

A jeep was owned and maintained by the State of Rajasthan for the official use of the Collector of a district. The driver of the Jeep had negligently driven the vehicle while he was bringing it back from the workshop after repairs and a pedestrian was knocked down. He died and his widow sued the driver and State for damages. A Constitution Bench of the Supreme Court held that the State was vicariously liable for the rash and negligent act of the driver.

## 15. Res ipsa loquitur

In an action for negligence, the plaintiff has to prove not only that the defendant owed a legal duty of care to him but also that he committed a breach of that duty. The burden of proof lies on the plaintiff.

The general rule is that the plaintiff has to prove the negligence on the part of the defendant. However, under certain circumstances, the plaintiff need not prove that the defendant was negligent. When the accident explains only one thing i.e., that the accident could not ordinarily occur unless the defendant had been negligent, the law raises a presumption of negligence on the part of the defendant. The negligence of defendant would be inferred from the facts on the basis of the maxim '*Res Ipsa Loquitur*', which means 'the thing speaks for itself'. Then the burden of proof is shifted from the plaintiff to the defendant and the defendant has to prove that he was not negligent. If the defendant fails to give any satisfactory explanation to rebut the presumption of negligence, he will be liable.

### **Byrne v. Boadle (1863)**

A barrel of flour fell on the head of the plaintiff from the second floor of the defendant's warehouse. In such a case the plaintiff need not prove anything more because the facts themselves raise a presumption that the defendant was negligent. Here the burden of proof of negligence shifts from the plaintiff to the defendant and the defendant has to prove that he was not negligent.

### **Municipal Corporation of Delhi v. Subhagwanti (1966)**

A clock tower situated opposite to the Town Hall in the main bazaar of Chandni Chowk, Delhi collapsed and as a result of this a number of persons died. The clock tower belonged to the Municipal Corporation of Delhi and was exclusively under its control. It was 80 years old but the normal life of the structure could be 40-45 years. In these circumstances the Supreme Court held that the fall of the Clock Tower tells its own story in raising an inference of negligence on the part of the defendant.

Since the defendants could not prove absence of negligence on their part they were held liable.

### Mangila v. Parasram (1971)

A boy of seven who was answering the call of nature by the side of the road was struck down by a passenger bus coming on the wrong side of the road. The boy met with instantaneous death. The court applied the doctrine of *Res Ipsa Loquitur* and held that the defendant was liable.

### 16. Volenti non fit Injuria

The maxim *volenti non fit injuria* means that 'a person who has consented to suffer a harm has no remedy in law'. If the plaintiff has voluntarily consented to suffer some harm, he is not allowed to complain for that and he has no remedy in tort.

When you invite somebody to your house you cannot sue him for trespass. Similarly you cannot sue a surgeon for battery (a tort) after submitting to a surgical operation. It is because you have consented to these acts.

Consent to suffer the harm may be express or implied.

When consent is given by words, oral or written, it is express consent.

The implied consent can be inferred from the conduct of the parties. For example, a player in the games of cricket or football is deemed to be agreed to any hurt which may be resulted in the normal course of the game. Thus a player in a game of cricket or football has no right of action if he is injured while the game is played lawfully. So also, spectators to cricket or football or hockey matches or at motor races are presumed to undertake the risks which may reasonably be expected to occur at such meets.

### **Hall v. Brook Lands Auto Racing Club, (1933)**

The plaintiff was a spectator at a motor car race which was held at Brook lands on a track owned by the defendant company. During the race there was a collision between two cars. One of which was thrown among the spectators and resulted in injury to the plaintiff. It was held that the plaintiff impliedly took the risk of such injury and the defendant was not liable.

### **Wool drige v. Summer (1963)**

The plaintiff a photographer, at a horse show was injured by a galloping horse ridden at the show by the defendant. The court held that the defendant not liable as it is a case of *volenti non fit injuria*.

### **Hegarty v. Shine (1878)**

The plaintiff was infected by her paramour with a venereal disease. He had concealed from her of the disease. She sued him for assault. The Court held that she was a consenting party and thus not entitled to claim compensation.

### **Limitation to the maxim (Rescue cases)**

The defence of *volenti non fit injuria* is not available when the plaintiff has consented to suffer the harm in rescue cases. Inspite of the fact that the plaintiff has consented to suffer the harm, he may still be entitled to his action against the defendant in rescue cases. Rescue cases from an exception to the application of the doctrine of *volenti non fit injuria*.

### **Hynes v. Harwood (1935)**

The defendant's servants left a two horse van unattended in a street. A boy threw a stone on the horse and they bolted in the direction of some children. To prevent harm to the children a police constable, who was on duty, managed to stop the horse, but in doing so he himself suffered serious personal injuries. It being rescue case, the defence of

'volunti non fit injuria' was not accepted and the defendants were held liable.

### 17. *Ubi jus ibi remedium*

The maxim *ubi jus ibi remedium* means 'where there is a right, there is a remedy'. If a right is recognised by law, the person whose right is violated by another should be given a remedy. If proper remedy is not available, the mere declaration of right would be meaningless.

The Constitution of India confers to the citizen a long list of fundamental rights. These rights are available against State. If the State violates fundamental rights of the citizen, he can approach the Supreme Court or High Court for appropriate remedy. The Supreme Court and High Courts can issue writs or other orders for enforcing fundamental rights.

The Civil and Criminal laws recognise several legal rights. If a person's right recognised by civil law is violated by another, he can approach the Civil court for remedy. Civil Courts can pass decree or order and enforce the right. If a person is aggrieved by the criminal act of another, the aggrieved person can approach the Criminal courts for remedy.

It is to be noted that a person who wants to enforce his right through court of law should approach the court within the period fixed by the Limitation Act. If he fails to approach the court within the period, the proceedings will be dismissed. Thus his right will become imperfect right. Imperfect rights constitute an exception to the maxim *ubi jus ibi remedium*.

### 18. *Caveat Emptor and Caveat Venditor*

The maxim "caveat emptor" means "let the buyer beware". The maxim *caveat venditor* means "let the seller beware"

The general rule is that the buyer of goods should take the precaution and see that the article he purchases is fit for his purpose. The seller is under no duty to reveal the defects in the goods he is selling. The buyer has to make sure that he is buying the right quality of goods fit for the purpose for which it is intended. However, under modern situations, the law is in favour of the exceptions to this rule whereby the seller supplying defective goods can be made liable.

Section 16 of the Sale of Goods Act, 1930 recognises the maxim "caveat emptor". By virtue of Section 16 there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

Though the maxim is recognised under section 16 of the Sale of Goods Act as a general rule, there are several exceptions to the maxim. The maxim 'caveat emptor' does not apply under the following circumstances and the seller would be liable for defects in the goods.

a) Implied Condition as to Quality

By virtue of Section 16 (1) of the Sale of Goods Act, 1930 there is an implied condition that the goods sold are reasonably fit for the purpose for which they are purchased if the following conditions are satisfied:

- i) The buyer makes known to the seller the specific purpose;
- ii) The buyer relies on the judgement or skill of the seller; and
- iii) The seller happens to be a person whose course of business is to sell the goods of that description.

**Priest v. Last (1903) 2 K.B. 148**

A hot-bottle was purchased from the defendant, retail chemist, on the understanding that the bottle stands boiling water. The bottle burst when used and injured the plaintiff's wife. Held, the seller was liable to pay damages.

- b) Implied Condition as to Merchantable Quality (Section 16 (2)).  
If goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. It means that the goods should be commercially saleable. The implied condition as to merchantability cannot be applied when the defect is patent and the buyer has examined it. Then the maxim *caveat emptor* will be applicable.

**Jackson v. Rolex Motor and Cycle Co. Ltd** (1910) 2K, B. 937

A manufacturer supplied 600 horns under a contract. The horns were found to be defective because of faulty manufacture. It was held that the buyer was entitled to reject the whole consignment.

**Grant v. Australian Knitting Mills** (1936 A.C. 85)

'X' purchased some woollen underwear from a company dealing in such goods. 'X' contracted a skin disease due to the excessive presence of chemicals on the garments. The court held that the goods were not of merchantable quality and thus the manufacturer is liable to pay compensation.

c. Condition as to wholesomeness

In the case of sale of eatables and provisions there is an implied condition that the goods must be suitable for consumption.

**Frost v. Aylesbury Dairy Co. Ltd.** (1905) 1 K.B. 608

'F' purchased milk from 'A', and the milk contained typhoid germs. The wife of 'F' became infected and died. It was held that F could recover damages.

**Henry Kendall and Sons v. William Lillico and others** (1968 2 All. E. R. 444)

The seller sold some groundnuts to the buyers. The purpose was to resell it in smaller quantities for compounding as food for cattle and poultry. The nuts contained a toxic substance and were unfit for the pur-

pose for which it was intended. The buyers sold it to third parties who fed the nuts to pheasants which died. The House of Lords held that the seller was liable.

The above stated statutory exceptions to the maxim have reduced to a great extent the effect of the general rule 'let the buyer beware'. In these exceptional situations the rule applicable is '*caveat venditor*' which means 'let the seller beware'. In other words the seller is liable for supply of defective goods under given circumstances. Now it is also covered by the Consumer Protection Act, 1986.

19. i. Injuria sine damno  
ii. Damnum sine injuria

A tort is a civil wrong and the injured party can institute a civil proceeding (suit) against the wrongdoer and claim unliquidated damages. The Court will assess the amount of compensation.

The plaintiff who claims compensation from the defendant for a tort should establish the following three essential conditions:

- (i) There must be a *wrongful act or omission* on the part of the defendant.
- (ii) The wrongful act or omission should have caused *legal damage* (*violation of right*) to the plaintiff.
- (iii) There should be *legal remedy* in the form of an action for damages.

#### Injuria sine damno

Under law of torts the defendant would be liable only when he by his act or omission violated the right of the plaintiff. Tortious liability arises only when there is a breach of duty owed to the plaintiff, i.e., when there is a violation of the right of the plaintiff. If there is no violation of legal right there can be no action under law of torts. If there is

violation of legal rights, the defendant is liable to pay compensation to the plaintiff even though the plaintiff has not suffered any loss. This principle is expressed in the maxim "*Injuria sine damno*" (*injury without damage*). *Injuria* means infringement of a right conferred by law on the plaintiff. *Damnum* means loss or damage. *Injuria sine damno* means violation of a legal right without causing any harm, loss or damage to the plaintiff.

### **Ashby v. White [ (1703)**

The plaintiff was a qualified voter at a parliamentary election. He was not allowed to cast his vote by the defendant a returning officer. No loss was suffered by such refusal because the candidate for whom the plaintiff wanted to vote won in spite of the wrongful act of the defendant. The court applied the maxim *injuria sine damno* and held that the plaintiff is entitled to nominal damages.

### **Bhim Singh v. State of J&K (1968),**

The petitioner, a Member of Legislative Assembly of State of Jammu & Kashmir was wrongfully detained by the police while he was going to attend the Assembly session. He was not produced before the Magistrate within 24 hours. As a consequence of this the member was deprived of his Constitutional right to attend the Assembly session and his fundamental right to be produced before the Magistrate within 24 hours. The Supreme Court awarded to him Rs. 50,000/- by way of consequential relief.

Thus, where there is *Injuria* (i.e., infringement of right), the plaintiff is entitled to damages or compensation even though the plaintiff has not actually suffered any damage or loss. The maxim *Injuria sine damno* embodies this principle.

### **Damnum sine injuria**

Under law of torts the defendant is not liable if there is no violation of right of the plaintiff even though his act has resulted in damage of

loss to the plaintiff. Where there is no violation of a legal right no action can lie in a court of law even though the defendants act has caused some loss or harm or damage to the plaintiff. This principle is expressed by the maxim *Damnum sine Injuria*. It means that a damage without the violation of a legal right is not actionable in a court of law.

#### **Gloucester Grammar School case (1410)**

The plaintiff was conducting a grammar school. The defendant opened a new school next door to the plaintiff's school. Majority of the students left the plaintiff's school and joined in the defendant's new school. This resulted in loss to the plaintiff. The plaintiff claimed compensation from the defendant. The court held that the plaintiff had no cause of action against the defendant because it was only a case of *damnum sine injuria* (damage without violation of legal right). There was no duty on the part of the defendant that a school should not be started near the plaintiff's school.

#### **Mogul Steamship Co. v. Gregor Gow and Co. (1892)**

The plaintiff and defendants were owners of ships and engaged in the business of carrying tea. In order to drive the plaintiff out of this field the defendants associated together and reduced the freightage. The plaintiff was also forced to reduce the freight to compete with the defendants. This resulted in heavy loss to the plaintiff. The plaintiff filed a suit and claimed compensation from the defendants. The Court held that there was no violation of right of the plaintiff and hence the defendants were not liable to compensate the plaintiff.

#### **Electro Crume Limited v. Welsh Plastics Limited ( 1968)**

The defendant was the owner of a lorry. His employee drove the lorry negligently. Consequently it hit and damaged a fire hydrant on an industrial estate. The plaintiff was having his factory in that industrial estate. To repair the hydrant, supply of water was cut off for several hours. The plaintiff's factory could not work for want of water supply. In this way the plaintiff suffered loss and sued the defendant and claimed

damages. The court held that though the plaintiff had suffered damage there was no legal injury. It is a case of *damnum sine injuria* and the suit was dismissed.

#### **Mayor of Bradford Corporation v. Pickles (1895)**

The defendant had a piece of land which he offered to the Bradford Corporation for sale. The offer was not accepted. This infuriated the defendant. The Corporation was supplying water to a village from wells on its own land. The wells were fed by an underground stream passing underneath the land of the defendant which was on a higher level. The defendant began to dig deep on his own land. The underground water was thus impounded by him on his own land and was prevented from reaching the Corporation's wells. The object of the plaintiff was to compel the corporation to buy his land at his own price. The Corporation sued the defendant for an injunction to restrain him from digging and claimed compensation.

The House of Lords held that since the defendant was exercising his lawful right he could not be made liable even though the defendant acted maliciously.

Thus a legal act, though motivated by malice, will not make the defendant liable. The plaintiff will get compensation only if he proves to have suffered loss as a result of violation of his right by the act of the defendant.

#### **20. Lis Pendens**

Section 52 of the Transfer of Property Act deals with doctrine of *Lis Pendens* as expressed in the maxim "*ut lite pendente nihil innovetur*". The maxim means nothing new should be introduced in a pending litigation.

The maxim "*lis pendens*" means 'a suit pending before a court of law'. Section 52 of the Transfer of Property Act, 1882 which deals with

The transfer of property during the pendency of a suit in a court of law regarding immovable property, gives answers to the following questions.

1. Whether either party to a suit can transfer immovable property, which is the subject matter of the suit, while the suit is pending in a competent court without permission of that court ?
2. If property is transferred without permission of the Court, what are the consequences?

By virtue of section 52 of the Act, during the pendency of any suit or proceeding in a competent court either party cannot transfer the immovable property, which is the subject matter of the suit or proceeding, except under the authority of the court and on such terms as it may impose. Thus, the general rule is that before making a transfer of property which is the subject matter of dispute leave of the court is to be obtained.

A suit is said to be pending from the date on which the plaint is instituted in the court and until the complete satisfaction or discharge of a final decree passed in the suit.

If during the pendency of the suit one of the parties to the suit transfers the property without consent of the court, the transferee will be bound by the decree as if he is the transferor even though he was unaware of the suit. The transfer as such is not void. It is because section 52 does not prohibit the transfer of property during pendency of the suit. Thus if the decree is in favour of the transferor, the transferee can claim the benefit of decree. If the decree is not in favour of the transferor, the transferee will be bound by the terms of decree even though he is not a party to the suit.

In order to apply the doctrine of lis pendens the following conditions are to be satisfied.

1. A suit or proceeding should be pending in a court in India.
2. The court should be a competent court to decide the dispute.
3. The dispute should be regarding the right of parties with regard to immovable property.
4. There should not be collusion between the parties to the suit.
5. One of the parties to suit should have transferred the property without the consent of the court.

If all the above conditions are satisfied the transferee will be bound by the terms of decree as if the transferor himself. This is the doctrine of *lis pendens*.

### Example

X was owner of the immovable property. X gifted the property to Y and possession is delivered to him. The gift was vitiated by fraud. X filed a suit to set aside the gift deed on the ground of fraud. While the suit is pending in the court, Y transferred the property to Z without the consent of the court. The possession of the property was delivered to Z. Z was not impleaded as a party in the suit. The suit ended in favour of X and the court set aside the gift deed and directed delivery of possession. In such a case Z is bound to give possession of the property to X. He cannot claim any protection. However if the suit was a collusive one, Z is not bound by the decree.

### **Bellemy v. Sabine (1857) (1 De G &7, 566)**

X filed a suit against Y for setting aside of a sale deed and recovery of possession of the property. After the institution of the suit Y transferred the property to Z. X continued the suit against Y without knowledge of this transfer. The action ended in favour of X. The court set aside the sale deed executed by X and directed X to make certain payments to Y. Z challenged the decree on the ground that he was neither a party to the suit nor aware of the decree. The court held that Z who is the transferee from Y pending the suit was bound by the decree.

eventhough he was unaware of the pending suit. However he is entitled to receive from X the amount which X owes to Y.

The effect of the doctrine of *lis pendens* is that the transferee is bound by the decision of the court. It does not prevent the vesting of the title in him but makes it subject to the rights of the parties as decided in the suit. The transfer *pendente lite* is valid and good to the extent that it does not conflict with the rights of the parties in the suit as established under the decree.

In **Saraswathy Amma v. Bhaskara Pillai** (1987 (1) KLT SN 63 P.47) the Court held that the doctrine of *lis pendens* is founded on principles of law and equity. The rule is not based on the doctrine of notice, but on expediency, i.e., the necessity for final adjudication. It is immaterial whether the alienee *pendente lite* had , or had not, notice of pending proceeding. The conditions required are:

- (1) Pendency of a suit or proceeding in any court having authority.
- (2) The suit or proceeding is not collusive.
- (3) Any right to immovable property is directly or specifically in question.
- (4) The property is transferred by a party during the pendency of the suit.

If all the above conditions are satisfied the purchaser *pendente lite* becomes representative -in - interest of the party who sells to him and becomes bound by the decree passed against him. There is no duty cast upon the plaintiff to inform the transferee or give warning to him as a condition precedent to the applicability of the rule of *lis pendens*. When the document is hit by the rule of *lis pendens* the transferee takes the document only subject to the ultimate result of the suit. The doctrine of estoppel is not applicable in a case coming under section 52 of the Act. Thus the purchaser pending litigation cannot plead that the silence of the plaintiff would operate as estoppel against him.

In **K.A. Khader v. Rajamma John Madathil** (1993 (2) KLJ 575), it was held that the effect of the doctrine is not to annul all voluntary transfers effected by parties to the suit, but only to make the decree passed binding on the transferee even if he is not a party to it. The transfer will be valid subject to the result of the suit.

## 21. *Spes Successionis*

The Transfer of Property Act,1882 defines and amends the law relating to transfer of property by act of parties. The Transfer of Property Act mainly governs transfer *inter vivos* (between living persons) of immovable property in India. The Act does not deal with transfer by operation of law or by means of will or testament.

The general rule under section 6 of the Transfer of Property Act,1882 is that 'property of any kind may be transferred'. However one cannot transfer *spes successionis*. The expression "Spes Successionis" means 'a mere chance of succession' or 'interest to arise in future'.

By virtue of Section 6 (a) of the Transfer of Property Act,1882, the chance of an heir apparent succeeding to an estate or chance of a relation obtaining a legacy on the death of a kinsman (male relative )or any other mere possibility of a like nature cannot be transferred.

On the death of father a son will inherit his property by virtue of succession law. Son is an heir apparent. He cannot transfer his father's property during the life time of father.

The interest of a reversioner over the property held by a widow is an example of *spes successionis*. Under the Hindu Law on the death of husband, the widow was entitled to hold his property as a limited owner until her death. On her death the property held by her as a limited owner would come back to the heirs of the last male holder( husband). The persons who are entitled to the property on the death of the widow are

called reversioners. They cannot transfer the property during the life time of the widow.

### Holroyd v. Marshall (1862) 10 HLC 1

In this case the English court held that interest to arise in future (*spes successionis*) could be transferred. If the interest of the transferor materialises in future the transferee can claim the transferor to make good the transfer.

In India section 6(a) creates a statutory prohibition. If a person transfers a mere chance of succession and even if the hope or expectancy materialises, the transferee cannot claim the property in India.

### Anand Mohan Roy v. Gaur Mohan Malik ( 48 Cal 536)

A reversioner transferred the property in the hands of a widow to the plaintiff. After the death of widow the reversioner succeeded to the property. The plaintiff claimed the property and argued that the rule in Holroyd v. Marshall should be applied and the reversioner should be compelled to make good the transfer.

The court held that since there is a clear statutory prohibition to transfer *spes successionis*, a transferee would not get any right. A transfer of *spes successionis* is void *ab initio* and it cannot subsequently be made valid .

### Official Assignee v. Sampath Naidu ( AIR 1933 Mad. 795)

X had executed two mortgages over a property in respect of which he had only *spes successionis*. After sometime he succeeded to the property and sold them to another person.

The question before the court was that whether the mortgages were void as it offended section 6(a) of the Transfer of Property Act. The court held that the mortgages were void.

## **22. Delegatus non potest delegare**

The maxim *delegatus non potest delegare* means 'a delegate cannot further delegate'.

### **Application of the maxim in Contract of Agency**

A contract of agency is a contract by which one person called the 'principal' employs another person called 'agent' to enter into relationship with third person, for and on behalf of the principal. The contract of agency is of fiduciary in nature. It is based on a confidence reposed by the principal in the agent. The rule of law, therefore, is that an agent cannot delegate his powers or duties to another without the consent of the principal. This principle is expressed by the maxim '*delegatus non potest delegare*' - a delegate cannot further delegate. An agent being himself a delegate of his principal, cannot pass on that delegated authority to some one else. The basic reason behind this doctrine is that the authority given to an agent is personal and cannot be exercised through another.

Section 190 of the Indian Contract Act, 1872 lays down that "an agent cannot lawfully appoint a sub-agent to do acts which he has undertaken to do personally". To this rule there are certain exceptions:

- (a) If the custom of the trade permits the appointment of sub-agent.
- (b) If the nature of work is such that further delegation is essential.

### **Application of the maxim in the field of delegated legislation**

When the legislature by an Act confers some law making power on an executive authority, the rules or law should be made by that authority. When the authority to whom law making power is conferred by the statute further delegates those power to another subordinate authority or agency, it is called sub-delegation. Sometimes the statute itself empower the authority to sub-delegate the legislative function. In the absence of such a power the sub-delegation is bad

in law and the court will strike down sub-delegation. It is well-settled that the maxim *delegatus non potest delegare* ( a delegate cannot further delegate) applies in the field of delegated legislation also and sub-delegation is not permissible unless the said power is conferred expressly or by necessary implication. In the absence of express authorisation legislative power cannot be sub-delegated. The authority to whom legislative power is conferred must itself make the rule or regulation. If any other authority make a rule or regulation with the permission of the authorised authority, the sub-delegation will be struck down by the court.

In **Central Talkies v. Dwaraka Prasad** (AIR 1961 SC 606), the U.P (Temporary) Control of Rent and Eviction Act, 1947 provided that no suit shall be filed for the eviction of a tenant without permission either of a District Magistrate or any officer authorised by him to perform any of his functions under the Act. The District Magistrate authorised Additional District Magistrate to give permission to sue for the eviction. The Additional District Magistrate granted permission to sue for eviction. It was challenged. The court held that the order granting permission by the Additional District Magistrate was valid.

23. i. *Stare Decisis*
- ii. *Ratio-decidendi*
- iii. *Obitur Dictum*

#### **Doctrine of 'Stare Decisis'**

In England and India, legislations, precedents and custom are considered to be the main sources of law. When a case comes up for adjudication before a court, the judge would apply the law that finds a place in either the legislation, or precedent, or custom.

'Precedent' means a previous decision or judgment of court of law. It is a judicial decision which contains in itself a 'legal principle' or 'law'. It is cited as an authority for the legal principle embodied in it. Once a

case is decided by a judge by applying a principle, a case on similar facts which may arise in future must also be decided by applying the same principle. This practice would help in securing certainty, predictability, and uniformity in the application of law. The previous decisions of the House of Lords are followed by all courts in England. In India, the previous decisions of the Supreme Court of India are followed by all courts in India. The previous decisions of the High Courts are binding on all courts subordinate to it.

In England the binding nature of precedent is established by the doctrine of '*stare decisis*'. The maxim means that a precedent which is long-standing should not be disturbed. This doctrine added strength and respect to a precedent which stood for a pretty long time.

In England, a long standing decision will not be disregarded or overruled. Over-ruling is effected only in the case of a recent precedent. If old precedents are over-ruled by declaring it as incorrect or bad, it would cause grave inconvenience to the community. Because the over-ruling may disappoint or disturb the legitimate expectations of the people. Thus the doctrine of '*stare decisis*' has been observed by the courts.

The recent view of English Courts is that undue respect need not be given to a long standing precedent which is doing injustice. In **Reg v. Button** (1966 AC 591) the English Court over-ruled a precedent that stood for a century and a half. The court observed that lapse of a long time is not a good reason to continue a wrong principle.

### Ratio Decidendi

The expression ratio-decidendi literally means "reasons for the decision".

Whenever a case comes before a judge for adjudication, he is bound to decide the whole matter before him. He cannot leave a case undecided on the ground that there is no law covering the point. If the case before

him is not covered by an existing law, then he will have to make a legal principle and apply the same to decide the case in hand. The principle which governs his decision is called ratio-decidendi. The ratio decidendi in the decision becomes the law for subsequent cases.

Ratio-decidendi is the legal principle which was formulated and applied by the judge to decide a case in hand. It is the principle enunciated or declared by the judge in the course of his decision and actually made use of for deciding the point in dispute in the case.

In the field of Law of Torts, several new principles are enunciated and applied by the English and Indian Judges to decide cases. The following decisions are examples of cases in which new principles are enunciated by the judges.

#### **Donogue v. Stevenson (1932) AC 562**

In this case the English court established a new principle that manufacturers of consumable items are under a duty to see the consumable items should not contain noxious substances. If the manufacturer violates this principle, he is liable to compensate the ultimate consumer.

The facts of the case were like this:

A company manufactured ginger beer. The beer was put in opaque bottles and were sold to retailers. "A" purchased a bottle of beer from the retailer and gave it to his lady friend. She poured some of the contents in a tumbler and consumed the same. When the remaining contents of the bottle were poured into the tumbler, the decomposed body of a snail floated out with the ginger beer. She had a mental shock and fell ill. She filed a case claiming compensation against the manufacturer for negligence. The House of Lords held that the manufacturers owed a duty to take care that the bottle did not contain noxious matter, and that he was liable for the breach of that duty.

### **Rylands v. Fletcher (1868 L.R. 3 HL 330)**

In this case the House of Lords laid down the rule of "no fault liability" or "strict liability".

The facts of the case were like this:

The defendant (Rylands) employed an independent contractor to construct a reservoir on his land. In the course of the work the contractor came upon old shafts and passages on Ryland's land. They communicated with the mines of Plaintiff (Fletcher), a neighbour of Rylands. The contractor did not block them up and when the reservoir was filled, the water from it burst through the old shafts and flooded Fletcher's mines and that resulted in damage to the plaintiff. Fletcher sued Rylands for compensation. The House of Lords held the defendant liable though the defendant was not at fault. While deciding the case the court enunciated the following principle.

*"If a person for his own purposes collects and keeps on his land anything likely to do mischief by its escape, he does so at his own peril and is answerable for all the damage which is the natural consequence of its escape".*

### **M.C.Metha v. Union of India (1987) 1 SCC 395**

The Supreme Court of India has declared the 'Rule of Absolute Liability'. The rule of absolute liability propounded by the Supreme Court is an extention of Rule in Rylands v. Fletcher.

The facts of the case were like this:

On 4<sup>th</sup> and 6<sup>th</sup> December, 1985 some leakage of oleum gas occurred from Shriram Foods and Fertilisers Industries in the city of Delhi. As a consequence of this leakage, one advocate practicing in the Tis Hazari Court had died and several others were affected by the same. The action

for compensation was brought through a writ petition under Article 32 of the Constitution by way of Public Interest Litigation.

It was in the mind of the court that just a Year earlier there was a disaster in Bhopal when MIC gas had leaked from one of the plants belonging to Union Carbide, resulting in the death of atleast 2500 persons and creating various kinds of ailments to lakhs of others. The court found that victims of the leakage of dangerous substances like that could not be provided relief by applying the rule of strict liability laid down in *Rylands v. Fletcher*. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. For instance, when the escape of gas was due to the act of a stranger or Act of God, the defendant was not liable under the rule.

In this background the Supreme Court held that it was not bound by the rule of English law formulated in a different context in 19<sup>th</sup> Century, and evolved a new rule, the rule of 'Absolute Liability'.

According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons it owes an absolute and non-delegatable duty to ensure that no harm results to anyone due to such activity. The enterprise must be absolutely liable to compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the rule of Absolute Liability is not subject to any of the exceptions to the rule in *Rylands v. Fletcher*.

#### Obiter-dictum

The expression 'obiter dictum' literally means "a mere say by the way" or " a remark by the way".

Obiter dicta are legal principles discussed in the judgment but not applied to the case. In the course of a judgment, the judge may declare

certain principles to be applied in a hypothetical situation. An *obiter dictum* is a legal principle enunciated by the judge but not applied by him for deciding the case in hand. When comparing with *ratio decidendi*, the *obiter dictum* has only little legal authority. It shall have only a persuasive effect. Nevertheless, an obiter dictum of the Supreme Court of India will be followed by the subordinate courts in India.

In **Viswanatha Reddy v. K.R.Nadgouda** (AIR 1969 SC 604), Viswanatha Reddy was declared elected to the Mysore Assembly from Yadgiri constituency at the poll held in February, 1967. Nadgouda who was the only other candidate challenged the validity of the election on the ground that Reddy was not qualified to contest the election. The disqualification alleged was that there were Government contracts subsisting against the partnership firm of which Reddy was a partner and thereby he was disqualified under Sec.9 A of the Representation of the People Act, 1951.

The High Court rejected the petition filed by Nadgouda. On appeal the Supreme Court held that at the date of nomination, Reddy was disqualified from contesting as a candidate, and therefore, the election of Reddy was declared void. The vote cast in his favour were treated as "votes thrown away" and Nadgouda was declared elected. The court applied the English principle of "votes being thrown away". In England, when there are only two candidates and the returned candidate is found to be disqualified on the date of poll, his election will be declared void and the other candidate would be declared elected. This principle is known as votes being thrown away. In order to apply this principle a notice should be given to the public before the actual poll as to the disqualification of the returned candidate. In Viswanatha Reddy's case actually there was no public notice as to the disqualification. Nevertheless the Supreme Court declared Nadgouda as elected.

The court observed thus:

"When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified

candidate may be regarded as thrown away irrespective of whether the voters who voted for him were aware of the disqualification or not". (This principle constitute the *ratio decidendi* in the above case).

By way of *obiter*, the Supreme Court observed that when there are more than two contesting candidates, a public notice of disqualification of the returned candidate would be necessary to declare the candidate who secured next highest vote as returned (elected).

24. *Ut res magis valeat quam pereat*

The maxim *ut res magis valeat quam pereat* means that 'the thing may have effect rather than be destroyed'. There is a presumption that a word or words used in a statute is not unnecessary or without any purpose to serve. In the field of interpretation of statutes, one of the basic rules is that the courts should not consider any word or provision in the statute as redundant or superfluous or unnecessary. It could not be assumed that the legislature had used any word without any purpose. The legislature is deemed not to waste its words or to say anything in vain. In the interpretation of statutes, the courts should always presume that the legislature inserted every part of the statute for a purpose and the legislative intention is that every part of the statute should have an effect.

In **Sankar Ram&Co. v. Kasi Naleker**, (2003) 11 SCC 699, the Supreme Court observed that it is a cardinal rule of construction that normally no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute. In the field of interpretation of statutes, the courts always presume that the legislature inserted every part thereof with a purpose and the legislative intention is that every part of the statute should have effect. It may not be correct to say that a word or words used in a statute are either unnecessary or without any purpose to serve, unless there are compelling reasons to say so looking to the scheme of the statute and having regard to the object and purpose sought to be achieved by it.

## ✓ 25. *Expressio Unis Est Exclusio Alterius*

The maxim means express words in the statute shut the door to further implication. If the legislature has expressly mentioned one thing, we cannot consider that those items excluded are there. If the legislature expressly mentions one or more things of a particular class, then it may be regarded that the legislature has purposefully excluded all other members of that class.

### Illustration

A statute empowers a Magistrate to issue summons or warrant for the purpose of compelling a person to attend before the court. In such a case the Magistrate cannot attach the properties of the person whose attendance is required for the purpose of compelling him to attend before the court.

### **Taylor v. Taylor (1975 I Ch. D. 426 )**

The court observed that when a statutory power is conferred on a court for the first time, and the mode of exercising it is pointed out, then no other mode is to be adopted.

This maxim is an auxiliary rule of construction. It is neither a universal nor a conclusive rule. This rule is to be applied with caution.

According to Hopes.C.J, "this rule is often a valuable servant but a dangerous master to follow in the construction of statutes. The exclusion of things is often the result of inadvertence or accident and the maxim ought not to be applied when its application leads to inconsistency or injustice.

## 26. *Salus Populi Est Suprema Lex*

In England, the Crown enjoys special privilege of withholding disclosure of documents in court proceedings. It can refuse to disclose any evidence or to answer any question if in its opinion such disclosure

of answer would be injurious to the public interest. This principle is based on the well known maxim *salus populi est suprema lex*. The maxim means 'the good of the people is the supreme law'.

In India, the Government privilege to withhold documents from the Courts is recognised by section 123 of the Indian Evidence Act, 1872. By section 123 no one shall be permitted to give any evidence derived from un-published official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

The general rule is that both the parties to the dispute must produce all the relevant documents in their possession. If any party fails to produce such evidence, an adverse inference can be drawn against him under section 114 of the Evidence Act. Section 123 gives a great advantage to the Government and it can withhold relevant evidence from the Court in public interest and no adverse inference can be drawn against it if the claim of privilege is upheld by the Court.

**In State of Punjab v. Sodhi Sukhdev Singh** (AIR 1961 SC 493), the respondent who was a District and Sessions Judge was removed from service by the President of India. He made a representation against his removal. In pursuance of the representation, the Council of Ministers secured the advice of the Public Service Commission and thereafter decided to re-employ him. He then filed a suit for declaration that his removal was illegal and void. He wanted production of certain documents. The State claimed privilege in respect of them. The Supreme Court by majority held that the documents in question were protected under section 123 of the Evidence Act and could be withheld from production on the ground of public interest.

It is to be noted that the Courts have, in the interest of justice, power to decide the validity of claim of privilege raised by the Government. If the court disallows the claim, the Government has to produce the documents before the Court.

27. I. *In jure non remota causa sed proxima spectatur*  
II. *Causa Proxima , non remota spectata*

When a tort (civil wrong) is committed, the question of defendant's liability arises. The consequences of a wrongful act may be endless or there may be consequences of consequences. For example, a motor cyclist negligently hit a child and the child succumbed to his injuries. On hearing of this news the father of the child died of heart attack and the mother of the child, who was pregnant, suffered nervous shock and became chill. She gave birth to a still born child after two months. The question is - can the motor cyclist be liable for all these consequences?

In the above illustration, he is only liable for those consequences which are not too remote from his conduct. A defendant cannot be made liable for all the consequences which followed his wrongful act. A person is liable for those consequences which are not too remote from his wrongful act. This principle is contained in the well-known maxim, *In jure non remota causa sed proxima spectatur*. The maxim means that 'in law, the immediate and not the remote cause of any event is regarded'. The very same principle is contained in another maxim *causa proxima, non remota spectatur*. It means 'the immediate cause and not the remote is looked at'.

There are two main tests to determine whether the damage is remote or not. They are the test of directness and test of reasonable foresight.

#### 1. Test of Directness

According to the test of directness a person is liable for all the direct consequences of his wrongful act, whether he could have foreseen them or not; because consequences which directly follow a wrongful act are not too remote.

#### 2. Test of Reasonable Foresight

According to the test of reasonable foresight if the consequences

of a wrongful act can be foreseen by a reasonable man they are not too remote. If those consequences could not be foreseen by a reasonable man they are considered to be remote. Thus if I commit a wrong, I will be liable only for those consequences which I could foresee. I am not liable for those consequences which could not have been foreseen.

#### **Smith v. London and South Western Railway Co. (1870)**

The railway company was negligent in allowing a heap of trimmings of hedges and grass near a railway line during dry weather. Spark from the railway engine set fire to the material. Due to the high wind the fire was carried to the plaintiff's cottage which was burnt. The defendants were held liable even though they could not have foreseen the loss to the cottage. The court applied the test of directness.

#### **Re Polemis and Furness, Whity & Co. (1921)**

In this case the defendants chartered a ship. The cargo to be carried by them included a quantity of Benzine and Petrol in tins. Due to leakage in those tins some of their contents collected in the hold of the ship. Owing to the negligence of the defendant's servants a plank fell into the hold. It resulted in a spark and consequently the ship was totally destroyed by fire. The owners of the ship were held entitled to recover the loss nearly 2,00,000 pounds being the direct consequence of the wrongful act although such a loss could not have been reasonably foreseen. In this case also the test of directness was applied to fix liability upon the defendant.

#### **The Wagon Mound Case ( Overseas Tankship (U.K) Ltd. v. Morts Dock and Engg. Co. Ltd. (1961)**

In this case the test of directness was held to be incorrect and was rejected by the Judicial committee of the Privy Council. It was further held that the test of reasonable foresight is the better test to determine whether the damage is remote or not.

The facts of the case were like this:

The Wagon Mound, an oil burning vessel, was chartered by the

defendants, Overseas Tank ship Ltd., and was taking fuel oil at Sydney port. At a distance of about 600 feet, the plaintiff, Morts Dock Company, owned a wharf, where the repairs of a ship including some welding operations were going on. Due to the negligence of defendant's servants a large quantity of oil was spilt on the water. The oil which was spread over the water was carried to the plaintiff's wharf. About 60 hours thereafter molten metal (metal made liquid by heating at a very high temperature) from the plaintiff's wharf fell on floating cotton waste, which ignited the fuel oil on the water and the fire caused great damage to the wharf and equipment. It was also found that the defendant could not foresee that the oil so spilt would catch fire.

The trial court applied the rule of directness and held the defendant liable. The Supreme Court of the New South Wales also followed the *Polemis rule* and held that the defendant was liable for the fire.

On appeal the Privy Council held that *Re Polemis* was no more good law and reversed the decision of the Supreme Court.

## 28. Novus Actus Interveniens

In law of torts, the defendant will be liable to the plaintiff for his wrongful acts. If the consequence of the wrongfule act is too remote, the defendant will not be liable for the damage suffered by the plaintiff. A consequence will be considered too remote if the chain of causation between the defendant's act and the plaintiff's damage is broken by the intervention of a new act. This principle is contained in the maxim *novus actus interveniens*. The maxim means 'a new intervening act'. If the damage suffered by the plaintiff is not the direct result of the wrongfule act of the defendant, but due to the wrongfule act of a third person or the plaintiff himself, the defendant can escape liability by pleading *novus actus interveniene* as a defence.

Example : 'X' a private bus owner negligently allowed the carriage to be overcrowded. 'Y' was one of the passengers in the bus, and somebody

has picked his pocket, making use of the hustle in the bus. 'Y' cannot claim compensation for the loss of his purse from the bus owner, 'X'. The loss or damage sustained by Y can only be considered as a remote consequence of the wrongful act of X (allowing the carriage to be overcrowded) because the chain of causation was broken by the intervening act of wilful wrong committed by a third person.

## 29. Necessitas non habet legem

The maxim *necessitas non habet legem* means 'necessity knows no law'. If a man is compelled to do an act out of sheer necessity, he (defendant) will not be liable for the injurious consequences of it to another( plaintiff) , even if the said act has caused considerable damage to the latter (plaintiff).

In civil as well as criminal cases "necessity" can be pleaded as a defence.

### Examples

1. A boat fully loaded with rice bag was caught in a storm in a wide lake far away from the shore. The captain threw the heavy rice bags into the depths of the waters of the lake to lighten the load of the boat and save it and men in it. The act of the captain is justifiable as he has done the act out of sheer necessity.
2. A house was on fire. 'X' entered the house and removed the goods from the house, to save them from fire. X is not liable for the tort of trespass.

Section 81 of the Indian Penal Code, 1860 deals with the defence of compulsion by necessity. Section 81 permits the infliction of lesser evil in order to prevent greater evil.

By virtue of s.81 of the Code, a harmful act is not an offence if it was done under the following circumstance.

- (1) The act should have been done in good faith.
- (2) The harmful act must be done for the purpose of preventing or avoiding other harm to person or property.
- (3) The person who has done the harmful act should not have criminal intention to cause harm.

If all the above conditions are satisfied, the person who has done the harmful act is not liable for his harmful act even though he had done it with knowledge that his act would result in harm.

### Illustrations

- (1) The Captain of a ship finds himself in a peculiar situation. He is about to strike down a boat with 20 passengers. If he takes a sudden turn to otherside in order to save 20 passengers the ship will strike down a boat with two passengers. Here if he takes a turn in good faith to avoid danger to the 20 passengers in the first boat and causes death of 2 persons, he is not guilty of any offence.
- (2) A, in great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. A is not liable for any offence.
- (3) A prisoner escaped from a jail to avoid being burnt to death by fire caused by bombing. He is not guilty of escaping from lawful custody. He does not act with any criminal intention. He acted in good faith to prevent the loss of his life.

### **R. v. Dudly and Stephens (L.R. 14 Q.B.D 273)**

D, S and a boy were on board a boat. The boat was cast away on the high seas about 100 miles from the seashore. On 20th day when they had no food for eight days and no water for 5 days, D and S killed the boy and ate the flesh of the boy for four days. On the 4th day they were picked up by a passing vessel. They were tried for the murder of the boy.

They took the defence of necessity. The court held that the accused were liable for murder and observed that preserving one's life is not an absolute necessity justifying the killing of another human being. Nevertheless in this case a minor punishment was given.

The defence of necessity will fail under the following circumstances:  
(i) if offence committed is greater than the harm avoided, or (ii) if the harm could be avoided by other methods.

### 30. Rebus sic standibus

An independant State like India or England may enter into agreement with another State. The agreement between the States is known as 'treaty'. As a general rule of Public International Law, a State which entered into a treaty with another State is bound to act in good faith in terms of the treaty. However, a State can avoid performance of its treaty obligation when there is a change in the fundamental or material circumstances under which the treaty was concluded by taking shelter under the maxim *rebus sic standibus*. The maxim means that "when the fundamental or material circumstances under which a treaty is concluded are changed, then the change becomes a basis of avoidance or termination of treaty". *Rebus Sic Standibus* is based on the assumption that there is an implied clause in every treaty that the agreement is binding only so long as the material circumstances on which it rests remain unchanged.

### 31. Doctrine of 'Ultra Vires'

*Ultra vires* means 'beyond the powers of'. India is a democratic country. India has a written constitution known as the Constitution of India. As per the Constitution various authorities are established to govern the country. The Parliament and State Legislatures are established to enact laws. The Constitution clearly demarcates the law making power of the Parliament and State Legislatures. The VII<sup>th</sup> Schedule to the

Constitution classifies the subjects for law making into three:

- List I (Union list) - contains subjects on which the Parliament can enact laws.
- List II (State list) - contains subjects on which the State legislatures can enact laws.
- List III (Concurrent list) - contains subjects on which both the Parliament and State Legislatures can enact laws.

Sometimes, the State legislature may enact a law on a subject included in the Union list or Parliament may enact a law on a subject in the State list. If State legislature enacts a law on a subject in the Union list, the Supreme Court or High Court can declare that law as *ultra vires* (beyond the powers of) the Constitution. If the Parliament enacts a law in the State list, then also the court can declare that law as *ultra vires* the Constitution.

## Topic - XXIV

# Definitions and Meanings of Some Legal Terms

### 1 Contract

The word "contract" has been derived from the Latin term *contractum* which means "drawn together."

**Section 2 (h) of the Indian Contract Act, 1872 defines the term 'contract' in the following words:**

**"A contract is an agreement enforceable by law".**

**Pollock** defines the term Contract as follows:

**"Every agreement and promise enforceable at law is a contract".**

In Halsbury's Laws of England the following definition is given.

**"A contract is an agreement made between two or more persons which is intended to be enforceable at law, and is constituted by the acceptance by one party of an offer made to him by the other party to do or to abstain from doing some act."**

The analysis of the above stated definitions bring to light the following points.

- (1) A contract is an agreement made between two or more persons.
- (2) The agreement should be one enforceable through court of law.

Thus there are two elements in a contract. They are:

(1) an agreement, and

(2) enforceability by law.

Thus a Contract = An Agreement + Enforceability by law.

## **2      Void Agreement**

An agreement not enforceable through court of law is called void agreement. A minor's agreement is a void agreement. It is *ab initio* void.

## **3      Consensus ad idem**

*Consensus ad idem* means identity of minds. The parties to a contract must have agreed about the subject matter of the contract in the same sense, at the same time. Unless there is *consensus ad idem* (identity of minds), there is no enforceable contract. Thus an agreement where there is no *consensus ad idem*, is void and unenforceable.

### **Example**

'A' has two cars, one is Ambassador and the other is Fiat. A offered to 'B' a car for sale. B accepted the offer believing that the car which 'A' offered is Fiat. But A actually offered the Ambassador Car. There is no *consensus ad idem* and consequently no enforceable contract.

## **4      Consideration**

An agreement to be enforceable by law, it must be supported by lawful consideration. Consideration means 'something in return'. The agreement is legally enforceable only when both the parties give something and get something in return. The consideration need not necessarily be in cash or in kind. It may be a service or a return promise. But it must be real and lawful.

## **5      Contract of Indemnity**

A contract is an agreement enforceable at law. A contract of indemnity is a species of contracts.

A contract of indemnity is a contract by which one person promises to the other that he will compensate any loss resulting to the promisee by the act or omission of the promisor himself or of any other person.

The object of a contract of indemnity is to protect the promisee

against the anticipated loss.

The person who undertakes to indemnify or make good the loss is known as the *indemnifier* or promisor and the person whose loss is to be made good is called the *indemnified* or promisee.

#### Examples

- (a) 'X' sent some goods through a carrier from one place to another. The original receipt was lost and X promised that any loss arising to the carrier from the delivery of goods to him will be compensated by him. It is a contract of indemnity.
- (b) 'X' and 'Y' entered into a shop and Y said to the owner of the shop "you supply the goods required by 'X', I will see that you are paid". It is a contract of indemnity.

#### 6. Contract of Guarantee

A "Contract of Guarantee" as "a contract to perform the promise, or discharge the liability, of a third person in case of his default".

The person who gives the guarantee is known as the '**Surety**' or '**Guarantor**'. The person in respect of whose default the guarantee is given is known as the '**Principal Debtor**' and the person to whom the guarantee is given is known as the '**Creditor**'.

#### Examples

- (1) 'X' and 'Y' enter a shop, Y says to the trader, "supply the goods required to X, if he does not pay, I will". It is a contract of guarantee, the primary liability is with X, and the secondary liability is with Y.
- (2) 'X' requests 'Y' to lend Rs. 1000/- to 'Z' and guarantees that Z will repay the amount within a specified time and on Z's failing to pay he will himself pay to Y. It is a contract of guarantee.

A contract of guarantee may be express or implied. It may be either oral or written. But in England a guarantee must be in writing and signed by the guarantor.

## 7. Contract of Bailment

The term 'bailment' originated from a French word 'bailier' which means 'to deliver'. It means a delivery of goods on condition to re-deliver them when the condition is satisfied.

"A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them".

The person who delivers the goods is called the 'bailor' and the person to whom they are delivered is called the 'bailee'.

### Examples

- 1) X lends a book to Y to be returned after the examination. It is a contract of bailment between X and Y.
- 2) X deposited goods in a cloak room at a railway station. It is a contract of bailment. The railway is liable to keep the goods and return it when X makes a demand for it.

## 8. Pawn or Pledge

Pledge is "the bailment of goods as security for the payment of a debt or the performance of a promise".

The bailor is called 'pawnor' or 'pledger' and the bailee is called the 'pawnee' or 'pledgee'.

Pledge is a special kind of bailment for a specific purpose i.e., by way of security. As pledge is a species of bailment, delivery is the es-

sence in this case and this distinguishes a pledge from a mortgage.

#### 9. Contract of Agency

Contract of agency is a contract whereby one person (agent) is engaged or employed to do an act for and on behalf of another (principal) or to bring that another person (principal) into legal relationship with a third person.

The person engaging or employing another to do an act for him is called the '**Principal**'. The person so employed or engaged to do an act for another is called '**Agent**'.

An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such an act is done, or who is represented is called the "**Principal**"

#### 10. Contract of Sale, Sale and Agreement to Sell

A "**contract of sale of goods**" is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one co-owner and another. A contract of sale may be absolute or conditional.

The word "**seller**" means a person who **sells** or **agrees to sell** goods. The word "**buyer**" means a person who buys or agrees to buy goods. The word "**price**" means the money consideration for a sale of goods. The word "**goods**" means every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The expression "**property in goods**" means the general property in goods and not merely a special property. Thus "**property in goods**" refers to the ownership in the goods.

The definition of Contract of Sale contains (i) '**Sale**' as well as (ii)

### **'Agreement for sale'.**

If under a contract of sale the property in the goods is transferred from seller to the buyer, the contract is called a '**sale**'.

In other words if the property in the goods (i.e., legal ownership of the goods) is immediately transferred to the buyer, the contract of sale is called a sale. Thus the sale has the immediate effect of transferring the ownership of the goods.

If under a contract of sale the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an '**agreement to sell**'. In other words, if the property in the goods is to be transferred to the buyer at some future date or on the fulfillment of a certain condition, the contract of sale is called an agreement to sell. Thus, in agreement to sell, ownership of goods is not immediately transferred from a seller to a buyer. The ownership in the goods will be transferred only on, a future date.

An '**agreement to sell**' becomes a '**sale**' when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

### **11 Partnership**

**Partnership** is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. **Sir Frederic Pollock** defines "**Partnership**" as "the relation which subsists between persons who have agreed to share the profits of a business carried on by all, or any of them on behalf of all of them."

#### **Essential ingredients of Partnership**

##### **1)      Partnership is an association of two or more Persons**

In a Partnership there should be minimum two persons. As regards the maximum number of partners in a firm, section 11 of the Com-

panies Act 1956, provides that the number of partners in a firm carrying on banking business should not exceed ten and in any other business twenty. If the number exceeds this limit, the partnership becomes an illegal association. It ceases to be partnership if the number of partners get reduced to one by any reason.

## 2) Agreement

The Partnership relation is one of a contractual nature. It springs from an agreement. The agreement may be express (i.e., oral or written) or implied. Implied agreement may be inferred from the course of conduct of the parties. The agreement may be for a fixed period or for the execution of a particular adventure, or it may give option to the partners to withdraw from the partnership at any time. Partnership is thus created by contract. It does not arise by operation of law or from status.

## 3) Business

A partnership can be formed only for the purpose of carrying on of business. Business includes every trade, occupation and profession. The business to be carried on by the firm must be legal.

## 4) Sharing of Profits

The object of partnership must be to make profit. Profit must be distributed among the partners in an agreed ratio. A person may share in the profits of partnership, but still he may not be a partner. The sharing of profit also involves sharing of loss which in fact is negative profit.

## 5) Mutual Agency

The business of partnership may be carried on by all the partners or any of them acting for all. A partner is both an agent (in the sense that he can bind by his acts to the other partners) and the principal (in the sense that he can be bound by the acts of the other partners). The question whether a person is or is not a partner depends upon whether he has the authority to act for those who are admittedly partners and whether those admittedly partners have the authority to act for him.

## **12. Immovable Property**

The Transfer of Property Act , 1882 mainly deals with transfer (sale, mortgage, lease, gift, and exchange) of immovable property by living persons. The Act also deals with gift of movable property..

According to Section 3 para 2 of the Act, "*immovable property does not include standing timber, growing crops or grass*". This section does not give a clear meaning of the term immovable property.

The General Clauses Act, 1897 defines the term immovable property as follows:

*" Immovable property includes land, benefits to arise out of land and things attached to the earth"*

The Transfer of Property Act defines the expression "**Attached to the Earth**". The expression attached to the earth means-

1. Rooted to the earth as in the case of trees and shrubs
2. Embedded in the earth as in the case of walls or buildings
3. Attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

One who considers the definitions of the word "**immovable property**" contained in the Transfer of Property Act, 1882 and the General Clauses Act and the definition of the expression "**attached to the earth**" in the Transfer of Property Act will come to the following conclusion.

1. Land is immovable property
2. Benefits to arise out of land are immovable properties
3. Trees and shrubs which are rooted in the earth are immovable properties.
4. Buildings or walls which are embedded in the earth are immovable properties

5. Things or chattels which are attached to the building or walls for the permanent beneficial enjoyment of the building or walls are immovable properties. Example: Doors, windows etc.

6 Standing timbers or growing crops or grass are not immovable properties.

#### 13. Mortgage, Mortgagor and Mortgagee

A mortgage is transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advance by way of loan. A mortgage is a security for a debt. It may be created for securing an existing or future debt.

The person who borrowed money and transferred his interest in the property to secure the payment of money advanced by way of loan is called **mortgagor**. The person in whose favour the interest is transferred is called **mortgagee**. He is the person who has lent money to the mortgagor. The principal money and interest of which payment is secured are called the **mortgage money**. The instrument by which the interest in the specific immovable property is transferred is called **mortgage deed**.

#### 14 Lease

A lease of immovable property is a transfer of right to enjoy property for a specified period. The period may be express or implied. The transfer is made for consideration. The consideration may be paid or promised to pay. The consideration may be money, share of crops or any other valuable things. The consideration may be made periodically or on specified occasions.

The consideration which is paid is known as premium or rent. The transferor is called 'lessor' and the transferee is called 'lessee'.

## **15    Gift**

The following are the essentials of gift.

1. Gift is the transfer of certain existing movable or immovable property by one person called donor to another person called donee.
2. The transfer should be made voluntarily and without consideration.
3. The transfer must be accepted by the donee or any other person on behalf of the donee.
4. The acceptance must be made during the life-time of the donor and while he is still capable of giving.
5. If the donee dies before acceptance, the gift is void.
6. The donor should be competent to contract. He should have attained the age of majority and is of sound mind.
7. A minor is incompetent to contract and a gift made by minor is void.
8. The donee may be a minor.

## **16    Company**

The word Company is used to denote an association of persons who have associated together to conduct or to carry on a business for gain. The persons associating together will contribute some money for the conduct of the business and the total amount is known as Share Capital of the Company. This share capital will be used by the Company to carry on its business. The profit deriving from the conduct of business will be divided among the members who have contributed money towards the share capital of the Company. The association of persons will be known by a separate name. The association will be registered under the Companies Act and thereafter it will be a legal person having an artificial personality.

A Company is a Corporation aggregate. It will be known by a separate name. It will be having perpetual succession. It is a legal person living only in the eyes of law. It can acquire properties in its own name. It can contract debts. The liability of the Company will be of its own.

The member's liability will be only to the extent of the value of the shares they hold in the Company. The Company will have a common seal. It is the signature of the Company.

### 17 Memorandum of Association ( Conventional Law)

In order to register a company one of the documents to be filed with the Registrar of companies is Memorandum of Association. The Memorandum of Association is the Charter of the company. It is the dominant instrument and it defines the limits of the company's powers and objects. Any act of the company beyond the limits of its powers and objects as defined in the Memorandum of Association will be *ultra vires* and void. The Memorandum of Association of a company is the constitution of the company. It defines the relation of the company with outside world and the scope of its activities.

The Memorandum of Association of a Company shall be printed, divided into paragraphs numbered consecutively and signed by seven subscribers in the case of a public company. If it is a private company, at least two subscribers must sign the Memorandum.

#### Contents of Memorandum

The Memorandum of Association of a Company shall contain the following clauses.

##### 1) Name Clause

The first Clause of a Memorandum shall state the name of the proposed company.

The Memorandum shall state the name of the Company with Ltd. as the last word of the name in case of a Public Limited Company and Pvt. Ltd. in the case of a Private Limited Company. Once the name is registered, the name and address of the registered office must be painted or affixed on the outside of every office or place of business of the company. The name of the company must also be engraved on the seal of the Company.

## **2) Office Clause**

The Memorandum of Association must mention the State in which the registered office of the company is to be situated. The situation of the registered office of the company determines its domicile and nationality.

## **3) Object of Clause**

The Memorandum of Association of every Company shall clearly state the objects of the Company. The object clause shall state:-

- 1) The main objects of the company
- 2) Objects incidental or ancillary to the attainment of main objects.
- 3) Other objects of the Company.

## **4) Liability Clause**

The Memorandum must contain a statement as to the liability of members of the company. The liability of members may be limited by shares or by guarantee. The Memorandum may provide that the liability of directors is unlimited.

If the member's liability is limited by shares, they are liable only to pay the face value of the shares held by them.

## **5) Capital Clause**

The Memorandum shall contain the amount of Share Capital with which the company is proposed to be registered and the division of it into shares of a fixed amount. The capital with which the company is registered is called Registered Capital or Authorised Capital or Nominal Capital.

## **6) Association and Subscription Clause**

In the Association and subscription clause of a public company, there should be at least seven subscribers and they should have signed and it should be attested by witnesses. In the Case of a Private company, at least two persons should subscribe and put their signatures. The

names and addresses of the subscribers should be mentioned in this clause. The Subscribers should have given an undertaking to take shares from the company. The number of shares each subscriber has undertaken to take should be mentioned in this clause.

#### **18 Articles of Association ( Conventional Law)**

Articles of Association is another document which is to be produced along with the Memorandum for the registration of a Company. The Articles of Association contain rules and regulations relating to the internal management of the Company.

All the companies need not have Articles of Association of their own. Unlimited Companies, Companies Limited by Guarantee and Private Companies Limited by Shares must have Articles of Association. A public company Limited by Shares need not file its own articles. If a Public Company Limited by Shares does not register its own Articles, the Articles contained in Table A of Schedule -I shall automatically apply to it.

The Articles of Association should be printed and divided into paragraphs and consecutively numbered. It must be signed by the subscribers to the Memorandum and the signatures are to be attested by the witnesses.

#### **19 By- law of Co-operative Society ( Conventional Law)**

Rules adopted by an association or corporation or a co-operative society for its internal management is known as bye-law. In Kerala, a co-operative society can be registered under the Kerala Co-operative Societies Act, 1969. In order to register a Co-operative Society, an application for registration of the society shall be made to the Registrar of Co-operative Societies. An application for registration shall be accompanied by three copies of the By-law of the society. By-law of the society shall contain the following:

- (a) Name and address of the society.

- (b) The area of operation
- (c) The manner in which and the limit upto which the funds of the society may be raised.
- (d) The terms and qualifications for admission to membership.
- (e) The privilages, rights, duties and liabilities of members.
- (f) The nature and extent of the liability of the members for the debts contracted by the society
- (g) The circumstances under which withdrawal from membership will be permitted
- (h) The manner in which penalty shall be levied on members found to be guilty of breach of by-law
- (i) The consequences of default in payment of any sum due by a member
- (j) The procedure for expulsion of members
- (k) The manner of making, amending or repealing bye-law
- (l) The disposal of Net Profit
- (m) The mode of conveying annual and special general body meetings
- (n) The conduct of elections to the committee and other bodies of the society
- (o) Procedure to be followed in case of death of members
- (p) The transfer of share of a member.

## 20 Tort

The word 'Tort' has been derived from the Latin term *tortum* which means to twist. Etymologically, the word 'tort' signifies a crooked act or a wrongful act. The word 'tort' implies a conduct which is not lawful or straight but twisted, crooked or unlawful. It means a legal wrong or an unlawful act.

The essential features of a tort are the following:

- (i) A tort is a civil wrong
- (ii) The tortious liability arises from breach of a duty.
- (iii) The duty should be one imposed by the law..
- (iv) The duty must be towards persons generally. .

- (iv) The tortious liability would not arise from breach of a contract, breach of a trust or breach of an equitable obligation.
- (iv) The remedy for the person aggrieved by a tort is that of unliquidated damages i.e., the court will assess the amount of compensation.

A tort is a civil wrong and the injured party can institute a civil proceeding (suit) against the wrongdoer and claim unliquidated damages. The Court will assess the amount of compensation.

## 21 Crime or Offence

A crime is an act or omission which the law punishes. A crime is considered to be a public wrong, i.e., a wrong against public at large or wrong against the State. When a person commits a crime the State prosecutes him.

A crime is an offence (i.e., an act or omission) punishable at law. A punishment in any form is inflicted in a crime. There are different kinds of punishment ranging from death to warning. If a law awards punishment for a wrong it is known as criminal or penal law.

An offence means any act or omission made punishable by any law for the time being in force .

## 22 Bailable and Non-bailable Offences

Section 2 (a) of the Code of Criminal Procedure ,1973 defines the expressions "bailable offence" and "non-bailable offence". "**Bailable offence**" means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force; and "**"non-bailable offence"** means any other offence.

The Code of Criminal Procedure, 1973 classifies offences into two category - Bailable and Non-bailable. The First Schedule of the Code of Criminal Procedure classifies offences under the Indian Penal Code, 1860 and other penal laws into bailable and non-bailable.

The offences under the Indian Penal Code are specifically classified into Bailable and Non-Bailable in 5th column of the First Schedule to the Code of Criminal Procedure.

In the case of offences under any other penal law, an offence is non-bailable if the punishment for the offence is imprisonment of three years or more. If the punishment for the offence is imprisonment for a period less than three years, the offence is bailable.

Bailable Offences are less serious offences. In the case of Bailable Offence, bail can be claimed as of right and is granted as a matter of course. In the case of Bailable Offences the Police Officer or the Court can grant bail. Section 436 of the Code deals with granting of bail in the case of bailable offence.

Non - bailable offences are serious offences. Section 437 of the Code deals with granting of bail in the case of non - bailable offences.

In the case of non - bailable offences the granting of bail is at the discretion of the officer- in -charge of a Police Station or Court. Section 437 (1) of the Code gives a discretionary power to release an accused on bail even if he has committed non-bailable offence. However if the accused has committed an offence and the punishment prescribed for such offence is death or imprisonment for life, the Session Court or High Court only can grant bail. Even though the offence charged against the accused is punishable with death or imprisonment for life, the Magistrate can release an accused on bail if he or she is under the age of 16 years or a woman or a sick or infirm.

## **23 Cognizable Offence and Non - Cognizable Offence**

### **Cognizable Case and Non - Cognizable Case**

Section 2 (c) of the Code of Criminal Procedure defines the expressions "Cognizable Offence" and "Cognizable Case".

**Cognizable Offence** means an offence for which a Police Officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without a warrant.

**Cognizable Case** means a case in which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

Section 2 (1) of the Code of Criminal Procedure, 1973 defines the expression "Non - Cognizable Offence" and "Non - Cognizable Case".

A non-cognizable offence means an offence for which a Police Officer has no authority to arrest without warrant. A non-cognizable case means a case in which a police officer has no authority to arrest without warrant.

The First Schedule to the Code classifies offences under the Indian Penal Code and other Penal Laws into cognizable and non - cognizable offences. The offences under the Indian Penal Code are specifically classified into Cognizable and Non - cognizable in 4th column of the First Schedule. In the case of offences under any other penal law, if the offence is punishable with imprisonment for three years or more, the offence is cognizable and if the punishment is imprisonment for less than three years the offence is non - cognizable.

Cognizable Offences are generally more serious offences, which are heavily punishable. Murder, Culpable Homicide, Rape, etc., are examples of cognizable offences. When a person commits cognizable offence, the police officer can arrest him without a warrant of the court as a custodian of the welfare of the society. In the case of Cognizable Offence the Police Officer can conduct investigation without an order from the court. When an Officer - in-charge of a police station gets information as to the commission of a cognizable offence, he has to record the first information, known as **FIR ( First Information Report)**, and after registering a case, start investigation.

Non - cognizable offences are minor offences. The injury committed to the society is comparatively small. Causing Simple Hurt, Adultery etc., are examples of non - cognizable offences. When a person gives information to an officer - in - charge of a police station of the commission of a non - cognizable offence, the officer shall enter the substance of information in a book kept by such an officer in the form prescribed by the State Government. The Officer shall refer the informant to the Magistrate. A police officer shall not investigate a non - cognizable offence without an order from a competent Magistrate.

#### 24 Summons Case and Warrant Case

Section 2 (w) of the Code of Criminal Procedure ,1973 defines Summons Case. Section 2 (x) defines Warrant Case. Section 2 (w) says that "a case, which is not a warrant case, is a summons case". Section 2 (x) defines that a Warrant Case is one, which is relating to an offence punishable with imprisonment for a term exceeding two years. Thus a summons case is one, which is relating to an offence punishable with imprisonment for a period not exceeding two years.

The classification of cases into Summons Case and Warrant Case is useful in order to determine the type of trial procedure to be adopted in a case. The trial procedure for Warrant Case is much elaborate than a Summons Case.

The classification is also useful to decide whether summons or warrant is to be issued to compel the appearance of the accused before the Court. As per section 204 of the Code the Court shall issue summons against the accused for his appearance in summons cases. In Warrant Cases, the Court may issue summons or warrant at the first instance. Thus in warrant cases the court is at discretion to issue summons or warrant. But in summons cases the court has to issue summons first for compelling an accused to appear before the Court.

25 Investigation, Inquiry and Trial

There are three stages in a criminal case. The first stage is investigation. The second stage is inquiry and the third stage is trial.

Investigation

Section 2 (h) of the Code of Criminal Procedure ,1973 defines the term investigation. "Investigation includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf".

Investigation is conducted by a Police Officer or any other authorized person other than a Magistrate. The object of investigation is to collect evidence for the purpose of prosecution of a case. The proceedings are conducted by a Police Officer or any other authorized person. The Magistrate will not conduct investigation. So it is not a Judicial proceeding. The investigation of an offence consists of following activities.

1. Proceeding to the place of offence.
2. Ascertainment of facts and circumstances of the case
3. Discover and arrest of the suspected offender
4. Collection of evidence relating to the commission of offence by examination of various persons, search of places or seizure of things.
5. Formation of opinion as to whether the materials collected is to be placed before a Magistrate for trial and file a charge sheet for taking further steps by the Magistrate.

Inquiry

Section 2(g) of the Code defines the term "inquiry". "Inquiry means every inquiry, other than trial, conducted under this Code by a Magistrate or Court.

Inquiry is conducted by Magistrate or Court. It is the second stage of a criminal case. Activities conducted by Magistrate other than a trial is called inquiry.

**In Alim & Others v. State** (1982 Cr LJ 1264 (All)), the court held that all those proceedings before a Magistrate prior to the framing of a charge or an inquiry preparatory to the commitment of a case to the Session Court is inquiry by Magistrate. The object of inquiry is to determine the truth or falsity of certain facts with a view to taking further action thereon. An Inquiry into an offence never ends in conviction or acquittal. But the accused may be discharged or committed for trial at the end of inquiry. Inquiry is a judicial proceeding since a Magistrate or Court conducts it.

### Trial

The term trial is not defined in the Code of Criminal Procedure, 1973. It is the examination and determination of a cause by a Judge or Magistrate who has jurisdiction over it. In this stage the court summon the witnesses and examine them for the purpose of determining the guilt of the accused. At this stage court takes evidence adduced by both the prosecution and accused. At the end of the trial the court passes an order of acquittal or conviction.

### **26    Discharge and Acquittal**

The term 'discharge' is not synonymous with 'acquittal'. These two terms carry different meanings.

During inquiry or trial of a case if the court finds that there is no *prima facie* case or evidence against the accused the court can pass an order of discharge. An order of discharge does not establish the guilt or innocence of the accused. An order of discharge does not bar further proceedings of the very same case against the accused when fresh and better evidence is available.

An order of acquittal is passed at the end of the trial. If the evidence adduced by the prosecution are found to be not sufficient to prove the guilt of the accused, the court passes an order of acquittal. An order of acquittal establishes the innocence of the accused. It is recorded only after the judgment. An acquittal by a court of competent jurisdiction bars a re-trial for the same offence even on fresh and better evidence. Section 300 of the Code of Criminal Procedure lays down that a person once acquitted cannot be tried again for the same offence. It bars a second trial when the accused is acquitted in the first trial.

## 27 Evidence

The word 'evidence' is derived from the latin term 'evidentia' which means 'the state of being evident ie., plain, apparent or clear'. Latin expression "evidens evidere" means to show clearly, to make plain, certain or to prove.

Section 3 of the Act defines Evidence. The term evidence means and includes-

- (i) All statements which the court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry, such statements are called 'oral evidence'.
- (ii) All documents including electronic records produced for the inspection of the court; such documents are called 'documentary evidence'.

Any fact which produces in the mind of a Judge a persuasion of the existence of some other fact is called evidence.

### **Factum Probandum and Factum Probans**

In a suit or other proceedings before the court certain facts are to be proved to establish the respective claims of the parties. The facts which are to be proved is known as factum probandum ( principal fact) and the fact which tends to establish the principal fact is called factum probans (the evidentiary fact).

## **Evidence and Proof**

A fact in issue can be proved either by oral evidence or by documentary evidence. The expression 'evidence' is different from proof. The term evidence is used to denote the means by which a belief is created in the mind of the Judge. The final belief actually created in the mind of the Judge is indicated by the expression 'proof' or 'proved'. Thus proof is the end and evidence is the means to proof.

## **28 Oral Evidence and Documentary Evidence**

### **(a) Oral Evidence**

All statements made by witnesses in relation to matters of fact under inquiry are called Oral Evidence or Parol Evidence. If the question before the court is whether any explosion took place before a fire occurred, the noise of the explosion and its flash are evidence of it. Persons who saw the flash or heard the noise can give evidence of the fact of explosion. When they give evidence in the court it is Oral Evidence.

The statements may be made by any method by which the witness is capable of making it. A witness who cannot speak may communicate his knowledge of the fact to the court by signs or by writing and in either case it will be regarded as Oral Evidence.

According to section 59 of the Evidence Act all facts except the contents of documents may be proved by oral evidence.

### **Direct Evidence Rule or Rule against Hearsay Evidence**

According to section 60 of the Indian Evidence Act, oral evidence must be direct. The witness who gives oral evidence should have first hand personal knowledge of the fact.

If the witness who gives oral evidence says about something which could be seen, the witness should have actually seen it. The evidence

of an eye or ocular witness is known as "ocular evidence". If he says about a fact which could be heard, he must have actually heard it. If he says about a fact which could be perceived by any other senses, he should have perceived it by his senses. If he says of an opinion, it should be his own opinion.

Thus, section 60 excludes hearsay evidence. Hearsay evidence is the statement deposed by a person who has not himself witnessed the happening of a transaction but has only heard of it from others. If a person who has seen or witnessed an accident gives oral evidence in the court, it is direct oral evidence. If his wife who has come to know of this accident from her husband gives evidence in the court, it is hearsay evidence.

#### (b) Documentary Evidence

A fact may be proved either by oral evidence or by documentary evidence. However, by virtue of section 59 of the Act, all facts except the contents of documents or electronic records may be proved by oral evidence. The contents of documents should be proved by producing the document in the court for its inspection. All documents including electronic records produced for the inspection of the court are called documentary evidence. Thus 'documents' and 'electronic records' produced for the inspection of the court are called documentary evidence.

Documents means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means.

#### Illustrations

- i) A writing is a document.
- ii) Words printed, lithographed or photographed are documents.
- iii) A map or plan is a document.
- iv) An inscription on a metal plate or a stone is a document.
- v) A caricature is a document.

By virtue of section 3 of the Indian Evidence Act, 1872 the expression "Electronic Record" shall have the same meaning as assigned to it in the Information Technology Act, 2000. Section 2(t) of the Information Technology Act, 2000, defines the expression "Electronic Record" as follows:

"Electronic Record" means data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche".

## 29 Primary Evidence and Secondary Evidence

A fact can be proved by Oral Evidence or by Documentary Evidence. All 'documents' including 'electronic records' produced for the inspection of the court are called documentary evidence. The contents of documents is to be proved by producing the document for inspection of the court.

By virtue of section 61 of the Indian Evidence Act, the contents of documents may be proved either by Primary or Secondary Evidence. If the original document is produced for the inspection of the court , it is called Primary Evidence. If copy of the original document is produced for the inspection of the court it is known as secondary evidence. Though the contents of document can be proved by Primary Evidence or Secondary Evidence, by virtue of section 64, the documents must be proved by primary evidence except under the circumstances stated in section 65

The following are Secondary Evidence:

1. Certified Copies
2. Copies made from the original by mechanical process, which in themselves ensure the accuracy of the copy, and copies compared with such copies.
3. Copies made from, or compared with, the original.
4. Counter parts of documents as against the parties who

*did not execute them.*

5. Oral accounts of the contents of a document given by some person who has himself seen it.

Though the contents of document can be proved by Primary Evidence or Secondary Evidence, by virtue of section 64, the documents must be proved by primary evidence except under circumstances stated in section 65. By virtue of section 65, secondary evidence is admissible under the following circumstances:

- (a) Original is in the possession of adversary
- (b) Original is in the possession of a person out of reach of the Court.
- (c) Original is in possession of a person legally bound to produce it but has not produced it even after notice.
- (d) When existence, condition or contents of original have been admitted in writing.
- (e) When the original has been destroyed.
- (f) When the original is not easily movable.
- (g) When the original is a Public Document.
- (h) When a certified copy is permitted to be given in evidence.
- (i) Original consists of numerous accounts.

### 30 Direct Evidence and Circumstantial Evidence

When a witness who has actually witnessed the fact in issue gives evidence in the court, it is known as the direct evidence. If 'A', who has seen B inflicting a stab on 'C', gives evidence in court, it is direct evidence of the fact in issue. If there is no eye witness to a murder case the fact in issue can be proved by a number of facts which are so closely connected with the fact in issue. Such facts are called Circumstantial Evidence. The Circumstantial Evidence is the testimony by witnesses as to the circumstances from which an inference is to be drawn as to the fact in issue. The Court can rely on circumstantial evidence in civil and criminal cases. In a criminal case based on

circumstantial evidence, the evidence of circumstances should fully establish the guilt of the accused. The chain of evidence should be complete and it should not leave any reasonable ground for a conclusion consistent with the innocence of the accused. It must show that in all probability the crime must have been committed by the accused.

### illustration

A is charged with murder of C about 10 p.m. on 21-3-2014. There is no eye witness to the fact in issue. The guilt of A can be established by the following facts:

- (1) The accused had a quarrel with the deceased in the evening of 21-3-2014
- (ii) The accused openly declared that he would revenge the deceased.
- (iii) The accused had purchased a knife at about 7 p. m. on that day.
- (iv) The knife which was found on the dead body of B was very much similar to that which was purchased by the accused.
- (v) The accused was found running wearing blood stained shirt at about 10:10 p.m.
- (vi) The marks of shoes similar to that of the accused were found near the scene of occurrence.
- (vii) He absented himself from his house after the event.

The above stated chain of facts form conclusive proof against accused and are admissible to prove his guilt. These facts constitute circumstantial evidence. Witnesses to these facts can give evidence in the court and establish the guilt of the accused.

### **31 Substantive Evidence**

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### **Non-substantive Evidence (Corroborative Evidence)**

Substantive evidence is that evidence which may be relied for the proof or disproof of the fact in issue and on which a finding may be based. Non - substantive evidence cannot be the basis for the proof of

disproof of the fact in issue. It can only be used to contradict a substantive evidence under section 145 and 155 of the Evidence Act or it may be used to corroborate a substantive evidence under section 157 of the Evidence Act. If it is used to corroborate a substantive evidence, it is known as "corroborative evidence".

### 32. Examination - In - Chief

The testimony (statement) of a witness is recorded in the form of answers to questions put to him. The questioning of the witness in the court is called his examination.

A witness is first examined by the party or his counsel who has called him as a witness and this is known as examination - in - chief. The purpose of an examination - in - chief is to enable the witness to tell to the court by his own words the relevant facts of the case. The questions should be put to him about the relevant facts and then he should be given the fullest freedom to answer the questions.

The object of examination - in - chief is to elicit all the material facts within the knowledge of the witness in order to prove the case of the party called him as a witness. The counsel has to put questions on any matter relevant to establish the case of the party called him as a witness. Those facts which are relevant to prove the case of the party who called the witness should be brought to light during examination - in - chief. The questions should be moulded in such a manner that the answer to such questions should be capable to prove the case of the party who called the witness and it should not be favourable to the opposite party.

### 33 Cross Examination

After the examination - in - chief, the adverse party examines the witness. The examination of a witness by the adverse party is called his cross - examination. In the examination - in - chief. If the witness has not supported the case of the party who called him as a

witness there is no necessity to conduct cross - examination. However if the cross examination of such a witness would be useful to prove the case of the party conducting cross - examination, the witness is to be cross examined.

Cross - examination is the greatest engine ever invented for discovery of truth. The success or failure of a party very much depend upon the skilful manner in which cross examination is conducted on his behalf.

Cross - examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his testimony in chief examination. If we compare the evidence in chief to a quite strong rope, cross examination may be compared to the testing of the rope inch by inch and strand by strand. Thus testing the evidence is the key stone of cross examination.

### 34 Re - examination

The examination of a witness, subsequent to the cross examination, by the party who called him shall be called his re - examination. When there is any doubt in the answer given by the witness in the cross examination, re - examination is conducted to get a clarification.

The re - examination of a witness must be confined to the explanation of matters referred to in cross - examination. It is not possible to introduce new matter in the re - examination without permission of the court. If a material question is omitted in the examination - in - chief, it cannot be asked as of right in re - examination. However the court has the discretion to allow such question. If a new question is allowed, the opposite party will be allowed to cross - examine the witness on the new matter. It then becomes a re- cross - examination.

## First Information Report (FIR)

When an offence is committed by a person, the aggrieved person would normally go to the police station and inform the police with regard to the crime, with the object of setting the criminal law in motion. Normally the person aggrieved would give information to the Police. Many a time, the information of crime will be given by a person who is not actually aggrieved by the crime or who has not even first-hand knowledge of the offence. Sometimes the information will be given through telephone. The information given to the police may be with regard to the commission of a cognizable offence or a non-cognizable offence. The information may also be with regard to commission of suicide or unnatural death.

Sections 154 to 176 deal with the procedure to be followed by the police when it gets information of cognizable offences, or non-cognizable offences, or unnatural death and further investigation of the crime.

Section 154 of the Code deals with recording of information with regard to the commission of **cognizable offence**.

Any person who is aware of the commission of any Cognizable Offence can give information to the officer -in- charge of police station and thereby set the criminal law in motion. The informant may not be a person actually aggrieved by the crime. The informant may not have first-hand knowledge of the offence.

When a person gives information relating to the commission of a cognizable offence to the officer- in -charge of a police station, he shall record the information. The information so recorded is usually known as the First Information Report or simply as F.I.R.

## 36 Complaint

There are two courses open before a person who intends to initiate criminal proceedings in respect of an offence,

- He may give information to the police, if the offence is a cognizable offence.
- He may go to Magistrate and file a **complaint** irrespective of whether the offence is cognizable or non-cognizable.

A complaint is an allegation made to the Magistrate with a view to his taking cognizance of the offence. The complaint may be made orally or in writing. The complaint should mention that an offence is committed by known or unknown person.

### 37 Bail

The word 'bail' means the process by which a person is released from custody.

If a person is arrested and he is accused of a bailable offence, he shall be released on bail at any time while in custody if he is prepared to give bail. In case of bailable offences bail can be granted by the Police Officer or the Court.

In the case of non-bailable offences, the accused cannot claim bail as a matter of right. Granting of bail is at the discretion of the Court.

### 38 Anticipatory Bail

Anticipatory bail can be granted only by the High Court or a Court of Session. Anticipatory bail is a direction given by the High Court or Court of Session to release a person on bail at the time when he may be arrested. It is a direction given by the Court even before the person is arrested. The person who apprehends his arrest on an accusation of a non-bailable offence may apply to the court for a direction to the Police Officer who would arrest him to release him on bail when he will be arrested. Anticipatory bail cannot be granted after the arrest of the accused.

### 39 Free legal aid

A person who is accused of an offence before a Criminal Court has a right to be defended by a pleader of his choice..

If in the trial, the accused is not represented by a pleader, and if it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State. It is a free legal aid that is provided to an accused who is unable to engage a lawyer..

In *State of Kerala v. Mohanan* (1987 (2) KLT 64), it was held that if the accused is in custody and he has not engaged a counsel, the court has to see that he is defended by a legal practitioner. If an accused refuses to have the service of a counsel, the court cannot thrust it on him. No person accused of any offence, whose personal liberty is in jeopardy, shall be denied of free legal aid at State cost if he is not in a position to engage a lawyer for defending him.

In *Kannan v. State of Kerala* (1992 (1) KLT 782), the Kerala High Court held that it is for the Court to assign the pleader to defend the case for the accused if he has no sufficient means to engage a pleader of his choice. In the matter of selecting the advocate the accused has no option. It is entirely for the court to assign a pleader to defend the accused. The accused has no right to insist upon a particular pleader to be appointed on his behalf at State expense to defend his case.

#### 40 Power- of- Attorney

Power of Attorney is an instrument empowering a specified person to act for and in the name of the person executing it. The donee of a Power-of- Attorney or power -of attorney holder may execute any instrument or do any thing in his own name and signature by the authority of the donor of the power ( principal). The instrument and thing so executed or done shall be as effectual in law as if it had been executed or done by the principal.

The law relating to power-of -attorney is contained in the statute called Powers - of - Attorney Act,1882.

#### 41 Will

When a person dies without executing a "Will" or "Testament" his heir or heirs, according to the personal law, may succeed to the property left behind by the deceased owner (also called propositus). This situation leads to intestate succession. If the deceased is a Hindu, the Hindu Succession Act, 1956 will govern the situation. If the deceased is a Mussalman, the Muslim law of Inheritance will be applicable. If the deceased is a Christian, the Indian Succession Act, 1925 will be applicable.

The owner of property can, while he is alive, very well make a declaration as to how his property should be disposed of on his death. Then he is said to have executed a "will" or "testament". The maker of the will may be referred to as **testator**. This situation leads to testamentary succession after his death. The person to whom the testator has bequeathed the property in whole or in part is called a **legatee**, and the property is called **legacy or bequest**.

#### 42 **Plaint**

By section 26 (1) of the Code of Civil Procedure, 1908, every suit (civil case) shall be instituted by the presentation of a plaint to the Court.

A suit is instituted by presentation of a plaint. The Plaintiff is the pleading of the plaintiff. The plaint shall contain the following particulars:

- 1) The name of the court in which the suit is brought
- 2) The name, description and place of residence of the plaintiff
- 3) The name, description and place of residence of the defendant.
- 4) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect.
- 5) The fact constituting the cause of action and when it arose.
- 6) The facts showing that the Court has jurisdiction.
- 7) The relief which the plaintiff claims.
- 8) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- 9) A statement of the value of the subject-matter of the suit for the purpose of jurisdiction and of court-fees.

#### 43 **Written Statement**

When a suit is filed by presentation of a plaint, the court may issue summons to the defendant calling upon him to appear on a day specified in the summons and answer the claim of the plaintiff.

The defendant shall present a written statement of his defence. A

written statement is a reply of the defendant to the plaint filed by the plaintiff. A written statement is the pleading of the defendant. In the written statement the defendant either admits the claim of the plaintiff or takes legal objections against the claim of the plaintiff. The defendant can also state any new facts in his favour.

The Written Statement shall contain only a statement in concise form of the material facts on which the defendant relies for his defence. It shall not contain the evidence by which the defences are to be proved.

If the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint. However the court may in its discretion, require any such fact to be proved.

The written statement shall be signed by the party and his pleader. It shall be verified at the foot by the defendant. The person verifying the written statement shall specify, by reference to the numbered paragraphs of the written statement, what he verifies on his knowledge and what he verifies upon information received and believed to be true.

The verification shall be signed by the person making it and shall state the date on which and place at which it was signed.

#### **44 Plea of Set - off**

When the plaintiff files a **suit for recovery of money**, the defendant can claim set-off as a defence in his written statement in respect of some amount which the plaintiff owes to him. It avoids the necessity of filling a fresh suit by the defendant against the plaintiff.

When a defendant pleads set-off, he is put in the position of a plaintiff as regards the amount claimed by him. There are two suits - one by the plaintiff against the defendant and the other by the defendant against the plaintiff; and they are tried together. A separate suit number, however, is not given to a set-off.

When the defendant claims set-off in his written statement, the plaintiff can file a written statement by way of defence to the claim of

set-off. It is known as "Replication."

#### **45 Plea of Counter -Claim**

Counter - claim may be defined as ' a claim made by the defendant in a suit against the plaintiff'. A defendant in a suit may, in addition to his right to plead a set-off, set up a counter-claim. It may be set up only in respect of a claim for which the defendant can file a separate suit. Thus, a counter-claim is substantially a cross-suit.

The counter-claim of the defendant will be treated as a plaint and the plaintiff has a right to file a Written Statement ( known as Replication) in answer to the counter-claim of the defendant.

The effect of the counter-claim is that even if the suit of the plaintiff is stayed, discontinued, dismissed or withdrawn, the counter-claim will be decided on merits to get a decree for a counter-claim as claimed in the written statement.

The counter-claim shall be treated as plaint and governed by the rules applicable to plaints. Similarly, a reply filed in answer to a counter-claim shall be treated as written statement and governed by rules applicable to written statements.

A counter- claim can be set up not only in a suit for recovery of money but also in any other suit. A set-off can be claimed only in a suit for recovery of money.

#### **46 Interlocutory Application and Affidavit**

Interlocutory Applications are filed for some interim reliefs during the pendency of any suit, appeal or other proceedings. It must be supported by an affidavit.

An affidavit is a solemnly sworn statement in writing made before an officer authorised to administer oaths. The person who is swearing the affidavit is called the deponent. The following rules are to be followed in drafting an affidavit.

- (a) An affidavit shall be drawn up in the first person.
- (b) It shall be divided into consecutively numbered paragraphs.

- (c) The affidavit shall state the full name, age, description and place of abode of the deponent.
- (d) Every affidavit shall clearly express how much of the statement is to the deponent's information, knowledge or belief, It shall be signed by the deponent.
- (e) Affidavit is to be sworn or affirmed before any Judicial Officer, a District Registrar or Sub Registrar, Chief Ministerial Officer of any Civil or Criminal Court, a Member of Parliament or of the Legislature, the Chairman or Executive authority or a Member of any Municipal Council, Corporation or other local authority, a Gazetted Officer, a Commissioned Officer in the Defence Forces of India or a Pleader.
- (f) The person before whom an affidavit is sworn or affirmed shall state the date on which and place where the same is made and sign under his name and designation at the end.

By virtue various provisions of the Code of Civil Procedure and Civil Rules of Practice, Kerala interlocutory applications may be filed for the following purposes.

1. Advancement of hearing
2. Attachment before Judgment
3. Amendment of Pleadings
4. Restoration of the Suit dismissed for default
5. Setting aside of Ex-parte Decree
6. Temperory Injunction
7. Appointing Commissionfor Local Investigation
8. Appointment of Receiver
9. Impleading of Parties

It is to be noted that the above instances are only illustrative and not exhaustive.