

# **BUSINESS LAWS AND ETHICS**

**INTERMEDIATE: PAPER 5**

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# SECTION – A : COMMERCIAL LAWS

## CHAPTER -1

## LAW OF CONTRACTS

**Meaning:** A contract is an agreement made between two (or) more parties which the law will enforce.”

**Definition:** According to section 2(h) of the Indian contract act, 1872. “An agreement enforceable by law is a contract.

According to **SALMOND**, a contract is “An agreement creating and defining obligations between the parties”

**Kinds of contracts:** - Contracts may be classified according to their (a) validity, (b) Formation, and (c) Performance.

### **(a)Classification according to validity:-**

1. **A valid contract:** A valid contract is an agreement which is binding and enforceable. An agreement becomes a contract when all the essential elements (i.e., offer and acceptance, intention to create legal relationship etc..,) are present, in such a case the contract is said to be valid.

2. **A voidable contract:** An agreement which is enforceable by law at the option of one (or) more parties thereto, but not at the option of the other (or) others, is a voidable contract. This happens when the essentials elements of a free consent is missing. When the consent of a party to a contract is said to be not free, if it is caused by Coercion, Undue influence, Misrepresentation (or) fraud, etc.,

3. **A void contract:** A void contract is really not a contract at all. The term “void” means an agreement which is without any legal effect. In other words “an agreement not enforceable by law is said to be void”.

4. **Illegal contracts:** Some agreements are illegal in themselves (ex:- contracts of immoral nature, opposed to public policy etc..,) Thus, All illegal contracts are void but all void contracts are not illegal (ex:- A wagering agreement, though void is not illegal).

5. **An unenforceable contract:** An unenforceable contract is one which cannot be enforced in a court of law because of some technical defect such as absence of writing (or) where the remedy has been barred by lapses of time.

### **(b) Classification according to their formation:-**

1. **Express contract:** An express contract is one, the terms of which are stated in words, spoken (or) written at the time of the formation of the contract.

2. **Implied contract:** An implied contract is one in which the evidence of the agreement is shown by acts and conduct of the parties, but not by words, written (or) spoken. In other words where the offer (or) acceptance of any promise made otherwise than in words, the promise is said to be implied promise (or) implied contract.

3. **Quasi-contract:** In truth Quasi-contract is not a contract at all. A quasi-contract is acts which are created by law. It does not have any essential elements of a valid contract. It is not intentionally created by parties but it is imposed by law. It is founded upon the ‘principles of natural justice, equity and fair play’.

### **(c) Classification according to their performance:**

1. **Executed contract:** “Executed” means that which is done. An executed contract is one in which both the parties have performed their respective obligation.

2. **Executory contract:** “Executory” means that which remains to be carried into effect. An executory contract is one in which the parties have yet to perform their obligations.

3. **Unilateral (or) one-sided contract:** in this type of contract, one party to a contract has performed his part even at the time of its formation and an obligation is outstanding only against the parties.

**4. Bilateral contract (or) Two-sided contract:** It is a contract in which the obligations on the part of both the parties to the contract are outstanding at the time of the formation of the contract

#### **Essential elements of a valid contract:**

According to section 10, "All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and not here by expressly declared to be void"

In order to become a contract an agreement must have the following essential elements, they are follows:-

##### **1) Offer and acceptance:**

- ❖ To constitute a contract there must be an offer and an acceptance of that offer.
- ❖ The offer and acceptance should relate to same thing in the same sense.
- ❖ There must be two (or) more persons to an agreement because one person cannot enter into an agreement with himself.

##### **2) Intention to create legal relationship:**

- ❖ The parties must have intention to create legal relationship among them.
- ❖ Generally, the agreements of social, domestic and political nature are not a contract.
- ❖ If there is no such intention to create a legal relationship among the parties, there is no contract between them.

##### **Example: BALFOUR (vs) BALFOUR (1919)**

**Facts:** A husband promised to pay his wife a household allowance of L 30 (pounds) every month. Later the parties separated and the husband failed to pay the amount. The wife sued for allowance.

**Judgment:** Agreements such as these were outside the realm of contract altogether. Because there is no intention to create legal relationship among the parties.

##### **3) Free and Genuine consent:**

- ❖ The consent of the parties to the agreement must be free and genuine.
- ❖ Free consent is said to be absent, if the agreement is induced by a)coercion, b)undue influence, c)fraud, d)Mis-representation, e)mistake.

##### **4) Lawful Object:**

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- ❖ The object of the agreement must be lawful. In other words, it means the object must not be (a) Illegal, (b) immoral, (c) opposed to public policy.
- ❖ If an agreement suffers from any legal flaw, it would not be enforceable by law.

##### **5) Lawful Consideration:**

- ❖ An agreement to be enforceable by law must be supported by consideration.
- ❖ Consideration means "an advantage or benefit" moving from one party to another. In other words "something in return".
- ❖ The agreement is enforceable only when both the parties give something and get something in return.
- ❖ The consideration must be real and lawful.

##### **6) Capacity of parties: (Competency)**

- ❖ The parties to a contract should be capable of entering into a valid contract.
- ❖ Every person is competent to contract if
  - (a). He is of the age of majority.
  - (b). He is of sound mind and
  - (c). He is not dis-qualified from contracting by any law.
- ❖ The flaw in capacity to contract may arise from minority, lunacy, idiocy, drunkenness, etc.,

### **7) Agreement not to be declared void:**

- ❖ The agreements must not have been expressly declared to be void u/s 24 to 30 of the act.

**Example:** Agreements in restraint of trade, marriages, legal proceedings, etc...

### **8) Certainty:**

- ❖ The meaning of the agreement must be certain and not be vague (or) indefinite.
- ❖ If it is vague (or) indefinite it is not possible to ascertain its meaning.

### **Example:**

'A' agrees to sell to 'B' a hundred tones of oil. There is nothing whatever to show what kind of oil intended. The agreement is void for uncertainty.

### **9) Possibility of performance:**

- ❖ The terms of an agreement should be capable of performance.
- ❖ The agreement to do an act impossible in itself is void and cannot be enforceable.

### **Example:**

'A' agrees with 'B', to put life into B's dead wife, the agreement is void it is impossible of performance.

### **10) Necessary legal formalities:**

- ❖ According to Indian contract Act, oral (or) written are perfectly valid.
- ❖ There is no provision for contracting being written, registered and stamped.
- ❖ But if is required by law, that it should comply with legal formalities and then it should be complied with all legal (or) necessary formalities for its enforceability.

### **PROPOSAL : Definition:**

According to section 2(a) of Indian contract act, 1872, defines offer as "when one person signifies to another his willingness to do (or) to abstain from doing anything with a view to obtaining the assent of that other, such act (or) abstinence, he is said to make a proposal".

### **Legal rules (OR) Essential elements of a valid offer / proposal:-**

- ❖ **1) Offer must be capable of creating legal relations:** A social invitation, even if it is accepted does not create legal relationship because it is not so intended to create legal relationship. Therefore, an offer must be such as would result in a valid contract when it is accepted.
- ❖ **2) Offer must be certain, definite and not vague:** If the terms of the offer are vague, indefinite, and uncertain, it does not amount to a lawful offer and its acceptance cannot create any contractual relationship.
- ❖ **3) Offer must be communicated:** An offer is effective only when it is communicated to the person whom it is made unless an offer is communicated; there is no acceptance and no contract. An acceptance of an offer, in ignorance of the offer can never be treated as acceptance and does not create any right on the acceptor.

Example: LALMAN SHUKLA (VS) GAURI DATT. (1913)

**Facts:** 'S' sent his servant, 'L' to trace his missing nephew. He then announced that anybody would be entitled to a certain reward. 'L' traced the boy in ignorance of his announcement. Subsequently, when he came to know of his reward, he claimed it.

**Judgment:** He was not entitled to the reward.

- ❖ **4) Offer must be distinguished from an invitation to offer:** A proposer/offer must be distinguished from an invitation to offer. In the case of invitation to offer, the person sending out the invitation does not make any offer, but only invites the party to make an offer. Such invitations for offers are not offers in the eyes of law and do not become agreement by the acceptance of such offers.

**Example: Pharmaceutical society of great Britain (vs) Boots cash chemists (1953).**

**Facts:** Goods are sold in a shop under the 'self service' system. Customers select goods in the shop and take them to the cashier for payment of price.

**Judgment:** The contract, in this case, is made, not when a customer selects the goods, but when the cashier accepts the offer to buy and receives the price.

**5) Offer may be expressed (or) implied:** An offer may be made either by words (or) by conduct. An offer which is expressed by words (i.e., spoken or written) is called an '**express offer**' and offer which is inferred from the conduct of a person (or) the circumstances of the case is called an '**implied offer**'.

**6) Offer must be made between the two parties:** There must be two (or) more parties to create a valid offer because one person cannot make a proposal/offer to him self.

**7) Offer may be specific (or) general:** An offer is said to be specific when it is made to a definite person, such an offer is accepted only by the person to whom it is made. On the other hand general offer is one which is made to a public at large and maybe accepted by anyone who fulfills the requisite conditions.

**Example: Carilll (vs) Carbolic Ball company (1893).**

- ❖ **Facts:** A company advertised in several newspapers is that a reward of L 100 (pounds) would be given to any person contracted influenza after using the smoke ball according to the printed directions. Once Mr.Carilll used the smoke balls according to the directions of the company but contracted influenza.

**Judgment:** she could recover the amount as by using the smoke balls she accepted the offer.

**8) Offer must be made with a view to obtaining the assent:** A offer to do (or) not to do something must be made with a view to obtaining the assent of the other party addressed and it should not made merely with a view to disclosing the intention of making an offer.

**9) Offer must not be statement of price:** A mere statement of price is not treated as an offer to sell. Therefore, an offer must not be a statement of price.

**Example: HARVEY (VS) FACEY (1893):**

**Facts:** Three telegrams were exchanged between Harvey and Facey.

- (a) "Will you sell us your Bumper hall pen? Telegram lowest cash price- answer paid". [Harvey to Facey].
- (b) "Lowest price fro bumper hall pen L 900 (pounds)". [ Facey to Harvey ]
- (c) "We agree to buy Bumper hall pen for the sum of L 900 (pounds) asked by you". [ Facey to Harvey ]

**Judgment:** There was no concluded contract between Harvey and Facey. Because, a mere statement of price is not considered as an offer to sell.

**10)** Offer should not contain a term "the non-compliance" of which may be assumed to amount to acceptance.

### **ACCEPTANCE :DEFINITION**

According to section 2(b) of the Indian contract Act, 1872, defines an acceptance is "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted becomes a promise".

On the acceptance of the proposal, the proposer is called the promisor/offeror and the acceptor is called the promise/offeree.

Legal rules as to acceptance: A valid acceptance must satisfies the following rules:-

1) Acceptance must be absolute and unqualified:

- ❖ An acceptance to be valid it must be absolute and unqualified and in accordance with the exact terms of the offer.
- ❖ An acceptance with a variation, slight, is no acceptance, and may amount to a mere counter-offer (i.e., original may or may not accept).

2) Acceptance must be communicated to the offeror:

- ❖ For a valid acceptance, acceptance must not only be made by the offeree but it must also be communicated by the offeree to the offeror.

- ❖ Communication of the acceptance must be expressed or implied.
- ❖ A mere mental acceptance is no acceptance.

**3) Acceptance must be according to the mode prescribed (or) usual and reasonable manner:**

- ❖ If the offeror prescribed a mode of acceptance, acceptance must be given according to the mode prescribed.
- ❖ If the offeror prescribed no mode of acceptance, acceptance must be given according to some usual and reasonable mode.
- ❖ If an offer is not accepted according to the prescribed (or) usual mode. The proposer may within a reasonable time give notice to the offeree that the acceptance is not according to the mode prescribed.
- ❖ If the offeror keeps quiet he is deemed to have accepted the acceptance.

**4) Acceptance must be given within a reasonable time:**

- ❖ If any time limit is specified, the acceptance must be given within that time.
- ❖ If no time limit is specified, the acceptance must be given within a reasonable time.

**Example: Ramsgate Victoria Hotel Company (vs) Monteflore (1886)**

**Facts:** On June 8<sup>th</sup> 'M' offered to take shares in 'R' Company. He received a letter of acceptance on November 23<sup>rd</sup>. He refused to take shares.

**Judgment:** 'M' was entitled to refuse his offer has lapsed as the reasonable period which it could be accepted and elapsed.

**5) It cannot precede an offer:**

- ❖ If the acceptance precedes an offer, it is not a valid acceptance and does not result in a contract.
- ❖ In other words "acceptance subject to contract" is no acceptance.

**6) Acceptance must be given by the parties (or) party to whom it is made:**

- ❖ An offer can be accepted only by the person (or) persons to whom it is made.
- ❖ It cannot be accepted by another person without the consent of the offeror.

**Example: Boulton (vs) Jones (1857).**

**Facts:** Boulton bought a hose-pipe business from Brocklehurst. Jones, to whom Brocklehurst owed a debt, placed an order with Brocklehurst for the supply of certain goods. Boulton supplied the goods even though the order was not addressed to him. Jones refused to pay Boulton for the goods because he, by entering into a contract with Brocklehurst, intended to set off his debt against Brocklehurst.

**Judgment:** The offer was made to the Brocklehurst and it was not in the power of Boulton to step in and accept. Therefore there was no contract.

**7) It cannot be implied from silence:**

- ❖ Silence does not amount to acceptance.
- ❖ If the offeree does not respond to offer (or) keeps quiet, the offer will lapse after reasonable time.
- ❖ The offeror cannot compel the offeree to respond offer (or) to suggest that silence will be equivalent to acceptance.

**8) Acceptance must be expressed (or) implied:**

- ❖ An acceptance may be given either by words (or) by conduct.
- ❖ An acceptance which is expressed by words (i.e., spoken or written) is called '**expressed acceptance**'.
- ❖ An acceptance which is inferred by conduct of the person (or) by circumstances of the case is called an '**implied or tacit acceptance**'.

### **Example: Carilill (vs) Carbolic Ball company (1893).**

**Facts:** A company advertised in several newspapers is that a reward of L 100 (ponds) would be given to any person contracted influenza after using the smoke ball according to the printed directions. Once Mr. Carilill used the smoke balls according to the directions of the company but contracted influenza.

**Judgment:** she could recover the amount as by using the smoke balls she accepted the offer.

**9)** Acceptance may be given by performing some condition (or) by accepting some consideration.

**10)** Acceptance must be made before the offer lapses (or) before the offer is withdrawn.

### **CROSS OFFER**

when two (or) more identical offers exchanged between the parties in ignorance at the time of each other's offer, the offer are called as cross offers. In such a case, the courts construe one offer as the offer and the other as the acceptance. Thus a cross offer will not create any contract.

**Example:** 'A' offers to sell his car to 'B' for RS.15000/- 'B' at the same time, offers by a letter to buy 'A's car for Rs.15000/-. The two letters cross each other in the post. In such a case the courts construe one offer as the offer and the other as the acceptance. Thus there was no concluded contract between A and B

### **COUNTER OFFER**

when the offeree offers to qualified acceptance of the offer subject to modifications and variations in the terms of the original offer, he is said to have made a counter offer. Counter offer amounts to rejection of the original offer. In such a case an offer may be revoked.

### **Example: Hyde (vs) Wrench (1840)**

**Facts:** 'W' offered to sell a farm to 'H' for L 1000 (pounds). 'H' offered L 950 (pounds) 'W' refused the offer. Subsequently, 'H' offered to purchase the farm for L 1000 (pounds).

**Judgment:** There was no contract as 'H' by offering L 950 (pounds) had rejected the original offer. Because the counter offer to a proposal amount to its rejection

### **REVOCATION OF PROPOSALS AND ACCEPTANCES (SECTION 5)**

Revocation means taking back or withdrawal of offer or acceptance.

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

#### **Example:**

Ravi proposes, by a letter sent by post, to sell his house to Radha. Radha accepts the proposal by a letter sent by post. Ravi may revoke his proposal at any time before or at the moment when Radha posts her letter of acceptance, but not afterwards. Radha may revoke her acceptance at any time before or at the moment when the letter communicating it reaches Ravi, but not afterwards.

#### **THE COMMUNICATION OF A REVOCATION IS COMPLETE:**

As against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

#### **Examples:**

Sasi proposes, by letter, to sell a house to Mani at a certain price. The communication of the proposal is complete when

Mani receives the letter. Mani accepts Sasi's proposal by a letter sent by post. The communication of the acceptance is complete—as against

Sasi, when the letter is posted; as against Mani, when the letter is received by Sasi. Sasi revokes his proposal by telegram. The revocation is complete as against Sasi when the telegram is dispatched. It is complete as against Mani, when Mani receives it. Mani revokes his acceptance by telegram. Mani's revocation is complete as against Mani when the telegram is dispatched, and as against Sasi when it reaches him.

**Example:**

Radhu proposes by a letter sent by post to sell his horse to Manisha. Manisha accepts the proposal by a letter sent by post. Radhu may revoke his offer anytime before or at the moment when Manisha posts his acceptance letter to Radhu and not afterwards.

An offer can be withdrawn anytime before its acceptance. Any subsequent acceptance of offer by the offeree after withdrawal will not result in binding contract. However, the said general principal of contract would be in applicable where voluntary retirement under a statutory scheme which categorically bars the employees from withdrawing the option once exercised. Terms of the statutory scheme would prevail over the general principal of contract. [New India Assurance Co Ltd. v. Raghuvir Singh Narang (2010) 5SCC 335]

**MODES FOR REVOCATION OF AN OFFER OR ACCEPTANCE**

The following are the conditions when a proposal is

**Revoked (as per Section 6):**

By the communication of notice of revocation by the proposer to the other party. The offer or may revoke his proposal anytime before the letter of acceptance is posted to him and not afterwards. Similarly acceptance can be revoked anytime before the letter of acceptance is received by the offeror.

By the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance.

**Case Laws:**

In *Ramsgate Victoria Hotel company v. Montefore* (1866) LRI109 case, an offer to purchase shares made in June was not accepted till November, it was held that the offer had lapsed because of the delay in acceptance within a reasonable time. Where an offeror promises to keep the offer open for a fixed time the promise is mere nudum pactum unless supported by consideration. In the absence of the consideration to keep the offer open the offeror can withdraw his offer anytime before acceptance.

**Case Law:**

In *Pipraich Sugar Mills v. Mazdoor Union* (1956) SCR872 case, a conditional offer to pay certain amount by the employees lapsed when the condition was not accepted, the condition being immediate withdrawal of strike notice.

By the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance. Where an offeree writes his acceptance but dies before posting, the offer lapse and posting of the letter after his death will not create a contract.

**Example:** 'A' makes proposal to 'B' to sell his house at a certain price. The letter is posted on 1<sup>st</sup> of the month. 'B' accepts the proposal by a letter sent by post on 4<sup>th</sup>. The letter reaches 'A' on the 6<sup>th</sup>.

'A' may revoke his offer at any time before 'B' posts his letter of acceptance. (i.e., on 4<sup>th</sup>, but not afterwards).

'B' may revoke his acceptance at any time before the letter of acceptance reaches 'A'. (i.e., on 6<sup>th</sup> but not afterwards)

**VOID AGREEMENTS**

According to section 2(g) of the Indian contract Act, 1872. 'A void agreement is one which is not enforceable by law'.

A void agreement does not create any legal right (or) obligation. It is void-ab-initio (i.e., void of into right from the beginning).

**The following agreements have been expressly declared to void by the contract act:-**

- Agreements by incompetent parties. (Section 11)
- Agreements made under mutual mistake of facts. (Section 20)
- Agreements which the consideration (or) object is unlawful. (Section 23)
- Agreements which the consideration (or) object is unlawful in part. (Section 24)
- Agreements made without consideration. (Section 25)
- Agreements in restraint of marriage. (Section 26)
- Agreements in restraint of trade. (Section 27)
- Agreements in restraint of legal proceedings. (Section 28)

- Agreement which the meaning is uncertain. (section 29)
- Agreements by way of wager. (section 30)
- Agreements contingent on impossible events. (section 36)
- Agreements to do impossible Acts. (section 56)

### **CONSIDERATIONS AND OBJECTS UNLAWFUL IN PART**

The Agreements are void, if Considerations and objects are unlawful in part. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

#### **Example**

Ravi Promises to superintend, on behalf of Mahesh, a legal manufacture of indigo, and an illegal traffic in other articles. Mahesh promises to pay Ravi salary of Rs.10,000 a year. The agreement is void, the object of Ravi's promise and the consideration for Mahesh's promise, being in part unlawful.

### **NO CONSIDERATION (Section 25):**

The general rule is ex-nudopacto non oritur action. An agreement made without consideration is void.

#### **Example:**

If Latha promises to pay Gokul Rs.1000 without any obligation from Gokul. This is a void agreement for want of consideration. However, the Act itself provides exceptions to this rule in Section 25 itself.

#### **An agreement made without consideration is not void.**

**a. Agreement without consideration is void, unless** it is in writing and registered. If an agreement is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other, it is valid despite being void of consideration. The expression the parties standing in near relation to each other means the parties are related to each other by blood relations. Nearness of relations does not always mean natural love and affection.

#### **Example (Bhiwa v. Shivaram (1899) 1 Bom LR 495)**

Sai sued Bala his brother for a share of certain lands. The case was initially dismissed on the ground that the property was not ancestral. Bala later on by registered agreement agreed to give  $\frac{1}{2}$  of the property to Sai. The court held that the defendant Bala had such a natural love and affection for his brother and in order to reconcile was willing to give him half of the property. Hence, the agreement was held to be enforceable.

#### **Case Law:**

In Rajlukhy Dabee v. Bhootnath Mookerjee (1900) 4 Cal WN 488 case the defendant promised to pay his wife a fixed sum of money every month for her separate residence and maintenance. The agreement was duly registered and made mention of some domestic quarrels between the parties. The court held that the case is not covered under exception rules as there was no natural love and affection between the parties.

**b. Agreement without consideration is void**, unless it is a promise to compensate for something done: If it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, it is a good agreement despite no consideration from other party.

#### **Example**

Ali found Babu's purse and returned the same to Babu. Babu promised to pay him Rs. 500. The act of Ali is voluntary act. This is covered under exception rule and Babu's promise to pay Rs. 500 is enforceable.

**c. Agreement without consideration is void, unless it is a promise to pay a debt barred by limitation law:** If it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

**Example**

Joy owes Rs.6000 to Hari. The debt has now become time barred. Joy now promises to pay him Rs.6000 in discharge of the debt which has become time barred. This agreement is enforceable.

**For Claim exemption under section 25(3) the following conditions should be satisfied:**

- ❖ Enforceable: Debt of the creditor must be enforceable but for limitation period.
- ❖ Promise to pay the debt: Promise to pay the debt and not merely an acknowledgement of debt.
- ❖ Promise in writing: The promise must be in writing and signed by the debtor or his agent.
- ❖ Promise to a person: The promise must be given by the person to be charged therewith and not by anybody else.
- ❖ In any of the afore said cases, such an agreement is a contract.

**AGREEMENT IN RESTRAINT OF MARRIAGE**

Section 26 provides that every agreement in restraint of the marriage of any person, other than a minor is void.

**AGREEMENT IN RESTRAINT OF TRADE**

Section 27 : An agreement which interferes with the liberty of a person to engage himself in any lawful profession, trade (or) Business of any kind is called 'An Agreement in restraint of trade'.

Thus, every agreement by which any one is restrained from exercising a lawful profession (or) trade (or) business of any kind, is to that extent void and opposed to public policy. But this rule is subject to the following exceptions:-

**Example: Shaikh Kalu (vs) Ram Saran Bhagat (1909):**

**Facts:** Out of 30 makers of combs in the city of Patna, 29 agreed to supply with 'R' to supply him and also agreed not to supply any one else all their output. Under the agreement 'R' was free to reject the goods if he found no market for them.

**Judgment:** The agreement amounted to restraint of trade and thus void.

Thus, every agreement by which any one is restrained from exercising a lawful profession (or) trade (or) business of any kind, is to that extent void and opposed to public policy.

**Exceptions:** The general principle of law is that all restraints of trade are void. But in India it is valid if it falls within any of the statutory exceptions. The following are the exceptions to the rule that "**An Agreement in restraint of trade is void**".

1. Sale of goodwill.
2. Partner's agreement.
3. Trade combinations.
4. Service agreements.

**Exceptions****The exceptions depend on the following:**

- ❖ One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, Limits means local limits and the duration of restriction is not too long i.e. duration of the restraint is so long as the buyer or any person deriving title to the goodwill from him carries on the like business and not for life long.
- ❖ Partners agreement: Partner : A partner not to carry on any business other than that of the firm while he is a partner of the firm.
- ❖ Retiring partner: Retiring partner agreeing with his other partners not to carry on a business similar to that of the firm within a reasonable period or within a specified local limits.
- ❖ Dissolution : Partners on dissolution agreeing not to carry on a business similar to that of the firm within a specified period or within a specified local limit.
- ❖ Sale of goodwill: Any partner upon sale of goodwill of a firm, make an agreement with the buyer that such partner shall not carry on similar business within a specified period or within a specified local limits.

- ❖ Not to use firm : When goodwill of a firm is sold upon dissolution a partner agreeing with the buyer of goodwill that he will not use firms name, represent himself as carrying on firms business or solicit customs of person who were dealing with the firm before dissolution.

### **Agreements in restraint of legal proceedings:**

An agreement in restraint of legal proceeding is the one by which any party thereto is restricted absolutely from enforcing his right under a contract through a court. Contracts of this nature are void because its object is to defeat the provision of the Indian Limitation act

### **AGREEMENTS IN RESTRAINT OF LEGAL PROCEEDINGS ARE VOID (SECTION 28)**

**Agreements in restraint of legal proceedings:** An agreement in restraint of legal proceeding is the one by which any party thereto is restricted absolutely from enforcing his right under a contract through a court. Contracts of this nature are void because its object is to defeat the provision of the Indian Limitation act

#### **Exception**

**Savings of contract to refer to arbitration dispute that may arise** : This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

**Saving of contract to refer questions that have already arisen** : Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

### **AGREEMENTS VOID FOR UNCERTAINTY (SECTION 29)**

According to Section 29 “Agreements, the meaning of which is not certain, or capable of being made certain, are void.”

#### **Example**

Ashok agrees to sell to Bala “a hundred tons of oil”. There is nothing whatever to show what kind of oil was intended.

The agreement is void for uncertainty.



#### **Case Laws:**

In Kovuru Kalappa v. Kumara Krishna AIR (1945) Mad 10 case, an agreement to pay a certain sum with interest after two years after such deductions as would be agreed upon was held to be void due to uncertainty under Section 29.

In Guthing v. Lyna (1833) 213 Ad 232 case, a cow was brought for a certain sum coupled with a promise to give \$5 more if the horse proved lucky. The agreement was found to be void due to uncertainty of terms.

### **AGREEMENTS BY WAY OF WAGER ARE VOID (SECTION 30)**

Wagering agreements are mere bet where one person agrees to pay another person a certain sum on happening of something and another person pay him on non happening of that event.“Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to a person to abide by the result of any game or other uncertain event on which any wager is made.”

#### **Example :**

Giri agree to pay Rs.100 to Deepa if it rains today, on the other hand Deepa agree to pay Giri if it does not rain. This is a wager agreement. Contract Act does not define wager. According to Anson, wager is a promise to give money or money's worth upon determination or ascertainment of an uncertain event. The essence of wagering is similar to gambling where one person wins and another person loses.

**Exception in favor of certain prizes for horse-racing:** This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

**Section 294A of the Indian Penal Code not affected:** Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294A of the Indian Penal Code, (45 of 1860) apply.

## **CONSIDERATION**

### **Meaning:-**

Consideration is a technical term used in the sense of quid-pro-quo (i.e., some thing in return). When a party to an agreement promises to do something, he must get something in return. This “something” is defined as consideration.

### **Definition:-**

According to section 2(d) of the Indian contract Act, 1872, defines consideration as “when at the desire of the promisor, the promise (or) any other person has done (or) abstained from doing, (or) does (or) abstains from doing, (or) promises to do (or) to abstain from doing, something, such act (or) abstinence (or) promise is called a consideration for the promise”.

### **Example: Abdul Aziz (vs) Masum Ali (1914)**

**Facts:** The secretary of a mosque committee filed a suit to enforce a promise which the promisor had made to subscribe Rs.500/- for rebuilding a mosque.

**Judgment:** The promise was not enforceable because there was no consideration in the sense of benefit, as ‘the person who promised gained nothing in return for the promise made’, and the secretary of the committee to whom the promise was made, suffered no detriment (liability) as nothing had been done to carry out the repairs. Hence the suit was dismissed.

**ESSENTIALS OF A VALID CONSIDERATION:-** The following are the essentials of a valid consideration (OR) legal rules as to consideration.

#### **1. It may be past, present (or) future:**

- ❖ The words “has done (or) abstained from doing refer to past consideration.
- ❖ The word “does (or) abstains from doing” refer to present consideration.
- ❖ Similarly the word “promises to do (or) to abstain from doing” refers to the future consideration. Thus, the consideration may be past, present (or) future.

#### **2. It must move at the desire of the promisor:**

- ❖ In order to constitute a legal consideration, the act (or) abstinence forming the consideration for the promise must move at the desire (or) request of the promisor.
- ❖ If it is done at the instance of a third party (or) without the desire of the promisor, it will not be a valid contract.

### **Example: Durga Prasad (vs) Baldeo (1880);**

**Facts:** ‘B’ spent some money on the improvement of a market at the desire of the collector of the district. In consideration of this ‘D’ who was using the market promised to pay some money to ‘B’.

**Judgment:** The agreement was void being without consideration.

#### **3. It must not be illegal, immoral (or) not opposed to public policy:**

- ❖ The consideration given for an agreement must not be unlawful, illegal, immoral and not opposed to public policy.
- ❖ Where it is unlawful, the court will not allow an action on the agreement.

#### **4. It need not be adequate:**

- ❖ Consideration need not be any particular value.
- ❖ It need not be approximately equal value with the promise for which it is exchanged. But it must be something which the law would regard as having some value.
- ❖ In other words consideration, as already explained, it means “something in return”. This means something in return need not be necessarily be an equal in value to “something given”.

#### **5. It must be real and not illusory:**

- ❖ Consideration must not be illegal, impossible (or) illusory but it must be real and of some value in the eyes of law.
- ❖ The following are not real consideration:

(a)Physical impossibility, (b)legal impossibility, (c)uncertain consideration, (d) illusory consideration.

#### **6. It must move from the promise (or) any other person:**

- ❖ Under English law consideration must move from the promisee itself. But, under Indian law, consideration move from the promisee (or) any other person (i.e., even a stranger).
- ❖ This means as long as there is a consideration for a promise, it is immaterial who has furnished it. But the stranger to a consideration will be sue only if he is a party to the contact.

#### **Example: Chinnaya (vs) Ramayya (1882).**

**Facts:** An old lady, by a deed of gift, made over certain property to her daughter 'D', under the directions that she should pay her aunt, 'P' (sister of old lady), a certain sum of money annually. The same day 'D' entered into an agreement with 'P' to pay her the agreed amount later 'D' refused to pay the amount on the plea that no consideration had moved from 'P' to 'D'.

**Judgment:** 'P' was entitled to maintain suit as consideration had moved from the old lady, sister of 'P', to the daughter, 'D'.

**7. It must be something the promisor is not already bound to do:** A promise to do what one is already bound to do, either by general law (or) under an existing contract, is not a good consideration for a new promise, since it adds nothing to the pre-existing legal or contractual obligation.

**8. It may be an act, abstinence (or) forbearance (or) a return promise:** consideration may be an act, abstinence (or) forbearance (or) a return promise. Thus it may be noted that the following are good considerations for a contract.

- ❖ Forbearance to sue.
- ❖ Compromise of a disputed claim.
- ❖ Composition with creditors.

**EXAMPLE:-** A promise to perform a public duty by a public servant is not a consideration

#### **VALIDITY OF AN AGREEMENT WITHOUT CONSIDERATION:**

The general rule is that an agreement made without consideration is void. In the following cases, the agreement though made without consideration, will be valid and enforceable according to section 25 and 185 are as follows:-

**1. Nature love and affection:** An agreement made without consideration is valid if it is made out of love, nature and affection such agreements are enforceable if

- ❖ The agreement is made in writing and registered.
- ❖ The agreement must be made between the parties standing in near relations to each other and
- ❖ There must be nature, love and affection between the parties.

#### **Example: Venkatswamy (vs) Rangaswamy (1903):**

**Facts:** By a registered agreement, 'V', on account of nature, love and affection for his brother, 'R', promises to discharge debt to 'B'. If 'V' does not discharge the debt.

**Judgment:** 'R' may discharge it and then sue 'V' to recover the amount. Therefore it is a valid agreement.

**2. Compensation for past voluntary services:** A promise made without consideration is valid if, it is a person who has already done voluntarily done something for the promisor, is enforceable, even though without consideration. In simple words, a promise to pay for a past voluntary service is binding.

**3. Promise to pay Time-Bared debt:** An agreement to pay a time-bared debt is enforceable if the following conditions are satisfied.

- ❖ The debt is a time bared debt
- ❖ The debtor promises to pay the time barred debt.
- ❖ The promise is made in writing.
- ❖ The promise is signed by the debtor.

**4. Completed gifts:** The rule “No consideration – No contract” does not apply to completed gifts. According to section 1 to 25 states “nothing in section 25 shall affect the validity, as between the donor and donee, of any gift actually made”

**5. Agency:** According to section 185, no consideration is necessary to create an agency.

**6. Charitable subscription:** Where the promisee on the strength of promise makes commitments (i.e., changes his position to his liability/detriment).

#### **Example: Kedernath (vs) Ghouri Mohammed (1886).**

**Facts:** ‘G’ had agreed to subscribe Rs.100/- towards the construction of a town hall at Howrah. The secretary, ‘K’, on the faith of the promise, called for plans and entrusted the work to contractors and undertook the liability to pay them.

**Judgment:** The amount could be recovered, as the promise resulted in a sufficient detriment to the secretary. However, be enforceable only to the extent of the liability incurred by the secretary. In this case, the promise, even though it was gratuitous, became, enforceable because on the faith of promise

#### **STRANGER TO CONTRACT / DOCTRINE OF PRIVITY OF CONTRACT:**

**Introduction:** There is a general rule of law is that only the parties to a contract can sue. In other words, if a person not a party to a contract, he cannot sue. This rule is known as the “Doctrine of privity of contract”. Privity of contract means relationship subsisting between the parties who have entered into contractual obligations.

#### **There are two consequences of doctrine of privity of contract they are follows:**

- ❖ A person who is not a party to a contract cannot sue even if the contract is for his benefit and he provided consideration.
- ❖ A stranger to a contract cannot sue.
- ❖ A contract cannot provide rights (or) impose obligations arising under it on any person other than the parties to it.
- ❖ A stranger to a contract can sue.

#### **Example: Dunlop Pneumatic Tyre Co.Ltd (vs) Selfridge & Co.Ltd (1915).**

**Facts:** ‘S’ bought tyres from the Dunlop Rubber company and sold them to ‘D’, a sub-dealer, who agreed with ‘S’ not to sell below Dunlop’s list price and to pay the Dunlop company L 5 (pounds) as damages on every tyre ‘D’ undersold. ‘D’ sold two tyres at less than the list price and there upon, the Dunlop Company sued him for the breach.

**Judgment:** The Dunlop Company could not maintain the suit as it was a stranger to the contract.

**Exceptions:** The following are the exceptions to the rule that a stranger to a contract cannot sue:-

**1. A trust:** In trust deed beneficiaries is allowed to sue the trustee for enforcement of trustee’s duties even though they are not contracting party. However, the name of the beneficiary must be clearly mentioned in the contract.

#### **Example: Gandy (vs) Gandy (1884):**

**Facts:** A husband who was separated from his wife executed a separation deed by which he promised to pay to the trustees all expenses for the maintenance of his wife.

**Judgment:** This sort of agreement creates a trust in favour of the wife and can be enforced.

**2. Marriage settlements, partition (or) other family arrangements:** When an agreement is made in connection of marriage settlements, partitions (or) other family arrangements and a provision is made for the benefit of a person, he may sue although he is not a party to the agreement.

**Example: Daropti (vs) Jaspat Rai (1905):**

**Facts:** 'J's wife deserted him because of his ill treatment. 'J' entered into an agreement with his father-in-law to treat her properly (or) else pay her monthly maintenance. Subsequently, she was again ill-treated and also driven out.

**Judgment:** she was entitled to enforce the promise made by 'J' to her father.

**3. Acknowledgement (or) Estoppel:** The person, who becomes an agent of a third party by acknowledgement (or) Estoppel, can be sued by such third party.

**4. Assignment of contract:** Assignment means voluntary transfer of the rights by a person to another. In such a case an assignee becomes entitled to sue and enforce the rights which are assigned to him.

**5. Contracts entered into through an agent:** The principal enforce the contract entered into by his agent provided the agent act within the scope of his authority and in the name of the principal.

**6. Covenants running with the land:** In case of transfer of immovable property, the purchaser of land (or) the owner of the land is bound by certain conditions (or) covenants created by an agreement affecting the land.

## **LEGALITY OF OBJECT**

**Meaning:-**

Consideration is a technical term used in the sense of quid-pro-quo (i.e., some thing in return). When a party to an agreement promises to do something, he must get something in return. This "something" is defined as consideration.

An agreement will not be enforceable if its objects (or) the consideration are unlawful. According to section, of the Indian contract Act, 1872. The consideration and objects are unlawful in the following cases:

**1. If it is forbidden by law:** If the object (or) the consideration of an agreement is forbidden by law, in such a case the agreement is deemed to be unlawful and void. An act is forbidden by law if,

- ❖ It is punishable under the criminal law of the country. (or)
- ❖ It is prohibited by special legislations and regulations made by competent authority under power derived from legislature.

**Example:** 'A' promises to obtain for 'B' an employment in the public service and 'B' promises to pay Rs.1000/- to 'A'. The agreement is void, as the consideration for it is unlawful.

**2. If it is defeats the provision of any law:** If the object (or) consideration of an agreement is of such a nature that, though not directly forbidden by law, it would defeat the provisions of the law, in such a case the agreement is deemed to be unlawful and void.

**Example:** An agreement between husband and wife to live separately is invalid as being opposed to Hindu law.

**3. If it is fraudulent:** An agreement, whose object (or) consideration is to defraud others, is unlawful and hence it becomes void.

**Example:** 'A', 'B', 'C' enters into an agreement for division among them of gains acquired (or) to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

**4. If it involves (or) implies injury to the person (or) property of another:** If the object (or) consideration of an agreement is to injure the person (or) property of another is void. In such a case object (or) the consideration is deemed to be unlawful.

**Example: Ram Saroop (vs) Bansi Mandar (1915):**

**Facts:** "B" borrowed Rs.100 from "L" and executed a bond promising to work for "L" without pay for a period of two years. In case of default, "B" was to pay interest (at a very exorbitant rate) and the principal amount at once.

Judgment: The contract was void as it involves injury to the person of "B".

**5. If the court regards it as immoral:** An agreement, whose consideration and object is immoral, is deemed to be illegal and void. The word immoral includes sexual immorality. Hence its object (or) consideration is unlawful.

#### **Example: Pearce (vs) Brooks (1866):**

**Facts:** A firm of coach-builders hired out a carriage to a prostitute, knowing that it was to be used by prostitute to attract men.

**Judgment:** The coach-builders could not recover the hire as the agreement was unlawful.

**6. Where the court regards it as opposed to public policy:** An agreement whose consideration (or) object is such a nature that opposed to public policy. Thus it becomes void and it deemed to be unlawful.

#### **E-contracts:**

- ❖ Kind of contract formed in the course of E-commerce by interaction of two or more person competent to contract using electronic means, such as e-mail.
- ❖ Involves interaction of an individual with an electronic agent, such as computer program or interaction of at least two electronic agents that are programmed in such a way to generate contract.
- ❖ Increase in the cost of business operations and squeeze in profit margin led to use of electronic system as a new mode of business activities .Now rapid/instant communication across the world is no more restricted due to the constraints of geography and time.
- ❖ E-commerce is associated with the buying and selling of information, products and services via. Computer networks not necessitating physical one to one interaction of the buyer and seller. It is a means of transacting business electronically, usually, over the Internet. It is the tool that leads to 'enterprise integration'. With the growth of e-commerce, there is a rapid advancement in the use of e-contracts.

## **CAPACITY OF CONTRACT**

### **Competent to Contract: (Section 11)**

As per Section 11 every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

From the above provisions of the section it means the following types of persons are not competent to contract:

- ❖ A person who has not attained the age of majority, i.e. minor.
- ❖ A person of unsound mind
- ❖ A person who is disqualified from contracting by some law.

#### **Definition:**

According to section 3, of the Indian majority act, 1875 'A minor is a person who has not completed "18" years of age. However, minority will continue up to "21" years in case, if Hon.court has appointed guardian for a minor's property'.

Thus, minor estate is liable for necessities supplied to minor during minority. Minor does not personally liable for the supply of necessities.

According to the section 68 of the Act, "If a person incapable of entering into a contract, (or) any one whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who had furnished such supplies is entitled to be reimbursed from the property of such incapable"

#### **There are two essentials:-**

1. The things supplied must be suited to his condition in life (i.e., position and financial status of the minor).
2. The things supplied must be necessities of life (i.e., food, clothing, shelter, etc.,)

### **Necessaries also includes:-**

(a) **Necessary goods:** Necessary goods are not restricted to articles which are required to maintain a bare existence, such as bread and clothes, but it also include goods which are reasonably necessary to the minor having regard to his station in life. (i.e., watch, bicycle, etc.,)

#### **Example: Nash (vs) Imran (1908).**

**Facts:** 'T', a minor, bought eleven fancy waistcoats from 'N'. he was at that time adequately provided with clothes.

**Judgment:** The waistcoats were not necessities, and 'T' was not liable to pay for any of them.

(b) **Services rendered:** Certain services rendered to a minor have been held to be necessities. These include education, training for a trade, medical advice, hose given to a minor on rent for the purpose of living and continuing his studies etc.., As regards contracts which are not for the supply of necessities but which are undoubtedly beneficial to the minor, in such a case the minor private estate is liable.

#### **Example: Roberts (vs) Gray (1913).**

**Facts:** 'G', a minor, entered into a contract with 'R', a noted billiards player, to pay him a certain sum of money to learn the game and play matches with him during his world tour. 'R' spent time and money in making arrangements for billiards matches.

**Judgment:** 'G' was liable to pay as the agreement was one for necessities as it was in effect "for teaching, instruction, and employment and was reasonable for the benefit of the infant".

**Loans incurred to obtain necessities:** A loan taken by a minor to obtain necessities also binds him and is recoverable by the lender as if he himself had supplied the necessities. But the minor is not personally liable. It is only his estate which is liable for loans.

### **Legal rules regarding an agreement by a minor:**

A minor is incompetent to contract u/s 11of the Indian contact act, 1872. Minor's incompetence is not a punishment but it is a protection given to minors by law. The law becomes the guardian of minors to protect their rights because their mental capacity is not well developed. The following are the legal rules regarding minor's agreement are as follows:-

1. **An agreement by minor is absolutely void:** Where a minor is charged with obligations and the other contracting party seeks to enforce these obligations against minor, in such a case the agreement is deemed as void-ab-initio.

#### **Example: Mohiri Bibi (vs) Dharmadas Ghose (1903).**

**Facts:** A minor mortgaged his house in favour of money-lender to secure a loan of Rs.20000/- out of which the mortgagee ( Dharmadas Ghose a money lender) paid the minor a sum of Rs.8000/-. Subsequently, the minor sued for setting a side the mortgage, stating that he was underage when he executed the mortgage.

**Judgment:** The mortgage was void and, therefore, it was cancelled. Further the money lender's request for the repayment of the amount advanced to the minor as part of the consideration for the mortgage was also not accepted.

2. **He can be a promisee (or) a Beneficiary:** Any agreement which is some benefit to the minor and under which he is required to bear no obligation is valid. Thus, a minor can be a beneficiary (or) a promisee.

3. **His agreement cannot be ratified by him an attaining the age of majority:** An agreement by minor is void-ab-initio and therefore ratification by minor is not allowed. There is a fundamental principal in law (i.e., an agreement Void-ab-initio cannot be validated by subsequent action).

4. **If he has received any benefit under a void agreement, he cannot asked to compensate (or) pay for it:** Under section 64 and 65 of the act, provides a minor cannot be ordered to make compensation for a benefit obtained in a void agreement. Because section 64 and 65, which deals with restitution of benefit.

5. **Minor can always plead minority:** A minor's contract being void, any money advanced to a minor on a promissory note cannot be recovered even though a minor procures (or) take a loan by falsely representing that he is of full age it will not stop him from pleading his minority in a suit, to recover the amount and the suit will be dismissed. "The rule of estoppel cannot be applied against a minor".

### **Example: Leslie (vs) Shiell (1914).**

**Facts:** 'S', a minor, by fraudulently representing himself to be of full age, induced 'L' to lend him L 400 (pounds). He refused to repay it and 'L' sued for his money.

**Judgment:** The contract was void and 'S' was not liable to repay the amount.

**6. There can be no specific performance of the agreement entered into by him as they are void-ab-initio:** A contract entered into, on behalf of a minor by his parent/guardian (or) the manager of his estate can be expressly enforced by (or) against the minor, provide the contract is

- ❖ Within the authority of the guardian and
- ❖ For the benefit of the minor.

**7. He cannot enter into a contract of partnership:** A minor being incompetent to contract but be a partner of a partnership firm, but u/s 30 of the Indian partnership Act, provides he can be admitted for the 'benefits of a partnership' with the consent of all the partners.

**8. He can be an agent:** A minor can be an agent. It is so because the act of the agent is the act of the principal and therefore, the principal is liable to the third parties for the act of a minor agent.

**9. His parents/guardian is not liable for the contracts entered into by him:** The parents/guardian is not liable for the contract entered into by minor. The parents can hold liable for contracts for their minor children only when they are acting as agent.

**10. A minor is liable in tort (A civil wrong):** Minors are liable for negligence causing injury (or) damage to the property that does not belong to them.

**11. A minor is liable for necessaries:** Minor's estate is liable for necessities supplied to minor during minority. Minor does not personally liable for the supply of necessities.

The necessities such as food, clothing and shelter etc., necessities also includes goods and services.

### **PERSON OF UNSOUND MIND**

According to section 12 of the Indian contract Act, 1872 "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interests".

**Soundness of mind of a person depends on two facts:**

- ❖ Ability to understand the contract at the time of making.
- ❖ Ability to form a rational judgment about the effect of the contract on his interest.
- ❖ Unsoundness may arise from idiocy, lunacy, drunkenness, hypnotism, mental decay because of old age and delirium (high temperature) etc.,
- ❖ A person who is usually of unsound mind and occasionally of sound mind can contract when he is of sound mind.
- ❖ A person who is usually of sound mind and occasionally of unsound mind cannot contract when he is of unsound mind.
- ❖ Thus, the burden of proof will lie upon the person who claims that he was not of sound.

### **OTHER DISQUALIFIED PERSONS**

Besides minors and persons of unsound mind, there are also other persons who are disqualified from contracting partially (or) wholly. So, the contracts by such persons are void. If, by any provisional legislation, a person is declared "**disqualified proprietor**", he is not competent to enter into any contract in respect of the property.

**The following persons are disqualified from contracting:**

- (a) Alien enemy.
- (b) Foreign sovereign states.
- (c) Corporations.
- (d) Insolvents.
- (e) Convicts

**Alien Enemy:** An agreement with an alien enemy is void. But agreement with an alien friend is perfectly valid and enforceable. When the Government of an alien is at war with the Government of India, the alien is called alien enemy who cannot enter into any contract with any Indian citizen without the permission of Government of India as the same is against the public policy. Contract entered into with an alien before war is put into suspension during the duration of war.

**Foreign Sovereign and Ambassadors:** Foreign sovereigns and their representatives enjoy certain privileges and immunities in every country. They cannot enter into contract except through their agents residing in India. They can sue the Indian citizen but an Indian citizen cannot sue them.

**Company or Statutory bodies:** A contract entered into by a corporate body or statutory body will be valid only to the extent it is within its Memorandum of Association

**Insolvents:** An insolvent person is one who is unable to discharge his liabilities and therefore has applied for being adjudged insolvent or such proceedings have been initiated by any of his creditors. An insolvent person cannot enter into any contract relating to his property.

**Convicts:** A convict cannot enter into a contract while he is undergoing imprisonment.

### **FREE CONSENT:**

'Two or more persons are said to consent when they agree upon the same thing in the same sense.' - [Sec 13].

If the parties have not agreed upon the same thing in the same sense there is no real consent and hence no contract is formed.

### **Section 14 of the Contract act consent is said to be free when it is not caused by**

- ❖ Coercion (Sec 15)
- ❖ Undue influence (Sec 16)
- ❖ Fraud (Sec 17)
- ❖ Misrepresentation (Sec 18)
- ❖ Mistake, subject to provisions of Sec 20, 21 and 22.

According to Section 10, consensus ad idem or identify of mind is an essential requirement of a valid contract.

**Existence:** If there is no real consent the contract does not come into existence. When there is no consent at all, Salmond describes it as 'Error in Consensus'.

#### **Example :**

Mani has two horses Chek and Bazz, he intended to sell Bazz to Ravi. Ravi thinking that Mani intends to sell Chek, gave his consent for purchase of Chek. Here, in the instant there is no consent and there is no meeting of mind. Mani intended to sell Bazz, whereas Ravi thought it to be Chek and so gave his consent for Chek.

If the parties have not agreed upon the same thing in the same sense there is no real consent and hence, no contract is formed. In order to give rise to a valid contract there should not only be consent but the consent should also be free. Consent is said to be free if it is not caused by coercion, undue influence, fraud or misrepresentation, or mistake.

### **COERCION [SECTION 15]**

"Coercion" is the committing or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

#### **Example:**

Raju threatens to kidnap Pradeep (minor son of Hari), if Hari did not sell his house to Raju at the price offered by Raju. Hari signed the document selling his house to Raju at the price offered by Raju. Here, the consent had been obtained by coercion from Raju who is one of the party to contract. Consent will not be treated free and the contract will be treated avoidable at the option of Hari.

**Example:**

Mahesh threaten to kidnap Ram, a minor son of Latha, if Latha did not sell her property to Leela for the price agreed by Leela. Latha gave her consent and agreed to sell her property to Leela at the price offered by Leela. Here also, the consent is not free though the threat has not come directly from the party to the contract. The consent is tainted by coercion; accordingly the contract is avoidable at the option of Latha.

**Unlawful detaining also amount to coercion:**

If a person unlawfully detains or makes a threat to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement amount to coercion.

**Case Law :**

In *Muthia v. Karrupan* (1927) 50 Mad 786 case, an agent refused to hand over the books of a business after the expiry of his term unless the principal gave him the release from all liability in respect of the agency. The principal agreed, it was held that the release deed was not enforceable as consent was obtained by coercion.

**Effects of coercion:**

According to Section 19 when the consent is caused by coercion, fraud or misrepresentation, the agreement is avoidable at the option of the party whose consent was so caused. The aggrieved party may opt to rescind the contract. If the aggrieved party seeks to rescind the contract he/they must restore the benefit so obtained under the contract from other party.

**Example :**

Ram threatens to kill Lalitha, father of Kavi, if he did not sell his lat to him. He also gave him Rs. 50,000 as bayana (advance token money). Kavi gave her consent and made property paper in favor of Ram. This is voidable at the option of Kavi. If Kavi opts to rescind the contract she must return Rs. 50,000 taken as token advance from Ram in this contract.

**The various other conditions under the effect of coercion are:**

- a. It should be noted that threat to commit suicide also amounts to coercion.
- b. Prosecution: A mere threat to prosecute a man or file a suit against him does not constitute a coercion.

**Case Law:**

In *Andhra Sugar Ltd. v. State of AP AIR (1968) SC 599* case, it was held that compulsion of law is not a coercion, fraud, misrepresentation, mistake or even undue-influence.

**High prices and high interest Rates:**

Charging high interest rate, high price, etc., is not a coercion as the same is not prohibited under the Indian Penal code.

**A threat to commit suicide:**

Consent to an agreement may at times be obtained by threatening to commit suicide. The Madras High court has held that threat to commit suicide amounts to coercion.

**Case Law:**

In *Amiraju v. Seshamma (1917) 41 Mad 33* case, it was argued by Oldield J one of the judge of the Bench which decided this case, that Section 15 of the Contract Act must be construed strictly and that an act which is not punishable under the Indian Penal Code cannot be said to be forbidden by it. Suicide is not punishable by the Indian Penal Code, only the attempt to suicide is punishable.

**UNDUE INFLUENCE [SECTION 16]**

Undue influence is another way of causing forced consent of the other party. It is said to be a subtle species of fraud whereby mastery is obtained over the mind of the victim, by insidious approaches and seductive articles.

**Case Law:**

In *Smith v. Kay (1859) 7 HLC 750* case, Lord King down pointed out that the principle of undue influence applies to every case where influence is acquired and abused confidence is reposed and betrayed.

## **CONDITIONS OF UNDUE INFLUENCE**

**The presumption of undue influence are considered in the following relationships:**

- ❖ Parent and child
- ❖ Guardian and ward
- ❖ Doctor and patient
- ❖ Solicitor and client
- ❖ Trustee and beneficiary
- ❖ Religious advisor and disciple.

**There is no presumption of undue influence in the case of following relationships:**

- Landlord and tenant
- Debtor and creditor
- Husband and wife

The wife has to be pardanashin for such presumption. In these relationships undue influence has to be proved.

**Example :**

Ravi, having advanced money to his son Bala, during his minority, upon Bala's coming of age obtains, by misuse of parental influence, a bond from Bala for a greater amount than the sum due in respect of the advance. Ravi employs undue influence.

**Example:**

Mahesh, a man enfeebled by disease or age, is induced by Suresh's influence over him as his medical attendant, to agree to pay Suresh an unreasonable sum for his professional services. Suresh employs undue influence.

**Example :**

Paul being in debt to Raghu, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on Raghu to prove that the contract was not induced by undue influence.

Paul applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. Paul accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence

**Case Law**

In Smt. Chinnamma v. Devanga Sangha (1973) A Mys 338 case, it was held that it is not necessary that the person in position of domination must benefit. A benefit to a third party may be sufficient. In this case undue influence by office bearers of a benefiting the society was sufficient ground to avoid the contract.

**Effect of undue influence:**

Section 19A provides that when the consent is caused by undue influence, the agreement is avoidable at the option of the party whose consent was so caused. The aggrieved party may opt to rescind the contract. If the aggrieved party seeks to rescind the contract he must restore the benefit so obtained under the contract from other party, upon such terms and conditions as the court may seem just.

**Example:**

Somu's son has forged Raghu's name in a promissory note. Raghu under threat of prosecuting Somu's son, obtains a bond from Somu for the amount of the forged note. If Raghu sues on this bond, the Court may set the bond aside.

**Conditions for presumption of undue influence**

**The presumption is raised at least in the following cases:**

**a. Unconscionable bargains:**

Unconscionable transactions means a transaction which is so much to the advantage of one party disadvantage to the other, that is "shocks the conscience and which is irrecoverable with what is right or reasonable."

**Case Law :**

In Bellachi v. Pakeeran (2009) 12 SCC 95 case, it was held that the relationship between the parties so as to enable one of them to dominate the will of another is a sine qua non for constitution of undue influence. The party alleging the same must prove the same subject to just exceptions.

**b. Contracts with pardanashin women:**

- ❖ A pardanashin women is one who, according to the customs of her community lives in complete seclusion. A contract with a Pardanashin women is presumed to be influenced by undue influence.
- ❖ The burden of proof shall always rest upon the person who seeks to sustain transaction entered into with a pardanashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction.
- ❖ It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence direct and circumstantial [Kharbuja Kuer v. Jangbahadur Rai AIR (1963) sc 1203].

**FRAUD [SECTION 17]**

Fraud is an intentional misrepresentation of a material fact which induces the other party to enter into a contract. This happens when one person makes misrepresentation of material facts known to him to be untrue or made with reckless indifference as to whether it is true or false with the intention of causing other party to enter into a contract relying upon the same.

**Case Law:**

In Derry v. Peek (1889) 14 AC 337 case, a fraud is a false statement made knowingly or without belief in its truth or recklessly whether it is true or false.

**DEFINITION:**

As per Section 17 of the Contract Act: "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

- ❖ The suggestion, as a fact, of that which is not true by one who does not believe it to be true;
- ❖ The active concealment of a fact by one having knowledge or belief of the fact;
- ❖ A promise made without any intention of performing it;
- ❖ Any other act fitted to deceive;
- ❖ Any such act or omission as the law specially declares to be fraudulent.

**Example:**

Latha sells a horse to Madha by auction which Latha knows that the horse is deaf. Latha says nothing to Madha about the handicap (deafness) of the horse. In this case Latha is not a fraud. Madha says to Latha - "If you do not deny it, I shall assume that the horse is sound". Latha says nothing. Here, Latha's silence is equivalent to speech. Latha and Madha, being traders, enter upon a contract. Latha has private information of a change in prices which would affect Madha's willingness to proceed with the contract. Latha is not bound to inform Madha.

**Does silence amount to fraud**

One of the party to a contract makes studied silence to some of the facts relating to the subject matter of contract. The matter on which silence is maintained by party may be material fact. Does this amount to passive fraud under the Indian Contract Act or not depends upon various factors.

**Example:**

Ravi sells by auction a camel which Ravi knows to be of unsound health. Ravi says nothing to Ravi about health condition of the camel. This is not fraud. This is based on the doctrine of Caveat Emptor, which enjoins upon the buyer to beware of.

**Case Law:**

In Ward v. Hobbs (1878) 4 AC 13 case, the defendant sold to the plaintiff some pigs with all faults. At the time of sale the pigs were suffering from swine fever but the defendant did not disclose this fact to the plaintiff. Due to disease subsequently some of the pigs died and the plaintiff brought a case of damages against the defendant. The House of Lords held that the defendant was not liable. Again this decision is based on the famous doctrine of CAVEAT EMPTOR.

**Case Law :**

In Shri Krishnan v. Kurukshetra University (1976) 1 SCC 311 case, ABC University candidates must have put in at least 80% attendance during the academic year in order appear in the annual examination. Rina knowing that he fell short of required attendance filled up examination form and appeared in final examination. Rina cannot be said to have committed fraud and the university cannot cancel his examination.

**Example:**

Ravi says to Madhi, 'If you do not deny it, I shall assume that the horse that you are selling me is sound'. If Madhi says nothing, his silent is equivalent to speech and this amount to fraud.

**Case Law :**

In Shankar lal v. Bimla Devi, AIR (1959) MP 8 case, it was held that when a person speaks of another as his own son whom he holds out as his legitimate, natural or adopted son. It cannot possibly include an illegitimate son. Therefore, the representation was fraudulent when a Hindu father represented his illegitimate son as his son.

**Effects of Fraud:**

According to Section 19 when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may if he thinks it, insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representations made had been true.

**Example:**

Ravi intending to deceive Sudha, falsely represents that 500 mounds of indigo are made annually at Ravi's factory and thereby induces Sudha to buy the factory. This tantamount to false and Sudha is entitled to rescind the contract.

**Example:**

Sita fraudulently informs that Sita's estate is free from encumbrance, Ruba thereupon buys the estate. The estate is subject to amortize. Ruba may either avoid the contract or may insist of its being carried out, and the mortgage debt be redeemed.

However there is one exception to the rule of voidability of contract at the option of aggrieved party. If such consent was caused by misrepresentation, or by silence, fraudulent within the meaning of Section 19 the contact, nevertheless, is not voidable, if the party whose consent was so caused had the means to discovering the truth with ordinary diligence.

**MISREPRESENTATION (SECTION 18)**

A statement of fact which one party makes in the course of negotiation with a view to inducing the other party to enter into a contract is known as misrepresentation.

- ❖ It must relate to some fact which is material to the contract. It may be expressed by words spoken or written or implied from the acts and conduct of the parties.
- ❖ A representation when wrongly made either innocently or intentionally is a misrepresentation. When it is made innocently or unintentionally it is misrepresentation and when made intentionally or willfully it is fraud.

**TYPES OF MISREPRESENTATIONS:**

The various types of misrepresentation are as follows:

**Unwarranted statements:**

When a person positively asserts, makes an absolute and explicit statement of facts, that fact is true, though he has no reliable source to form this opinion, but he believes it to be true. This is one type of misrepresentation.

**Example**

In case, Maha told Raj that Kavi would be Director of ABC Ltd. Maha did not have this information either from Kavi or ABC Ltd., but from another source P which was not true. This information was later found to be false. It was held that Maha was not warranted to make such positive assertion that Kavi would be Director of ABC Ltd., so Raj was entitled to avoid the contract to take share of ABC Ltd. The High Court held that an assertion cannot be said to be warranted for his purpose when it is based on hearsay (*Mohanlal v. Gungagi cotton Mills co*, (1900) 4 CWN 369).

**Breach of duty:**

Any breach of duty which brings advantages to the person committing it by misleading the other to his prejudice is misrepresentation.

**Example:**

Rina while negotiating sale of goodwill of his school told Ravi that there are 3000 students. This statement was true when made. But when the bargain struck it fell to 2000 and was in the knowledge of However, Rina did not tell Ravi that the number of students has fallen to 2000. It was held to be a breach of duty on the part of A. B can void the contract (*Incledon v. Watson* (1862)).

**Effect of Misrepresentation:**

As per Section 19 when consent to an agreement is caused by misrepresentation, the agreement is a contract avoidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by misrepresentation, may, if he thinks it, insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representations made had been true.

**Example:**

Ravi intending to induce Sasi to purchase his factory represent that 500 mounds of indigo are made annually at Ravi's factory (Ravi believe it to be true) and thereby induces Sasi to buy the factory. Sasi visited the factory and took a copy of annual accounts A which show that actual production was only 50 pounds per annum. After seeing the accounts of Ravi, Sasi still purchased the factory. This contract is not avoidable at the option of Sasi as he had means to discover truth and despite that he purchased the factory.

**MISTAKE****TYPES OF MISTAKE:**

Mistake means an erroneous belief about something. It has not been defined in the Indian Contract Act.

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**Mistake can be -**

Mistake of law, or Mistake of fact.

The Mistake of law can be Mistake of law of the country or Mistake of law of a foreign country

**Mistake of law of the country:** When a party enters into a contract, without the knowledge of law in the country, the contract is affected by such mistake but it is not void. A contract is not voidable because it was caused by a mistake as to any law in force in India. The reason here is that ignorance of law is not an excuse at all. However if a party is induced to enter into a contract by the mistake of law then such a contract may be avoided.

**Example:**

Ravi and Bala make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

**Mistake of law of foreign country:** Such a mistake is treated as mistake of fact and Agreement is such case is void.

**Mistake of fact can be:**

- ❖ Bilateral mistake
- ❖ Unilateral mistake

### **Bilateral mistake**

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

#### **Example**

Arjun agrees to sell to Bala a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

Maha agrees to buy from Sita a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

#### **Conditions relating to mistakes:**

The following are the conditions pertaining to various mistakes are:

**Mistake must be mutual:** Both the parties must misunderstand each other and should be at cross purpose.

#### **Example**

Latha agreed to purchase Renu's motor car which was lying in Renu's garage. Unknown to both the parties the car as well car garage was blown in a massive fire that gutted his flat. The contract is void due to bilateral mistake of fact.

**Mistake must relate to a matter of fact essential to the agreement:** Essential fact of an agreement depends upon the nature of promise in each case.

#### **Example:**

A man and a woman entered into a separation agreement whereby man was to pay monthly maintenance allowance to the women. Both of them were mistakenly taken to be legally married. However, their marriage was not legally tenable. Held the agreement was void due to mutual mistake on the point of fact which was material to the existence of the agreement. [Galloway v. Galloway (1914) 30 TLR 531].

**Mistake as to existence of subject matter:** If both the parties are at mutual mistake as to existence of the subject matter the agreement is void.

#### **Example:**

Babu agreed to buy Baskar's horse for Rs. 5000. Unknown to both the parties it was found that the horse had already died at the time of bargain. The agreement is void due to non-existence of subject matter.

**Mistake as to identity of subject matter:** It usually happens when both the parties have different subject matter of contract in their mind, the contract is void due to mistake of identity of subject matter.

#### **Example :**

Abi has two camels Shergil and Chetak, he intended to sell Chetak to Raghu. Raghu intending to buy Shergil though the offer is for Chetak sends his acceptance. Since, there is bilateral mistake in the identity of the subject matter there is no contract. The contract is void.

**Mistake as to the quality of the subject matter:** If the subject matter is something essentially different from what the parties thought to be, the agreement is void.

#### **Example:**

Table napkins were sold at an auction by a description "with the crest of Charles I and the authentic property of that monarch", in fact the napkins were Georgian. Held the agreement was void as there was a mistake as to the quality of the subject matter. [Nicholson & Venn v. Smith Marriott (1947) 177 LT 180]

**Mistake as to quantity of subject matter:** Bilateral mistake as to quantity of subject matter would render the contract void.

#### **Example:**

A gold bar was sold under a mistake as to its weight. There was a difference in value between the weights of the bar as it was and as it was supposed to be. Held the agreement was void (Cox v. Prentice (1815) 3 MS 344).

**Mistake as to title of subject matter:** The agreement is void due to bilateral mistake as to title of the subject matter.

**Example:**

A person took a lease of a fishery which, unknown to both the parties belongs to A itself. Held, the lease was void [Cooper v. Phibbs (1867) LR2 HL 149]

**Mistake as to price of the subject matter:** Mutual mistake as to price of the subject matter would render the agreement void.

**Mistake as to physical impossibility of performance of Contract.** A contract is void if it is identified to be non-feasible due to physical factors, like time, distance, height, etc.

**Mistake as to legal impossibility of performance of Contract:** A contract is void if it provides that something shall be done, which as a matter of law cannot be done.

**Unilateral Mistake as to fact:** According to Section 22 a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. A unilateral mistake is not allowed as a defense in avoiding a contract unless the mistakes brought about by another party's fraud or misrepresentation.

**Example:**

Rathi intended to sell her land to A for Rs. 55 lakhs. By mistake she made an offer of Rs.50 lakhs in writing. A cannot avoid the contract on the plea of mistake of fact.

## **QUASI CONTRACT**

### **Definition**

Contracts are called Quasi contracts because the obligations associated with such transactions could neither be referred as tortious nor contractual but still recognized by law as enforceable like other contracts.

### **Philosophy of Quasi Contracts :**

- ❖ No one shall be allowed unjustly to enrich himself at the expense of another and claim based on a quasi contract is generally for money.
- ❖ A quasi contract is a fictitious contract created under legal obligations, similar to a valid contract. These contracts are also known as implied-in-law contracts.
- ❖ A quasi contract is created by the Court. For the same reason, there is no actual offer or acceptance or an agreement between the parties.

### **Features of a Quasi Contract:**

- ❖ It is imposed by law and does not arise by agreement.
- ❖ The duty of a party and not the promise of any party is the basis of such contract.
- ❖ The right under it is always a right to money and though not always to a liquidated sum of money.
- ❖ The right is available against specific persons and not the whole world.
- ❖ A suit for breach may be filed in the same way as in case of a complete contract.

### **Distinction between Quasi Contracts and Contracts**

Quasi Contracts	Contracts
The essential elements for formation of contracts are absent.	Essential elements for formation of contracts are present.
Obligation is imposed by law.	Obligation is created by consent of parties

## **TYPES OF QUASI CONTRACTS**

Sections 68 to 72 deal with five kinds of quasi contractual obligations. These are discussed below:

### **CLAIM FOR NECESSARIES SUPPLIED TO PERSON INCAPABLE OF CONTRACTING, OR ON HIS ACCOUNT (SECTION 68)**

If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

#### **Example:**

Ram supplies Bala, a lunatic, with necessaries suitable to his condition in life. Ram is entitled to be reimbursed from Bala's property.

## **QUASI CONTRACTS**

### **REIMBURSEMENT OF PERSON PAYING MONEY DUE BY ANOTHER IN PAYMENT OF WHICH HE IS INTERESTED (SECTION 69)**

In case of a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

#### **Example**

Karthi holds land in Bengal, on a lease granted by Madha, the zamindar. The revenue payable by Madha to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such a sale will be the annulment of Karthi's lease. If Karthi decides to prevent the sale and the consequent annulment of his own lease should be paid to the Government from the sum due from Madha. Madha is bound to make good to Karthi the amount so paid.

#### **The following requirements are needed for a contract to come under Section 69 and for enforcement of payment:**

- The payment should be bonafide payment.
- Payment should not be voluntary.
- Payment should be one which other party was legally to pay.
- If any of these condition is not met the case will not fall under section 69 of the Act, and the party cannot claim such payment.

#### **Case Law:**

In Vaikuntam v. Kallapiram (1900) 23 Mad 512 case, a Hindu mother incurred expenses for her daughter's marriage. She is entitled to recover the expenses incurred from the other members of the Hindu Joint Family.

### **OBLIGATION OF PERSON ENJOYING BENEFIT OF NON-GRATUITOUS ACT (SECTION 70)**

If a person lawfully does anything for another person or delivers anything to him, is not intending to do so gratuitously. If such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

#### **Example**

Harish, a tradesman, leaves goods at Deepa's house by mistake, Deepa treats the goods as her own. Deepa is bound to pay Harish for them.

#### **Case Law:**

In State of West Bengal v, BK Mondal & Sons AIR (1962) SC 779 case, a contractor on the request of an officer of the State of West Bengal, constructed a katcha road, office, kitchen, etc., for the clerks. The State accepted the works but tried to evade liability because no contract had been concluded according to the formalities of the Government of India Act. Since, the State had enjoyed the benefit of the works, the Supreme court decreed the contractor's claim.

## **FINDER OF GOODS (SECTION 71)**

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee besides the responsibility of exercising reasonable efforts in finding the real owner.

### **A finder follows these following rights:**

- a. **Right to retain the goods** until the true owner compensates him for the money spent in preserving the goods and finding the owner. The finder, however, cannot sue for compensation. Where the owner has declared specific reward, the finder can sue him for the same.
- b. **Right to sell:** If the owner cannot be found after due search, or he refuses to pay lawful charges of the finder, the finder may sell the goods if:
  - ❖ The goods are of perishable nature;
  - ❖ Lawful charges of the finder amounts to 2/3rd of the value of goods. Finder of lost goods can sell the goods;
  - ❖ Goods is likely to perish;
  - ❖ True owner with reasonable diligence could not be found;
  - ❖ True owner found but refuses to pay lawful charges of the finder of lost goods;
  - Lawful charges are about 2/3 of value of thing found.

## **LIABILITY OF PERSON TO WHOM MONEY IS PAID, OR THING DELIVERED BY MIS-TAKE OR UNDER COERCION (SECTION 72)**

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

### **Example**

Anu and Balaji jointly owed Rs.100 to Sri. Anu alone pays the amount to Sri, and Balaji, not knowing this fact, pays Rs. 100 over again to Sri. Sri is bound to repay the amount to Balaji.

### **Example**

A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods He is entitled to recover so much of the charge as was illegally excessive [D.Cawasji & Co v. State AIR (1969) May 23].

It may be noted that this section does not make any distinction between mistake of law and mistake of fact.

## **CONTINGENT CONTRACT**

A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

### **Example:**

Anu contracts to pay Bala Rs.10,000, if Bala’s house is burnt. This is a contingent contract.

### **Example:**

Ali agrees to sell a certain piece of land to Babu, if he succeeds in the litigation concerning his land. This is a contingent contract

## **EXCEPTIONS OF CONTINGENT CONTRACTS:**

### **The following contracts are exceptions of the contingent contracts:**

- (a). Ram promise to pay Rs.. 2,100 to someone who traces is missing horse.
- (b). Ram promise to pay Shyam Rs.5, 100 if he marries Radha.

In Example (a) there is no contract unless and until somebody traces the missing horse of Ram.Similarly incase the offer becomes binding once Shyam marries Radha and Ram is bound to pay him Rs.5, 100 as promised.

Contingent contracts can or cannot be enforced if a specific event does not happen within a fixed time may been forced by law when the fixed time has expired and such event had not happened, or, before the fixed time has expired, if it becomes certain that such event will not happen.

**Example:**

Abu promises to pay Kathir a sum of money, if a certain ship returns within a year. The contract may been forced if the ship returns within the year, and becomes void if the ship is burnt within the year.

**Characteristics of Contingent Contract:**

**Section 32** contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

**Example:**

A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced in law unless and until C dies in A's lifetime.

**Section 33** contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced, when the happening of that event becomes impossible, and not before.

**Section 34**, if the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

**Example:**

A agrees to pay B a sum of money if B marries C, C marries D. The marriage of B to C must now be considered impossible; although it is possible that D may die and that C may afterwards marry B.

**Section 35** contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

**Example:**

A promise to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year and becomes void if the ship is burnt within the year;

**Section 36** contingent agreements to do or not to do anything if an impossible even that happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

**Example**

A agrees to pay B `1,000/- if two straight lines should enclose a space. This agreement is void.

**DISCHARGE OF CONTRACT**

Once a contract has been duly formed the next milestones to be achieved is fulfillment of the contractual obligations of both the parties as contemplated in the contract. When the object is fulfilled the liabilities of both the parties comes to an end.

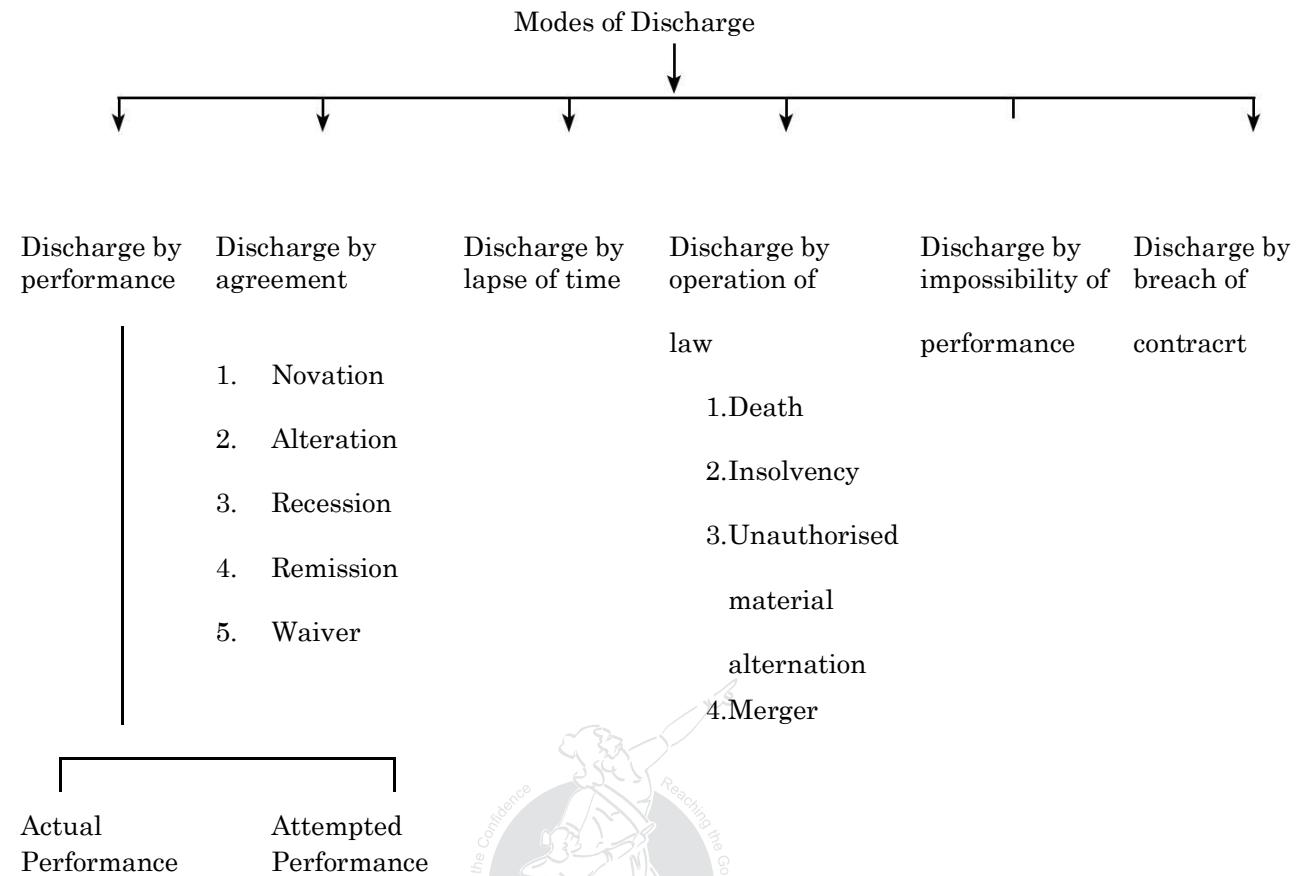
Discharge of Contract implies termination of contractual relationship among parties. When we say a contract is discharged it means it ceases to operate and rights and obligation under it comes to an end.

**A contract may be discharged by any of the following ways:**

- Performance
- Mutual consent
- Subsequent impossibility of performance
- Lapse of time
- Operation of law
- Breach of contract.

## **MODES OF DISCHARGE**

The mode of discharge may be:



### **Discharge by performance is the most usual form of discharge of a contract :**

When both the parties to the contract have discharged their respective contractual obligations as contemplated in the contract the contract stand discharged. Performance can be actual performance or tender of performance. In both the cases the contract stand discharged.



### **Discharged by a further agreement among parties which may be express or implied:**

By agreement of all the parties, a contract may be cancelled or its terms altered or get substituted by a new agreement for it. Whenever any of these things happens, the old contract is terminated. If the parties to the contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

### **CONTRACTS WHICH NEED NOT BE PERFORMED, EFFECT OF NOVATION, RESCISSION AND ALTERATION OF CONTRACT (SECTION 62)**

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

#### **Example**

Anu owes money to Balaji under a contract. It is agreed between Anu, Balaji and Chitra that Balaji shall thenceforth accept Chitra as his debtor, instead of Anu. The old debt of Anu to Balaji is at an end, a new debt from Chitra to Balaji has been contracted.

#### **Example**

Ajay owes Bala Rs. 10,000. Ajay enters into an agreement with Bala, and gives Bala a mortgage of his(Ajay's) estate for Rs. 5,000 in place of the debt of Rs. 10,000. This is a new contract and extinguishes the old.

**Novation:**

Novation means substitution of a new contract for the existing contract. If the parties to a contract agree to substitute a new contract for it, the original contract is discharged. The consideration for the new contract is discharged of the old contract.

**Example**

Joy owes money to Hari under a contract. It is agreed between Joy, Hari and Latha that Hari shall thenceforth accept Hari as his debtor, instead of Joy. The old debt of Joy to Hari comes to an end, and a new debt from Latha to Hari has been contracted.

**Example**

Kala owes Tinoj Rs. 15, 000, Kala enters into an arrangement with Tinoj, and gives Tinoj mortgage of her (Kala's) estate for Rs. 10,000 in place of the debt of Rs. 15,000. This is a new contract and extinguishes the old one.

**Alteration:**

If the parties to a contract agree to alter it, the original contract need not be performed. In this case parties remain the same, only terms of contract are altered. Alteration means change in one or more terms of the contract. If a material alteration is done without the consent of the other party the contract becomes void.

**Rescission:**

If the parties to a contract agree to rescind it, the original contract need not be performed. Rescission results in cancellation of the contract. Thus in case of rescission the existing contract is concealed by mutual consent and new contract does not come into existence.

**MUTUAL AGREEMENT OR CONSENT OF THE PARTIES IS REMISSION (SECTION 63)**

Section 63 reads: "every promise may dispense with or may remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks it."

**Waiver:**

Dispensing with performance or giving up a right under the contract is known as waiver.

**Example**

Anu promises to paint a picture for Bala. Bala afterwards forbids herim to do. Anu is no longer bound to perform the promise.

**Remission:**

Acceptance of lesser promise than what is due under the contract is called remission.

**Example**

Latha owes Babu Rs. 5,000. Latha pays to Babu, and Babu accepts in satisfaction of the whole debt Rs. 2,000 paid at the time and place at which the Rs. 5,000 were payable. The whole debt is discharged.

**Case Law :**

In Kapoor chand Vv. Mrs. Nawab Khan AIR (1963) SC 250 case, Aa creditor accepted Rs.20 lakhs in full satisfaction of his claim of Rs. 27 lakhs. It was held that the creditor was not entitled to sue for the balance. The case was completely covered by sSection 63. However, in Amarnath Vv. Bharat Heavy Electricals ltd., case, the position would be different if the promise accepts some performance under protest and the contract is not discharged.

**Agreement to extend time.:**

Every promise may extend the time of performance of contract. No consideration is necessary for such an agreement as more is required for the total or partial remission of the performance.

**Case Law:**

In *Keshavlal v. Lal Bihari Mills ltd* (1959) SCR 213 case, The Supreme court held that the buyer can not unilaterally extend time of his own accord and for his own benefit. Consent of the other party is also necessary.

**Accord and Satisfaction**

Accepting any other satisfaction instead of performance. A promisee may accept any satisfaction which he thinks it and this would discharge the promisor. Accepting some other satisfaction instead of actual performance is called ‘Accord and Satisfaction’ under English law. Accord is the agreement by which the obligation is discharged and satisfaction is the consideration which makes the agreement operative.

**Example**

Mani owes Bala, under a contract, a sum of money, the amount of which has not been ascertained. Mani without ascertaining the amount gives to Bala, and Bala, in satisfaction thereof, accepts the sum of Rs.2,000. This is a discharge of the whole debt, whatever may be its amount.

**Contract to perform an impossible act is void ab-initio:**

A contract is discharged if subsequent performance becomes impossible due to factors beyond the control of the parties. Supervening impossibility occurs in the following circumstances:-

- ❖ The subject matter of contract is destroyed.
- ❖ The state of things which form basis of contract changes.
- ❖ The performance depends on personal skill, incapacity of that party renders the contract discharged.
- ❖ Change of law may render the performance impossible.
- ❖ Outbreak of war may make a party alien enemy. Contract with alien enemy is unlawful and such contracts are suspended during duration of war.

**Law of Limitation:**

A contract should be performed within a specified time period, called period of limitation. If not performed within ‘period of limitation’ and no action is taken by the promisee, the contract is terminated.

**Example**

Hari agreed sell goods worth Rs. 21,000 to Yogan without any stipulation as to credit, Yogan did not pay the amount for three years. On expiry of three years from the date of the contract the debt becomes time barred under the Limitation Act and contract stand discharged.

**Example**

Vijay agreed sell goods worth Rs.31, 000 to Jeevi with stipulation of 6 months credit, Jeevi did not pay the amount even after expiry of three months, from the expiry of credit period of 9 months. On expiry of three years from the expiry of credit period the debt becomes time barred under the Limitation Act and contract stand discharged.

**Contract may be discharged due to operation of law**

By death of a party, merger, and insolvency of a party, unauthorized alteration in terms of contract, rights and liabilities getting vested in the same person.

**Death:**

In contract involving personal skills or ability, death terminates the contract. In other cases the rights and liabilities pass on to the legal representatives of the deceased party.

**Example**

Kala, a celebrated artist agrees to draw a life size portrait of Mani on his next birth day. However, before arrival of Mani’s birth day Kala dies in a road accident. The contract is discharged by operation of law due to death of Kala.

**Insolvency:**

Upon insolvency, the right and liabilities of the insolvent are, with certain exceptions, transferred to an officer of the court, known as the official Assignee in Kolkata and other presidency town and as Official receivers in other cases.

**Merger:**

When a superior rights and an inferior right coincide and meet in one and the same person, the inferior right vanishes into the superior right. This is known as merger.

**Example**

A man holding property under a lease, buys the property. His rights as a lessee would vanish. They are merged into the rights of ownership which he has now acquired.

**Unauthorized alteration in the terms of the contract:**

Unauthorized alteration in the contract with any party to the contract, renders the contract discharged and makes it void.

**Example**

Naren agree to sell his land to Vinoth for Rs. 8, 00, 000, however Naren while preparing the conveyance document mentioned the amount Rs. 8, 50, 000 instead of Rs. 8, 00, 000 without knowledge of Vinoth. The contract stands discharged and Y Vinoth is not entitled to honor the contract.

**Discharge by impossibility of performance:**

Impossibility of performance results in the discharge of the contract. An agreement which is impossible is void, because law does not compel to do impossible things.

**Discharge by breach:**

Breach means failure of a party to perform his obligations under a contract. Breach brings an end to the obligations created by a contract.

**Example:** X and Y wanted to marry each other. Before the time fixed for marriage, X goes mad. The contract becomes void.

**TERMINATION OF CONTRACT**

The agreement could have been terminated by issuing of a notice to the plaintiff, calling upon to complete the transaction within a particular time, failing which the contract will be treated as cancelled. That this is the proper way of terminating the contract is cleared .

**Case Law : “Narayana Swami PillaiV. Dhanakodi Ammal” – (1971) 1 Mys. L.J., 245**

The contract is for the sale of immovable property the vendor must give reasonable notice requiring the performance within a definite time.

**REVIEW QUESTIONS-GENERAL CONTRACTS**

1. Explain the essential elements of a valid contract
2. Write explanatory notes on Mere mental acceptance is no acceptance
3. Write short notes on Misrepresentation
4. Write notes on Effects of Coercion on a Contract
5. Write notes on Undue Influence
6. Explain Breach of Contract
7. Write explanatory notes on Counter Offer
8. Explain Lawful Consideration
9. Write short notes on Discharge of Contract
10. Distinguish between liquidated damages and penalty
11. Comment of following statements: An Offer must be communicated to the acceptor
12. Are all contracts without consideration void ? Do you agree ?
13. Can a minor be liable for payment of supplies of necessaries to him ?
14. When an offer lapses ?
15. Under what circumstances, a contract can be discharged
16. Certain agreements are expressly declared to be void/unlawful
17. What is fraud under Indian Contract Act, 1872
18. A minor can be appointed as Agent – Comment
19. A contract without adequate consideration is not a contract – offer your views
20. State the essentials of a valid contract
21. All consideration or object of an agreement is not lawful – Justify
22. A minor can neither undertake liabilities nor receive benefit under the contract – comment.
23. Void agreement” and “void contract” are same. Offer your views based on Rule Provision.
24. A deceit which does not deceive is not fraud. Comment
25. A patient in a lunatic asylum can also enter into a valid contract state the position based on legal provision
26. Rewrite a note on Quasi contract

## ICWA INTER - PRACTICAL QUESTIONS

### GENERAL CONTRACTS

**1. [D] 2008- Mr.X offers to sell his Maruti car to Mr.Y for and intended sum of Rs.90,000/- but by mistake he makes an offer in writing for Rs.70,000/- instead of Rs.90,000/- Mr.X can plead mistake as defence.**

Ans: As per Section 22 of the Indian Contract Act, A unilateral mistake is a mistake caused by only one party to the contract. A contract is not voidable merely because it is caused by one of the parties to it being under a mistake as to a matter of fact.

In the given problem, it is a unilateral mistake. Thus, Mr. X cannot plead the mistake as defense.

**2. [J] 2011-Mr.Sadhu offers to sell his house to Mr. Sarkar at Rs.221 lacks but by mistake makes the offer in writing for Rs.212 lacks which was accepted by Mr. Sarkar. Can Mr. Sadhu plead the mistake as defense?**

Ans : As per Section 22 of the Indian contract Act, 1872 a contract is not voidable merely because it is caused by one of the parties to it being under the mistake of fact.

In the given case Mr. Sadhu offers to sell his house to Mr. Sarkar at Rs.221 lacks but by mistake makes the offer in writing for Rs.212 lacks. He cannot plead the mistake as defense.

**3. [J] 2012 – Mr. A being an agent of Mr. P (who is owner of land) agrees for money to obtain for Mr. B a lease of P's land but without the knowledge of 'P' Discuss the validity of this agreement.**

Ans: As per Section 196 of the Indian Contract Act, 1872 when an act is done by one person on behalf of another but without his knowledge or authority, the later may elect either to ratify or disown such Act.

In terms of Section 23 of the Contract Act, 1872 the agreement between A and B is void as it implies a fraud by concealment, by A, on his principal.

**4.[D] 2012-Mr.Menon offered on 1st December, 2012 to sell his house to Mr. Polson at INR Thirty five lacks. Polson accepted by email on 2nd December, 2012 at 8A.M at 10A.M Mr. Polson sent a Fax revoking the acceptance. Both email (i.e. acceptance) and Fax (i.e. revocation) reached Menon at the same time. Hence this was valid**

Ans: As per Section 4 of the Indian Contract Act, 1872, communication of acceptance is complete as against the proposer, when it is put in the course of transmission to him so as to be out of the power of the acceptor. As such the communication of the acceptance is valid. Once acceptance is made, it cannot be revoked. Mr. Polson cannot therefore revoke the same.

**5. [J] 2009-State the right and liabilities of "A" in the following case:**

An Auctioneer advertised in a newspaper that a sale of office furniture will be held at Kolkata on 29.11.2009. "A" came from New Delhi to buy the furniture but the auction was cancelled. Whether 'A' can file a suit against the auctioneer for his loss of time and cost

Ans: In case of auction, the advertisement in a newspaper for sale of office furniture is not an offer but an invitation to participation in an auction. Thus, A cannot file a suit against the auctioneer for his loss of time and cost

**6.[D] 2009-'B' offered to sell his car to 'A' for Rs.75, 000/- 'A' accept to purchase at Rs.74, 950/- 'B' refuses. Subsequently 'A' agrees to purchase at Rs.75, 000/- but 'B' refused. 'A' sued 'B' for specific performance of the contract.State legal position.**

Ans: When a person makes an offer and the other person makes a counter offer it means that the other person is not accepting the offer but making offer. It is on the will of the offer or to accept or reject the counter offer.

Hence, in the present case, A cannot sue B for specific performance as A had made a counter offer so the offer which B had made lapsed with a counter offer.

**7.[J] 2011-Mr.Bose directs Mr. Roy to sell wheat for which Mr. Bose agreed to pay 10% Commission on the price fetched by the Goods. Mr. Bose afterwards by a letter revokes Mr. Roy's Authority. But before receiving that revocation letter Mr. Roy sold wheat for Rs.10, 000. Mr. Bose refused to pay commission to Mr. Roy offer your views.**

Ans: Section 208 of the Indian Contract Act, 1872 provides that the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

In terms of the said provisions, the sale is binding on Mr. Bose, and Mr. Roy is entitled to his commission.

**8. [J]2012-Arun seeing a watch in Barun's shop marked for sale for INR 1000 entered the shop, places INR 1000 on the counter and asks for the watch. Barun refused. Can Barun refuse to sell the watch? Give reasons**

Ans: Yes. Display of goods by a shopkeeper with price marked on them is not an offer but merely an invitation of offer to sell the goods at that price. Therefore Barun can refuse to sell the watch.

**9.[D] 2008-Mr. Ramesh promised to pay Rs.10, 000/- on 30.10.08 jointly to Mr.Bhabesh and Mr.Naresh for some consideration. Mr. Bhabesh died on 1.9.08. On 30.10.08 Mr.Naresh demanded payment of whole amount of Rs.10, 000/- Whether Mr.Naresh is justified?**

Ans: When a person has made a promise to two or more persons jointly, then unless contrary intention appears from the contract, the right to claim performance rests with them during their joint lives. After the death of any one of them, the right to claim performance rests with the representative of such deceased person jointly with the survivor or survivors. After the death of the last survivor, the right to claim performance rests with the representatives of all jointly.

In the given problem after the death of Mr.Bhabesh, Mr.Naresh cannot demand the payment of whole amount to him.

**10.[J] 2009-A saved life "B". Who was drowning later "A" demanded remuneration from "B" for saving him since saving of life valid consideration, "A" would succeed.**

**[J] 2010 – A saved life of "B" when B was drowning Later "A" sued "B" for remuneration /reward because saving life was the consideration received by "B". State based on rules whether "A" would succeed?**

Ans: Consideration must be at the desire of the promisor. If it is done at the desire of the third party or without the desire of the promisor, it is not a valid consideration.

In the given problem, A saved life of B without being asked by B. A cannot demand remuneration for this.

**11.[D]2009-Mr. A approached Union Bank for loan of Rs.1,00,000/- which was not available from others due to tight money market. Bank agreed but at a high rate of interest. Mr. A accepted. Can he repudiate on the ground of undue influence? [2Marks]**

Mr. A cannot repudiate the contract on the ground of undue influence as the bank had not tried to dominate the will of Mr. A. took the loan from the bank in the ordinary course of business. Hence, the contract would be valid and binding upon Mr. A.

**12.[D] 2009-Mr.Sham informs Mr. Ram that Mr. Sham's estate is free from encumbrances. Mr. Ram buys the property fully relying on Mr. Sham. Subsequently it revealed that the estate was mortgaged. What will be the position of Mr. Ram?**

The contract is voidable at the option of Mr. Ram can repudiate the contract, further Mr. Ram can insist on the contract being carried out and the mortgaged debt redeemed.

**13.[D] 2010-Mr.X buys a ring from Mr. Y at a low price employing ‘undue influence’ and sells the ring to Mr. Z who purchased against consideration and without knowing of Mr. X’s ‘undue influence’. Can Mr. Y recover the ring from Z.?**

Ans: As per Section 19A, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

In the given problem, Mr. Y cannot recover the ring from Z. Mr. Z purchased on good faith against consideration. Contract between Mr. X and Mr. Y is voidable not void as per Section 19A.

**14.[J] 2010-Mr. “A” agrees that Mr. A shall sell Mr.B a house for Rs.1, 00,000/- but if Mr.B uses the house for “Gambling House” then Mr.B shall pay Rs.1, 50,000/- for the same. Explain the legality.**

Ans: As per Section 57 where the parties to the contract reciprocally promise to do first a legal thing and then an illegal thing, the legal promise is a contract and the illegal promise is a agreement.

Mr.A and Mr.B promises that Mr.A sell Mr.B a house for Rs.1,00,000 but that if B uses the house for gambling, he shall pay Rs.1,50,000 for it. The first sell of the house for Rs.1, 00,000 is a contract and the second sell of the house is set for an unlawful purpose of gambling and therefore, a void agreement.

**15.[J] 2011-Mr.Adarsh was due to perform on 20th Feb but on 17th Feb 2011 repudiated his obligation. On 25th Feb the contract become illegal through a change in Law. Mr.Vasant the other Party requested you to advice action against Mr.Adarsh.**

Ans: When a party repudiates a contract before the time fixed for performance or when a party by his own act disables himself from performing the contract, it is anticipatory breach of contract.

The contract is discharged only when the aggrieved party accepts the repudiation of the contract, i.e., elects to rescind the contract. If the repudiation is not accepted and subsequently an event happens, discharging the contract legally, the aggrieved party shall lose his right to sue for damages.

In the given case Mr. Adarsh was due to perform on 20th Feb but on 17th Feb, 2011 repudiated his obligation.

On 25th Feb the Contract become illegal through a change in Law. The contract was discharged and Mr.Vasant could not sue for damages. Similar observation was made in Avery V. Bowen (1856) 6 E.& B.965.

**16.[D] 2010- A. Das entered into contract to sign for B. Roy at Rs.10, 000/- which received in advance. A Das being too ill could not sing. B. Roy demanded compensation for loss profit which he would have made if A. Das had been able to sing. State B. Roy’s right.**

Ans: A person who rightful rescinds a contract is entitled to consideration for any damage which he has sustained through the non-fulfillment of the contract. Hence, in the present case B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

**17.[D] 2011-Mr.Ardhendu and Mr. Barun entered into a contract to build a house for a specified consideration Clause 14 of contract provides that in case of disputes, neither party may move court of Law but must accept the decision of an Arbitrator named in the contract. Does this clause violate the provisions of law?**

Ans: Arbitration is a form of Alternate Dispute Resolution (ADR) and is a legal technique for the resolution of disputes outside the courts. Arbitration & Conciliation Act, 1996 contains provisions for this purpose.

In BhajahariSahaBanikyan.BeharyLalBasak (1909) ILR 33 Cal 881 the Supreme Court observed that the arbitration award is a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding. In the given case, the contract between Mr.Ardhendu and Mr.Barun contains an arbitration clause. Any decision by the Arbitrator in terms of the contract is acceptable in law.

**18.[J] 2012-Arun entered into a contract with Barun to let the house under construction and received advance of INR 2lakhs. The house was, however, requisitioned by Government and, therefore, Arun failed to honor the contract can Barun recover damages for breach of contract? Advice.**

Ans: Subsequent to formation of the contract if any impossibility in performing the contract arises which is beyond the control of the parties, it is called post contractual impossibility or supervening impossibility. As provided in Section 56, such contract becomes void when the act becomes impossible or unlawful.

**19.2013- Mr. A offers to buy Mr. B's house on certain terms. Acceptance was to be sent by 'B' within 6(six) weeks. B within one week sent a letter accepting the offer with an alteration of one term. A then withdrew his offer. B writes again within three weeks accepting the terms originally proposed by 'A'. Hence this is a valid contract.**

Ans: When a person makes an offer and the other person makes a counter offer it means that the other person is not accepting the offer but making an after. Hence the offer made earlier lapses.

In the present case after making a counter offer, the offer made by A lapses and therefore B cannot accept it later. Hence it is not a valid contract.

**20.2013 - A patient in a lunatic asylum can also enter into a valid contract. State the position based on legal provision.**

Ans: In Trilok Chand V. Mahandu, AIR 1933 Lahore 458. It was held that if a person who is usually of unsound mind is proved to be having lucid intervals, he is capable of making a valid contract during such intervals.

**21.2013 – X agrees to pay Y a sum of money if Y marries Z. Z however marries F, who died subsequently. After the death of F, Z marries Y. Whether X is legally bound to pay the agreed sum of money to Y? Comment.**

Ans: As per section 34 of the Contract Act, if the future event on which a contract is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible within any definite time, or otherwise than under further contingencies, the contract is a contingent contract. In the given case Z marries F instead of Y. Therefore, X is not legally bound to pay the agreed sum of money to Y.

**22.2013 – Referring to a quarrel and disagreement between husband and wife, the husband agreed to execute and register a document in favour of his wife to transfer one of his properties to his wife . Later on husband refused. Whether wife can enforce?**

Ans: Section 25(1) of Indian Contract Act, 1872 provides that a contract without consideration shall be valid if made out of natural love and affection between parties standing in a near relation to each other. In the given case since the promise to transfer property is made after reference to quarrels & disagreement, the contract shall not be enforceable not be enforceable as natural love and affection was absent. The wife cannot succeed.

**23.2013 – M/s. wholeseller agreed to supply 1000 Pcs. Of Cotton Shirts to M/s. Retailer at INR 300 per shirt by 31.05.2013. On 01.02.2013 M/s. Wholeseller informs the Retailer that he is not willing to supply the shirts as the price of shirt creased to INR 350 each. Examine the right of M/s.**

Ans: As observed by Scrutton, L. J. in Ralli Bros. v. Compania Naviera, etc. (1920) 2 K.B. 287, 'impossibility of performance is, as a rule, not an excuse for non-performance. An act agreed to be done must be done in the spirit as agreed upon'. A contract is not discharged merely because of commercial impossibility, i.e. more profit is expected. The retailer has the right to get the goods in the agreed price. The attitude of the Wholeseller is called anticipating breach of contract. M/s. Retailer can claim damages.

## **SPECIAL CONTRACTS : INDEMNITY AND GUARANTEE**

### **INTRODUCTION**

The contract of indemnity and guarantee are the special types of contracts. Indemnity means protection against losses, especially, or payment for loss of money, goods, etc. Basically, it is a security against any default or compensation for loss etc. The person who promises to indemnify is known as indemnifier and the person in whose favor such promise is made is known as indemnified.

The special provision relating to contract of Indemnity and Guarantee are embodied in Section 124 to 142 of the Act.

### **CONTRACT OF INDEMNITY (SECTION 124)**

**Definition :** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity.”

The person to whom such promise is given or whose loss is promised to be made good is called promisee or indemnified or indemnity holder. It may be noted that the definition of indemnity given in the Indian contract Act is not exhaustive one.

#### **Contracts to indemnify includes**

Express promise to indemnify and

Cases where the loss is caused by the conduct of the promisor himself or by the conduct of any other person.

#### **Contracts to indemnify does not include**

Implied promises to indemnify and

Cases where loss arises from accidents and events not depending on the conduct of the promisor or any other person.

#### **Example**

Charan contracts to indemnify Bala against the consequences of any proceedings which Chitra may take against Bala in respect of a certain sum of Rs. 400. This is a contract of indemnity.

#### **Example**

Sai and Srinath went to a TV shop. Sai neither had enough cash nor any credit card to make the payment. Srinath common friend of both Sai and Kala (shopkeeper) said to the shopkeeper let Sai take the TV of his choice, I (Srinath) will see that you (shopkeeper) is paid. This again is a case of indemnity. Here also Srinath is the indemnifier and Kala the shopkeeper is the indemnified or indemnity holder.

#### **According to Section 124 of the Indian Contract Act the definition to indemnity can be given as follows:**

- ❖ It is express promise of indemnity and not an implied promise of indemnity, or
- ❖ In the cases where loss is caused by the conduct of the promisor or the conduct of any other person.

As per English law Indemnity is “a promise to save another harmless from loss caused as a result of transaction entered into at the instances of the promisor”.

#### **Accordingly the contracts of indemnity maybe either express or implied.**

An implied indemnity is inferred from the circumstances of the case or from the relationship of the parties.

#### **Example**

Hari on the instruction of Vinoth sold certain cattle belonging to Joy. Joy held Hari liable for it and recovered damages from him for selling it. It was held that Hari could recover the loss from Vinoth as a promise by Vinoth to Hari that any loss would be implied from his conduct in asking Hari to sell the cattle.

It is a case of implied indemnity which can be inferred from the instruction of Hari to Vinoth (Adamson v. Jarvis (1827) 4 Bing 66).

## **RIGHTS OF INDEMNITY HOLDER WHEN SUED (SECTION 125)**

The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover the following from the promisor:

### **Damages:**

All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.

### **Costs:**

All costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

### **Sums:**

All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

## **CONTRACT OF GUARANTEE, SURETY, PRINCIPAL DEBTOR, CREDITOR (SECTION 126)**

A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

### **Definitions**

#### **Surety:**

The person who gives the guarantee is called the “surety”.

#### **Principal Debtor:**

The person in respect of whose default the guarantee is given is called the “principal debtor”.

#### **Creditor:**

The person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written. The person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.

### **Tripartite Agreement:**

It may be noted that the contract of guarantee is a tripartite agreement, which contemplates the principal debtor, the creditors and the surety.

### **Characteristics of Contract of Guarantee**

#### **Concurrence:**

All the three parties must concur without which a contract of Guarantee is not complete.

#### **Example**

Chitra enters into a contract with Paul. Sai without any communication with Paul, undertakes for a consideration moving from Chitra to indemnify Chitra against any damages that may arise from a breach of Paul's obligation. This does not make Sai a surety for Paul, for a person cannot become a surety without the consent of the principal debtor.

### **To fulfill all the essentials of a valid contract:**

All elements of a valid contract/agreements like capacity, free consent, legal object and lawful consideration equally apply to a contract of Indemnity also.

### **Need not be in writing:**

It may be expressed or implied from the conduct of the parties. It may be in writing or oral. But as per English law a contract of guarantee must be in writing and signed by the party to the contract.

**Primary liability in some person other than surety.** If that liability does not exist, there cannot be a contract of guarantee. But a guarantee given for the debt of a minor is an exception to this rule.

The primary liability in a contract of guarantee is that of the principal debtor, whereas that of a surety is secondary. This arises only when there is a default on the part of the Principal debtor.

### **Example**

Kala took a loan of Rs. 70, 000 from Prasad for which Naren stood as a guarantor or surety. Here, the primary liability of discharge of the debt is that of Kala. Prasad cannot ask Naren to pay the loan taken by Prasad unless and until there is default by Prasad.

### **Example**

Ali sells and delivers goods to Babu. Chitra afterwards, without consideration, agrees to pay for the min default of Babu. The agreement is void.

Is Contract of Guarantee a contract of uberrimae fidei?

Contract of Partnership, Insurance Contract are contract of “uberrimae fidei”. They are contract of utmost good faith. In the case of contract of Uberrimae Fidei “fraud” on the part of any party to the contract gives another party to set aside the contract.

## **DISTINCTION BETWEEN CONTRACT OF INDEMNITY AND CONTRACT OF GUARANTEE**

	<b>Contract of Indemnity</b>	<b>Contract of Guarantee</b>
Parties	There are two parties to a contract are indemnifier and indemnified.	There are three parties to contract are creditor, principal debtor and surety.
Liability	The liability of the indemnifier is primary and independent.	The liability of the surety is secondary and collateral, the principal debtor being primarily liable.
Number	The number of contract is one, between indemnifier and indemnified	The number of contract is three,(a) between principal debtor and creditor (b) between creditor and surety, and (c) between surety and principal debtor.
Happening	The liability of the indemnifier is subject to happening of a contingency.	There is an existing debt the performance of which is guaranteed by the surety.
Request	The indemnifier need not act only at the request of the indemnified of the indemnified.	The surety should give guarantee only at the request of the principal debtor.
Proceed	The indemnifier cannot proceed against third parties in his own name unless there is an assignment in his favor.	After discharging the debt the surety can proceed against the principal debtor in his own name.

## **CONSIDERATION FOR GUARANTEE (SECTION 127)**

Anything done, or any promise made, for the benefit of the principal debtor, maybe a sufficient consideration to the surety for giving the guarantee.

### **Example**

Balu requests Anu to sell and deliver to him goods on credit. Anu agrees to do so, provided Hari will guarantee the payment of the price of the goods. Hari promises to guarantee the payment in consideration of Anu's promise to deliver the goods. This is a sufficient consideration for Hari's promise.

### **Example**

Abi sells and delivers goods to Sathish. Ashok afterwards requests Abi to bear to sue Sathish for the debt for a year, and promises that if he does so, Ashok will pay for the default of payment by Sathish. Abi agrees to bear as requested. This is a sufficient consideration for Ashok's promise.

### **Surety's Liability (Section 128)**

Liability of a surety is provided in Section 128 of the Act which says that the liability of the surety is co-extensive with that of the principal debtor. However, these may vary as per the terms of the contract between the parties. In other words the surety is liable to the extent the principal debtor is liable under the contract.

### **Example**

Deepa guarantees to Mahesh the payment of a bill of exchange by Mala, the acceptor. The bill is dishonored by Mala.

Kamal is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

### **Liability of a surety cannot be more than that of a Principal Debtor**

It can be less than that of the Principal debtor if so agreed between the parties. But the creditor cannot demand payment from the Surety without first exhausting of his right of payment from the principal debtor. However, in the event of default on the part of the principal debtor he can sue the surety for non-payment by him without suing the principal debtor.

### **Example**

Vidhya took a loan of Rs.70, 000 from Bala to be paid with interest @ 10% p.a. to be paid within one year. Sri stood a guarantor for Vidhya. What is the extent of liability of Sri in the instant case?

Sri is liable to pay principal amount of Rs. 70, 000 plus interest @ 10% for the period the debt remained unpaid in the event of Vidhya's failure to pay the debt. Bala cannot demand the payment from Sri unless claiming the amount from Vidhya. However, he can sue Sri without suing the principal debtor Vidhya.

### **Refinement in Surety liability**

A situation may arise when two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other to the third person not being a party to such contract, under such circumstance the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

### **Example**

Ajay and Sridhar make a joint and several promissory note to Latha. Ajay makes it, infact, as surety for Sridhar, and Latha knows this at the time when the note is made. The fact that Ajay, to the knowledge of Latha, made the note as surety for Sridhar, is no answer to a suit by Latha against Ajay upon the note.

### **Continuing Guarantee (Section 129)**

A guarantee which extends to a series of transactions is called a "continuing guarantee". In the case of continuing guarantee the liability of the surety extends to all the transactions contemplated until the revocation of the Guarantee.

**Example**

Ashok, inconsideration that Bala will employ Chitra in collecting the rents of Bala's zamindari, promises Bala to be responsible, to the amount of Rs.6,000, for due collection and payment by Chitra of those rents. This is a continuing guarantee.

**Example**

Amir guarantees payment to Baskar, a tea-dealer, to the amount of \$ 100, for any tea he may supply from time to time to Dinesh. Baskar supplies Dinesh with tea to above the value of \$100, and Dinesh pays Baskar for it. Afterwards Baskar supplies Dinesh with tea to the value of \$ 200. Dinesh fails to pay. The guarantee given by Amir was a continuing guarantee, and he is accordingly liable to Baskar to the extent of \$ 100.

**Guarantee given by a surety is continuing one or not**

Guarantee given by a surety is continuing one or not depends upon the language of the guarantee agreement, the subject matter and surrounding circumstances. Only after considering all the factors it can be decided whether the guarantee is continuing one or not.

**REVOCATION OF CONTINUING GUARANTEE (SECTION 130)**

Once a continuing guarantee has been given by the surety it can be revoked at any time by following ways:

**By Notice (Section 130)**

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

**Example**

Naren in consideration of Bala's discounting, at Naren's request, bills of exchange for Uma, guarantees to Bala, for twelve months, the due payment of all such bills to the extent of Rs. 5, 000. Bala discounts bills for Uma to the extent of Rs. 2, 000. Afterwards, at the end of three months, Naren revokes the guarantee. This revocation discharges Naren from all liability to Bala for any subsequent discount. But Naren is liable to Bala for the Rs. 2 ,000, on default of Uma.

Naren guarantees to Bala, to the extent of Rs. 10, 000, that Uma shall pay all the bills that Bala shall draw upon him. Bala draws upon Uma. Uma accepts the bill. Naren gives notice of revocation. Uma dishonors the bill at maturity. Naren is liable upon his guarantee.

**By surety's death (Section 131)**

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

However, the liability of the surety for the previous transactions remains same. Death just operate to relieve him of guarantee for future transactions only and not for past one.

**By other modes**

Apart from the two modes of revocation of continuing guarantee provided in Section 130-131, other ways of revocation of continuing providing under different Sections are as under;

Novation (Section 62)

Variation in terms of contract (Section 133)

Release of principal debtor (Section 134)

Compounding with principal debtor (Section 135)

Creditor's act or omission impairing surety's eventual remedy (Section 139)

Loss of security (Section 141)

**LIABILITY OF TWO PERSONS, PRIMARILY LIABLE, NOT AFFECTED BY ARRANGEMENT BETWEEN THEM THAT ONE SHALL BE SURETY ON OTHER'S DEFAULT (SECTION 132)**

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default to the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first

contract is not affected by the existence of these contract, although such third person may have been aware of its existence.

### **Example**

Tinoj and Naren make a joint and several promissory notes to Hari. Tinoj makes it, in fact, assuredly for Naren, and Hari knows this at the time when the note is made. The fact that Tinoj, to the knowledge of Hari, made the note assuredly for Naren, is no answer to a suit by Hari against Tinoj upon the note.

## **RIGHTS OF A SURETY**

The various rights of the surety are as follows:

### **Rights against Creditor**

**Pay the debt:** The surety may, before he is called upon to pay the debt, require the creditor to sue the principal debtor. In such case the surety is required to indemnify the creditor for any expenses or loss resulting there from.

**Counter Claim:** On being sued by the creditor, the surety can rely on any counter claim the principal debtor has against the creditor.

**Default:** Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

### **Surety's right to benefit of creditor's securities (Section 141)**

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

### **Example**

Magesh advances to Mani, his tenant, Rs. 2,000 on the guarantee of Ali. Magesh has also a further security for the Rs. 2,000 by a mortgage of Mani's furniture. Magesh cancels the mortgage. Mani becomes insolvent, and Magesh sues Ali on his guarantee. Ali is discharged from liability to the amount of the value of the furniture.

### **Example**

Joy a creditor, whose advance to Babu is secured by a decree, receives also a guarantee for that advance from Sri. Joy afterwards takes Babu's goods in execution under the decree, and then, without the knowledge of Sri, withdraws the execution. Sri is discharged.

## **RIGHTS AGAINST PRINCIPAL DEBTOR**

Right to be relieved of liability before payment has been made. But before he can do so, debt must be ascertained.

Once the principal debtors' liability accrues as a fixed sum, the surety can ask him to exonerate him from that liability.

**Implied promise to indemnify surety (Section 145):** In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

### **Example**

Bala is in debt to Usha, and Ali is surety for the debt. Usha demands payment from Ali, and on his refusal sues him for the amount. Ali defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from Bala the amount paid by him for costs, as well as the principal debt.

## **RIGHT AGAINST CO-SURETIES (RIGHT OF CONTRIBUTION)**

### **Co-sureties liable to contribute equally (Section 146)**

**Co-sureties:** Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts.

**Liable:** Whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt or of that part of it which remains unpaid by the principal debtor.

### Example

Ravi, Bala and Chitra are sureties to Deepa for the sum of Rs. 3, 000 lent to Angel. Angel makes default in payment.

Ravi, Bala and Chitra are liable, as between themselves, to pay Rs. 1, 000 each.

**Liability of co-sureties bound in different sums (Section 147)** Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

### Example

Asha, Bala and Hari, as sureties for Yogan, enter into three several bonds, each in a different penalty, namely, Asha in the penalty of Rs. 10,000, Bala in that of Rs. 20,000, Hari in that of Rs. 40,000, conditioned for Yogan's duly accounting to Abinaya. Yogan makes default to the extent of Rs. 30,000. Asha, Bala and Hari are each liable to pay Rs. 10,000.

## **DISCHARGE OF A SURETY**

The various conditions under which the discharge of surety be enacted are:

### By revocation which may be by way of –

(i) Giving notice (Section 130):

A specific guarantee cannot be revoked by the surety if the liability has already accrued. But continuing guarantee can be revoked by notice as to future transactions.

### Example

Kailash in consideration of Latha's discounting at Kailash's request bills of exchange for Hari, guarantees to Latha for twelve months, the due payment of all such bills to the extent of Rs. 50,000. Latha discounts the bill for Hari to the extent of Rs. 24,000. Afterwards, at the end of the three months, Kailash revokes the guarantee. The revocation discharges Kailash from liability to Latha for any subsequent discount. But Kailash is liable to Latha for Rs. 24,000 on default of Hari.

### (ii) Death of surety (Section 131)

Surety stands discharged for future transactions unless is contrary is not there in the contract. But deceased surety's estate cannot be liable for any transactions between the creditors and principal debtors after the death of the surety even if the creditor has no notice thereof.

### (iii) Novation

Novation is substitution of a new contract for an old one.

### By conduct of creditor

#### (i) By Variance in Terms of Contract (Section 133)

Any variance, made without surety's consent, in the terms of the contract between the principal (debtor) and the creditor, discharges the surety as to transactions subsequent to the variance.

### Example

Ali becomes surety to Suresh for Mani's conduct as a manager in Suresh's bank. Afterwards, Mani and Suresh contract, without Ali's consent, that Mani's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. Mani allows a customer to overdraw, and the bank loses a sum of money. Ali is discharged from his surety ship by the variance made without his consent, and is not liable to make good this loss.

### Example

Suresh agrees to appoint Mani as his clerk to sell goods at a yearly salary, upon Ali's becoming surety to Suresh for Mani's duly accounting for moneys received by him as such clerk. Afterwards, without

Ali's knowledge or consent, Suresh and Mani agree that Mani should be paid by a commission on the goods sold by him and not by a fixed salary. Ali is not liable for subsequent misconduct of Mani.

**c. By invalidation of contract:**

**(i) Guarantee Obtained By Misrepresentation Invalid (Section 142)**

Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid and thus discharge the surety to that extent.

**(ii) Guarantee Obtained By Concealment Invalid (Section 143)**

Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid and thus discharge the surety to that extent.

**Example**

Rajan engages Babu as a clerk to collect money for him, Babu fails to account for some of his receipts, and Rajan in consequence calls upon him to furnish security for his duly accounting. Naresh gives his guarantee for Babu's duly accounting. Rajan does not acquaint Naresh with Babu's previous conduct. Babu afterwards makes default. The guarantee is invalid.

**Example**

Amir guarantees to Sudha payment for iron to be supplied by him to Mani to the amount of 2,000 tons. Mani and Sudha have privately agreed that Mani should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from Amir. Amir is not liable as a surety.

**(iii) Guarantee On Contract That Creditor Shall Not Act On It Until Co-Surety Joins (Section 144)**

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

**Example**

Baskar signed a guarantee given to a bank which on the face of it was intended to be the joint and several guarantee of Ali, Baskar and Mahesh and Deepa, Deepa did not sign and afterwards died. The bank did not agree with Ali, Baskar and Mahesh to dispense with Deepa's signatures. Held Ali and Baskar will not be liable [National Provincial Bank of England v. Brackenbury (1966) 22 TLR 727].

(iv) If there is failure of consideration between creditor and principal debtor.

**Cases When Surety is not Discharged**

Surety is not discharged in the following circumstances:

**When Agreement made with Third Person to give time to Principal Debtor (Section 136)**

Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

**Example**

Latha, the holder of an overdue bill of exchange drawn by Anu as surety for Balu, and accepted by Balu, contracts with Mano to give time to Balu. Anu is not discharged.

**Creditor's Forbearance to Sue Does (Section 137)**

Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

**Example**

Arvind owes to Seema a debt guaranteed by Ravi. The debt becomes payable. Seema does not sue Arvind for a year after the debt has become payable. Ravi is not discharged from his suretyship.

**Release of One Co-Surety (Section 138)**

Co-sureties, are liable by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

## **BAILMENT AND PLEDGE**

### **INTRODUCTION**

Bailment means to deliver or to handover. It involves change of possession and not of ownership. It implies a sort of relationship in which the personal property of one person temporarily goes into the possession of another person. The provisions relating to Bailment and Pledge are contained in Sections 148 to 181 of the Act.

There are three different types of Bailment for which different Acts namely, the Railway Act 1989, the Carrier Act 1865, and the Carriage of Goods by Sea Act 1925, deals with these types of special Bailment. However, the Indian Contract Act 1872 just deals with general principals underlying contract of Bailment. The term bailment is derived from the French word "bailer" which means to deliver.

### **"BAILMENT", "BAILOR" AND "BAILEE" (SECTION 148)**

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 delivering the goods is called the "bailor". The person to whom the goods are delivered is called the "bailee".

### **Features of Bailment**

#### **The essential features of the bailment are:**

Bailment' is concerned only with goods.

It is delivery of possession to another person .

The delivery to another person should be for accomplishment of some purpose; and

Goods to be returned to the original owner on accomplishment of the defined purpose.

### **EXAMPLE**

Sai delivered his scooter to Giri an authorized Auto-Care dealer for repair and servicing his scooter. This is a case of bailment as it has all the essential features such as, (i) transfer of delivery to auto centre, (ii) purpose to be accomplished is to repair and service the scooter, and (iii) on accomplishment of the purpose i.e., repair and servicing the scooter is to be delivered back to the owner. Sai pays for the repair and servicing charges. This is a contract of Bailment.

### **Requisite of a bailment**

#### **The various requisites of bailment are:**

##### **Contract:**

Bailment is based on the agreement between the parties which may be expressed or implied from the conduct of the parties. But at time, it is imposed by law as in the case of finder of lost goods. Law of equity cast a duty upon the finder of lost goods to take reasonable care of the goods.

##### **Delivery of possession:**

Temporary transfer of possession between the bailor and bailee. The delivery of possession may be actual or constructive.

### **EXAMPLE**

A lady employed a goldsmith for melting her old jewels and making a new one out of it. Every evening she received the unfinished jewels and put it into a box kept at the goldsmith's premises. She kept the key of the box with herself. One night the jewels were stolen from the box. It was held there was no bailment as the goldsmith had redelivered to the lady the jewels bailed with him by her [Kaliperumal v. Visalaksmi AIR (1938) Mad 32].

##### **Definite purpose:**

Delivery of goods from bailor to bailee must be for some purpose. If the goods are delivered to a person by default, there is no bailment.

##### **Return of specific goods:**

The same goods must be returned to the bailor after accomplishment of the intended purpose. It is not necessary that the specific goods must be returned in the same form in which they were delivered to the bailee.

**EXAMPLE**

If a piece of cloth was delivered to the tailor for stitching a shirt, the same cloth must be returned in the form of shirt to the owner rather than the piece of cloth. Similarly, when a motor car is delivered to a motor car service centre for repair, the same car must be returned in repaired and serviced condition to the original owner.

**TYPES OF BAILMENT**

The bailment can be broadly grouped based on the following aspects:

**Charges**

Bailment can be made for the exclusive benefit of the bailor, wherein no charges are paid by the bailor to the bailee.

**EXAMPLE**

Hari and Sai are two good friends. Hari left for one month's foreign tour and left all the valuables with his friend Sai. This is also a bailment for the benefit of bailor only, as no charges are to be paid by Hari to Sai for taking care of his valuables.

**Compensation**

Bailment can be made for exclusive benefit of the bailee without any compensation to the bailor.

**EXAMPLE**

Bala lends his car to Srinath a personal friend of Bala for his use without any charges. This is a bailment for the benefit of Srinath bailee only.

**Consideration**

Mutually benefits both the parties. In this type of bailment there is a consideration from both the sides.

**EXAMPLE**

Kala delivered his car to Chitra auto centre for repair and maintenance. After repair and maintenance the car is to be delivered back to Kala on payment of repair and service charges. Here, consideration from bailor side is repair and servicing charges to be paid and from bailee side is to do necessary repair and maintenance.

**Bailment can also be classified into Gratuitous bailment:** It is a bailment where there is no consideration from either side.

**Non-Gratuitous bailment or bailment for reward:** Here consideration passes between bailor and bailee.

**HOW CAN THE DELIVERY BE MADE TO BAILEE (SECTION 149)**

The delivery to the bailee may be made by doing anything, which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

**Consideration for bailment:**

The detriment suffered by the bailor, in parting with the possession of the goods, is sufficient consideration to support the contract of bailment.

**DUTIES OF BAILOR**

A bailor has the following duties in the bailment contract:

**To disclose faults in goods bailed (Section 150) Disclose:** The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them.

**Extraordinary risk:** Expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

**Hire:** If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

**EXAMPLE**

Abi lends a horse, which he knows to be vicious, to Bala. He does not disclose the fact that the horse is vicious. The horse runs away. Bala is thrown and injured. Abi is responsible to Bala for damage sustained.

**To bear extra-ordinary expenses on bailment:**

The bailee is expected to take reasonable and ordinary care of the goods bailed to him. But when extraordinary expense is required on the goods bailed the same are to be borne by the bailor.

**EXAMPLE**

Viji lend his car to Giri for one week. Usual running and maintenance charges are to be borne by Viji. However, if due to some reasons the engine is to be overhauled, expenses there on are to be borne by Giri.

If, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor is required to repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

**To indemnify bailee for loss in case of premature termination of gratuitous bailment:**

In a gratuitous bailment the bailor can terminate the bailment any time, but in that case the loss accruing to the bailee from such premature termination should not exceed the benefit he has derived out of the bailment. If the loss exceeds the benefit derived by the bailee, the bailor has to make good the loss.

**EXAMPLE**

Ajith lend his old motor car to his friend Deepa for three months gratuitously. Deepa incurred Rs. 50,000 on complete overhauling the car, however after one month Ajith asked Deepa to return the car. Ajith should compensate her if the benefit derived by Deepa for using the car for one month is less than the cost of Rs. 50,000 incurred by her.

**To receive back the goods:**

It is the duty of bailor to take back the goods after the purpose for which the goods were delivered to the bailee is accomplished. Failure to do so within a reasonable time entitles the bailor to demand compensation from him.

**To indemnify the bailee:**

The title of the bailor to the goods is defective and the bailee suffers as a consequence, the bailor is responsible to the bailee for any loss which the bailee might sustain by reason that the bailor was not entitled to make bailment or receive back the goods or to give directions respecting them.

**DUTIES OF BAILEE**

Both the bailor and bailee have some rights and some duties in the contract of bailment.

**Duty To Take Care (Section 151):**

- ❖ In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.
- ❖ The onus is upon the bailee to prove that there has been no failure or negligence on his part to take reasonable care of the goods entrusted to him.

**EXAMPLE**

Abi delivered his car to Bala for servicing and periodic servicing. However, a stereo player and car stepney was stolen from the car before returning back the car to Abi. Bala neither informed Abi nor lodged any FIR. Bala is liable to Abi as he has not taken reasonable care in the instant case. The onus lies upon Bala to prove that there was no negligence on his part.

However, the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

### **Not To Make Unauthorized Use Of Goods Bailed (Section 154)**

Bailee is not expected to make unauthorized use of the goods bailed to him. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use.

#### **EXAMPLE**

Hari lends a horse to Babu for his self use. Babu allows Chitra, a member of his family, to ride the horse. Chitra rides with care, but the horse accidentally falls and is injured. Babu is liable to make compensation to Hari for the injury done to the horse.

**A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.**

#### **EXAMPLE**

Ajay lends a horse to Babu for hire, his own riding. Babu drives the horse in his carriage. This is, at the option of Ajay, a termination of the bailment.

#### **Not to mix the goods bailed with other goods**

The bailor must take reasonable care to ensure that the goods bailed do not mix with his own goods. If he mixes the bailed goods with his own goods the following rules will apply depending whether the mixing was with or without consent of bailor.

If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expenses of separation or division, and any damage arising from the mixture.

#### **EXAMPLE**

Giri bails 100 bales of cotton marked with a particular mark to Balu. Balu without Giri's consent, mixes the 100 bales with other bales of his own, bearing a different mark. Giri is entitled to have his 100 bales returned, and Balu is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

#### **Not to set up an adverse title**

Bailee should hold the goods on behalf of the bailor. If he delivers the goods bailed to other persons, he must prove that such third person has a right over the goods as against the bailor.

#### **To return any accretion to the bailed goods**

Bailor is bound to return any accretion on the bailed goods to the bailee unless there is a contract to the contrary.

#### **EXAMPLE**

Sai delivered his cow to Kala for his care and custody until he returns from tour. Meanwhile the cow gave birth to a calf. While returning the cow Kala is bound to return both the cow and calf to Sai.

#### **To return the bailed goods timely**

It is duty of bailee to return the goods bailed to him as per the direction of the bailee after accomplishment of the intended purpose without demand from the bailor. If he fails to do so he is responsible to the bailor for any loss despite reasonable care by him.

#### **EXAMPLE**

Ajay delivered his scooter to Dinesh for repair and servicing. Dinesh did the necessary servicing and repair demanded by the scooter. Despite having requested by Ajay to deliver the scooter to him, he did not deliver the scooter and after one week the scooter was stolen by a thief. Dinesh is liable to Ajay because he failed to return the scooter within a reasonable time even after repeated request by Ajay.

Further, according to Section 161, if by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

## **RIGHTS OF BAILOR**

### **Right to increase or profit from goods bailed out (Section 165)**

As per this section of the Act in the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

#### **EXAMPLE**

Joy leaves a cow in the custody of Sita to be taken care of. The cow gave birth to a calf and Sita is bound to deliver the calf as well as the cow to Joy.

#### **Right of enforcement**

The bailor has right to enforce by suit all the liabilities or duties of the bailee as his rights.

#### **Right to have the goods returned in accordance with direction:**

Goods are lent gratuitously, the bailor can demand their return whenever he likes even though he lent them for specified time or purpose. In case of gratuitous bailment if the bailee has suffered any loss due to premature termination of bailment the bailor is to compensate him.

#### **Right to have compensation from wrong doer (Section 180)**

As per this section if a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailor or the bailee may bring a suit against the third person for such deprivation or injury.

#### **EXAMPLE**

Sai delivered his Maruti 800 to Auto mart for routine servicing and maintenance check up. However, Sudhir a local bad boy of the area prevented the service centre from servicing the car of Sai and on the other hand caused some damage to the car also. Sai is entitled to proceed against Sudhir for his wrong doing.

## **BAILOR'S RESPONSIBILITY TO BAILEE (SECTION 164)**

The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

#### **RIGHTS OF BAILEE**

**RR Academy**

The following are the rights of the bailee:

#### **SEVERAL JOINT OWNERS OF GOODS (SECTION 165)**

In case of several joint owners of goods, the bailee may deliver them back to, or according to the directions of one joint owner without the consent of all, in the absence of any agreement to the contrary. In other words if there is nothing in the contract to have consent of all the joint owners, the bailee can deliver the goods to one of the joint owners without any consent of others.

#### **EXAMPLE**

Ashok, Naren and Joy are the joint owner of a cab, they delivered it to Dinesh on one month's hire charges. After one month Dinesh can return the same to either of the joint owners Ashok, Naren or Joy without taking consent of all of them. However, if the agreement provides that it has to be returned back to one particular owner, say Ashok, then it must be returned to him only.

#### **No Title (Section 166)**

If the bailor has no title to the goods and the bailee in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

#### **Claim Goods (Section 167)**

If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

**EXAMPLE**

Abi send his car to an authorized motor car service centre for repair. Before taking back the car from the service centre after repairs, Deepa a local private financier approach the service centre and claims his title over the car. Abi can approach the court to stop delivery of the goods to Deepa and decide the title of the goods.

**Labor or Skill (Section 170)**

The bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labor or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them. This is bailee's particular lien.

**EXAMPLE**

Ashok delivers a rough diamond to Babu, a jeweler, to be cut and polished, which is accordingly done. Babu is entitled to retain the stone till he is paid for the services he has rendered.

**RIGHTS OF A FINDER OF LOST GOODS.**

According to Section 71 of the Indian Contract Act, any person who finds goods belonging to others and takes them on his custody is subject to the same responsibility as the bailee.

The various rights of the finder of the lost goods are:

**Right of lien (Section 168)**

The finder of goods has a right of lien over the goods for his expenses. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner, but he may retain the goods against the owner until he receives such compensation.

**Right to finder of goods to sue for specified reward offered (Section 168)**

The finder of goods has no right to sue the owner for compensation for trouble and expense, voluntary incurred by him to preserve the goods and to find out the owner; but he may retain the goods again the owner until he receive such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he received it.

**Right to sell (Section 169)**

If the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell it.

**DUTIES OF A FINDER OF LOST GOODS**

- ❖ The finder of lost goods must take reasonable care of the goods and if in spite of this the goods are destroyed for no negligence on his part he is not liable for it.
- ❖ He must not own the goods for his own purpose
- ❖ He must not mix up the goods with other goods
- ❖ He must try to find out the true owner of the goods. If he fails to do so he is liable as a trespasser.

**TERMINATION OF BAILMENT**

A contract of bailment is terminated in the following cases:

**On the expiry of the period**

When the bailment is for a specific period it terminates on its expiry.

**EXAMPLE**

Sai lends his three wheeler Auto to his friend Bala on three months hire on payment of monthly hire charges.

On the expiry of 3 months the bailment contract stand discharged.

**On achievement of the object**

Bailment is for a specific purpose, it stands terminated on accomplishment of that purpose.

**EXAMPLE**

Sai deliver his motor cycle to Dina for repair. On completion of repair work by Sai the bailment stands discharged.

**Destruction of the subject matter goods**

A bailment stand discharged on destruction of the subject matter or when by reasons of change in nature it becomes incapable of use for purpose of the bailment.

**Death of bailee or bailor**

A gratuitous bailment stands discharged by the death of either of the party i.e., bailor or bailee.

The gratuitous bailment can be terminated any time subject to conditions laid down in Section 159 of the Contract Act.

**SUITS BY BAILEES OR BAILORS AGAINST WRONG-DOERS Right to interplead (Section 167)**

If a person, other than the bailor, claims the goods bailed, he may apply to the courts to stop delivery of the goods bailed and to decide the title to the goods.

**Suit by bailor or bailee against wrong-doer (Section 180)**

If a third party wrongfully deprives the bailee of the use of the goods bailed or does them any injury, the bailee is entitled to use all such remedies as the owner of the goods might have used. Either the bailee or the bailor may file a suit against the third party.

**Apportionment of relief or compensation obtained by such suits (Section 181)**

Whatever is obtained by way of relief or compensation in any such suits shall, as between the bailor and the bailee be dealt with according to their respective interests.

**BAILEE'S PARTICULAR LIEN (Section 170)**

'Lien' means right of a person to retain possession of some goods belonging to another until claim of the person in possession is satisfied.

Bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labor or skill in respect of the goods bailed.

To a contrary, in the absence of a contract the bailee has the right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

**EXAMPLE**

Sridhar delivers a rough diamond to Mani, a jeweler, to be cut and polished, which is accordingly done. Mani is entitled to retain the stone till he is paid for the services he has rendered.

## PLEDGE

### INTRODUCTION

Pledge or pawn is a special kind of bailment in which goods are delivered as a security for payment of a debt. In other words, when bailment of goods is as a security for payment of a debt or performance of a promise, it is called pledge.

### “PLEDGE”, “PAWNOR” AND “PAWNEE” (SECTION 172)

The bailment of goods as security for payment of a debt or performance of a promise is called “pledge”.

The bailor is in this case called the “pawnor”.

The bailee is called the “pawnee”.

### Example

Hari took a personal loan of Rs. 60, 000 from Joy and offered his golden ring as a security for due payment of the loan.

Here, the bailment of golden ring is a pledge.

### List of goods that can be Pledged - Moveable

Any moveable goods including document, valuables, fixed deposit receipt, saving bank account, etc., can be pledged.

The only condition required for the property to be pledged must be delivered which may be actual or constructive.

### DIFFERENCE BETWEEN BAILMENT AND PLEDGE

The following are the differences between bailment and pledge:

#### Purpose:

Bailment can be for any purpose but pledge can be for the purpose of security for the performance of a specific purpose.

#### Default:

In case of default by the pawnor to repay the debt, the pawnor may after giving notice the pawnee and can sell the pledged goods. On the other hand, the bailee may either retain the goods or sue for his charges.

#### Goods:

Pawnee has no right to use the goods pledged for his own use, but in case of a bailment the bailee can use the goods if the terms of contract so provide.

### RIGHTS OF A PAWNEE

#### Right to retain the goods (SECTION 173)

The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest, of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

### GOODS PLEDGED FOR ANY DEBT (SECTION 174)

The pawnee cannot, in the absence of a contract to that effect retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of the anything to the contrary, can be presumed in regard to subsequent advances made by the pawnee.

### EXTRAORDINARY EXPENSES (SECTION 175)

The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged. But for such expenses he has no right to retain the goods he can only sue to recover them.

### DEFAULT IN PAYMENT OF DEBT (SECTION 176)

If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

### **Amount due in respect of the debt or promise**

In case if the amount recovered by proceeds of sale is less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

### **Right against true owner**

The pawnee's title is defective: if the title acquired by the pawnor is defective being obtained by fraud or misrepresentation or undue influence, coercion and the contract has not been rescinded, the pawnee acquires a good title to the goods provided he acts in good faith.

## **RIGHTS OF PAWNOR**

### **Right to redeem the goods/debts**

If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

### **Preservation and maintenance of the goods**

The pawnor has a right to see that the pledged goods are properly maintained and preserved by the pawnee.

### **Rights of an ordinary debtors**

The ordinary debtors as provided under various statutes meant for protection of debtor.

## **PLEDGE BY NON-OWNERS**

The following cases even a non owner can create a valid pledge:

### **PLEDGE BY MERCANTILE AGENT (SECTION 178)**

Mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice, that the pawnor has no authority to pledge.

### **Pledge by person in possession under voidable contract (Section 178A)**

The pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

### **PLEDGE WHERE PAWNOR HAS ONLY A LIMITED INTEREST (SECTION 179)**

A person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

**Good Faith:** Pledge by seller after or buyer before sale can create a valid pledge provided the pawnee acts in good faith and has no notice of previous sale of goods to the buyer or lien of seller on the goods.

**Co-owners:** Pledge by co-owner in possession thereof with consent of other co-owners may create a valid pledge.

### **SUIT BY BAILOR OR BAILEE AGAINST WRONG-DOER (SECTION 180)**

If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

### **APPORTIONMENT OF RELIEF OR COMPENSATION OBTAINED BY SUCH SUITS**

Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

## LAW OF AGENCY

### INTRODUCTION

In the business world, most of the works are executed through agents. Consciously or unconsciously we all play the role of agent and principal in our day to day life.

For an instance, you ask your brother to visit the Electricity office and settle the bill. Your brother acted as an agent and you as a Principal are liable for his act. Similarly, if you are working in some organization you act as an agent of the business owner/proprietor. So it is necessary to know the rules regarding agents provided in the Indian Contract Act 1872.

### AGENT (SECTION 182)

#### DEFINITION

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 act is done, or who is so represented, is called the “principal”. The function of agent is to bring his principal in contact with third person.

#### Essential characteristics of Agency

##### Agreement:

Terms of agency depend upon the agreement between the principal and agent, but it is not necessary to have any agreement in writing. As between principal and third party any person can become an agent.

##### Consideration:

No consideration is required to create agency.

##### Intention of the parties:

Whether a person does intend to act on behalf of another person as an agent is also an important point. Unless and until the person has intention to act as an agent, there cannot be any agency relationship.

### CONDITION FOR BECOMING AN AGENT

Any person either personally or on behalf of another person/company can act as an agent. A well known fact is that in case of person's marriage the agent is a personal person himself, as marriages cannot be done through agent.

Under some circumstances if an act is not done through an agent, but done by the subject himself then as per Section 226, the act and contract performed by the agent will have the same legal consequence as if the contract had been entered between the contractor and the principal and the act has been done by the principal himself.

#### EXAMPLE

Ram being an agent of Babu receives the money due by Sabari to Babu. This act of Ram discharges the debt of Sabari to Babu.

#### EXAMPLE

Giri not knowing that Joy is an agent of Uma, the owner of the shop buy goods from Joy and pay the price thereof to Joy. Uma in a suit against Giri cannot claim a debt to himself from Joy.

#### Who can EMPLOY an AGENT (SECTION 183)

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. Accordingly, a minor or a lunatic person or a drunken person cannot appoint an agent.

#### Who can become an agent (Section 184)

Between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. But a minor can be appointed as an agent but he is not responsible to the principal.

## **EXCEPTIONS (SECTION 185)**

The following are the exceptions for creating an agent/agency:

### **TEST OF AGENCY**

If the person has a capacity to bind the principal and make him answerable to the third person, by bringing the principal into a legal relationship with the third person and thus establishing a privity of contract between the parties can be an agent/ agency. If the answer is yes, it is a case of agency-principal relationship, otherwise not.

### **CREATION OF AGENCY**

#### **By express agreement:**

The usual form of a contract of agency/agent is a power of attorney on a stamped paper.

#### **By implied agreement:**

**Such agency arises when the principal through his conduct leads the third party to believe that certain person is his agent. It includes:**

**Agency by estoppels:** Where a person by his conduct or by words spoken or written lead another person to believe that the person is his agent, he is precluded from denying that subsequently.

**Agency by holding out:** Agency by holding out is a branch of the agency by estoppels. A prior positive or affirmative action on the part of the principal is required to establish agency relationship.

**Agency by necessity:** In certain urgent cases the law confers an authority on a person to act as an agent for the benefit of another person when there is no opportunity to communicate between them. This is called agency by necessity.

### **EXAMPLE**

Sri and Bala are two real brothers. Sri lives in Chennai whereas Bala lives in Bangalore. Bala has a land in Chennai which is let out by him and Sri takes the rent and deposits in Bala's account. This is a case of agency between Sri and Bala even though it is not in writing.

#### **By ratification:**

When a person acts on behalf of another without his consent, and the other person accepts his acts, the acts are said to be ratified. This places the parties in the same position in which they would have been if acts were done with prior authority.

### **EXAMPLE**

Asha sold Balaji's land without Balaji's authority and remitted the sum in Balaji's bank account. Balaji later on ratified his act. The sale is valid as Balaji has ratified Asha's act as if it is authorized by him.

#### **Essential requirement for a valid ratification**

- ❖ The principal must have contractual capacity both at the time of the said act as well as at the time of ratification.
- ❖ The principal must be in existence at the time of contract.
- ❖ The agent must purport to act as an agent for a principal who is in contemplation and is identifiable at the time of contract.
- ❖ Ratification must be done with the full knowledge of the facts.
- ❖ Ratification must be done within a reasonable time.
- ❖ The act of ratification must be lawful and legal.
- ❖ There can be ratification or rejection of whole transaction in total but not in part
- ❖ Ratification should put the third party into damage.

### **EFFECT OF RATIFICATION (SECTION 196)**

Acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

### **RATIFICATION MAY BE EXPRESSED OR IMPLIED (SECTION 197)**

Ratification may be expressed or may be implied by the conduct of the person on whose behalf the acts are done.

**EXAMPLE**

Ashok, without authority, buys goods for Balaji. Afterwards Balaji sells them to Giri on his own account; Balaji's conduct implies a ratification of the purchase made for him by Ashok.

**KNOWLEDGE REQUISITE FOR VALID RATIFICATION (SECTION 198)**

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

**EFFECT OF RATIFYING UNAUTHORIZED ACT FORMING PART OF A TRANSACTION (SECTION 199)**

A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act forms a part.

**RATIFICATION OF UNAUTHORIZED ACT CANNOT INJURE THIRD PERSON (SECTION 200)**

An act done by one person on behalf of another, without the other person's authority, which if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

**EXAMPLE**

Ashok not being authorized thereto by Bala, demands on behalf of Bala, the delivery of a chattel, the property of Bala, from Bhuvanesh, who is in possession of it. This demand cannot be ratified by Bala, so as to make Bhuvanesh liable for damages for his refusal to deliver.

**By operation of law:**

Sometimes agency arises due to operation of law. Promoters of a company and partners of a firm are agents due to such implication.

**AGENT'S AUTHORITY MAY BE EXPRESS OR IMPLIED (SECTION 186)**

The authority of an agent may be express or implied.

**Definitions of Express and Implied Authority (Section 187)**

An authority is said to be express when it is given by words, spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted in circumstances of the case.

**EXAMPLE**

Sai owns a shop in Serampore, living himself in Kolkata, and visiting the shop occasionally. The shop is managed by Ajay, and he is in the habit of ordering goods from Deepa in the name of Sai for the purposes of the shop, and of paying for them out of Sai's funds with Sai's knowledge. Ajay has an implied authority from Sai to order goods from Deepa in the name of Sai for the purposes of the shop.

**Extent of Agent's Authority (Section 188)**

An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

**EXAMPLE**

Ali is employed by Bala, residing in London, to recover at Bombay a debt due to Bala. Ali may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

**Agent's Authority in an Emergency (Section 189)**

An agent has authority, in an emergency to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances. An agent for sale may have goods repaired if it be necessary.

**EXAMPLE**

Abu consigns provisions to Baskar at Kolkata, with directions to send them immediately to Sri at Cuttack. Baskar may sell the provisions at Kolkata, if they will not bear the journey to Cuttack without spoiling.

**SUB-AGENTS WHEN AGENT CANNOT DELEGATE (SECTION 190)**

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

**“SUB-AGENT”(SECTION 191)**

A “Sub-agent” is a person employed by, and acting under the control of, the original agent in the business of the agency.

- a. Sub-agent properly appointed (Section 192) When a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts as if he were an agent originally appointed by the principal.
- b. Agent's responsibility for sub-agents without Authority (Section 193) The agent is responsible to the principal for the acts of the sub-agent.
- c. Relation between Principal and Person Duly Appointed by Agent to Act in Business of Agency (Section 194)

Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

**EXAMPLE**

Anu authorizes Bala to buy 3,000 bales of cotton on account of Anu, and to pay for it out of Anu's money remaining in Bala's hands. Bala buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. Anu cannot revoke Bala's authority so far as regards payment for the cotton.

**TERMINATION OF AGENCY (SECTION 201)**

An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

**The following are the ways in which the agency can be terminated:****By Act of Parties**

Agreement between principal and agent.

Revocation by the principal: The principal may revoke the authority of the agent any time before the authority has been exercised. When agency is continuous one, notice of termination to agent as well as third parties is essential.

Agency may also be revoked by an agent by express renunciation after giving reasonable notice to principal. a. **Compensation for revocation by principal, or renunciation by agent (Section 205)**

Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

**Notice of revocation or renunciation (Section 206)**

Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

**Revocation and renunciation may be expressed or implied (Section 207)**

Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

**EXAMPLE**

Ashok empowers Balaji to let Ashok's house. Afterwards Ashok lets it himself. This is an implied revocation of Balaji's authority.

**By Operation of Law:**

Performance of contract.

Expiry of time period for which the agent was appointed even if the work is incomplete.

Death or insanity of principal or agent.

Insolvency of principal or agent

Destruction of subject matter.

Dissolution of company whether it is principal or agent.

When the countries of principal and agent breaks into an war.

Sub-agents' authority is terminated on termination of authority of the agent.

**TERMINATION OF AUTHORITIES****TERMINATION OF AGENT'S AUTHORITY TAKES EFFECT AS TO AGENT, AND AS TO THIRD PERSONS (SECTION 208)**

The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

**EXAMPLE**

Amala directs Baskar to sell goods for her, and agrees to give Baskar five per cent commission on the price fetched by the goods. Amala afterwards, by letter, revokes Baskar's authority. Baskar, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on Amala, and Baskar is entitled to five rupees as his commission.

**TERMINATION OF AGENCY, WHERE AGENT HAS AN INTEREST IN SUBJECT-MATTER (SECTION 202)**

The agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

**EXAMPLE**

Kala gives authority to Bala to sell Kala's land, and to pay himself, out of the proceeds, the debts due to him from Kala.

Kala cannot revoke this authority, nor can it be terminated by his insanity or death.

**AGENT'S DUTY ON TERMINATION OF AGENCY BY PRINCIPAL'S DEATH OR INSANITY (SECTION 209)**

Agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

**TERMINATION OF SUB-AGENT'S AUTHORITY (SECTION 210)**

The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

**DUTIES OF AGENT**

The various duties of agents are:

**To carry out work as per direction of principal (section 211)****Conduct the business:**

An agent is bound to conduct the business of his principal according to the directions given by the principal.

**Custom:**

In the absence of any such directions from the principal, there is the custom which prevails in doing business of the same kind at the place where the agent conducts such business.

**Good:**

When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

**EXAMPLE**

Ravi, an agent engaged in carrying on for Bala a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. Ravi must make good to Bala the interest usually obtained by such investments.

**EXAMPLE**

Bala, a broker, in whose business it is not the custom to sell on credit, sells goods of Ravi on credit to Hari, whose credit at the time was very high. Hari, before payment, becomes insolvent. Bala must make good the loss to Ravi.

**To carry out with care, skill and diligence (Section 212)**

- ❖ An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill.
- ❖ The agent is always bound to act with reasonable diligence, and to use such skill as he possesses.
- ❖ To make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not respect of loss or damage which is indirectly or remotely caused by such neglect, want of skill or misconduct.

**EXAMPLE**

Amir, an agent for the sale of goods, having authority to sell on credit, sells to Baskar on credit, without making the proper and usual enquiries as to the solvency of Baskar. Baskar, at the time of such sale, is insolvent. Amir must make compensation to his principal in respect of any loss thereby sustained.

**An agent is bound to render proper accounts to his principal on demand (Section 213).**

**It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions (Section 214).**

**Not to deal in his own account (Section 215)**

If he does so without consent or knowledge of the principal the principal may either repudiate the contract or ask him to remit the benefit to him. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

**EXAMPLE**

Hari directs Bala, his agent, to buy a certain house for him. Bala tells Hari it cannot be bought, and buys the house for himself. Hari may, on discovering that Bala has bought the house, compel him to sell it to Hari at the price he gave for it.

**To pay the sum received for the principal**

An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

**To protect and preserve the interest of principal in case of his death or insanity (Section 209).**

**Not to use Information:** An agent should not use information obtained in course of agency against the principal

**Title:** Not set an adverse title to the goods. If he does so he will be liable for conversion

**Position:** Not put himself in a position where his duties and interest will conflict.

**EXAMPLE**

Ajay employed Balu a stock broker to buy some shares for him. Balu without disclosing Ajay sold some of his own holding to Ajay. It was held that Balu could rescind the contract due to set up of adverse title by Ajay (Armstrong v. Jackson (1977) KB 822).

**Authority:**

Not delegate his authority subject to certain exceptions. As an agent himself is an agent he cannot delegate his authority except under some exceptional cases.

**Not to make secret profit from agency.**

The contract of agency is fiduciary of utmost good faith. Except with the knowledge and consent of the principal he should not make any secret profit other than his normal commission and remuneration.

**EXAMPLE**

An auctioneer appointed by Srinivas the principal received from the client additional commission in addition to the commission paid by his principal. Sai is liable to account for the same to Hari (Andrews v. Ramaswamy & co, (1903) 2 KB635).

**Rights of Agent**

**Agent's lien on principal's property Section 221:**

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

**EXAMPLE**

Nithya is an consignment agent of Ravi and entitled to 10% commission on all the sales made by him plus re-imbursement of reasonable expenses incurred on such transaction. Ravi did not pay him the commission accruing to him. Nithya is entitled to retain the goods or other paper of Ravi until he is paid his commission and remuneration.

**Right to receive remuneration:**

As per agreement, or if there is no agreement, reasonable remuneration should be given to the agent. A question may arise when the remuneration become due as per section 219 in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete. However an agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration under Section 220 of the Act in respect of that part of the business which he has misconducted.

**EXAMPLE**

Hari employs Kamal to recover Rs. 1,00,000 from Viji, and to lay it out on good security. Kamal recovers the Rs.1,00,000 and lays out Rs.90,000 on good security, but lays out Rs. 10,000 on security which he ought to have known to be bad, whereby Hari loses Rs. 2,000. Kamal is entitled to remuneration for recovering the Rs.1, 00,000 and for investing the Rs. 90,000. He is not entitled to any remuneration for investing the Rs. 10,000 and he must make good the Rs. 2,000 to Kamal.

**EXAMPLE**

Sai employs Srinath to recover Rs.1,000 from Maha. Through Srinath's misconduct the money is not recovered. Srinath is entitled to no remuneration for his services, and must make good the loss.

**Lawful Acts Section 222:**

The agent has right to be indemnified against all lawful acts done by him in exercise of authority conferred upon him.

**EXAMPLE**

Ali an agent of Paul seized some goods of Tim, a third party at the command of Tim, although the goods have been seized improperly it was shown that Ali had acted bona fide, and held Ali was entitled to be indemnified. The agent has right to be compensated for all injuries sustained by him because of negligence or lack of skill on part of principal (Toplis v. Crane (1938) 5 Bing).

**The agent has right to be compensated for all injuries sustained by him because of negligence or lack of skill on part of principal (Section 225).**

### **EXAMPLE**

Sita a whitewash man was employed by Palani and his agent and deputed him for white wash of three stories lat of Babu. Sita fell from the wooden ladder and sustained injury. Palani must compensate Sita.

**The agent has 'right of stoppage in transit' under following circumstances:**

**On behalf of principal:** If he has bought goods on behalf of principal incurring personal liability.

This right is similar to that of an unpaid seller.

**Personally liable:** If he is personally liable to principal for price of goods sold, he has this right against buyer in case the buyer becomes insolvent. This right is also similar to that of an unpaid seller.

### **PRINCIPAL'S DUTY TO AGENT**

**Agent to be indemnified against consequences of lawful acts (Section 222)**

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

### **EXAMPLE**

Ravi, at Singapore, under instructions from Giri of Kolkata, contracts with Hari to deliver certain goods to him. Giri does not send the goods to Ravi, and Hari sues Ravi for breach of contract. Ravi informs Giri of the suit, and Giri authorizes him to defend the suit. Ravi defends the suit, and is compelled to pay damages and costs, and incurs expenses. Giri is liable to Ravi for such damages, costs and expenses.

### **AGENT TO BE INDEMNIFIED AGAINST CONSEQUENCES OF ACTS DONE IN GOOD FAITH (SECTION 223)**

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

### **EXAMPLE**

Sai, a decree-holder and entitled to execution of Ravi's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of Ravi. The officer seizes the goods, and is sued by Cina, the true owner of the goods. Sai is liable to indemnify the officer for the sum which he is compelled to pay to Cina, in consequence of obeying Sai's directions.

Ravi, at the request of Sai, sells goods in the possession of Sai, but which Sai had no right to dispose of. Ravi does not know this, and hands over the proceeds of the sale to Sai. Afterwards Cina, the true owner of the goods, sues Ravi and recovers the value of the goods and costs. Sai is liable to indemnify Ravi for what he has been compelled to pay to Cina and for Ravi's own expenses.

### **NON-LIABILITY OF EMPLOYER OF AGENT TO DO A CRIMINAL ACT (SECTION 224)**

One person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

### **EXAMPLE**

Srini employs Nivedha to beat Latha, and agrees to indemnify him against all consequences of the act. Nivedha thereupon beats Latha, and has to pay damages to Latha for so doing. Srini is not liable to indemnify Nivedha for those damages.

### **EFFECT OF AGENCY ON CONTRACT WITH THIRD PERSONS ENFORCEMENT AND CONSEQUENCES OF AGENT'S CONTRACTS (SECTION 226)**

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

**EXAMPLE**

Sai buys goods from Hari, knowing that he is an agent for their sale, but not knowing who is principal. Hari's principal is the person entitled to claim from Sai the price of the goods, and Sai cannot, in a suit by the principal, set off against that claim a debt due to himself from Hari.

**Compensation to agent for injury caused by principal's neglect (Section 225)**

The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

**EXAMPLE**

Giri employs Balaji as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and Balaji is in consequence hurt. Giri must make compensation to Balaji.

**PRINCIPAL HOW FAR BOUND, WHEN AGENT EXCEEDS AUTHORITY (SECTION 227)**

At times an agent acting within his authority exceed his authority, can he make the principal liable for his act. Let us refer to Section 227 of the act which says as under: 'When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.'

**EXAMPLE**

Nagu, being owner of a ship and cargo, authorizes Ravi to procure an insurance for Rs.4,000 on the ship. Ravi procures a policy for Rs.4,000 on the ship, and another for the like sum on the cargo. Nagu is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

**PRINCIPAL NOT BOUND WHEN EXCESS OF AGENT'S AUTHORITY IS NOT SEPARABLE (SECTION 228)**

An agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

**EXAMPLE**

Mani authorizes Joy to buy 500 sheep for him. Joy buys 500 sheep and 200 lambs for one sum of Rs.5,000. Mani may repudiate the whole transaction.

**CONSEQUENCES OF NOTICE GIVEN TO AGENT (SECTION 229)**

This section provides that "Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal".

**EXAMPLE**

Ashok is employed by Balu to buy from Ramu certain goods, of which Ramu is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, Ashok learns that the goods really belonged to Deepa, but Balu is ignorant of that fact. Balu is not entitled to set off a debt owing to him from Ramu against the price of the goods.

**AGENT CANNOT PERSONALLY ENFORCE, NOR BE BOUND BY, CONTRACTS ON BEHALF OF PRINCIPAL (SECTION 230)**

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

**Contract shall be presumed to exist in the following cases:**

- ❖ Contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.
- ❖ Agent does not disclose the name of his principal.
- ❖ The principal, though disclosed, cannot be sued.

## **RIGHTS OF PARTIES TO A CONTRACT MADE BY AGENT NOT DISCLOSED (SECTION 231)**

- ❖ If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract.
- ❖ If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract.
- ❖ If he can show that, if he had known who the principal in the contract was, or if he had known that the agent was not a principal, he would not have entered into the contract.

## **PERFORMANCE OF CONTRACT WITH AGENT SUPPOSED TO BE PRINCIPAL (SECTION 232)**

One man makes a contract with another neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

### **EXAMPLE**

Abi, who owes 400 rupees to Balu, sells 1,000 rupees worth of rice to Balu. Abi is acting as agent for Hari in the transaction, but Balu has neither knowledge nor reasonable ground of suspicion that such is the case. Hari cannot compel Balu to take the rice without allowing him to set off Abi's debt.

## **AGENT WHEN AGENT IS PERSONALLY LIABLE (SECTION 233)**

In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

### **EXAMPLE**

Amir enters into a contract with Bala to sell him 100 bales of cotton, and afterwards discovers that Bala was acting as agent for Hari. Amir may sue either Bala or Hari, or both, for the price of the cotton.

## **CONSEQUENCE OF INDUCING AGENT OR PRINCIPAL TO ACT ON BELIEF THAT PRINCIPAL OR AGENT WILL BE HELD EXCLUSIVELY LIABLE (SECTION 234)**

This section provides as under "When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively."

### **EXAMPLE**

Deepa induces Hari an agent of Viji to sell Viji's shop to someone known to her (Deepa) assuring her that his act is within the scope of authority. This act was outside the scope of Hari's authority. Hari is acting on the belief of Deepa such that he will not be personally liable. Deepa cannot proceed against either Hari or Viji for her misdeed.

## **PRETENDED AGENT**

A person who not being an authorized agent of another but pretends himself to be authorized agent of another and thereby induces a third party to deal with him as such agent is called pretended agent.

## **Liability of a pretended agent (Section 235)**

A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

### **EXAMPLE**

Mahesh made Mano to believe that he is an authorized dealer of ABC Associates, even though he is not in any way connected with ABC Associates and thus induces him to sell goods worth Rs.50, 000 to him on credit. ABC did not ratify the act of Mahesh denying him as their agent.

Neither Mahesh nor Mano has any claim to proceed against ABC Associates.

## **PERSON FALSELY CONTRACTING AS AGENT NOT ENTITLED TO PERFORMANCE (SECTION 236)**

A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Conduct induces a third party to believe that the act and obligations of the agent are within his authority the principal is liable for the acts of the agent.

Further, Section 237 states that, an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

#### **EXAMPLE**

Mani consigns goods to Viji for sale, and gives him instructions not to sell under a fixed price. Dina, being ignorant of Viji's instructions, enters into a contract with Viji to buy the goods at a price lower than the reserved price. Mani is bound by the contract.

Mani entrusts Viji with negotiable instruments endorsed in blank. Viji sells them to Dina in violation of private orders from Mani. The sale is good.

#### **EFFECT ON AGREEMENT, OF MISREPRESENTATION OR FRAUD BY AGENT (SECTION 238)**

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed, by the principal; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

#### **EXAMPLE**

Dinakaran, being Bala's agent for the sale of goods, induces Latha to buy them by a misrepresentation, which he was not authorized by Bala to make. The contract is voidable, as between Bala and Latha, at the option of Latha.

#### **IRREVOCABLE AGENCY**

An agency which cannot be terminated or put to an end is called an irrevocable agency.

#### **An agency is irrevocable under following condition:**

An agency which cannot be terminated or put to an end is called an irrevocable agency.

Agency is coupled with interest for the agent over and above his remuneration: An agency is said to be coupled with interest when it is created for securing some benefits to the agent over and above his remuneration as an agent.

Further, according to Section 202, the agent has himself an interest in the property which forms subject matter of agency, the agency cannot in the absence of any express contract be terminated to the prejudice of such interest.

#### **EXAMPLE**

Abith is indebted to Bala, he appoints him as his agent and thus authorizes him to sell his land and to pay himself in discharge of his debt. Abith cannot revoke the authority nor put to an end to the authority.

# **CHAPTER 2**

## **SALE OF GOODS ACT,1930**

### **CONTRACT OF SALE OF GOODS**

The law relating to sale of goods is contained in the Sale of Goods Act 1930. It has to be read as part of the Indian Contract Act 1872 [Sections 2(5) and (3)].

According to Section 4, 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 money consideration called the price.

It shows that the expression “contract of sale” includes both a sale where the seller transfers the ownership of the goods to the buyer, and an agreement to sell where the ownership of goods is to be transferred at a future time or subject to some conditions to be fulfilled later on.

**The following are thus the essentials of a contract of sale of goods**

#### **Bilateral contract:**

It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.

#### **Transfer of property:**

The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.

#### **Goods:**

The subject matter must be some goods.

#### **Price or money consideration:**

The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.

All essential elements of a valid contract must be present in a contract of sale.

### **SALE AND AGREEMENT TO SELL**

<b>Basis</b>	<b>Contract of sale</b>	<b>Agreement to sell</b>
Transfer of property	The property of the goods passes from the buyer to the seller.	The transfer of property takes place at a future time or subject to certain conditions to be fulfilled.
Type of contract	It is an executed contract	It is an executory contract
Type of goods	Sales takes place only for existing and specific goods.	Future and contingent goods.
Risk of loss	If the goods are destroyed, the loss falls on the buyer despite the goods are in the possession of the seller.	If the goods are destroyed, the loss falls on the seller despite the goods are in the possession of the buyer
Breach of contract	The seller can sue the buyer for price and for damages in case of breach by the buyer	The seller can sue for damages only in case of breach by the buyer
General and particular property	It gives buyer to enjoy the goods as against the world at large including the seller	It gives a right to the buyer against the seller to sue for damages
Insolvency of the buyer	In the absence of lien over the goods the seller is to return the goods to the Official receiver or assignee. He is entitled to get the dividend declared by the Official receiver which will be at the reduced rate.	The seller is not bound to part with the goods until the price is paid to him.
Insolvency of the seller	The buyer, becoming the owner, is entitled to recover the same from the Official receiver or assignee	The buyer cannot claim the goods but the dividend declared by the Official receiver or assignee.

## **SALE AND BAILMENT**

A “bailment” is a transaction under which goods are delivered by one person (the bailor) to another (the bailee) for some purpose, upon a contract that they be returned or disposed of as directed after the purpose is accomplished (Section 148 of the Indian Contract Act 1872).

The property in the goods is not intended to and does not pass on delivery though it may sometimes be the intention of the parties that it should pass in due course. But where goods are delivered to another on terms which indicate that the property is to pass at once the contract must be one of sale and not bailment.

## **SALE AND CONTRACT FOR WORK AND LABOUR**

The distinction between a “sale” and a “contract for work and labor” becomes important when question of passing of property arises for consideration.

However, these two are difficult to distinguish. The test generally applied is that if as a result of the contract, property in an article is transferred to one who had no property therein previously for a money consideration, it is a sale, where it is otherwise it is a contract for work and labor.

## **SALE AND HIREPURCHASE AGREEMENT**

- ❖ “Sale”, is a contract by which property in goods passes from the seller to the buyer for a price.
- ❖ A “hire purchase agreement” is basically a contract of hire, but in addition, it gives the hirer an option to purchase the goods at the end of the hiring period.
- ❖ Consequently, until the final payment, the hirer is merely a bailee of goods and ownership remains vested in the bailor. Under such a contract, the owner of goods delivers the goods to person who agrees to pay certain stipulated periodical payments as hire charges. Though the possession is with the hirer, the ownership of the goods remains with the original owner.
- ❖ The essence of hire purchase agreement is that there is no agreement to buy, but only an option is given to the hirer to buy by paying all the installments or put an end to the hiring and return the goods to the owner, at any time before the exercise of the option.
- ❖ Since the hirer does not become owner of the goods until he has exercised his option to buy, he cannot pass any title even to an innocent and bona fide purchaser.
- ❖ The transaction of hire-purchase protects the owner of the goods against the insolvency of the buyer, for if the buyer becomes insolvent or fails to pay the installments, he can take back the goods as owner. And if the hirer declines to take delivery of the goods, the remedy of the owner will be damages for non-hiring and not for rent for the period agreed.
- ❖ It is important to note the difference between a hire purchase agreement and mere payment of the price by installments because, the latter is a sale, only the payment of price is to be made by installments.
- ❖ The distinction between the two is very important because, in a hire-purchase agreement the risk of loss or deterioration of the goods hired lies with the owner and the hirer will be absolved of any responsibility therefore, if he has taken reasonable care to protect the same as a bailee. But it is otherwise in the case of a sale where the price is to be paid in installments.

## **SUBJECT MATTER OF CONTRACT OF SALE OF GOODS**

### **Goods:**

The subject matter of the contract of sale is essentially goods. According to Section 2(7) of the Sale of Goods Act, “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.

An exception is that, actionable claims and money are not goods and cannot be bought and sold under this Act.

Further, money means current money, i.e., the recognized currency in circulation in the country, but not old and rare coins which may be treated as goods.

An actionable claim is what a person cannot presently use or enjoy, but what can be recovered by him by means of a suit or an action.

Thus, a debt due to a man from another is an actionable claim and cannot be sold as goods, although it can be assigned. Under the provisions of the Transfer of Property Act 1882, goodwill, trademarks, copyrights and patents are all goods, so is a ship. As regards water, gas, electricity, it is doubtful whether they are goods.

### **The famous case laws are:**

Rash Behari v. Emperor (1936) 41 C.W.N. 225;

M.B. Electric Supply Co. Ltd. v. State of Rajasthan, AIR (1973) Raj. 132)

### **Goods may be (a) existing, (b) future, or (c) contingent.**

Further, the existing goods may be specific or generic, or ascertained or unascertained.

#### **Existing Goods:**

Existing goods are goods which are either owned or possessed by the seller at the time of the contract. Sale of goods possessed but not owned by the seller would be by an agent or pledgee.

Existing goods are specific goods which are identified and agreed upon at the time of the contract of sale. Ascertained goods are either specific goods at the time of the contract or are ascertained or identified to the contract later on i.e., made specific.

Generic or unascertained goods are goods which are not specifically identified but are indicated by description.

#### **Example**

If a merchant agrees to supply a television set from his stock, it is a contract of sale of unascertained goods because it is not known which set will be delivered.

As soon as a particular set is separated or identified for delivery and the buyer has notice of it, the goods are ascertained and become specific goods.

#### **Future Goods:**

Future goods are goods to be manufactured or produced or acquired by the seller after the making of the contract of sale. A agrees to sell all the mangoes which will be produced in his garden next season. This is an agreement for the sale of future goods [Section 2(6)].

#### **Contingent Goods:**

Where there is a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen, such goods are known as contingent goods. Contingent goods fall in the class of future goods.

#### **Example**

Ravi agrees to sell a certain radio set, provided he is able to get it from its present owner. This is an agreement to sell contingent goods. In such a case, if the contingency does not happen because of the fault of the seller, he will not be liable for damages.

Actual sale can take place only of specific goods and property in goods passes from the seller to buyer at the time of the contract, provided the goods are in a deliverable state and the contract is unconditional.

There can be an agreement to sell, only in case of future or contingent goods.

#### **EFFECT OF PERISHING GOODS**

In a contract of sale of goods, the goods may perish before sale is complete. Such a stage may arise in the following cases:

#### **Goods perishing before making a contract (Section 7)**

Where in a contract of sale of specific goods, the goods without the knowledge of the seller have, at the time of making the contract perished or become so damaged as no longer to answer to their description in the contract, the contract is void. This is based on the rule that mutual mistake of fact essential to the contract renders the contract void.

If the seller was aware of the destruction and still entered into the contract, he is estopped from disputing the contract.

Moreover, perishing of goods not only includes loss by theft, but also where the goods have lost their commercial value.

### **Goods perishing after agreement to sell (Section 8)**

Where there is an agreement to sell specific goods, and subsequently the goods without any fault of any party perish or are so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided. The provision applies only to sale of specific goods. If the sale is of unascertained goods, the perishing of the whole quantity of such goods in the possession of the seller will not relieve him of his obligation to deliver.

### **PRICE**

No sale can take place without a price. Thus, if there is no valuable consideration to support a voluntary surrender of goods by the real owner to another person, the transaction is a gift, and is not governed by the Sale of Goods Act. Therefore, price, which is money consideration for the sale of goods, constitutes the essence for a contract of sale. It may be money actually paid or promised to be paid. If a consideration other than money is to be given, it is not a sale.

### **MODES OF FIXING PRICE (SECTION 9 AND 10)**

#### **The price may be fixed:**

- ❖ At the time of contract by the parties themselves
- ❖ May be left to be determined by the course of dealings between the parties
- ❖ May be left to be fixed in some way stipulated in the contract
- ❖ May be left to be fixed by some third-party.
- ❖ Where the contract states that the price is to be fixed by a third-party and such third-party fails to do so, the contract is void.
- ❖ But if the buyer has already taken the benefit of the goods, he must pay a reasonable price for them.
- ❖ If the third-party's failure to fix the price is due to the fault of the seller or buyer, then that party is liable for an action for damages.
- ❖ Where nothing is said by the parties regarding price, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case.
- ❖ Generally, the market price would be a reasonable price.

### **CONDITIONS- DEFINITION**

Section 12(1) provides that a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

#### **Condition [Section 12(2)]**

A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to right to treat the contract as repudiated.

A condition in a contract of sale of goods is of fundamental nature for breach of which the buyer can repudiate the contract.

#### **Warranty [Section 12(3)]**

A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

S.No.	Condition	Warranty
1.	A condition is a stipulation which is essential to the main purpose of the contract.	A Warranty is a stipulation which is collateral to the main purpose of the contract.
2.	The aggrieved party can repudiate the contract of sale in case there is a breach of a condition	The aggrieved party can claim damages only in case of breach of a warranty.
3.	A breach of condition may be treated as a breach of a warranty. This would happen where the aggrieved party is contended with damages only	A breach of a warranty, con not be treated as a breach of a condition.

### **TRANSFER OF OWNERSHIP**

Sections 18 to 25 of the Sale of Goods Act, determine when the property passes from the seller to the buyer.

#### **Rules for Ascertaining Passing of Property:**

The provisions are discussed hereunder:

#### **Goods must be ascertained (section 18)**

As per section 18 in a contract for sale of unascertained goods, the property in the goods does not pass to the buyer unless and until the goods are ascertained.

#### **Intention of the parties for such transfer (section 19)**

As per section 19(2), in a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case.

When intention of the parties cannot be ascertained, rules contained in section 20-24 are required to be applied for ascertaining the time of transfer of property:

#### **Specific goods (Secs 20 to 22)**

##### **Specific goods in a deliverable state (section 20)**

In an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. (Sec 20). Goods are said to be in deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery thereof.

##### **Specific goods to be put into a deliverable state (Sec. 21)**

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof (sec 21).

##### **Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price (section 22)**

If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. (sec 22).

### **Unascertained goods (Sec 23)**

Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

**Delivery to carrier:** Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have appropriated the goods for the purpose of the contract.

### **Goods on approval or ‘on sale or return’**

In order to push up the sales generally there is a practice of sending goods to the customer with the clear cut understanding that he has option to approve or return the goods within a given period. This type of sales is known as “approval or sale or return” In such cases the transaction does not culminate into sale until the goods are approved by the customer and the property in goods still remains with the seller.

When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer—

When he signifies his approval or acceptance to the seller

When he does any other act adopting the transaction.

If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

### **Reservation of Right of Disposal (Sec 25)**

Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled.

#### **The seller is deemed to have reserved the right of disposal:**

- Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of landing or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.
- Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance to payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

### **PASSING OF RISK (SECTION 26)**

The general rule is that goods remain at the seller's risk until the ownership is transferred to the buyer. After the ownership has passed to the buyer, the goods are at the buyer's risk whether the delivery has been made or not.

#### **Example**

Ajay buys goods of Bala and property has passed from Bala to Ajay; but the goods remain in Bala's warehouse and the price is unpaid. Before delivery, Bala's warehouse is burnt down for no fault of Bala and the goods are destroyed. Ajay must pay Bala the price of the goods, as he was the owner. The rule is *res perit domino* - the loss falls on the owner.

But the parties may agree that risk will pass at the time different from the time when ownership passed. For example, the seller may agree to be responsible for the goods even after the ownership is passed to the buyer or vice versa.

**Case Law:**

In Consolidated Coffee Ltd. v. Coffee Board, (1980) 3 SCC 358 case, one of the terms adopted by coffee board for auction of coffee was the property in the coffee knocked down to a bidder would not pass until the payment of price and in the meantime the goods would remain with the seller but at the risk of the buyer, In such cases, risk and property passes on at different stages.

**TRANSFER OF TITLE BY PERSON NOT THE OWNER (SECTION 27-30)**

The general rule is that only the owner of goods can sell the goods. Conversely, the sale of an article by a person who is not or who has not the authority of the owner, gives no title to the buyer. The rule is expressed by the maxim; "Nemo Dat Quod Non Habet" i.e., no one can pass a better title than he himself has.

**Example**

Anu, the hirer of goods under a hire purchase agreement, sells them to Bala, then Bala, though a bona fide purchaser, does not acquire the property in the goods. At most he can acquire such an interest as the hirer had.

**Example**

Ali finds a ring of Baskar and sells it to a third person who purchases it for value and in good faith. The true owner, i.e., Baskar can recover from that person, for Ali having no title to the ring could pass none the better.

**EXCEPTION TO THE GENERAL RULE**

**Sale by a mercantile agent:** A buyer will get a good title if he buys in good faith from a mercantile agent who is in possession either of the goods or documents of title to the goods with the consent of the owner, and who sells the goods in the ordinary course of his business.

**Sale by a co-owner:** A buyer who buys in good faith from one of the several joint owners who is in sole possession of the goods with the permission of his co-owners will get good title to the goods.

**Sale by a person in possession under a voidable contract:** A buyer buys in good faith from a person in possession of goods under a contract which is voidable, but has not been rescinded at the time of the sale.

**Sale by seller in possession after sale:** Where a seller, after having sold the goods, continues or is in possession of the goods or of the documents of title to the goods and again sells them by himself or through his mercantile agent to a person who buys in good faith and without notice of the previous sale, such a buyer gets a good title to the goods.

**Sale by buyer in possession:** If a person has brought or agreed to buy goods obtains, with the seller's consent, possession of the goods or of the documents of title to them, any sale by him or by his mercantile agent to a buyer who takes in good faith without notice of any lien or other claim of the original seller against the goods, will give a good title to the buyer. In any of the above cases, if the transfer is by way of pledge or pawn only, it will be valid as a pledge or pawn.

**Estoppe:** If the true owner stands by and allows an innocent buyer to pay over money to a third-party, who professes to have the right to sell an article, the true owner will be estopped from denying the third-party's right to sell.

**Sale by an unpaid seller:** Where an unpaid seller has exercised his right of lien or stoppage in transit and is in possession of the goods, he may resell them and the second buyer will get absolute right to the goods.

**Sale by person under other laws:** A pawnee, on default of the pawnee to repay, has a right to sell the goods, pawned and the buyer gets a good title to the goods. The finder of lost goods can also sell under certain circumstances.

The Official Assignee or Official Receiver, Liquidator, Officers of Court selling under a decree, Executors, and

Administrators, all these persons are not owners, but they can convey better title than they have.

## **IMPLIED WARRANTIES/CONDITIONS**

Even where no definite representations have been made, the law implies certain representations as having been made which may be warranties or conditions. An express warranty or condition does not impose a negative effect on an implied warranty or condition unless inconsistent therewith.

### **Implied Warranties [Sections 14(b), 14(c) and 16(3)]**

Implied warranties are those which the law presumes to have been incorporated in the contract of sale inspite of the fact that the parties have not expressly included them in a contract of sale. Subject to the contract to the contrary, following are the implied warranties in a contract of sale:

#### **Warranty as to Quiet Possession Section 14(b):**

According to this section of the Sale of Goods Act, with the help of an implied warranty the buyer shall have and enjoy quiet possession of goods. If the buyer's possession is disturbed by anyone having superior title than that of the seller, the buyer is entitled to hold the seller liable for breach of warranty.

#### **Warranty as to Freedom from Encumbrances (Section 14(c)):**

This section states that in a contract of sale, there is an implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party not declared or known to the buyer before or at the time when the contract is made. But if the buyer is aware of any encumbrance on the goods at the time of entering into the contract, he will not be entitled to any compensation from the seller for discharging the encumbrance.

#### **Warranty to Disclose Dangerous Nature of Goods:**

If the goods are inherently dangerous or likely to be dangerous and the buyer is ignorant of the danger, the seller must warn the buyer of the probable danger.

#### **Warranties implied by the custom or usage of trade (Section 16(3)):**

This section provides that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

### **Implied Conditions [Sections 14(a), 15(1), 15(2), 16(1) and Proviso 16(2), and Proviso 16(3) and 12(b) and 12(c)]**

Different implied conditions apply under different types of contracts of sale of goods, such as sale by description, or sale by sample, or sale by description as well as sample.

The condition, as to title to goods applies to all types of contracts, subject to that there is apparently no other intention.

#### **Implied Conditions as to Title:**

There is an implied condition that the seller, in an actual sale, has the right to sell the goods, and, in an agreement to sell, he will have a right to sell the goods at the time when property is to pass. As a result, if the title of the seller turns out to be defective, the buyer is entitled to reject the goods and can recover the full price paid by him.

Ram had bought a second hand motor car from Bala and paid for it. After he had used it for six months, he was deprived of it because the seller had no title to it. It was held that Bala had broken the condition as to title and Ram was therefore entitled to recover the purchase money from Bala (Rowland v. Divall (1923) 2 K.B. 500).

#### **Implied Conditions under a Sale by Description:**

The following implied conditions corresponds to the sale by description:

Goods must correspond with description (Section 15):

It is provided under this section of the Act that when there is a sale of goods by description, there is an implied condition that the goods shall correspond with description.

In a sale by description, the buyer relies for his information on the description of the goods given by the seller, e.g., in the contract or in the preliminary negotiations.

**Example**

When Sathish buys goods which he has not seen, it must be sale by description, e.g., where he buys a new fiat car from Viji and the car is not new, he can reject the car. Even if the buyer has seen the goods, the goods must be in accordance with the description (Beale v. Taylor (1967) ALL E.R. 253).

**Goods must also be of merchantable quality Section 16(2):**

Goods must also be of merchantable quality, if they are bought by description from dealer of goods of that description. [

Merchantable quality means that the goods must be such as would be acceptable to a reasonable person, having regard to prevailing conditions.

They are not merchantable if they have defects which make them unfit for ordinary use, or are such that a reasonable person knowing of their condition would not buy them.

**Example**

Jack bought black yarn from Dinesh and, when delivered, found it damaged by the white ants. In this case the condition of merchantability was broken. But, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed.

If, however, examination by the buyer does not reveal the defect and he approves and accepts the goods, but when put to work, the goods are found to be defective, there is a breach of condition of merchantable quality.

The buyer is given a right to examine the goods before accepting them. But a mere opportunity without an actual examination, however, cursory, would not suffice to deprive him of this right.

**Condition as to wholesomeness:**

The provisions, (i.e., eatables) supplied must not only answer the description, but they must also be merchantable and wholesome or sound.

**Example**

Giri bought milk from Anu and the milk contained typhoid germs. Giri's wife became infected and died.

**Example**

Anu was liable for damages. Again, Chitra bought a bun at Mani's bakery, and broke one of his teeth by biting on a stone present in the bun. Mani was held liable.

**Condition as to quality or fitness for a particular purpose:**

Ordinarily, in a contract of sale, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied. But there is an implied condition that the goods are reasonably fit for the purpose for which they are required if:

The buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill and judgment.

i.ii. The goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not). There is no such condition if the goods are bought under a patent or trade name.

**Case Law:**

**In Priest v. Last (1903) 2 K.B. 148 case**, a hot water bottle was bought by the plaintiff, a draper, who could not be expected to have special skill knowledge with regard to hot water bottles, from a chemist, who sold such articles stating that the bottle will not stand boiling water but was intended to hold hot water. While being used by the plaintiff's wife, the bottle burst open and injured her. Held, the seller was responsible for damages as the bottle was not fit for use as a hot water bottle.

**Implied Conditions under a Sale of Sample (Section 7)****In a contract of sale by sample:**

- There is an implied condition that the bulk shall correspond with the sample in quality;
- Another implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

- It is further an implied condition of merchantability, as regards latent or hidden defects in the goods which would not be apparent on reasonable examination of the sample.
- “Worsted coating” quality equal to sample was sold to tailors, the cloth was found to have a defect in the fixture rendering the same unfit for stitching into coats. The seller was held liable even though the same defect existed in the sample, which was examined.

### Implied Conditions in Sale by Sample as Well as by Description

In a sale by sample as well as by description, the goods supplied must correspond both with the samples as well as with the description.

#### Case Law:

**In Nichol v. Godis (1854) 158 E.R. 426 case**, there was a sale of “foreign refined rape-oil having warranty only equal to sample”. The oil tendered was the same as the sample, but it was not “foreign refined rape-oil” having a mixture of it and other oil. It was held that the seller was liable, and the buyer could refuse to accept.

### DOCTRINE OF CAVEAT EMPTOR

The term “caveat emptor” is a Latin word which means “let the buyer beware”. This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. If he buys goods for a particular purpose, and if he makes a wrong selection he cannot blame the seller if the goods turn out to be defective or do not serve his purpose.

The doctrine of caveat emptor is embodied in Section 16 of the Act which states that “subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale”.

#### Case Law :

**In Ward v. Hobbs, (1878) 4 A.C. 13 case**, certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and all but one died of typhoid fever. They also infected some of the buyer's own pigs. It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

### Exceptions to the doctrine of Caveat Emptor (Section 16):

#### This section lays down the following exceptions::

- Where the seller makes a false representation and the buyer relies on it.
- When the seller actively conceals a defect in the goods which is not visible on a reasonable examination of the same.
- When the buyer, relying upon the skill and judgment of the seller, has expressly or impliedly communicated to him the purpose for which the goods are required.
- Where goods are bought by description from a seller who deals in goods of that description.

### PERFORMANCE OF CONTRACT OF SALE - INTRODUCTION

It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer to accept the goods and pay for them in accordance with the contract of sale.

Unless otherwise agreed, payment of the price and the delivery of the goods and concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.

### **DELIVERY (SECTIONS 33-39)**

Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic.

**Actual or physical delivery** takes place where the goods are handed over by the seller to the buyer or his agent authorized to take possession of the goods.

**Constructive delivery** takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer.

**For example**, where the seller, after having sold the goods, may hold them as bailee for the buyer, there is constructive delivery.

**Symbolic delivery** is made by indicating or giving a symbol. Here the goods themselves are not delivered, but the “means of obtaining possession” of goods is delivered,

**For example:** by delivering the key of the warehouse where the goods are stored, bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

### **RULES AS TO DELIVERY**

#### **The following rules apply regarding delivery of goods:**

- ❖ Delivery should have the effect of putting the buyer in possession.
- ❖ The seller must deliver the goods according to the contract.
- ❖ The seller is to deliver the goods when the buyer applies for delivery; it is the duty of the buyer to claim delivery.
- ❖ Where the goods at the time of the sale are in the possession of a third person, there will be delivery only when that person acknowledges to the buyer that he holds the goods on his behalf.
- ❖ The seller should tender delivery so that the buyer can take the goods. It is no duty of the seller to send or carry the goods to the buyer unless the contract so provides.
- ❖ But the goods must be in a deliverable state at the time of delivery or tender of delivery. If by the contract the seller is bound to send the goods to the buyer, but no time is fixed, the seller is bound to send them within a reasonable time.
- ❖ The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place at which they happen to be at the time of the contract of sale and if not then in existence they are to be delivered at the place at which they are manufactured or produced.
- ❖ The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by the seller.
- ❖ If the goods are to be delivered at a place other than where they are, the risk of deterioration in transit will, unless otherwise agreed, be borne by the buyer.
- ❖ Unless otherwise agreed, the buyer is not bound to accept delivery in installments.

### **ACCEPTANCE OF GOODS BY THE BUYER**

#### **Acceptance of the goods by the buyer takes place when the buyer:**

- Intimates to the seller that he has accepted the goods.
- Retains the goods, after the lapse of a reasonable time without intimating to the seller that he has rejected them.

**Does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells. If the seller sends the buyer a larger or smaller quantity of goods than ordered, the buyer may:**

- Reject the whole
- Accept the whole
- Accept the quantity be ordered and reject the rest.
- If the seller delivers with the goods ordered, goods of a wrong description, the buyer may accept the goods ordered and reject the rest, or reject the whole.
- Where the buyer rightly rejects the goods, he is not bound to return the rejected goods to the seller. It is sufficient if he intimates the seller that he refuses to accept them. In that case, the seller has to remove them.

### **INSTALLMENT DELIVERIES**

When there is a contract for the sale of goods to be delivered by stated installments which are to be separately paid for, and either the buyer or the seller commits a breach of contract, it depends on the terms of the contract whether the breach is a repudiation of the whole contract or a severable breach merely giving right to claim for damages.

### **Buyer's right of examining the goods**

According to Section 41, the buyer is having right to examine the goods, which have not been examined by him previously before acceptance. The examination of the goods by the buyer is for the purpose of ascertaining whether they are in conformity with the contract. The seller is also bound to afford an opportunity to the buyer for examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

### **Acceptance**

#### **Section 42 provides that the buyer is deemed to have accepted the goods-**

- ❖ Intimates to the seller that he has accepted them
- ❖ Goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller
- ❖ After the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

### **Return of rejected goods**

Section 43 provides that where goods are delivered to the buyer and he refuses to accept them, the buyer is not bound to return them to the seller. It is sufficient if he intimates to the seller that he refuses to accept them.

### **Liability of the buyer -Section 44**

- ❖ The seller is already and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time take delivery of the goods.
- ❖ Liable to the seller any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods.
- ❖ The rights of the seller shall not be affected by this section where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

### **UNPAID SELLER (SECTION 45)**

- ❖ The seller of goods is deemed to be unpaid seller:
- ❖ When the whole of the price has not been paid or tendered; or
- ❖ When a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonored.

## **RIGHTS OF AN UNPAID SELLER AGAINST THE GOODS**

#### **An unpaid seller's right against the goods are:**

- .a. A lien or right of retention
- .b. The right of stoppage in transit.
- .c. The right of resale.
- .d. The right to withhold delivery.

### **RIGHT OF LIEN (SECTIONS 47-49 AND 54)**

An unpaid seller in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the fulfillment or tender of the price in cases where:

- The goods have been sold without stipulation as to credit
- The goods have been sold on credit, but the term of credit has expired
- The buyer becomes insolvent.
- The lien depends on physical possession.
- The seller's lien is possessory lien, so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

**A lien is lost –**

- Seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods
- Buyer or his agent lawfully obtains possession of the goods
- By waiver of his lien by the unpaid seller.

**STOPPAGE IN TRANSIT (SECTIONS 50-52)**

- The right of stoppage in transit is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment of the price.
- The right to stop goods is available to an unpaid seller when the buyer becomes insolvent; and the goods are in transit.
- The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.
- The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehouse keeper for the purpose of transmission to the buyer and until the buyer takes delivery of them.

**The transit comes to an end in the following cases:**

- If the buyer obtains delivery before the arrival of the goods at their destination
- If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;
- If the carrier wrongfully refuses to deliver the goods to the buyer.
- If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.
- The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier, he must redeliver the goods to the seller who must pay the expenses of the redelivery.
- The seller's right of lien or stoppage in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

**Right of re-sale (Section 54):****The unpaid seller may re-sell:**

- The goods are perishable
- The right is expressly reserved in the contract
- In exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not pay or tender the price within a reasonable time.
- If there is a deficiency between the price due and amount realized, he is entitled to recover it from the buyer. If there is a surplus, he can keep it.
- Not given any notice and he will have to pay the buyer profit, if any, on the resale.

**Rights to withhold Delivery:**

If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

**RIGHTS OF AN UNPAID SELLER AGAINST THE BUYER (SECTIONS 55 AND 56)**

An unpaid seller may sue the buyer for the price of the goods in case of breach of contract where the property in the goods has passed to the buyer or he has wrongfully refused to pay the price according to the terms of the contract.

The seller may sue the buyer even if the property in the goods has not passed where the price is payable on a certain day.

Under Section 56, the seller may sue the buyer for damages or breach of contract where the buyer wrongfully neglects or refuses to accept and pay for the goods.

**Thus an unpaid sellers rights against the buyer personally are:**

- .a. A suit for the price.
- .b. A suit for damages.

**Suit for repudiation:**

The buyer repudiates the contract before the date of delivery, the seller may wait till the date of delivery or may treat the contract as cancelled and sue for damages for breach.

**Suit for interest: [Sec. 61]**

Where there is specific agreement between the seller and the buyer regarding interest on the price of goods, the seller may claim it from the date when payment becomes due. If there is no specific agreement, the interest is payable from the date notified by the seller to the buyer.

**Buyer's Remedies against Seller for Breach of Contract**

**Suit for Damages for Non-Delivery:** The seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. This is in addition to the buyer's right to recover the price, if already paid, in case of non-delivery.

**Suit for price:** The buyer has paid the price and the goods are not delivered to him, he can recover the amount paid.

**Suit for specific performance-** The goods are specific or ascertained, a buyer may sue the seller for specific performance of the contract and compel him to deliver the same goods. The court orders for specific performance only when the goods are specific or ascertained and an order for

**AUCTION SALES (SECTION 64)**

- A sale by auction is a public sale where goods are offered to be taken by bidders. It is a proceeding at which people are invited to complete for the purchase of property by successive offer of advancing sums.
- Section 64 lays down the rules regulating auction sales. Where goods are put up for sale in lots, each, lot is *prima facie* deemed to be the subject of a separate contract of sale.
- The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner.
- Until such announcement is made, any bidder may retract his bid.

**REVIEW QUESTIONS-SPECIAL CONTRACT**

1. Distinguish between Indemnity and Guarantee
2. Statement: Surety is not discharged even when the creditor changes his terms of contract with principal debtor
3. How the surety is discharged from liability ?
4. In the event of principal debtor being a minor, creditor cannot recover his money from the surety –offer your views
5. Bailee's particular lien
6. Sale and Bailement are same .Do you agree
7. State the difference kinds or types of bailment
8. Distinguish between Bailment and Pledge
9. Comment on the following :Pledgee can sell the pledged goods to any person
10. Write short notes on Agency of necessity
11. Write short on agency of ratification
12. An Agent retained all the stock and other papers of a principal until his pending dues are cleared by the principal. State legal position
13. Discuss the position of Agent appointed by minor
14. Write short notes on conditions & warranties (Sale of Good Act).
15. Explain the terms "Sale" and "agreement to sell".
16. Write short notes on Caveat emptor
17. Explain future goods and specific goods
18. Give short notes on :Rights of the unpaid seller
19. Briefly describe about termination of lien
20. Short notes on Right of resale
21. Exceptions to 'implied conditions as to Quality or fitness'
22. Write notes on Transfer of property of unascertained Goods
23. What are the essentials of a contract of sale?

## **ICWA INTER - PRACTICAL QUESTIONS**

### **SPECIAL CONTRACTS**

#### **Practical Questions – Indemnity and Guarantee**

**A” executed a guarantee in favor of state bank of India as security for a loan to “B”. Later “A” contended that the guarantee was not enforceable as it was not supported by consideration as he was not paid guarantee commission. Is ‘A’s stand correct in law?**

Ans: As provided in section 127, anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee. For example, B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A’s promise to deliver the goods. This is a sufficient consideration for C’s promise.

Thus, A’s stand that the guarantee was not enforceable as it was not supported by consideration is not correct.

**Statesman publishes at the request of Mr. D.D a libel upon Mr. S. S. Mr. D. D. agree to indemnity the statesman the consequence of the publication if any. Mr. S. S. sued statesman to pay damage. Statesman paid Rs. 2, 00, 000/- to Mr. S. S. and demanded the amount from D.D who refused. State legal provisions.**

Ans: When the agent does an act which is criminal in nature upon the directions of the employer. The employer is not liable to indemnify the agent either on an express or implied promise against the consequences of the criminal act. Hence, in the given problem Mr. D. D. is not liable.

**Mr. Bose is indebted to Mr. Das and Mr. Ghosh is the surety. When Mr. Bose & Mr. Ghosh refused to pay, Mr. Das sued the surety(Mr. Ghosh) who paid the amount and cost as per orders of the court. Can the surety recover the amount from Mr. Bose?**

Ans: Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully. In terms of the said provision, Mr. Ghosh can recover from Bose the amount paid by him and costs also.

**Mr. Barick owe banker a debt guaranteed by both Mr. Arora and Mr. Bora. The banker releases Mr. Arora one of the co-sureties. Hence the remaining i.e. other surety(Mr. Bora) is also released automatically offer views.**

Ans: As per section 138 of the contract act, 1872, where there are co-sureties, a release by the creditor of one of them does not discharge the others. Therefore, in the given case release of Mr. Arora does not release Mr. Bora from liabilities.

**Mr. A, Mr. B & Mr. C are sureties to Mr. D for the sum of INR 6000 lent to Mr. E. Mr. E. failed to repay on due date. Mr. A, one of the sureties, disagreed to pay. Advice whether ‘A’ is right.**

Ans: As per section 146 of the contract act, where 2 or more persons are co-sureties for the same debt, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor. Therefore, in the given case A, B and C are liable, as between themselves, to pay INR.2, 000 each.

**A bank gives a guarantee on behalf of a principal debtor is called guarantor ?**

In the contract of guarantee, the person who gives the guarantee is called surety, the person in respect of whose default the guarantee is given is called the principal debtor and the person to whom guarantee is given is called the creditor. Thus , a bank when gives a guarantee on behalf of a principal debtor called a surety not guarantor.

**BEE owes Rs.10,000 to CEE Amount was guaranteed by GEE said debt becomes payable on 25.10.07. CEE does not sue BEE .Hence due to delay GEE is automatically discharged from his suretyship .Comment.**

As per section 137 Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not in the absence of any provision in the guarantee to the contrary , discharge the surety.Thus the given problem, GEE is not discharged from his suretyship.

**A surety is discharged from his liability where there is failure of consideration between the creditor and principal debtor in a contract of guarantee.**

There is no need of separate consideration for a contract of guarantee between the creditor and surety.But there must be consideration between creditor and the principal debtor.On the failure of such consideration, surety will be discharged from his liability.

**Mr.Ray made a contract with Mr.Basu to grow vegetables on Mr.Rays land and to deliver to Mr.Basu at a fixed rate.Mr.Karmakar guarantees Mr.Rays performance of this contract.Mr.Basu diverts stream of water which is necessary for production thereby prevented Mr.Ray to grow vegetables.Mr.Ray fails to supply as per contract.Hence Mr.Basu sues Mr.Kamakar(Guarantor) for non performance-Advise**

As per section 139 Indian contract Act 1872, if the creditor does any act which is inconsistent with surety rights the surety is discharged .In the given case Mr.Basu the surety prevented Mr.Ray to grow vegetables by preventing flow of water.Therfore Mr.Basu is discharged of his duties.

## **Practical Questions – Bailment and Pledge**

**A railway company refuses to deliver certain goods to the consignee except upon payment of Rs. 2000 being excess/illegal charge. The consignee paid the said amount in order to obtain the goods. Is there any remedy?**

Ans: The consignee can recover the amount which was illegally excessive because to whom money is paid under coercion or by mistake must return it.

**Mr. Roy give Mr. Ghosh on hire, a horse for own riding but Mr. Ghosh drives the horse in his carriage. What action MR. Roy can take?**

Ans: Sec 153, provides that a contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. In terms of the said provision this is, at the of Mr. Roy, a termination of the bailment.

**Saxena lets to Mr. Menon for hire a horse for his own riding but Mr. Menon drives the horse in his carriage. What action Saxena can take?**

Ans: As per sec 153, of the Indian contract act, 1872, a contract of bailment is available at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. Saxena lets to Mr. Menon for hire a horse for his own riding. This is, at the option of Saxena a termination of the bailment.

## **Practical Question – Law of Agency**

**Mr. Ramesh direct his agent to sell his Maruti car. Agent buys the car for himself but in the name of his friend at Rs. 50, 000/- against market price of Rs. 70, 000/- without the consent of Mr. Ramesh. What action Mr. Ramesh can take?**

Ans: As per Sec 204, the principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Thus, in the given problem, Mr. Ramesh cannot revoke his authority for payment of car.

**Mr. B(a broker) by the orders of Mr. A purchases 10 Drums of oil for A from Mr. C Afterwards Mr. A refuses to receive oil. Mr. C sues Mr. B who informs Mr. A but Mr. A repudiates the contract. Although Mr. B defends but failed. Mr. B has to pay cost, damages and incurs expense. Can B recover any amount from A.**

Ans: As 'B' acted on the instruction of 'A' therefore he is an Agent of 'A'. The employer of an agent is liable to indemnify his agent against all lawful acts done by such agent in exercise of authorities conferred upon him. Hence, in the present case, 'A'(employer) is liable to pay 'B'(Agent) cost, damages and expenses incurred.

**State the right and liabilities of "A" in the following case: "A" authorizes "B" to buy 500 pieces of Sunlight soap for him but "B" buys 500 pieces Sunlight and 200 pieces Henko at a total price of Rs. 5000. "A" refused to pay to "B".**

Ans: When an agent does more than what he is authorized to do then if the work can be separated, the agent is liable for the excess work done and if the work cannot be separated, the agent is liable for whole of the work.

In light of the above provisions, B does more than what he was authorized to do. Secondly, Rs. 5, 000 cannot be separated between Sunlight and Henko. Therefore "A" may repudiate the whole transaction.

**State the right and liabilities of "A" in the following case: "A" is owner of the factory building and also of product. "A" authorizes "B" to take an insurance policy on factory building for Rs. 2 lacs. "B" procures a policy for Rs. 2 lacs on factory and another policy for Rs. 2, 000 on products. "A" refused to reimburse to "B".**

Ans: In the present case B was only authorized to take an insurance policy on factory building for Rs. 2 lacs and not on products. Therefore, A will need to reimburse B with only Rs. 2 lacs and not the insurance value of the products because he was not asked to do so.

**Mr. Roy consigns some fruits to his agent MR. Paul at Mumbai with direction to send those to Mr. Kar at Chembur. Mr. Paul sold fruits, which were spoiling at Mumbai below cost price consent of MR. Roy whether MR. Paul's action was valid?**

Ans: As per Sec 189, An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss and would be done by a person or ordinary prudence, in his own case, under similar circumstances. In terms of the said provision, Mr. Paul's action was valid.

## **Practical questions- Sale of Goods Act ,1930**

**Mr. Buyer purchased a scooter for Rs. 5, 000 on 1.7.02 from Mr. Seller. Mr. Buyer was running the scooter from the date of purchase. Mr. Unknown who was the true owner has now demanded the scooter from Mr. Buyer who was not aware that Mr. Seller had no title to it. State the legal position.**

Ans: As per sec 14 of the sale of goods act, (unless otherwise stated in the contract of sale, there is an implied condition that the seller has a right to sell the goods. In terms of the said provision, Mr. Buyer can recover the price from Mr. Seller. Similar decision was made in Rowland vs. Divall)

**Mr. Ram bought a Maruti Zen car from Mr. Shyam at Rs. One lakh. Mr. Ram was running the car for sometime. Subsequently due to Mr. Shyam's defective title, Mr. Ram had to return the car to Mr. Laxman who the true owner. Is Mr. Ram entitled to recover the price from Mr. Shyam.**

Ans: As per Sec 14, of the sale of goods act, unless otherwise stated in the contract of sale, there is an implied condition that the seller has a right to sell the goods. In terms of the said provision, Mr. Ram can recover the price from Mr. Shyam. Similar decision was made in Rowland Vs. Divall.

**Mr. A agreed to purchase 100 bales of cotton from "B" from his large stock "A" sent his men to take delivery of cotton. On completion of packing of only 70 bales, there was accidental fire and entire stock including packed 70 bales were destroyed. There was no insurance cover. Who will bear loss?**

Ans: As per Sec 21, where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof. Mr. B will bear the loss as the goods are not delivered and are in his possession.

**As per sales order A is to supply 20 MT of sugar to B. A however supplied 22MT and billed for accordingly. B paid cost of 20 MT which was ordered by B. Can A take any action against B?**

Ans: As per sec 37(2), of the sale of goods act, when the seller delivers more quantity of goods than contracted, the buyer may reject the excess quantity of goods or the whole. If he accepts the whole he shall pay for them at the contract rate.

In light of above provisions, B is liable to pay for the full 22MT of sugar.

**On 30/11/2009. Mr. Sham agree to sell a painting to Mr. Ram for Rs. 5, 000 but Mr. Sham died on 8/12/2009. Mr. Sham's son claimed Rs. 10, 000 can Mr. Ram obtain the painting at Rs. 5, 000 which was agreed to by Mr. Sham?**

Ans: As per sec 4(1) of the sale of goods act, 1930, a contract of sale of goods is contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price.

Hence, in view of the above provision, Mr. Ram can enforce Mr. Sham's heirs for the painting at Rs.5, 000.

**Mr. Sham orders on Mr. Ram to deliver certain goods at Mumbai. While the goods are lying at Mumbai Rly. station, station master informs Mr. Sham that the goods are held at station at Mr. Sham's risk, but Mr. Sham became insolvent. Has Mr. Ram any right as an unpaid seller?**

Ans: As per sec 46, in case of the insolvency of the buyer, the goods are held at the station by the station master as bailee of Mr. Sham. Since the goods are not in transit, Mr. Ram's right of stoppage in transit is not existing.

**Mr. Ram gives some diamond to Mr. Sham on sale or return basis. On the same day, MR. Sham gives those diamonds to Mr. Jadu on “sale or return” basis. Those diamonds were lost from Mr. Jadu on the same day, who will bear the loss?**

Ans: Sec 24, provides that when goods are delivered to the buyer on approval or an sale or return or other similar terms, the property in the goods passes to the buyer when he signifies his approval or acceptance to the seller. In terms of the said provision sham will bear the loss as he becomes the owner by passing the goods to Mr. Jadu

**Mr. Bose settled the price after selecting 2 chairs. He arranges to take delivery of chairs next day and agree to pay and next month. Said chairs were destroyed by fire before delivery. Seller demanded the price Mr. Bose refused state legal position.**

Ans: As per sec 26, when the property in the goods is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. In the given problem, the risk in the goods has been transferred to Mr. Bose from seller though the delivery has not been made.

**Ramen sold 50kg. Of rice to khagen who paid by cheque and Ramen gave the delivery order to Khagen. Khagen resold such rice to Bhaben who purchased on good faith and for consideration. Khagen's cheque was dishonored. Ramen refused to deliver rice to Bhaben on the plea of non- payment. Advice Bhaben.**

Ans: As per sec 53(1), (the unpaid seller's right of lien or stoppage is defeated if the document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and consideration.

In view of the above provision, Bhaben will get the delivery of goods as the document was taken by Bhaben in good faith and for consideration.

**A woman who had an abnormally sensitive skin bought Harris Tweed coat and got rashes through wearing the coat. Is there any breach of condition?**

**Can the woman take shelter under consumer protection act as the goods are hazardous to life & safety?**

Ans: 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 subject to the provisions of the sale of goods act and of any other law for the time being in force. [Sec 16] In contract of sale of goods there is an implied condition that the eatable goods should be fit for consumption. This not only implies merchantability of the goods but also the quality of the goods as to wholesomeness. So in the given case there is no breach of conditions as the coat is fit wholesomely for use.

Under the consumer protection act, 1986, a complaint can be made by the woman to the District Forum alleging any defect in the goods.

**Mrs. Kamni purchased a tin of standard quality kerosene oil from a dealer of repute. When part of the kerosene was put to use in a stove for cooking, an explosion occurred causing damage. Mrs. Kamni claims damages from the dealer who refuses, to pay damages. Offer your views based on provisions of sale of goods act.**

Ans: as per sec 16(2) of the goods act, 1930 where goods are bought by description there is an implied condition that the goods shall be of merchantable quality. As for specific goods under its trade name or patent name, this is no implied condition as to fitness for any particular purpose. Based on this principal, the dealer is liable.

**Mr. Ambika an agent of a buyer obtained goods from railways and loaded such goods on his truck on**

**In the meantime, the railways received a notice from the seller(i.e. consignor) for stopping goods in transit the buyer become insolvent. Referring to the provisions of the sale of goods act, 1930 decide whether the railways can stop goods in transit as instructed by the seller?**

Ans: As per sec 50 of the sale goods act, 1930 when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit. As per sec 51, goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of that goods from obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. In the given case Mr. Ambika, the agent of the buyer has taken delivery of the goods and loaded on its truck. Therefore, the transit ended there. The railways cannot stop the goods.

**Mr. Paul sold to Mr. Ray certain quantity of foreign refined palm oil warranted equal to sample. The sample consisted of palm oil mixed with vegetable oil. The oil tendered corresponds with the sample but it was not such as is known in market as foreign refined palm oil. Mr. Ray wants to reject the oil on the ground that the oil supplied was not in accordance with the foreign refined palm oil. Advice Mr. Ray.**

Ans: As per Sec 15 of the sale of goods act, 1930 if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. In the given case, the oil was supposed to be foreign palm oil and also as per sample. The oil should correspond to the sample and should also be of foreign palm oil. Since, the oil was not foreign palm oil, Mr. Ray can reject the goods.

**As per order, Mr. Malhotra sent some goods to Mr. Paul at Kolkata through Rail. The station superintendent of Howrah station informed Mr. Paul that goods are held at the station at Paul's risk and cost. In the mean time, Mr. Paul became insolvent. Mr. Malhotra wants to enforce right as an unpaid seller advice.**

Ans: As per sec 51, of the sale goods act, 1930 if after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end.

**Ashim sells 1600 kgs of wheat out of large quantity lying in his godwon and forwarded to Bablu. Out of these, Bablu sells 600 kgs to Chandan (wheat yet to be ascertained). Then Chandan forward the delivery order signed by Bablu to Ashim who confirmed that wheat would be dispatched in due course.**

**Bablu then becomes insolvent. Ashim refused to deliver to Chandan. Advice Chandan based on rules.**

Ans: Sale by Bablu to Chandan is in good faith and based on the document of titles to the goods sent by Ashim. Chandan gets a good title to the goods and can demand the goods from Ashim. Even though, Bablu the intermediate buyer is insolvent, Chandan is eligible for the goods bought by him.

**Mr. Batliboi bought 50kgs of potato against cash from Mr. Joshi under a contract of sale but half of consignment was rotten and Mr. Joshi neither refused to change the rotten potato nor refunded the value. Advice Mr. Batliboi.**

Ans: As per sec 16(2) of the sale of goods act, 1930 where goods are bought by description there is an implied condition that the goods shall be of merchantable quality. In case of eatables, in addition to the implied conditions to merchantability, there is another condition that the goods shall be whole some. Since the potatoes are rotten and not merchantable, Mr. Batliboi can recover the damage.

**Transfer of title to goods takes place when it is intended .Whether it is correct ?**

Ans:It is correct in terms of section 19 of the sale of the goods act , 1930, however it is applicable in the case of contract for sale of specific or ascertained goods in a deliverable state.

**The title to goods is transferred to the buyer immediately on payment of first installment in Hire purchase Agreement ?**

The title to goods is transferred to the buyer when the last instalment in Hire purchase agreement is paid.Above statement is not correct.

**Mr.Sham agree to sell Mr.Ram 10 bags of wheat out of 100 bags lying in his godown for Rs.10,000 wheat is completely destroyed by fire.Mr.Ram cannot compel to Mr.Sham to supply wheat as per contract.**

There was agreement for sell of specific goods .The seller neither is responsible as the risk in the goods have already passed to the buyer.The agreement is therefore is avoided.

**A stock of bank was sold at an agreed price per tonne.The bank was to be weighted by the agent of seller as also by the buyer for ascertainment of price.A part of the bank was weighted and carried away by the buyers agent on 12.11.11.On 13.11.11 the remaining stock was swept away by flood who will bear the loss and why?**

Section 21 – where there is a contract of sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.Therefore in the present case the seller will bear the loss.

**Mr.A Bose contract with Mr.Ghosh to deliver to him 300kgs Rice before 31.05.2015.Mr.Bose delivered 200kgs by 31.05.2015.Mr.Ghosh refused to pay due to non performance.**

AS per section 37 sale of goods act, where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, But if the buyer accepts the goods so delivered he shall pay for them at the contract rate.If Mr.Ghosh had accepted the goods he shall pay for the same.

**A seller may deliver goods to a carrier with a right of disposal ?**

As per section 25 of the sale of the goods act where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled.

# CHAPTER 3

## NEGOTIABLE INSTRUMENT ACT,1881

### INTRODUCTION

Negotiable Instrument Act 1881 primarily contains the law relating to negotiable instruments. The term ‘negotiable’ means transferable and the term ‘instrument’ means ‘any written document creating a right in favor of some person.’ Thus by negotiable instrument we mean a written document by which a right is given to a person and which is transferable in accordance with provisions of Negotiable Instrument Act 1881. Bill of exchange, promissory note, etc., are included in schedule 7 list 1 entry no 46. Central Government has power to make enactment on “promissory note, Bill of exchange and Cheque, etc.

Negotiable Instruments are money/cash equivalents. These can be converted into liquid cash subject to certain conditions. They play an important role in the economy in settlement of debts and claims. This act has been amended as many as 23 times to meet the needs of the time. The last amendment was made in 2002.

### DEFINITION

Negotiable Instrument means a promissory note or bill of exchange or cheque payable either to order or to the bearer Section 13 (1).

### MEANING

Negotiable instrument means an instrument the property in which is acquired by anyone who takes it

- Bonafide and
- For value
- Not with standing any defect in the title of any prior party.

### CONDITIONS

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- It should be freely transferable
- Defective title of transferor does affects the title of person taking it for value and in good faith.
- Transferee can sue upon the instrument in his own name.

### ELEMENTS

- Transferability free from equities
- Transferability by delivery or Endorsement.

### EFFECTS OF NEGOTIABILITY

- Nemo Dat Quad Non – Habet :- No one can pass a better title than he himself has
- Negotiable instrument is an exception to above rule.
- Thus, a bonafide transferee of negotiable instrument without notice of any defect of title acquires a better title than that of transferor.

## **CHARACTERISTICS**

- Holder is presumed to be the owner of the property contained therein.
- It is written document
- It should be signed
- Payable to bearer or order
- It is unconditional
- It may be transferred by endorsement and delivery.
- Transferee obtains a good title.
- Note: These are freely transferable but can be transferred only till maturity and in case of cheque till it becomes stale (i.e., three months from the date of issue).

## **CLASSIFICATION OF NEGOTIABLE INSTRUMENTS**

The negotiable instruments may be classified as under:

### **BEARER INSTRUMENTS:**

A promissory note, bill of exchange or cheque is payable to bearer when It is expressed to be so payable, or The only or last endorsement on the instrument is an endorsement in blank. A person who is a holder of a bearer instrument can obtain the payment of the instrument.

### **ORDER INSTRUMENTS:**

A promissory note, bill of exchange or cheque is payable to order

- (i) Expressed to be so payable
- (ii) Expressed to be payable to a particular person, and does not contain any words prohibiting transfer or indicating an intention that it shall not be transferable.

### **INLAND INSTRUMENTS (SECTION 11)**

A promissory note, bill of exchange or cheque drawn or made in India, and made payable, or drawn upon any person, resident in India shall be deemed to be an inland instrument.

### **FOREIGN INSTRUMENTS**

- An instrument which is not an inland instrument is deemed to be a foreign instrument.
- The essentials of a foreign instrument include that:
- It must be drawn outside India and made payable outside or inside India; or
- It must be drawn in India and made payable outside India and drawn on a person resident outside India.

### **DEMAND INSTRUMENTS (SECTION 19)**

- It means immediate payable. It may be presented for payment at any time at the holder's option but it must be presented within a reasonable time.
- These instrument do not specify any time for payment.

## **TIME INSTRUMENTS**

Time instruments are those which are payable at sometime in the future. Therefore, a promissory note or a bill of exchange payable after a fixed period, or after sight, or on specified day, or on the happening of an event which is certain to happen, is known as a time instrument.

## **AMBIGUOUS INSTRUMENTS (SECTION 17)**

- Instrument which can be construed either as a promissory note or as a bill of exchange .
- Such instrument language is not clear.
- It may give rise to multiple interpretations
- Once an instrument is treated as a bill or note, it cannot be treated differently thereafter.

## **INCHOATE OR INCOMPLETE INSTRUMENT (SECTION 20)**

- Such instrument is signed but is incomplete in other aspects
- Holder, thus gets a *prima facie* authority to make it complete for any amount specified therein, not exceeding the amount covered by stamp.
- Person signing and delivering it is liable to both holder and Holder in due course.
- "Holder" can recover only what the person signing and delivering the paper agreed to pay under the instrument.
- "Holder-in-due-course" can recover the whole amount made payable by the instrument provided that it is covered by the stamp, even though the amount authorized was smaller.

## **ESCROW INSTRUMENT**

When an instrument is drawn conditionally or for a special purpose as a collateral security and not for the purpose of transferring property therein, it is called Escrow instrument. The liability to pay in case of an Escrow instrument does not arise if the conditions agreed upon are not fulfilled or the purpose for which the instrument was delivered is not achieved.

## **CAPACITY TO BECOME A PARTY TO A NEGOTIABLE INSTRUMENT**

A person competent to contract can become a party to a negotiable instrument. If a party who makes, draws, endorses, or negotiates a negotiable instrument is incompetent to do so, the agreement is void as against him.

But the contract is still valid against the other parties competent to contract.

**The following entities cannot bond themselves by becoming a party to a negotiable instrument:**

### **Minor**

A minor person is not competent to contract; therefore he cannot bind himself by becoming a party to a negotiable instrument. But mere presence of a minor as one of the party in a negotiable instrument does not make it invalid. A minor can draw, indorse, deliver and negotiate an instrument so as to bind all parties except himself.

### **EXAMPLE**

Ajay, Bala and Chitra a minor executed a promissory note in favor of Paul. Held Chitra immunity from liability did not absolve Ajay and Bala, other joint promisors, from liability ( *Sulochana v. Pandiyan Bank Ltd AIR (1975) Mad 70* ).

**A minor is not personally liable on a bill or note given by him for necessaries supplied to him. It is only his estate which is liable for such a bill or note.**

When an instrument is signed both by an adult and a minor jointly, the minor is not liable but the adult person signed the instrument cannot escape from his liability. A minor can take minority as defense even though he made false representation of his age or concealed his true age. Similarly, if a minor is a payee in an instrument, he can enforce payment thereof to him.

### **Corporation**

Corporation can be a party to a negotiable instrument if authorized by its Article of Association, otherwise it is ultra vires.

### **Agent**

Section 27 an agent can bind his principal by acting on his behalf only in the manner in which he is duly authorized to become a party to a negotiable instrument.

The agent is required to make it clear that he is acting in representative capacity which must be evidenced by the manner he signs such document.

The form of signature must show that he does not intend to incur personal liability. Otherwise he becomes personally liable.

### **EXAMPLE**

Ali, manager of XYZ Ltd accepted a bill of exchange and signed as a manager. It was held that Ali was personally liable (Liverpool Bank v. Walker (1859)).

### **Legal Representative**

Section 30 a legal representative of a deceased person who signs his name to a negotiable instrument incurs personal liability unless by clear words he limits his liability to the extent of the assets of the deceased received by him as legal representative.

### **Hindu Undivided family**

The Karta of a Joint Hindu family can bind the other members by executing a negotiable instrument provided the transaction is for the benefit of the family or is for the legal necessity. The other members of the Joint Hindu family are bound to the extent of their shares in the Joint family property but are not liable personally.

### **Lunatic, Idiot and Drunken Person**

The legal position of these persons to make, draw and endorse a negotiable instrument is same that of a minor person.

However, a lunatic person can, however, bind himself by a negotiable instrument if he signs it during a lucid interval.

### **Insolvent person**

Once a person is adjudicated as an insolvent person his properties vest in the Official Assignee or the official Receiver, so in that case he cannot be party to a negotiable instrument. However, a bill drawn upon the insolvent person before he becomes insolvent may be presented to the Official Assignee for acceptance.

## **KINDS OF NEGOTIABLE INSTRUMENTS**

### **PROMISSORY NOTE( Section 4)**

A "promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money to, or to the order of, a certain person, or only to bearer of the instrument.

### **PARTIES TO A PROMISSORY NOTE**

- The Maker: The person who makes or executes the note promising to pay the amount stated therein.
- The Payee: One to whom the note is payable.
- The Holder: is either the payee or some other person to whom he may have endorsed the note.
- The Endorser.
- The Endorsee.

### **ESSENTIALS OF A PROMISSORY NOTE**

- In writing: Oral promise to pay is not sufficient
- Express promise to pay: Mere acknowledgement of debt is not sufficient.

**EXAMPLE**

If Ashok writes to Babu "I owe you (I.O.U.) Rs. 500", there is no promise to pay and the instrument is not a promissory note.

**Definite and unconditional promise:** If a promise is to pay is dependent upon an event which is certain to happen, although the time of its happening is uncertain, the promise to pay is unconditional.

**EXAMPLE**

Ajay promises to pay Baskar Rs. 500 seven days after his marriage with Maha. The promise is conditional since the promise is dependent upon marriage of the promisor with Maha, which may or may not happen.

**Signed by maker:** Giri promissory note must be signed by the maker. The signatures may be made on any part of the instrument.

**Promise to pay a certain sum:** Raghu promise to pay Ram Rs.500 and all other sums which shall be due to him , " Since the amount payable is not certain , it is not a valid promissory note.

**Promise to pay money only:** Hari promise to pay Naren Rs.500 and to deliver to him my black horse on 1st January. It is not a valid promissory note.

**Payee must be certain:** The name of payee must be specified in the promissory note, otherwise it will be invalid. As per the provision of the RBI Act 1934, a promissory note cannot be made payable to bearer.

**Stamped:** A promissory note must be stamped.

**EXAMPLE**

Kala promise to pay Mani Rs. 5000 provided if she has sufficient balance in her bank account after meeting all mandatory payments. This is not a promissory note.

**BILLS OF EXCHANGE**

A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of, a certain person or to the bearer of the instrument (Section 5).

**ESSENTIALS OF A BILL OF EXCHANGE**

- It must be in writing.
- It must contain an express order to pay
- The order to pay must be definite and unconditional
- It must be signed by the drawer.
- The parties must be certain.
- The sum payable must also be certain.
- The order must be to pay money only
- It must comply with other formalities e.g. stamps, date, etc.

**PARTIES TO A BILL OF EXCHANGE****The following are the parties to a bill of exchange****Drawer:**

- The person who draws the bill.
- Liability is secondary and conditional.
- Liability is primary and conditional until the bill is accepted.

**Drawee:**

- The person on whom the bill is drawn. On the Acceptance of the bill he is called as acceptor.
- Becomes liable for the payment of the bill.
- Liability is primary and unconditional.

**Payee:**

- The person to whom money is to be paid is named in the bill.

**Endorser :** The party to whom it is endorses the bill.

**Endorse:** The party to whom it is endorsed.

**Holder:** The person entitled in his own name to the possession of bill and to receive or recover the amount due thereon from the parties.

**Drawee in case of need:** When in the bill , the person whose name is entered in addition to the drawee to be resorted to in case of need.

**Acceptor for Honor:** Person who offer better security for safeguarding the honor of drawer or any endorser, accepts the bill.

**DIFFERENCE BETWEEN PROMISSORY NOTE AND BILL OF EXCHANGE**

S.NO	PROMISSORY NOTE	BILLS OF EXCHANGE
1	It contains a promise to pay	It contains order to pay
2	Makers liability is primary and absolute	Drawers liability is secondary and conditional
3	Two parties	Three parties
4	Cannot be made payable to bearer	Can be made payable to bearer
5	Issuer like a Debtor	Issuer like a Creditor
6	Cannot be made payable to maker himself	Drawer and payee or drawee and payee may be the same person
7	No formalities of acceptance required	Formally accepted
8	No notice of dishonor is required	Drawer must get notice of dishonor.

**RR Academy****TYPES OF BIILLS**

- Inland bills: Bill drawn in India for any person in India
- Foreign Bills: Bills which are not inland bills. Foreign bill is drawn in sets of three copies
- Trade Bills: Bill is issued for trade settlements

**EXAMPLE**

Amir purchased goods worth Rs. 10,000 from Yogan. In lieu of cash payment Amir accept of a bill of exchange of Rs.10, 000 to be payable after three months. This is a genuine trade bill.

**Accommodation Bills:** These bills used for mutual help, which is drawn, accepted or endorsed without any consideration.

**EXAMPLE**

Accordingly Sri draws a bill of exchange of 10,000 for three months on Latha which Latha accepts. Sri can either get it or discounted with Bank. On the maturity date Sri refunded the money to Latha so that he can make payment to the bank or to the person to whom the bill was endorsed by Sri. This is an accommodation bill drawn to accommodate the person in needs of temporary financial accommodation. In the above case Sri is called the accommodated party and Latha the accommodating party.

### **Fictitious Bill**

When drawer or payee or both are fictitious the bill is called fictitious bill. If both drawer and payee of a bill is fictitious person, the acceptor is liable to a holder in due course, if the holder in due course can show that the signature of the supposed drawer and that of first payee are in the same handwriting.

### **EXAMPLE**

Mani draw a bill of exchange on Madhi for Rs. 10,000 to be payable to Ashok after three months. There is no person in the name of Ashok and the bill has been made payable to a dummy person. This is a fictitious bill of exchange.

### **Clean and documentary bill**

When no documents relating to goods are annexed to the bill, it is clean bill. When documents of title or other documents relating to goods are attached, it is documentary bill.

### **CHEQUE (Section 6)**

“Cheque is a special type of bill of exchange which is always Drawn upon a specified bank and Payable on demand. It also includes electronic image of truncated cheque or cheque in an electronic form.

**A cheque in the electronic form:** means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;

**A truncated cheque**’ means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

**Clearing house**’ means the clearing house managed by the Reserve Bank of India. It is a kind of bill of exchange, thus must satisfy all requirement of a bill.

### **PARTIES**

All are same as that of Bill of exchange, except drawee who is a banker.

### **ESSENTIALS OF A CHEQUE**

- It is always drawn on a banker.
- It is always payable on demand.
- It does not require acceptance. There is, however, a custom among banks to mark cheques as good for purposes of clearance.
- A cheque can be drawn on bank where the drawer has an account.
- Cheques may be payable to the drawer himself. It may be made payable to bearer on demand unlike a bill or a note.
- The banker is liable only to the drawer. A holder has no remedy against the banker if a cheque is dishonored.
- A cheque is usually valid for six months. However, it is not invalid if it is post dated or ante-dated.
- No stamp is required to be affixed on cheques.

## **DIFFERENCE BETWEEN CHEQUE AND BILL OF EXCHANGE**

S.NO	BILL OF EXCHANGE	CHEQUE
1.	Any person can become a drawee	Only bank can be a drawee
2.	3 days of grace	No days of grace
3	Notice of dishonor is required	No notice of dishonor
4	It can never be made payable to bearer on demand	It can be drawn to bearer and made payable on demand
5	It sometimes require presentment for acceptance	It is not necessary for presentment
6	Adequately stamped	Never required to be stamped
7	Cannot be crossed	Can be crossed
8	Cannot be countermanded	Can be countermanded anytime

Note: All cheques are bill of exchange but all bills are not cheques

### **BANKER**

A banker is one who does banking business. Section 5(b) of the Banking Regulation Act, 1949 banking is, "Accepting for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft or otherwise."

### **CUSTOMER**

A person who has an account with the bank or who utilizes the bank services is called customer.

### **OBLIGATIONS AND RIGHTS OF THE BANKER**

- Honor cheques of the customers.
- Collect cheques and drafts on behalf of the customers.
- Keep proper record of transactions with the customer.
- Comply with the express standing instructions of the customer.
- Not to disclose the state of customer's account to anyone else.
- Give reasonable notice to the customer, if the banker wishes to close the account.
- Right of lien over any goods and securities bailed to him for a general balance of account.
- Right of set off and right of appropriation.
- Right to claim incidental charges and interest as per rules and regulations of the bank.

### **LIABILITY OF A BANKER**

- Liable to the customer to the extent of amount of the account opened.
- Liable to honor customers cheques to the extent of amount in his account.
- Liable to maintain proper and accurate accounts of credits and debits.
- Liable to compensate the drawer for any loss or damage suffered.
- Liable to honor cheque presented in due course.

## **WHEN THE BANKER MAY REFUSE PAYMENT**

**In the following cases the banker may refuse to pay a customer's cheque:**

- Cheque is post-dated.
- The banker has no sufficient funds of the drawer with him and there is no communication between the bank and the customer to honor the cheque.
- Cheque is of doubtful legality.
- Cheque is not duly presented, e.g., it is presented after banking hours.
- Cheque on the face of it is irregular, ambiguous or otherwise materially altered.
- Cheque is presented at a branch where the customer has no account.
- When some persons have joint account and the cheque is not signed jointly by all or by the survivors of them.
- Cheque has been allowed to become stale, i.e., it has not been presented within three months of the date mentioned on it.
- 

## **PROTECTION OF PAYING BANKER (SECTION 85)**

- Cheque payable to order purports to be endorsed by or on behalf of the payee the banker is discharged by payment in due course.
- Banker can debit the account of the customer with the amount even though the endorsement turns out subsequently to have been forged, or the agent of the payee without authority.
- Banker is only bound to know the signature of his own customers.
- If the drawer's signature is forged a banker remains liable to the drawer even if payment is made in due course and cannot debit the drawers account.
- In case of crossed cheques banker can debit the drawers account so paid, even thought the amount of cheque does not reaches the true owner.

## **PAYMENT IN DUE COURSE (SECTION 10)**

- In accordance with the apparent tenor of the instrument
- In good faith
- Without negligence
- To any person in possession thereof.
- In money and money only.

## **COLLECTING BANKER**

- Collecting the proceeds of a cheque for a customer
- If banker collects the proceeds of a cheque for a customer, to which he has no title true owner may sue the collecting banker for conversion.

## **SECTION 131 OF THE ACT**

A banker who has in good faith and without negligence received payment for a customer of a crossed cheque generally or specially to himself shall not in case the title to the cheque proves defective , incur any liability to the true owner of the cheque by reason of only having received such payment.

The bankers protection is lost if he becomes the holder for value.

## **OVERDUE/STALE/OUT OF DATE CHEQUES**

- Cheques becomes barred by statute after 3 years from its due date
- It means that the holder cannot sue on that cheque after 3 years
- It has to be presented within a reasonable time
- In India it is 3 months.

### **ENDORSERS LIABILITY**

- It arises only if cheque is presented within a reasonable time of its delivery by that endorser.
- **RIGHTS OF HOLDER AGAINST THE BANKER**
- If holder does not present the cheque within reasonable time after issue, thus the drawer suffers damage.
- If banker makes payment of crossed cheque over the counter.

### **HOLDER (SECTION 8)**

- Person must be named in the instrument
- It implies de jure i.e., holder in law and de facto i.e., holder in fact.

### **HOLDER IN DUE COURSE (SECTION 9)**

- Person who obtains instrument
- Before maturity
- For some consideration
- In good faith

### **DIFFERENCE BETWEEN HOLDER AND HOLDER IN DUE COURSE**

S. No	HOLDER	HOLDER IN DUE COURSE
1	Instrument without consideration	Instrument for consideration
2	Does not acquire a good title	Acquires a good title
3	Even alter it has become due for payment	Acquires the instrument before the amount thereon becomes payable
4	Enforce it against the person who has signed it and the transferor from whom he has obtained it.	He can sue all the prior parties until the instrument is duly satisfied.

### **CASE LAW:**

In Daulat ram v. Nagindas, 15 Born. L.R.333, case it was held that if a debtor hands over a negotiable instrument to his creditor in discharge of a pre-existing debt, the creditor can claim to be holder in due course of the instrument.

If a holder holds a negotiable instrument as a pledge, he is deemed to be holder for value to the extent of his advance or loan.

### **CROSSING**

#### **Cheque is either open or crossed**

**Open cheque:** Presented by payee to the paying banker and is paid over the counter.

**Crossed Cheque:** Not paid over the counter but has to be collected through a banker.

When two parallel lines are drawn on the upper left corner of cheque, it is known as crossing of cheque.

It is a direction to the paying banker that the cheque should be paid only to a banker or a specified banker.

It is done as a measure of safety.

## **MODES OF CROSSING (SECTION 123 TO 131 A)**

### **GENERAL CROSSING:**

- Two parallel lines are drawn and nothing is specified in between them. Amount will be directly credited to account of payee.
- Payee cannot get money over the counter
- It prevents the money from going in wrong hands.

### **RESTRICTIVE CROSSING**

- Words A/c payee are specified within the crossing
- Cheque cannot be further negotiated.
- Collecting banker will be guilty of negligence if he credits the proceeds to account other than of A/c payee.
- It does not affect the paying banker.

### **SPECIAL CROSSING**

- The name of a particular bank is specified between the crossed lines.
- Amount can be collected only by the bank whose name is specified.

### **NOT NEGOTIABLE CORSSING**

- The words not negotiable is specified between the crossed lines.
- It ensures protection from any misappropriation.

### **EXAMPLE**

Arjun draws a crossed cheque on his banker in favor of 'Bala' without the words not negotiable therein. Amir steals it from the house of Bala and endorses it to Deepa who receives it for value and in good faith from Amir (i.e., without the knowledge of the fact that Amir had no title to the cheque). Deepa will be its holder in due course and will have valid title, though his transferor (endorser) had no title thereto. In the above example, if the cheque bears the words "NOT NEGOTIABLE" then 'Deepa' will not have a valid title even if all the above circumstances are satisfied.

### **Collection of Third Party Crossed bearer cheques**

In trade circles it is observed that as per practice the crossed bearer cheques were circulated and exchanged freely for trade transactions. They were in the past collected by bank through the instrument issued in the name of third parties and were presented by the customers of the bank for credit to their account without endorsement on the reverse of the instrument.

### **Some important judgments on liability of bank are as follows**

#### **CASE LAW:**

In Canara Bank v. Canara Sales Corporation & others (1987), SC, case

the customer's signature is forged there is no mandate to the bank to pay. As such the bank is not entitled to debit customers account on such forged note cheque.

#### **CASE LAW :**

In Bihta Coop. Development and Cane Marketing Union Ltd. v. Bank of Bihar, SC, case in a joint account if one of the signatures is forged then there is no mandate and banker cannot make payment.

**CASE LAW:**

In Bank of Bihar v. Mahabir Lal (1964), SC, case the payment should be made in due course to seek protection under Section 85.

**Under Section 131 a collecting bank is protected if following conditions are met:**

- The collecting banker should have acted in good faith.
- He should have acted without negligence.
- He should receive payment for customer.
- The check should have been crossed generally or specially to the bank.

**LIABILITY OF A DRAWER (SECTION 30)**

- Drawers liability is conditional; it arises only in the event of a dishonor by the drawee or acceptor.
- Notice of dishonor should have been received by him.
- Dishonor by non acceptance followed by the notice, the drawer becomes liable immediately for the full amount of the bill.
- He cannot ask the holder to wait till the maturity.
- If holder chooses to wait till maturity before he sues the drawer, he does not require a fresh cause of action by reason of its non payment on the due date.

**LIABILITY OF DRAWEE (SECTION 31)**

Drawee in case of cheque is always a banker

It is his duty to pay the cheque- funds sufficient and properly applicable to such payment.

If he refusal payment without sufficient cause, and has to pay compensation for any loss or damage by such refusal.

Amount of compensation is measured by the loss of credit suffered by the drawer.

**LIABILITY OF MAKER OF NOTE AND ACCEPTOR OF BILL (SECTION 32)**

- Liability arises only when he accepts the bill
- In absence of contract to contrary, he is bound to pay the amount at maturity as per the apparent tenor of this bill.
- If the bill is accepted after maturity, he is bound for the amount to the holder on demand.
- In default of such payment he is bound to compensate any party to the bill for any loss or damage caused to him by such default.

**LIABILITY OF ENDORSER (SECTION 35)**

- By accepting and delivering it before maturity, he undertakes the responsibility that on the presentment it shall be accepted and paid.
- If it is dishonor by drawee, acceptor or maker, he will identify the holder or subsequent endorser who is compelled to pay, provided due notice of dishonor is received by him.
- However he may make his liability conditional.
- 

**LIABILITY OF PRIOR PARTIES (SECTION 36)**

- Every prior party is liable to Holder in Due Course until the instrument is satisfied.
- Liability is joint and several.

### **LIABILITY OF ACCEPTOR OF FORGED ENDORSEMENT (SECTION 41)**

Such acceptor is not relieved from his liability if he had the knowledge of such forged endorsement.  
**LIABILITY INTER SE**

Various parties to a negotiable instrument who are liable thereon stand on a different footing with the respect to the nature of liability of each of them.

### **ACCEPTORS LIABILITY ON A BILL DRAWN IN A FICTITIOUS NAME**

He remains liable to Holder in Due Course

### **NEGOTIATION (SECTION 14)**

Negotiable instrument is transferred to a person, so as to make the person the holder of the instrument, the instrument is said to be negotiated, it may be

- Mere Delivery or
- Endorsement and Delivery

### **ASSIGNMENT**

It is a mode of transferring the instrument which requires a written document, under this, the instrument is transferred like goods, by deed that is under a contract.

### **DIFFERENCE BETWEEN NEGOTIATION AND ASSIGNMENT**

Points	Negotiation	Assignment
Acquire	Transferee acquires all the rights of a Holder in due course	Assignee does not acquire the rights of a Holder in due course
Notice	Notice of transfer is not needed	Notice of Assignment must be served by assignee on his debtor.
Consideration	Consideration is presumed	Consideration must be proved
Require	Requires payment of stamp duty	Not requires payment of stamp duty
Delivery	Delivery in case of Bearer instrument	Requires a document to be reduced into writing and signed by the transferor.

### **MERE DELIVERY (SECTION 46)**

Making acceptance or endorsement of instrument is not complete until delivery, actual or constructive, of the instrument.

- Voluntarily with the intention of passing property in the instrument to the person.
- Bill or cheque payable to the bearer is negotiated by mere delivery.
- These do not require transferors signature
- Bearer is not liable to any party if the instrument is dishonored.
- He is only liable to his immediate transferee
- Bearer cheque always remains with the bearer.

## **ENDORSEMENT AND DELIVERY**

It is required in instruments payable to a specified person or to the order of a specified person transferee does not become the holder, unless the holder signs it thus transferee does not get any right against Holder in Due course.

### **EXAMPLE**

Ram was the holder of a cheque for Rs. 10,000 payable to bearer. He kept the cheque in his safe. Yogan a thief stole the cheque from Ram's safe. In this case, there is no negotiation of the cheque from Ram to Yogan because the cheque was not voluntarily delivered to Yogan. It may also be noted that if Yogan delivers this cheque for some consideration to Ajay who receives the same in good faith and before maturity. Ajay will become the holder in due course and will be entitled to receive the amount of the instrument.

## **ENDORSEMENT (SECTION 15)**

Sigining ones name on the negotiable instrument for the purpose of transferring it to another person.

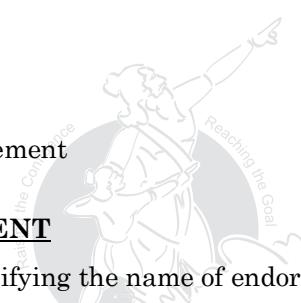
If there is no space on the instrument it may be made on a slip of paper to it known as Allonge.

Endorsee is the person to whom the instrument is endorsed.

### **KINDS OF ENDORSEMENT**

**The various kinds of endorsements are:**

- Blank/General endorsement
- Special/Full endorsement
- Restrictive endorsement
- Partial endorsement
- Conditional/Qualified endorsement



### **BLANK/GENERAL ENDORSEMENT**

- An endorsement without specifying the name of endorsee
- It becomes payable to bearer
- Its holders may convert it into an endorsement in full by writing above endorsers signature a direction to pay it to another person or his order.

### **SPECIAL/FULL ENDORSEMENT**

An endorsement which specifies the name of the endorsee along with the endorsers signature.

### **RESTRICTIVE ENDORSEMENT**

It has the effect of restricting further negotiation and transfer

### **PARTIAL ENDORSEMENT**

Only a part of the amount payable on the instrument is transferable to the endorsee.

### **CONDITIONAL /QUALIFIED ENDORSEMENT**

- It combines an order to pay with condition
- It limits or nullifies the liability of the endorser

### **SANS RE COURSE ENDORSEMENT**

Without liability

Endorser declines to accept the liability on the endorsement of any subsequent party.

## **FACULTATIVE ENDORSEMENT**

Desire to waive certain rights

Ex- Right to receive notice of dishonor.

## **NEGOTIATION BACK ENDORSEMENT**

- An instrument is said to have negotiated back to him or taken back the negotiable instrument when a person who has been party to negotiable instrument takes it again.
- Holder cannot recover amount from intermediate parties i.e., parties between endorsee and holder but can recover only from immediate prior parties.
- This lead to circuitry of action negotiation of lost instrument or that detained by unlawful means.
- Possessor or endorsee is not entitled to receive any amount due thereon from maker, acceptor or holder unless he is a HDC.

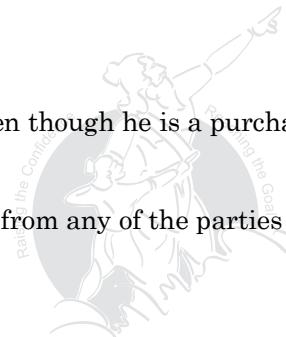
## **EXAMPLE**

Ram, the holder of a bill endorses it to Balu, Balu endorses to Sai, and Sai to Deepa, and endorses it again to Ram. Ram, being a holder in due course of the bill by second endorsement by Deepa, can recover the amount thereof from Balu, Sai, or Deepa and himself being a prior party is liable to all of them. Therefore, Ram having been relegated by the second endorsement to his original position, cannot sue Balu, Sri and Deepa.

## **FORGED ENDORSEMENT**

### In case of endorsement in full

- Forgery conveys no title
- Endorsee acquires no title even though he is a purchaser for value in good faith
- Endorsement is nullity
- In case of bearer instrument
- Holder can claim the amount from any of the parties to the instrument.



## **EXAMPLE**

A bill is endorsed, "Pay Ali or order". Ali endorses it in blank, and it comes into the hands of Babu, who simply delivers it to Sai, Sai forges Babu's endorsement and transfer it to Dinesh. Here, Dinesh, as the holder does not derive his title through the forged endorsement of Babu, but through the genuine endorsement of Ali and can claim payment from any of the parties to the instrument in spite of the intervening forged endorsement.

## **ACCEPTANCE OF BILL OF EXCHANGE**

- It may be defined as the indication by the drawee of his assent to the drawer that he will pay the amount of bill on due date.
- Drawee has to write the words accepted on the face of the bill and sign his name underneath.
- Drawee becomes acceptor
- Acceptor is primary liable on the bill.

## **ESSENTIALS OF VALID ACCEPTANCE**

- It must be written
- It must be sign by the drawee
- It must be either on the face or back of the bill
- It must be completed by delivery or by notice
- It must be presented for acceptance within reasonable time
- It must be presented for acceptance at the drawee place
- It must be absolute or conditional.
- General Acceptance is absolute and as a rule, an acceptance has to be general.

- Qualified Acceptance is made subject to some condition or qualification, thereby varying the effect of the bill, it is a qualified acceptance
- The holder of the bill may either refuse to take a qualified acceptance or non-acquiescence in it. Where he refuses to take it, he can treat the bill as dishonored by non-acceptance, and sue the drawer accordingly.

### **ACCEPTANCE FOR HONOR**

- Bill has been noted or protested for non-acceptance or for better security
- Such an acceptance made with the consent of the holder
- Acceptance for honor is not already liable on the bill
- Acceptance for honor of any party already liable on the bill
- Acceptance is by writing on the bill.
- Supra protest means that the bill is protested for non-payment after duly it is accepted.

### **PRESENTMENT FOR ACCEPTANCE**

***Only following bills of exchange require presentment***

- Bill payable after sight
- There is express stipulation that it has to be presented for acceptance before it is presented for payment (Section 15).

#### **The presentment should be made to the following persons:**

- The drawee or his duly authorized agent.
- If there are many drawees, bill must be presented to all of them.
- The legal representatives of the drawee if drawee is dead.
- The official receiver or assignee of insolvent drawee.
- To a drawee in case of need, if there is any. This is necessary when the original drawee refuses to accept the bill.
- Further, it must be made before maturity, within a reasonable time after it is drawn, within the stipulated period, within business hours and at the place of business or residence of the drawee.

### **EXCEPTION ON PRESENTMENT FOR ACCEPTANCE**

**The presentment of acceptance is exempted when:**

- Drawee could not be found after reasonable search,
- Drawee is a fictitious person,
- Drawee is a person incapable of contracting or
- On some other ground.

### **PRESENTMENT FOR PAYMENT**

- It means an exhibition to drawee or acceptor by holder with a request for payment
- It must be made during normal banking hours
- It must be made immediately on due date
- 3 days of grace added incase installments

#### **Instrument can be presented at any of following places**

Place

Business

Residence

Reasonable place.

### **PRESENTMENT FOR PAYMENT IS EXCUSED**

- If drawee is intentionally prevented from presentment
- If the respective place is closed
- If person liable to pay cannot be found after reasonable search
- If it is a fictitious instrument
- If instrument is dishonored by non-acceptance
- Presentment for payment becomes impossible
- No person is present to make the payment at the place specified
- Drawer and Drawee are same person
- Drawer could not have suffered any damage
- On some other ground

### **DISHONOUR BY NON-ACCEPTANCE (SECTION 91)**

- Drawees make Default in payment
- Presentment for acceptance is excused
- Drawee is incompetent to contract
- Drawee is a fictitious person or after reasonable search
- Acceptance is a qualified

### **DISHONOUR BY NON-PAYMENT (SECTION 92)**

When maker acceptor or drawee makes default in payment' When payment is excused and it is left unpaid , after maturity

### **NOTICE OF DISHONOUR (SECTIONS 91-98, 105-107)**

- It is a notice which informs the party liable to pay or accept about their liability
- Its objective is just to notify the party of its liability
- Its omission discharges all the parties other than maker or acceptor, even in respect of original consideration.
- Notice may be oral or in writing, but it must be actual formal notice. It must be given within a responsible time of dishonor.

### **NOTING (SECTION 99)**

- It is a process in which Notary Public enters all the information regarding dishonor of his records, such as Fact of dishonor
- Date of Dishonor
- Reason of Dishonor
- Charges of Notary Public

### **PROTEST**

- It is formal certificate of dishonor issued by Notary public to the holder of promissory note.
- It is issued after noting the fact of dishonor,
- Authentic evidence of dishonor to drawer and endorsee,
- Foreign promissory notes to be protested,
- Foreign bill must be protested,
- If the acceptor of a bill has become insolvent, or has suspended payment, or his credit has been publicly impeached, before the maturity of the bill. It is called for protest for better security.

### **DISCHARGE OF INSTRUMENT**

#### **A negotiable instrument is discharged:**

- By payment in due course
- When the principal debtor becomes the holder;
- By an act that would discharge simple contract;
- By renunciation; and
- By cancellation.

## **DISCHARGE OF PARTY OR PARTIES**

Any particular party or parties are discharged, the instrument continues to be negotiable and the undischarged parties remain liable on it. For example, the non-presentment of a bill on the due date discharges the endorsers from their liability, but the acceptor remains liable on it.

### **A party may be discharged in the following ways**

- By cancellation by the holder of the name of any party to it with the intention of discharging him.
- By release, when the holder releases any party to the instrument
- Discharge of secondary parties, i.e., endorsers.
- By the operation of the law, i.e., by insolvency of the debtor.
- By allowing drawee more than 48 hours to accept the bill, all previous parties are discharged.
- By non-presentment of cheque promptly the drawer is discharged.
- By taking qualified acceptance, all the previous parties are discharged.
- By material alteration.

## **MATERIAL ALTERATION (SECTION 87)**

An alteration is material if it alters the operation of the instrument or liabilities of parties, and it makes the instrument void.

### **Material alteration means altering the following:**

- Date of instrument
- Sum payable
- Time of payment
- Place of payment
- Tearing the instrument
- Added new parties
- Other methods
- No Material Alteration
- If the alteration is corrected
- Common intention of parties
- Crossing of cheque
- If alteration is made before issue with the consent of the parties.



### **A banker must dishonor a customer's cheque under following circumstances:**

- The customer becomes insolvent.
- The customer becomes insane.
- The customer countermands payment.
- On receiving the notice of death of a customer.
- The customer gives notice of closure of account.
- The customer gives notice of assignment of credit balance of his account.
- The banker has reason to believe that the title of the person presenting the cheque is defective.
- The banker receives notice of loss of cheque by customer.
- Apart from above circumstances a banker may dishonor a customer's cheque in the following circumstances
- The customer is not having sufficient fund in his account.

### **EXAMPLE**

Hari issued a cheque of Rs. 6,000 in favor of Joy. Joy presented the cheque before the bank. However, Hari's A/c in the bank had only Rs. 5,000. Bank may dishonor the cheque for insufficient funds. The customers' signature does not match with his specimen signature with the bank.

The cheque is ambiguous or of doubtful legality.

The cheque becomes stale.

If presented to different branch.

## **PRESUMPTIONS OF LAW**

- Every instrument is made for some consideration
- Every instrument is made on the date it is mentioned
- Accepted before maturity within a reasonable time.
- Instruments are endorsed in the order in which they appear
- Every instrument is transferred before its maturity
- Holder is HDC
- Lost or destroyed instrument was duly signed and stamped

In case of dishonor instrument, court presumes the fact of dishonor.

## **PENALTIES IN CASE OF DISHONOUR OF CHEQUE**

- Drawer will be punishable within imprisonment for a term up to 2 years
- Fine up to twice the amount of cheque
- With both and above without prejudice to other provisions of the act.
- Dishonor of cheque for insufficiency of funds in the account:

## **PRESUMPTION IN FAVOUR OF THE HOLDER (Section 139)**

It shall be presumed unless otherwise proved that the holder of a cheque has received the cheque for discharge in whole or in part of any debt or liability

## **DEFENCE WHICH MAY NOT BE ALLOWED IN ANY PROSECUTION U/S 138 (SEC 140)**

The drawer cannot pray that at the time of issue of cheque, he had no reason to believe that the cheque will be dishonored.

## **OFFENCES BY COMPANIES (SEC 141)**

In case the party committing an offence is a company, every person in charge of the company and responsible in carrying out the business, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

### **However, the person will not be liable if-**

- It is proved that the offence was committed without his knowledge;
- Exercised all due diligence to prevent occurrence of that offence;
- Person is Director as a Government nominee.

## **Cognizance of offences**

- No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of first class shall try any offence u/s 138.
- No court shall take cognizance of offences u/s 138 except upon a complaint, in writing made by payee or holder in due course.
- Such complaint should be made within one month from the date on which cause of action arises.
- The complainant may satisfy the court that there was sufficient ground for not making the complaint within such period.

## **SUMMARY TRIAL AND DISPOSAL (SEC. 143 TO 147)**

### **POWER OF COURT TO TRY CASES SUMMARILY (SEC143)**

- All offences u/s 138 to 147 shall be tried by Metropolitan Magistrate or Judicial Magistrate of first class. The Magistrate can pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees.
- Trial should be done in continuous manner on day to day basis. If adjournment is required beyond the following day, the reasons should be recorded in writing.
- Every effort should be made to conclude trial within 6 months from the date of filing.

## **MODE OF SERVICE OF SUMMONS (SEC 144)**

Summons may be serviced to the accused or witness at his usual place of residence or business by speed post or courier approved by a court of session.

**EVIDENCE ON AFIDAVIT (SEC 145)**

The evidence produced by the plaintiff may be given on affidavit and may be read in evidence of any enquiry, trial or other proceeding under the Code of Criminal Procedure.

The court may on application of the prosecution or accused, if it thinks it, summon any person producing evidence on affidavit as to facts contained therein.

**BANK'S SLIP ACTING AS PRIMA FACIE EVIDENCE (SEC 146)**

The Court shall in respect of every proceeding under Chapter XVII, presume the fact of dishonor on basis of production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonored, unless such fact is proved false.

**OFFENCES TO BE COMPOUNDABLE (SEC 147)**

Notwithstanding anything contained in the Code of Criminal Procedure 1973, every offence punishable under this Act shall be punishable.



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## REVIEW QUESTIONS

1. Define Negotiable Instrument.Explain the characteristics of Negotiable Instrument
2. What are the presumptions as to Negotiable Instrument
3. Comment on the following based on legal provisions: (i) There are in total two parties to a promissory Note
4. Define Promissory note.What are the essential characteristics of a Promissory Note
5. Define Bill of Exchange.What are the essential characteristics of a Bill of Exchange
6. Difference between Promissory Note and Bill of Exchange
7. Bill of Exchange and Promissory note cannot have the same meaning.Comment
8. Define Cheque.What are essential characteristics of Cheque
9. Define Crossing.Explain the types of Crossing
10. Write explanatory notes on Protection to Collecting Banker
11. Write short notes on Payment in Due Course
12. What are the consequences of a dishonor of a cheque
13. Dishonoured cheque is not to be treated as an offence – comment
14. Maker of a cheque is not liable under N.I Act for dishonour of cheque under certain conditions.  
State such conditions.
15. Explain the classification of Negotiable Instruments
16. Write short notes on Inchoate Instrument
17. Statements: Maturity of a Negotiable Instrument
18. Difference between Negotiation and Endorsement
19. Define Endorsement.Explain the types of various Endorsement
20. Difference between Negotiation and Assignment
21. Difference between Holder and Holder in due course
22. Write detailed concept about the privileges of Holder in due course
23. What will be the fate of a “Holder” of negotiable instrument if he fails to give notice of dishonor to prior parties ?
24. Statement : Dishonour by Non-Acceptance
25. Write short notes on Acceptance for Honour
26. When notice of Dishonour is not necessary
27. Write explanatory notes on Material Alteration
28. What is the meaning of Acceptance.Discuss about the effect of qualified acceptance
29. Difference between Noting and Protesting
30. Explain the concept about the Discharge of Negotiable Instrument

# CHAPTER 4

## INDIAN PARTNERSHIP ACT, 1932

### NATURE OF PARTNERSHIP

- ❖ The Indian Partnership Act, 1932 lays down the important provisions relating to partnership contracts.
- ❖ However, the general principles of the Indian Contracts Act, 1872 which formally contained the provisions of the law of partnership shall apply so far as they are not inconsistent with this Act. (Section 3)

### DEFINITIONS

#### Partnership

According to Section 4 “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”.

- ❖ There must be at least two persons
- ❖ There must be a relationship arising out of an agreement between two or more persons to do a business
- ❖ The agreement must be to share the profits of a business
- ❖ The business must be carried on by all or any of them acting for all

**If any one of them is not proved to be present, there cannot be a partnership.**

- The first element relates to the voluntary contractual nature of partnership.
- The second gives the motive which leads to the formation of firms, i.e. the acquisition of gain.
- The third shows that the persons of the group who conduct the business do so as agents for all the persons in the group, and are therefore liable to account to all the persons in the group (*Maliram Choudhary v. Jagannath*, AIR 1972 Orissa 17).

### Partners, Firm and Firm Name

Persons who have entered into partnership with one another are called individually “partners” and collectively “a firm”, and the name under which their business is carried on is called the “firm name”. (Section 4)

- ❖ The “firm name”, partners have a right to carry on business under any name and style which they choose to adopt, provided they do not violate the rules relating to trade name or goodwill.
- ❖ They must not adopt name calculated to mislead the public into confusing them with a firm of repute already in existence with a similar name.
- ❖ They must not use a name implying the sanction of patronage of the Government. A partnership firm cannot use the word “Limited” as a part of its name.

### ESSENTIAL OF PARTNERSHIP AND TEST OF PARTNERSHIP

#### Association of two or more Persons:

- ❖ There must be a contract between two or more persons. Therefore unless there are at least two persons there can not be a partnership.
- ❖ Persons must be competent to enter into a contract.
- ❖ They may all be natural or artificial or some natural and other artificial. Thus a corporation or limited partnership may itself be a partner in a general partnership.

**Agreement:** Existence of an agreement is essential of partnership.

- ❖ Section 5 of the Act states that the relation of partnership arises from contract and not from status; and in particular, the members of a Hindu Undivided Family carrying on a family business as such, or a Burmese Buddhist Husband and wife carrying on business as such are not partners in such business.
- ❖ Such an agreement between the partners may be express or implied. Further, the agreement must be a valid agreement and for a lawful object and purpose and between the persons competent to contract.

### **Business:**

- ❖ Partnership implies business and when there is no association to carry on business there is no partnership. The term “business” is, however, used in the widest sense to cover trade, occupation and profession.
- ❖ As per Section 2(b) of the Act the term “business” includes every trade, occupation and profession. In the definition of partnership the word “business” is used in the sense of “carrying on business” which suggests continuity or repetition of acts.
- ❖ But it does not mean that it should be confined to lengthy operations, it may consist of a single adventure of a single undertaking, if there is continued participation of two or more persons for acquisition of gains.

### **Sharing of Profits**

- ❖ To constitute a partnership, the parties must have agreed to carry on a business and to share profits in common.
- ❖ “Profits” mean the excess of returns over advances, the excess of what is obtained over the cost of obtaining it. Sharing of profits also involves sharing of losses.
- ❖ The sharing of profit is an essential element of partnership, the sharing of losses is not. It is open to one or more partners to bear all the losses of the business.
- ❖ It follows that the sharing of profits is an essential ingredient of partnership and there would be no partnership where only one of the partners is entitled to the whole of the profits of the business. But it is open to the partners to agree to share the profits in any way they like.
- ❖ Agree to share the profits either in specific proportions or in specific sums.
- ❖ There is nothing to stop a partner from agreeing to receive a fixed annual or monthly amount “by way of profits” irrespective of whether profits are earned or not.

### **Sharing of Profits is not Conclusive:**

- ❖ Test Although sharing of profits is a *prima facie* evidence of the existence of partnership, this is not the conclusive test of the same.
- ❖ A person may have a share in the partnership profits, but still may not be a partner.
- ❖ For instance, a joint owner of a property sharing its return or members of non-profit or non-trading associations will not be called partners.

### **ILLUSTRATIONS**

- A and B buy 100 bales of cotton, which they agree to sell for their joint account, each party sharing profits and bearing losses equally. A and B are partners in respect of such account.
- A and B buy 100 bales of cotton agreeing to divide these between them. A and B are not partners.
- “A” a trader, owed money to XY&Z. He agreed to pay XY&Z out of the profits of his business (run under the supervision of X, Y and Z) what he owned to them.
- It was held that the arrangement does not make X, Y and Z the partners with A in the business.

### **Mutual Agency the True Test:**

- Mutual agency is the foundation of partner's liability. Each partner is both an agent and principal for himself and others; that is the significance of the phrase "carried on by all or any of them acting for all".
- Each partner is an agent binding the other partners who are his principal and each partner is again a principal, who in turn is bound by the acts of the other partners.
- ❖ The relation of principal and agent exists between the parties and not merely whether the parties share the profits or the business is carried on for the benefit of all.
- ❖ It is this relation of agency among partners which distinguishes a partnership from a single co-ownership on the one hand and the agreement to share profits on the other.
- ❖ The existence of this relation of agency can be gathered from the real intention of the parties and the circumstances of the case. The question of intention must be decided on the basis of the conduct of parties and of all the surrounding circumstances.
- ❖ The partners finding themselves in financial difficulties assigned their properties to creditors trustees for carrying on the business and paying off their debts out of the income of the business.
- ❖ The trustees incurred certain liabilities and the creditors brought action against trustees seeking to make them personally liable on these contracts.
- ❖ The House of Lords held that they were not liable. Mere sharing of profits is not a conclusive test of partnership.
- ❖ "The real test is whether the trade was carried on his behalf, i.e., he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liability has been incurred and under whose management the profits have been made".
- ❖ It may be observed that the question whether a person is or is not a partner depends almost in all cases upon whether he has the authority to act for other partners and whether other partners have the authority to act for him. It follows that the agency relationship is the most important test of partnership.

### **FORMATION OF PARTNERSHIP**

According to the definition of partnership under the Indian Partnership Act, there must be an agreement between the partners of a partnership firm.

The partnership agreement must comply with all the essentials of a valid contract. There must be free consent of the parties who must be competent to contract and the object of partnership should not be forbidden by law or immoral or opposed to public policy. Two exceptions, however, may be noted:

- ❖ A minor may be admitted to the benefits of a partnership with the consent of all other partners.
- ❖ As relations of partners inter se are that of agency, no consideration is required to create the partnership.

### **PARTNERSHIP DEED**

- ❖ The agreement of partnership may be oral but to avoid future disputes it is always advisable to have it in writing. The mutual rights and obligations of partners must be discussed in detail and should be put into writing in the shape of a 'Partnership Deed', before the partnership is actually started.
- ❖ (The partnership deed is also called as 'Partnership Agreement', 'Constitution of Partnership', 'Articles of Partnership' etc.).
- ❖ The deed must be properly drafted and stamped according to the provisions of the Indian Stamp Act.
- ❖ Each partner should be given a copy of the deed and if the firm is to be registered, a copy of the deed should be filed with the Registrar of Firms at the time of such legislation.

## **CONTENTS OF PARTNERSHIP DEED**

The exact terms of the partnership deed (or agreement) will depend upon the circumstances but generally a partnership deed contains the following covenants:

- ❖ The firm name and business to be carried on under that name.
- ❖ Names and addresses of partners.
- ❖ Nature and scope of business and address(s) of business place(s).
- ❖ Commencement and duration of partnership.
- ❖ The capital and the contribution made by each partner.
- ❖ Provision for further capital and loans by partners to the firm.
- ❖ Partner's drawings.
- ❖ Interest on capital, loans, drawings and current account.
- ❖ Salaries, commission and remuneration to partners,
- ❖ Profit (or loss) sharing ratio of partners.
- ❖ The keeping of proper books of accounts, inspection and audit, Bank Accounts and their operation.
- ❖ The accounting period and the date on which that accounts are to be prepared.
- ❖ Rights, powers and duties of the partners.
- ❖ Whether and in what circumstances, notice of retirement or dissolution can be given by a partner.
- ❖ Provision that death or retirement of a partner will not bring about dissolution of partnership,
- ❖ Valuation of goodwill on retirement, death, dissolution etc.
- ❖ The method of valuation of assets (and liabilities) on retirement or death of any partner.
- ❖ Provision for expulsion of a partner.
- ❖ Provision regarding the allocation of business activities to be performed by individual partners
- ❖ The arbitration clause for the settlement of disputes.
- ❖ The terms contained in the partnership deed may be varied with the consent of all the parties, and such consent may be express or implied by a course of dealing. [Section 11(1)]

## **CLASSIFICATION OF PARTNERSHIP**

A partnership may either be for a particular adventure or for a fixed period. It may also be a partnership at will. From the duration point of view, a partnership may be classified into the following two categories:

### **PARTICULAR PARTNERSHIP (SECTION 8)**

"A person may become a partner with another person in a particular adventure or undertaking". When two or more persons agree to do business in a particular adventure or undertaking, such a partnership is called "Particular Partnership". Thus, a particular partnership may even be for a single adventure or undertaking.

## **PARTNERSHIP AT WILL (SECTION 7)**

"Where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership, the partnership is called Partnership at Will".

- ❖ A partnership is deemed to be a partnership at will when
- ❖ No fixed period has been agreed upon for the duration of partnership
- ❖ No provision made as to the determination of partnership in any other way.
- ❖ The partnership at will has no fixed or definite date of termination and, therefore, death or retirement of a partner does not affect the existence of such partnership.
- ❖ Section 43(1) provides that "Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.
- ❖ The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no such date is mentioned, as from the date of communication of the notice".
- ❖ This accounts for the importance of the definition of 'Partnership at Will'.

## **CO-OWNERSHIP AND PARTNERSHIP**

There is a possibility that two co-owners may employ their property in a business and share the profits, and still be not partners.

- ❖ Partnership is between two persons but not more than 20 (10 in the case of banks) co-ownership may have two or any number more than two.
  - ❖ Co- ownership is not always the result of an agreement: it may arise by the operation of law or from status,
- Example: Co-heirs of a property. Partnership must arise from an agreement. A partner is the agent of the other partners, but a co-owner is not the agent of the other co-owner(s).
- ❖ Co-ownership does not necessarily involve community of profits and loss, partnership does.
  - ❖ Co-owner can without the consent of the others transfer his rights and interests to strangers, a partner cannot do so without the consent of all the other partners so as to make the transferee a partner in the firm.
  - ❖ Co-owner can ask for division of property in specie, but no partner can ask for this. His only right is to have a share of the profits out of the properties. Partnerships end at death or insolvency; co-ownerships end at death.
  - ❖ Co-owner has no lien on the property while a partner has a lien on the firm property.

## **HINDU JOINT FAMILY AND PARTNERSHIPS**

- ❖ A partnership comes into existence by means of a contract between the partners; a Hindu joint family firm arises as a result of status, i.e., by birth in the family.
- ❖ The death of a partner dissolves the partnership, but the death of a co-parcener does not dissolve the family firm. In a joint family firm only the Karta or manager (who is the head of the family) has implied authority to borrow and bind other members; in a partnership each partner is entitled to do so.
- ❖ Every partner is personally liable for the debts of the firm; in a joint family business only the Karta is personally liable.
- ❖ A minor is a member of a joint family firm from the very day of his birth by virtue of his status, but he is not personally liable.
- ❖ A minor cannot be a partner, although he may be admitted to the benefits of partnership. A partner can demand the accounts of the firm, a co-parcener cannot ask for accounts, his only remedy is to ask for partition of the assets of the family firm.

- ❖ No registration of a family firm is necessary, while a partnership firm must be registered before it can maintain suits against outsiders.
- ❖ Each partner has a definite share in the business and this can be changed only by agreement, but the share of a co-parcener is not fixed; it may be enlarged by death or reduced by a birth in the family.
- ❖ There is a definite limit to the number of partners, but there is no such limit in the case of a Hindu joint family firm. A Hindu joint family business is governed by Hindu Law, while Indian Partnership Act, governs partnerships and excludes Hindu joint family firms. (Section 5)

### **COMPANY AND PARTNERSHIP**

- ❖ The members constituting a partnership do not form a whole as distinct from the individuals composing it.
- ❖ The firm has no legal entity and has no rights and obligations separate from the partners. In a firm every partner is an agent of the rest of the partners, but a member of a company is neither the agent of the company nor of other members.
- ❖ A company, as soon as it is incorporated, say by registration under the Companies Act, becomes a legal entity distinct from its members constituting it (*Salomon v. Salomon & Co.*, 1897, A.C. 22). It can sue and be sued in its own name like any natural person.
- ❖ In a partnership, there are rights and obligations as against individual partners, but in the case of a company, the rights and obligations are as against the fictitious entity of the whole of the company and not the members composing it.
- ❖ The creditors of the partnership can call upon individual partners to pay the firm's debt, but the members of a company are not personally liable for the company's debts. In other words, a partner's liability is unlimited while the liability of the members of a company is limited to the extent of the amount remaining unpaid on their shares (*Prasad v. Missir*).
- ❖ Partnership firm may dissolve by the death or insolvency of a partner, but a company is not affected by the death or insolvency of a member. A partner cannot transfer his interest so as to substitute the transferee in his place as the partner,

Without the consent of all the other partners; a member can transfer his share to any one he likes. The maximum number of partners for a banking firm is 10 and for other firms it is 20, while the maximum number of members for a private company is 50 and a public company can have any number of members.

### **CHANGE IN A FIRM**

The Indian Partnership Act, 1932, contemplates the following changes in a partnership firm:

- ❖ Changes in the constitution of a firm.
- ❖ Changes in the nature of a business or undertakings.
- ❖ Changes in the duration of a firm.

### **A change in the constitution of a firm takes place when:**

- ❖ New partner is introduced as a partner in a firm (Section 31)
- ❖ Partner retires from a firm (Section 32)
- ❖ Partner is expelled from a firm (Section 33)
- ❖ Partner is adjudicated as an insolvent (Section 34)
- ❖ Partner dies (Section 35)

A change in the nature of the business can only be brought about by the consent of all the partners.

Partnership formed for a definite purpose, agreed upon at the time of formation of the partnership, cannot depart from the agreed purpose without the consent of all the partners [Section 12(c)].

Section 17(c) provides for a case whether a partnership firm is formed for a particular undertaking or

undertakings, it proceeds to carry on other undertaking or undertakings, in that event the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures of undertakings.

### **PARTNERSHIP PROPERTY**

It is open to the partners to agree among themselves as to what is to be treated as the property of the firm, and what is to be separate property of one or more partners, although employed for the purposes of the firm.

**In the absence of any such agreement, express or implied, the property of the firm is deemed to include:**

- ❖ All property, rights and interests which have been brought into the common stock for the purposes of the partnership by individual partners, whether at the commencement of the business or subsequently added thereto
- ❖ Those acquired in the course of the business with money belonging to the firm
- ❖ The goodwill of the business (Section 14)

The property of the firm belongs to the firm and not to the individual partner or partners. The ownership belongs to the firm, and no partner can deal with specific properties as if the properties are his own, nor does the partner possess any assignable interest in such property (Narayanappa v. Bhaskaia Krishnappa, AIR 1966 SC 1300).

Whether such property is or is not partnership property depends upon the agreement between the partners (Lachhman Dass v. Mrs. Gulab Devi, AIR 1936 ALL. 270).

- ❖ The source of the purchase money.
- ❖ The reason due to which the property was purchased or acquired.
- ❖ The object for which the property was purchased or acquired.
- ❖ The mode in which the property was obtained.
- ❖ The mode in which the property was dealt with.
- ❖ The use to which the property was put to.

All such facts are matter of evidence and depend on the facts of each case. These facts indicate the intention of the parties but are not conclusive to make a property as partnership property. These facts can be established by entries in the books of account of the firm and of the partners, correspondence, the deed of partnership, etc.

### **KINDS OF PARTNERS**

**The following kinds of partners generally exist in a partnership:**

#### **ACTUAL, ACTIVE OR OSTENSIBLE PARTNER**

- ❖ These are the ordinary types of partners who invest money into the business of the firm, actively participate in the functioning and management of the business and share its profits or losses.
- ❖ Section 12(a) lays down that "Subject to contract between the partners, every partner is entitled to take part in the conduct of the business of the firm".
- ❖ Such partner as actively participates in the firm's business, binds himself and other partners by all his acts done in the usual course of partnership business. Such partner must give a public notice of his retirement from the firm in order to absolve (free) himself from liability for the acts of the other partners done after his retirement.

#### **SLEEPING OR DORMANT PARTNER**

- ❖ These partners invest money in the firm's business and take their share of profits but do not participate in the functioning and management of the business. But even then their liability is unlimited. The Act specially provides that if an act is binding on the firm, every partner is liable for it.

- ❖ A sleeping partner can retire from the firm without giving any public notice to this effect. His liability for the acts of the firm ceases soon after retirement.
- ❖ Such partner has no duties to perform but is entitled to have access to books and accounts of the firm and he can have a copy of them.

### **NOMINAL PARTNER**

Some people do not invest or participate in the management of the firm but only give their name to the business or firm. They are nominal partners but are liable to third parties for all the acts of the firm. Unlike a sleeping partner, they are known to the outsiders as partners in the firm, whereas actually they are not.

### **PARTNER IN PROFITS ONLY**

- ❖ A partner who is entitled to share in the profits of a partnership firm without being liable to share the losses, is called a partner in profits only.
- ❖ Thus, a person who has sufficient capital but is not prepared to take risk may be admitted to the partnership by the other partners. Inspite of his specific position.
- ❖ He continues to be liable to the third parties for all acts of the firm, just like other parties.

### **SUB PARTNER**

Where a partner agrees to share his profits in the firm with a third person, that third person is called a sub-partner. Such a sub-partner has no rights or duties towards the firm and does not carry any liability for the debts of the firm. Also he cannot bind the firm or other partners by his acts.

### **PARTNER BY ESTOPPEL OR HOLDING OUT**

- ❖ If the behaviour of a person arouses misunderstanding that he is a partner in a firm (when actually he is not), such a person is estopped from later on denying the liabilities for the acts of the firm. Such person is called partner by estoppel and is liable to all third parties.
- ❖ The rule as to holding out is based on the doctrine of estoppel as contained in Section 115 of the Indian Evidence Act.
- ❖ *Holding Out* means “to represent”. Strangers, who hold themselves out or represent themselves to be partners in a firm, whereby they induce others to give credit to the partnership are called “Partners by Holding Out”.
- ❖ In case of “Partnership by Estoppel”, the representation is made by partners about a stranger within his knowledge and hearing and he does not contradict it. He is then held liable as a partner.

### **EFFECTS OF HOLDING OUT**

- ❖ The Holding Out partner becomes personally and individually liable for the acts of the firm. But he does not become a partner in the firm and is not entitled to any rights or claim upon the firm.
- ❖ An outsider, who has given credit to the firm thinking him to be a partner, can hold him liable as if he is a partner in that firm.
- ❖ As the liability of the partners is joint and several he can be held liable to pay the entire amount. But under the doctrine of subrogation as well as on the basis of quasi-contract, he can recover the amount so paid from the partners of the firm, if they are solvent.

### **EXCEPTIONS TO HOLDING OUT**

The doctrine of Holding Out is not applicable in the following cases:

- It does not apply to cases of torts committed by partners. A person, therefore, cannot be held liable for the torts of another simply because that other person held himself to be his partner.

- It does not extend to bind the estate of a deceased partner, where after a partner's death the business of the firm is continued in the old firm name. [Section 28(2)]
- It also does not apply where the Holding Out partner has been adjudicated insolvent. (Section 45)

### **MINOR ADMITTED TO THE BENEFITS OF PARTNERSHIP**

- ❖ In view of Section 11 of the Indian Contract Act, 1872, and the decision of the Privy Council in *Mohri Bibi v. Dharmo Das Ghose*, (1903) 30 I.A 114, a minor's agreement is altogether void and unenforceable. An agreement is an essential ingredient in a partnership, it follows that a minor cannot enter into an agreement of partnership.
- ❖ On the same principle, a minor cannot be clothed with all the rights and obligations of a full-fledged partner through a guardian.
- ❖ Section 5 states "The relation of partnership arises from a contract..." The minor is incompetent to contract and, therefore, partnership cannot come into existence if the parties to a contract of partnership consist of one major and one minor.
- ❖ The only provision that Section 30 makes is that with the "consent of all the partners for the time being, a minor can be admitted into the benefits of partnership to which a minor is going to be admitted". A partnership firm cannot be formed with only minors as partners.
- ❖ There must be atleast two major partners before a minor is admitted into the benefits of partnership.

### **RIGHTS OF MINOR**

- ❖ He is entitled to his agreed share and can inspect books of account of the firm [Section 30(2)]. He can bring a suit for account and his share when he intends to sever his connections with the firm, but not otherwise. [Section 30(4)]
- ❖ A minor who was admitted to the benefits during his minority within six months of his attaining the age of majority or when he comes to know of his being so admitted (whichever date is later), he has to elect whether he wants to become a partner, or sever his connection with the firm.
- ❖ He may give public notice of his election to continue or repudiate, but if he fails to give any public notice within the period stated above, he will be deemed to have elected to become a partner in the firm. [Section 30(5)]

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### **LIABILITIES OF MINOR**

**Share in Liability:** A minor partner's liability is confined only to the extent of his share in the firm. Section 30(3) provides that a minor's share is liable for the acts of the firm.

But a minor is not personally liable in any such act. Thus, he is neither personally liable nor is his private estate liable for the acts of the firm.

**Personal Liabilities:** Where a minor on attaining majority, elects to become a partner, he becomes personally liable as other partners to the third parties for all the acts of the firm done since he was admitted to the benefits of partnership.

**Election by Minor:** A minor who was admitted to the benefits during his minority within six months of his attaining the age of majority or when he comes to know of his being so admitted (whichever date is later), he has to elect whether he wants to become a partner, or sever his connection with the firm. He may give public notice of his election to continue or repudiate, but if he fails to give any public notice within the period stated above, he will be deemed to have elected to become a partner in the firm. [Section 30(5)]

If he becomes or elects to become a partner, his position will be as under:

- ❖ Rights and liabilities will be similar to those of a full-fledged partner.
- ❖ Personally liable for all the acts of the firm, done since he was first admitted to the benefits of the partnership.
- ❖ Share of profits and property remains the same as was before, unless altered by agreement.

**If he elects not to become a partner, then:**

- ❖ Rights and liabilities shall continue to be those of a minor upto the date of his giving public notice.
- ❖ Share shall not be liable for any acts of the firm done after the date of the public notice.
- ❖ Entitled to sue the partners for his share of the property and profits in the firm. [Section 30(8)]

**RELATION OF PARTNERS TO ONE ANOTHER**

- ❖ The relation of partnership arises through an agreement between the parties and such an agreement normally provides for mutual rights and obligations, or duties of the partners.
- ❖ Partnership arises by implication, or wherever the articles of partnership are silent, or where they do not exist, the rights and duties of partners are governed by the Act.

**RIGHTS OF PARTNERS**

- ❖ Every partner has a right to take part in the conduct and management of the business. [Section 12(a)]
- ❖ Every partner whether active or dormant, has a right of free access to all records, books and accounts of the business and also to examine and copy them. [Section 12(d)]
- ❖ Every partner is entitled to share in the profits equally, unless different proportions are stipulated. [Section 13(b)]
- ❖ A partner who has contributed more than the share of the capital for the purpose of the business is entitled to an interest at a rate agreed upon, and where no rate is stipulated for, at six per cent per annum. But a partner cannot claim interest on capital, unless there is an agreement to pay it. [Section 13(d)]
- ❖ A partner is entitled to be indemnified by the firm for all expenses incurred by him in the course of the business, for all payments made by him in respect of partnership debts or liabilities and disbursements made in an emergency for protecting the firm from loss. [Section 13(e)]
- ❖ Every partner is, as a rule, a joint owner of the partnership property, and have it applied exclusively for the purposes of the partnership. (Section 15)
- ❖ A partner has power to act in an emergency for protecting the firm from loss. (Section 21)
- ❖ Every partner is entitled to prevent the introduction of a new partner into the firm without his consent. (Section 31)
- ❖ Every partner has a right to retire by giving notice where the partnership is at will. [Section 32(1)(c)]
- ❖ Every partner has a right to continue in the partnership and not to be expelled from it. [Section 33(1)]
- ❖ An incoming partner will not be liable for any debts or liabilities of the firm before he becomes a partner. [Section 31(2)] (l)
- ❖ Every outgoing partner has a right to carry on a competitive business under certain conditions. (Section 36)

**DUTIES OF PARTNERS**

- ❖ Every partner is bound to carry on the business of the firm to the greatest common advantage. (Section 9)
- ❖ Every partner must be just and faithful to other partners. (Section 9)
- ❖ A partner is bound to keep and render true, proper and correct accounts of the partnership. (Section 9)
- ❖ Utmost good faith between the partners is the rule and one partner must not take advantage of the other. As an agent of other partners, every partner is bound to communicate full information to them. (Section 9)

- ❖ Every partner must account for any benefits derived from the partnership business without the consent of the other partners, i.e., a partner must not make “secret profits”. [Section 16(a)]
- ❖ A partner must not compete with the firm, without the consent of the other partners. Any profits made by such unauthorised competition can be claimed by the firm. [Section 16(b)]
- ❖ Every partner is bound to attend diligently to the business of the firm and in the absence of any agreement to the contrary, he is not entitled to receive any remuneration. [Section 12(b) and 13(a)]
- ❖ In the absence of an agreement to the contrary, every partner is bound to share losses equally with the others. [Section 13(b)]
- ❖ Every partner must hold and use the partnership property exclusively for the firm. (Section 15)
- ❖ Every partner is bound to indemnify the firm for any loss caused by fraud in the conduct of the business. (Section 10)
- ❖ A partner who is guilty of wilful neglect in the conduct of the business and the firm suffers loss in consequence, is bound to make compensation to the firm and other partners. [Section 13(f)]
- ❖ No partner can assign or transfer his partnership interest to any other person, so as to make him a partner in the business. (Section 29)
- ❖ But a partner may assign the profits and share in the partnership assets. But the assignee or transferee will have no right to ask for the accounts or to interfere in the management of the business; he would be entitled only to share the actual profits. On dissolution of the firm, he will be entitled to the share of the assets and also to accounts but only from the date of dissolution. (Section 29)
- ❖ Every partner is bound to act within the scope of his actual authority. If he exceeds his authority, he shall compensate the other partners for loss unless they ratify his act.

## **RELATION OF PARTNERS TO THIRD PARTIES**

### **PARTNER AS AGENTS**

Every partner is an agent of the firm and of other partners for the purpose of the business of the firm (Section 18). In the case of a partnership each partner is a principal and each one is an agent for the other partners. A partner is both a principal and an agent. Thus, the general law of agency is incorporated into the law of partnership. The law of partnership is often regarded as branch of the law of agency. The acts of every partner who does any act for carrying on in the usual way the business of the kind carried on by the firm bind the firm and his partners unless:

- ❖ The partner so acting has no authority to act for the firm in that matter; and
- ❖ The person with whom he is dealing knows that he has no authority; or
- ❖ Does not know or believe him to be a partner.

### **AUTHORITY OF A PARTNER**

The authority of a partner means the capacity of a partner to bind the firm by his act. This authority may be express or implied.

Authority is said to be express when it is given by words, spoken or written. The firm is bound by all acts of a partner done within the scope of his express authority even if the acts are not within the scope of the partnership business.

The implied authority of a partner is also known as ostensible or apparent authority. Sections 19 and 22 contain provisions regarding the scope of the implied authority of a partner. The implied authority is subject to the following conditions:

- ❖ The act done must relate to the “normal business” of the firm;
- ❖ The act must be done in the usual way;
- ❖ The act must be done in the name of the firm.

### **IMPLIED AUTHORITY OF A PARTNER**

- By selling firm's goods;
- By purchasing goods for the firm;
- By accepting any payment of debts due to the firm; and
- By engaging and discharging employees.

**In a Trading Firm (one which carries on business of buying and selling goods), a partner has the following additional powers:**

- ❖ To borrow money on the firm's credit and to pledge the firm's goods for that purpose;
- ❖ To accept, make and issue negotiable instruments in the firm's name; and
- ❖ To employ a solicitor or attorney on behalf of the firm (Bank of Australasia v. Beriliat, (1847) 6 Moor, P.C. 152 at pp. 193-94).

### **NO IMPLIED AUTHORITY**

Section 19(2) states that in the absence of any usage or custom or trade to the contrary, the implied authority of a partner does not empower him to:

- ❖ Submit a dispute relating to the business of the firm to arbitration
- ❖ Open a banking account on behalf of the firm in his own name
- ❖ Compromise or relinquish any claim or portion of a claim by the firm
- ❖ Withdraw a suit or proceeding filed on behalf of the firm;
- ❖ Admit any liability in a suit or proceedings against the firm;
- ❖ Acquire immovable property on behalf of the firm;
- ❖ Transfer immovable property belonging to the firm; and
- ❖ Enter into a partnership on behalf of the firm.

### **EXTENTS OF PARTNERS LIABILITY**

It is, however, open to the partners by means of an express contract to extend or limit the implied authority, but third parties will be bound by such limitations only when they have notice of such curtailment.

All partners are liable jointly and severally for all acts or omissions binding on the firm including liabilities arising from contracts as well as torts (Section 25).

This is known as the liability of partners for the acts of the firm.

### **LIABILITY OF THE FIRM FOR TORTS**

- ❖ Every partner is liable for the negligence and fraud of the other partners in the course of the management of business. A partner charges the firm if he acts as an agent for it.
- ❖ The firm is similarly liable where a partner commits a tort with the authority of his co-partners. (Section 26)
- ❖ If a partner acting within the scope of his apparent authority receives the property of a third person and misapplies it, or if the firm in the course of its business receives the property of a third person and, while it is in the firm's custody, a partner misapplies it, in each case the firm is liable to make good the loss. (Section 27)

## **LIABILITY OF AN INCOMING PARTNER**

As a general rule, an incoming partner is not liable for the debts incurred before he joined the firm as a partner [Section 31(2)].

The incoming partner may, however, assume liability for past debts by novation, i.e., by a tripartite agreement between

- ❖ The creditor of the firm,
- ❖ The partners existing at the time the debt was incurred.
- ❖ The incoming partner.

## **LIABILITY OF AN OUTGOING OR RETIRING PARTNER**

- ❖ An outgoing partner remains liable for the partnership debts contracted while he was a partner.
- ❖ However, be discharged by novation, i.e., by an agreement between himself, the new firm and the creditors. He may also continue to be liable after retirement if he allows himself to be held out as a partner,
- ❖ Example : Allowing his name to remain the firm name.
- ❖ To protect himself from his liability, he should give express notice of his retirement to the persons who were dealing with the firm before his retirement or give public notice in the manner as laid down in Section 72 of the Act, that is to say, by publishing it in the Official Gazette and in at least one vernacular newspaper where the firm carries on the business. [Section 32(3)]

## **DEATH OR INSOLVENCY**

The estate of a partner who dies, or who becomes insolvent, is not liable for partnership debts contracted after the date of the death or insolvency. It will, however, be liable for debts incurred before death or insolvency. (Sections 34 and 35)

## **DISSOLUTION**

- According to Section 39 “The dissolution of partnership between all the partners of a firm” is called the “Dissolution of the Firm”.
- A dissolution does not necessarily follow because the partnership has ceased to do business, for the partnership may continue for the purpose of realising the assets.
- The Partnership Act makes a distinction between the “dissolution of partnership” and “dissolution of firm”. Where there is dissolution of partnership between all the partners of a firm, it is a dissolution of the firm (Section 39). Where there is an extinction of relationship between some of the partners only, it is a dissolution of partnership.
- So the dissolution of a partnership may or may not include the dissolution of the firm, but the dissolution of the firm necessarily means the dissolution of the partnership as well.

## **DISSOLUTION OF PARTNERSHIP**

The dissolution of partnership takes place (even when there is no dissolution of the firm) in the following circumstances:

- ❖ By the expiry of the fixed term for which the partnership was formed. [Section 42(a)]
- ❖ By the completion of the adventure. [Section 42(b)]
- ❖ By the death of a partner. [Section 42(c)]
- ❖ By the insolvency of a partner. [Section 42(d)]
- ❖ By the retirement of a partner. [Section 42(e)]

In all the above cases, the remaining partners may continue the firm in pursuance of an agreement to that effect. If they do not continue then the dissolution of the firm takes place automatically.

## **DISSOLUTION OF THE FIRM**

In the following cases there is necessarily a breaking up or extinction of the relationship between all the partners of the firm, and closing up of the business:

**By mutual agreement:** A firm may be dissolved where all the partners agree that it shall be dissolved. (Section 40)

**By the insolvency of all the partners but one:** If all the partners except one become insolvent, the firm must come to an end, as a partnership firm with one partner cannot continue. [Section 41(a)]

**By business becoming illegal:** If the business of the firm becomes illegal because of some subsequent events, such as change of law, it is automatically or compulsorily dissolved by the operation of law. [Section 41(b)]

**By notice of dissolution:** Where the partnership is at will, the firm may be dissolved at any time, by any partner giving notice in writing of his intention to dissolve the firm, to all the other partners.

The dissolution will take place from the date mentioned in the notice or, if no such date is mentioned, as from the date of the communication of the notice. (Section 43)

## **DISSOLUTION OF THE FIRM THROUGH COURT**

Unlike a partnership at will, the partnership for a fixed period cannot be dissolved by a notice. It could only be dissolved by Court in a suit by a partner. Though remedy of dissolution by a suit is available in case of all kinds of partnership, it is of practical importance in case of partnership for a fixed period.

**As per Section 44, the Court may order dissolution of the firm in the following circumstances:**

**When a partner becomes of unsound mind:** As the insanity of a partner does not automatically dissolve the firm, either the lunatic through his guardian or other partners may file a suit for the dissolution of the firm, in either case the Court may order dissolution which will take effect from the date of the order.

**Permanent incapacity of a partner:** Where a partner has become permanently incapable of performing his duties as a partner, e.g., he becomes blind, paralytic, etc., the Court may, at the instance of any of the other partners, order the dissolution of the firm.

**Misconduct of a partner affecting the business:** Where a partner is guilty of misconduct, which is likely to affect prejudicially the business of the firm, the Court may dissolve the firm at the instance of any of the other partners. Gambling by a partner or conviction of a partner for travelling without ticket would be sufficient ground for dissolution.

**Persistent disregard of partnership agreement by a partner:** Where a partner frequently commits breaches of the partnership agreement and the other partners find it impossible to carry on the business, the Court may order dissolution at the instance of the other partners.

**Transfer of interest or share by a partner:** A partner is not entitled to assign away his interest so as to introduce a new partner into the firm. Where a partner has transferred the whole of his interest to a third person or where his interest has been attached under a decree or sold under a process of law, the other partners may sue for dissolution.

**Business working at a loss:** The Court may dissolve a partnership firm where it is satisfied that the business of the firm cannot be carried on except at a loss.

**Where just and equitable:** As the grounds mentioned are not exhaustive, the Court may dissolve a firm on any other ground if it is satisfied that it would be just and equitable to dissolve the firm. The Court may order dissolution where the sub-stratum of the partnership firm has gone or where there is a complete deadlock and destruction of confidence between the partners [re. Yenidjee Tobacco Co. Ltd. (1916) 2 Ch. 426].

## **EFFECT OF DISSOLUTION**

**Continuing Authority of Partners:** The authority of partners to bind the firm continues so long as is necessary to wind up the business, provided that the firm is in no case bound by the acts of a partner who has been adjudged an insolvent except on the principle of holding out. (Section 47)

Also each partner has an equitable lien over the firm's assets entitling him to have them applied in payment of the firm's debts, and in payment of whatever is due to partner. This lien can be enforced by injunction forbidding unfair distribution. (Section 46)

**Continuing Liability of Partners:** The partners continue to be liable to outsiders for any act done by any of them which would have been an act of the firm if done before the dissolution, unless a public notice is given of the dissolution.

After dissolution, the rights and obligations of partners continue in all things necessary for the winding up of the business. The partners may complete unfinished transactions. But this authority is only for the winding up of the affairs of the firm and not for new transactions.

## **RIGHTS TO RETURN OF PREMIUM**

To buy entry into an existing firm, a new partner sometimes has to pay a premium to the existing partners in addition to any investment of capital.

On dissolution, he is entitled to demand the return of a proportion of the premium if the partnership was for a fixed term and was dissolved before the expiry of that term, unless dissolution was caused by

- ❖ Agreement
- ❖ Misconduct of the party seeking return of the premium
- ❖ Death of a partner. (Section 51)

## **SETTLEMENT OF ACCOUNTS ON DISSOLUTION**

Section 48 of the Act provides that in settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

Losses, including deficiencies of capital shall be paid first out of undistributed profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits

The assets of the firm, including the sums, contributed by the partners to make up losses or deficiencies of capital shall be applied in the following manner and order:

- ❖ In paying outside creditors;
- ❖ In repaying advances made by partners (distinct from investment of capital);
- ❖ In repaying capital to partners; and
- ❖ The ultimate residue, if any, shall be divided among the partners in the proportions in which profits are divisible.

Where the assets are not sufficient, the partners have to bear the loss in equal shares. After they have contributed their share of the deficiency they will be paid rateably the amount due to them by way of their capital (The Rule followed in the case of *Garner v. Murray*, 1904 73 L.J. Ch. 66).

## **REMAINING DEFICIENCIES OF CAPITAL**

Where after paying outside creditors and repaying advances made by partners, as in (i) and (iii) above, there remains insufficient capital to repay all the partners, in full, deficiencies are shared in the same way as profits, in other words, the partners are paid rateably each according to his share in the capital.

But under the Rule in *Garner v. Murray*, if such deficiency is attributable to the insolvency of one of the partners, that deficiency must be borne by the other partners in the proportion of their last agreed shares in the capital, and not in the proportion in which they share profits and losses.

## **GOODWILL**

This is a partnership asset and means the benefit arising from a firm's business connections or reputation. "It is the advantage which is acquired by a business, beyond the mere value of the capital, stock fund and properly employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers".

Though an intangible asset, it has value; and unless otherwise agreed in the partnership articles, upon dissolution it must be sold and the proceeds of sale distributed as capital. Where dissolution is caused by death, the estate of the deceased partner is entitled to share in the proceeds of the sale.

If the goodwill is sold and there is no agreement as to its disposal, any partner can carry on the business, provided that by doing so he does not expose former partners to liability

**Sale of Goodwill:** Where goodwill is sold, either to a partner or to an outsider, the value is divisible among the partners in the same manner as they share profits and losses, unless otherwise agreed.

The rights of the buyer and seller of the goodwill are as follows:

**Buyer's Rights:** On the sale of goodwill the buyer may, unless the terms in the contract of sale provide otherwise:

- ❖ Represent himself in continuing the business,
- ❖ Maintain his exclusive rights to the use of the firm name, and
- ❖ Solicit former customers of the business and restrain the seller of the goodwill from doing so.

**Seller's Rights:** The vendors may enter into competition with the purchaser unless he is prevented by a valid restraint clause in the contract of sale.

## **REGISTRATION OF THE FIRM**

Section 56-71 deal with the registration of a firm and consequences of non-registration.

**Registration:** The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating:

- ❖ The name of the firm;
- ❖ The place or principal place of business of the firm;
- ❖ The names of any other places where the firm carries on business;
- ❖ The date when each partner joined the firm;
- ❖ The names in full and permanent addresses of the partners; and
- ❖ The duration of the firm.

The statement shall be signed and verified by all the partners or by their agents specially authorised in this behalf. (Section 58)

The Partnership Act, 1932, does not make registration of a firm compulsory but it introduces certain disabilities, which makes registration necessary at one time or other. An unregistered firm is not an illegal association.

## **EFFECT OF NON - REGISTRATION**

The following are the effects of non-registration of a firm:

Sub-section (1) of Section 69 places a bar on the right of the partners of a firm to sue each other or the firm for enforcing any right arising from a contract or conferred by the Partnership Act, if the firm is not registered and the person suing is or has not been shown in the Register of Firms as a partner in the firm.

Sub-section (2) of Section 69 places a bar on the institution of a suit by or on behalf of a firm against a third-party if the firm is not registered and the persons suing are or have not been shown in the Register of Firms as partners in the firm.

There is no bar on the right of third-parties to sue the firm or any partner.

**However, the Act allows the following suits:**

- ❖ A suit for the dissolution of a firm.
- ❖ A suit for rendering of accounts of a dissolved firm.
- ❖ A suit for realisation of the property of a dissolved firm.
- ❖ A suit or claim of set-off, the value of which does not exceed one hundred rupees,
- ❖ A proceeding in execution or other proceeding incidental to or arising from a suit or claim for not exceeding one hundred rupees in value.
- ❖ A suit by a firm which has no place of business in the territories to which the Indian Partnership Act extends.
- ❖ A suit for the realisation of the property of an insolvent partner.
- ❖ A suit by a firm whose places of business are situated in areas which are exempted from the application of Chapter VII of the Indian Partnership Act, 1932.

**Section 69** bars the very institution of a suit by an unregistered firm or by its partners. Registration is a condition precedent to the right to institute the suit and, therefore, the condition precedent must first be fulfilled before the institution of the suit. If, therefore, on the date of the institution of a suit, the firm is not registered, the subsequent registration cannot validate the suit.

The only option left to the Court is to dismiss the suit (**Prithvi Singh v. Hasan Ali, (1950) Bom. L.R. 862**).

By virtue of this provision a partner of an unregistered firm cannot institute a suit to compel the other partner or partners to join in the registration of firm. The only remedy of such a partner is to institute a suit for dissolution (**Keshav Lal v. Chuni Lal, AIR 1941 Rangoon 196**).

A suit by the firm is really a suit by all the partners who were its partners at the time of the accrual of the cause of action and, therefore, all must join in the institution of the suit.

However, an unregistered firm can bring a suit to enforce a right arising otherwise than out of contract e.g., for an injunction against a person for wrongful infringement of trade mark etc.

## **SPECIFIC PERFORMANCE OF PARTNERSHIP AGREEMENT**

It is not allowed. The working of a partnership depends upon the personal inclination of the partners, there can be no specific performance of a partnership agreement (Scott v. Raymont, 1868, 7 Fq. 112).

## **SUIT FOR LIBEL OR SLANDER**

A firm is merely a collection of partners and cannot bring a suit for libel or slander. Libel or slander against a firm imply a libel or slander of its partners. Such partners themselves or any one may file the suit for libel or slander (**P. K. Oswal Hosiery Mills v. Tilak Chand, AIR 1969, Punj. 150**).

## REVIEW QUESTIONS

1. Define Partnership .Explain the types of Partnership
2. Explain the types of Partners in detail
3. Statements:
  4. Mere sharing of profit is not conclusive evidence of partnership.
  5. Write about partnership by Holding out
  6. Who is partner by Holding out or Estoppels
  7. Comment on the following statement: A minor can be admitted as a partner in a partnership firm
  8. Difference between Partnership and Company
  9. Explain about the rights and duties of partners
  10. Write explanatory notes on Implied Authority of a Partner
  11. Discuss in detail about the extent of partners liability
  12. Comment on the following statements : Partner can be expelled from the firm
  13. Explain briefly dissolution of partnership firm
  14. Partnership firm once formed cannot be dissolved in any circumstances- State legal provisions
  15. Discuss about the liabilities of partners acts done after Dissolution
  16. Write explanatory notes on Effect of Non -Registration



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# CHAPTER 5

## LIMITED LIABILITY PARTNERSHIP ACT

### INTRODUCTION:

The world over Limited Liability Partnership [LLP] was viewed as an alternative corporate business vehicle that provides the benefits of the limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. Accordingly India being an emerging super power cannot lag behind and ignore the Importance of a form of business organization which has the benefit of both a corporate and a non corporate body. The need to provide corporate form to the professionals was felt and the demand for making available the alternative of limited liability partnership echoed all around. Considering the potential for growth of the service sector and the dominant role played by the professionals in India's economy and wide spread of LLP form of business in other countries a need was felt for a new corporate form that would provide an alternative to the traditional partnership which exposes its partners to unlimited personal liability.

With a view to provide an alternative form of business the Government of India introduced the Limited Liability Partnership Bill way back in 2006. The Bill was, however, referred to the Parliament Standing Committee, which submitted its report to the Lok Sabha on 27th November, 2007. The Government chose to withdraw the Bill of 2006 and reintroduced it in 2008 after taking into consideration the recommendations of the Committee. The Limited Liability Partnership Bill, 2008 was passed by the Parliament and received the assent of the President on 7th January, 2009 and it became the Limited Liability Partnership Act, 2008. The Act has been notified to be effective from 31st March, 2009. The LLP rules have also been notified effective from 1st April, 2009.

### SALIENT FEATURES OF LLP

**Own Name:** The separate legal entity of LLP is a concept hitherto known to corporate and the LLP enjoys right to enter agreements in its own name and is entitled to sue and be sued in its own name.

**Flexible:** The LLP has retained flexible management structure and flexible profit distribution of the partnership. The flexibility of management means that there are no mandatory board meetings or general meeting and there are few legal and procedural requirements to be followed by LLP.

**Sound mind:** The LLP can be formed by any individual and/or a body corporate provided the individual is of sound mind and is neither an undischarged insolvent nor has applied to be adjudicated as an insolvent. The body corporate can also be a partner of LLP.

Features	Company	Partnership firm	LLP
Registration	Compulsory registration required with the ROC. Certificate of Incorporation is conclusive evidence.	Not compulsory. Unregistered Partnership firms have some disadvantages	Compulsory registration required with the ROC
Name	Name of a public company to end with the word "limited" and a private company with the words "private limited"	No guidelines, but restrictions on use of some words as a part of name of the firm.	Name to end with "LLP" Limited Liability Partnership" but restrictions on use of some words as a part of name of the firm

**Identity :** Every LLP is allocated a unique identity number called as Limited Liability Partnership Identity Number (LLPIN), similar to Corporate Identity Number allotted upon registration/incorporation of a company. However, each partner in LLP need not obtain any identification number.

**Liable:** Only designated partners are liable to obtain unique identification number called as Designated Partner Identification Number (DPIN).

**Responsible :** The designated partner is responsible for doing all acts, matters and things as are required to be done by LLP as per the Act or as specified in LLPA.

**Penalties:** The designated partner is liable for all penalties imposed on LLP for any contravention of the provisions of the Act or LLP Agreement.

#### **COMPARISON BETWEEN COMPANY, PARTNERSHIP FIRM AND LLP**

Features	Company	Partnership firm	LLP
Legal entity status	Is a separate legal entity	Not a separate legal entity	Is a separate legal entity
Liability	Limited to the extent of unpaid capital.	Unlimited, can extend to the personal assets of the partners	Limited to the extent of the contribution to the LLP.
No. of shareholders / Partners	Minimum of 2. In a private company, maximum of 50 shareholders	2- 20 partners	Minimum of 2. No maximum limit
Foreign Nationals as shareholder / Partner	Foreign nationals can be shareholders.	Foreign nationals cannot form partnership firm.	Foreign nationals can be partners.
Meetings	Quarterly Board of Directors meeting, annual shareholding meeting is mandatory	Not required.	Not required.
Annual Return	Annual Accounts and Annual Return to be filed with ROC	No returns to be filed with the Registrar of Firms	Annual statement of accounts and solvency & Annual Return has to be filed with ROC.
Audit	Compulsory, irrespective of share capital and turnover.	Compulsory.	Required, if the contribution is above ` 25 lakhs or if annual turnover is above ` 40 lakhs.
Source of funding	Own fund in case of private ltd company but a public limited company can raise funds from public through IPO/deposits	Public fund cannot be raised.	Public fund cannot be raised.
Dissolution	Very procedural. Voluntary or by Order of National Company Law Tribunal.	By agreement of the partners, insolvency or by Court Order.	Less procedural compared to company. Voluntary or by Order of National Company Law Tribunal
Whistle blowing	No such provision	No such provision.	Protection provided to employees and partners who provide useful information during the investigation process.

## **LIMITED LIABILITY PARTNERSHIP**

A corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative and efficient manner, providing benefits of limited liability while allowing its members the flexibility for organizing their internal structure as a partnership' In a way it is a hybrid form of business organization having the characteristics of both a Company form of organization and a Partnership firm under the Partnership Act, 1932.

### **5.2.2 NATURE OF LIMITED LIABILITY PARTNERSHIP**

#### **Limited liability partnership to be body corporate**

- A limited liability partnership is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners.
- A limited liability partnership shall have perpetual succession.
- Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.

#### **Non-applicability of the Indian Partnership Act, 1932.**

The provisions of the Indian Partnership Act, 1932 shall not apply to a limited liability partnership.

### **PARTNERS**

**Any individual or body corporate may be a partner in a limited liability partnership:**

Individual shall not be capable of becoming a partner of a limited liability partnership:-

- ❖ Unsound mind by a Court of competent jurisdiction and the binding is in force
- ❖ Undischarged insolvent
- ❖ Applied to be adjudicated as an insolvent and his application is pending.

Thus a partnership firm and an individual with above mentioned limitations cannot be partner of an LLP.

#### **Minimum number of partners**

- ❖ Every limited liability partnership shall have at least two partners.
- ❖ If at any time the number of partners of a limited liability partnership is reduced below two and the limited liability partnership carries on business for more than six months while the number is so reduced, the person, who is the only partner of the limited liability partnership during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the limited liability partnership incurred during that period.

#### **Designated partners.**

**Two Designated partners :** Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India:

The term “resident in India” means a person who has stayed in India for a period of not less than one hundred and eighty-two days during the immediately preceding one year.

#### **Subject to the provisions of sub-section (1)**

**If the incorporation document:-**

- Specifies who are to be designated partners, such persons shall be designated partners on incorporation; or
- States that each of the partners from time to time of limited liability partnership is to be designated partner, every partner shall be a designated partner;
- Any partner may become a designated partner by and in accordance with the limited liability partnership agreement and a partner may cease to be a designated partner in accordance with limited liability partnership agreement.

**Prior Consent:** An individual shall not become a designated partner in any limited liability partnership unless he has given his prior consent to act as such to the limited liability partnership in such form and manner as may be prescribed.

**File:** Every limited liability partnership shall file with the registrar the particulars of every individual who has given his consent to act as designated partner in such form and manner as may be prescribed within thirty days of his appointment.

**Satisfy:** An individual eligible to be a designated partner shall satisfy such conditions and requirements as may be prescribed.

**Obtain :** Every designated partner of a limited liability partnership shall obtain a Designated Partner Identification Number (DPIN) from the Central Government and the provisions of sections 266A to 266G (both inclusive) of the Companies Act, 1956 shall apply mutatis mutandis for the said purpose.

**Form :** As per rule 7 of LLP Rules 2009 an individual shall give his prior consent to act as a designated partner to the Limited liability partnership in **Form 9**.

**Annexure : As per rule 7(3) of LLP Rules 2009** the particulars of an individual who has given his consent to act as designated partner shall be filed in **Form 4** along with fee as mentioned in Annexure 'A' to the LLP Rules 2009

#### **Liabilities of designated partners.**

- ❖ Responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership in respect of compliance of the provisions of this Act including filing of any document, return, statement and the like report pursuant to the provisions of this Act and as may be specified in the limited liability partnership agreement; and
- ❖ Liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

#### **Changes in designated partners**

- ❖ A limited liability partnership may appoint a designated partner within thirty days of a vacancy arising for any reason and provisions of sub-section (4) and sub-section (5) of section 7 shall apply in respect of such new designated partner
- ❖ If no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.
- ❖ Change in the particular of designated partner is required to be intimated to Central Government within a period of 30 days of such change(s) in Form 10

#### **PUNISHMENT FOR CONTRAVENTION OF SECTIONS 7, 8 AND 9.**

- The limited liability partnership and its every partner shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees.
- The limited liability partnership and its every partner shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees.

#### **5.2.5 INCORPORATION OF LIMITED LIABILITY PARTNERSHIP AND MATTERS INCIDENTAL**

**For a limited liability partnership to be incorporated,**

**Lawful Business :** Two or more persons associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document.

**Fees :** The incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the registered office of the limited liability partnership is to be situated.

**Statement:** Shall be filed along with the incorporation document, a statement in the prescribed form, made by either an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant,

who is engaged in the formation of the limited liability partnership and by anyone who subscribed his name to the incorporation document, that all the requirements of this Act.

**Registered Office :** A limited liability partnership may change the place of its registered office and file the notice of such change with the Registrar in such form and manner and subject to such conditions as may be prescribed and any such change shall take effect only upon such filing.

**Contravenes:** If the limited liability partnership contravenes any provisions of this section, the limited liability partnership and its every partner shall be punishable with fine which shall not be less than two thousand rupees but which may extend to twenty-five thousand rupees.

**Change the place:** Limited liability partnership may change the place of its registered office and file the notice of such change with the Registrar in form 15 within 30 days. Reregistered office can be changed from one place to another place in the manner provided in the Partnership Agreement.

**Agreement is silent:** If the agreement is silent then consent of all partners shall be required for changing the place of registered office of limited liability partnership to another place where the change in place of registered office is from one State to another State, the limited liability partnership having secured creditors shall also obtain consent of such secured creditors.

**General Notice:** The change in place of registered office is from one state to another state, a general notice, not less than 21 days before filing any notice with Registrar, is required to be published in a daily newspaper published in English and in the principal language of the district in which the registered office of the limited liability partnership is situated and circulating in that district giving notice of change of registered office.

**Jurisdiction:** However, there is just change in the jurisdiction of one Registrar to the jurisdiction of another Registrar; the limited liability Partnership shall file the notice in **Form 15** with the Registrar from where the limited liability partnership proposes to shift its registered office with a copy thereof for the information to the Registrar under whose Jurisdiction the registered office is proposed to be shifted.

**Punishment:** Failure to comply with the provision of this section the limited liability partnership and its every partner is liable to be punishable with fine which shall not be less than two thousand rupees but which may extend to twenty- five thousand rupees.

### **Effect of registration**

**On registration, a limited liability partnership shall, by its name, be capable of:**

- Suing and being sued
- Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible
- Having a common seal, if it decides to have one
- Doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

### **Name**

Every limited liability partnership shall have either the words “limited liability partnership” or the acronym “LLP” as the last words of its name.

**No limited liability partnership shall be registered by a name which, in the opinion of the Central Government is :-**

- ❖ Undesirable
- ❖ Identical or too nearly resembles to that of any other partnership firm or limited liability partnership or body corporate or a registered trade mark, or a trade mark which is subject of an application for registration, of any other person under the Trade Marks Act, 1999.

### **Reservation of name**

**A person may apply in such form and manner and accompanied by such fee as may be prescribed to the Registrar for the reservation of a name set out in the application as:-**

- ❖ The name of a proposed limited liability partnership.
- ❖ The name to which a limited liability partnership proposes to change its name.
- ❖ Upon receipt of an application under sub-section (1) and on payment of the prescribed fee, the Registrar may, if he is satisfied, subject to the rules prescribed by the Central Government in the matter, that the name to be reserved is not one which may be rejected on any ground referred to in sub-section (2) of section 15, reserve the name for a period of three months from the date of intimation by the Registrar.

#### **Change of name of limited liability partnership:**

- ❖ Sections 15 and 16 -The Central Government is satisfied that a limited liability partnership has been registered.
- ❖ Identical with or too nearly resembles the name of any other limited liability partnership or body corporate or other name as to be likely to be mistaken for it.
- ❖ The Central Government may direct such limited liability partnership to change its name, and the limited liability partnership shall comply with the said direction within three months after the date of the direction or such longer period as the Central Government may allow.
- ❖ Any limited liability partnership which fails to comply with a direction given under sub-section 1shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to five lakh rupees.
- ❖ The designated partner of such limited liability partnership shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees.

#### **Application for direction to change name in certain circumstances.**

- ❖ Any entity which already has a name similar to the name of a limited liability partnership which has been incorporated subsequently, may apply, to the Registrar to give a direction to any limited liability partnership, on a ground referred to in section 17 to change its name.
- ❖ The Registrar shall not consider any application unless the Registrar receives the application within twenty-four months from the date of registration of the limited liability partnership under that name.

#### **Change of registered name.**

Any limited liability partnership may change its name registered with the Registrar, by filing with him a notice of such change in such form and manner and on payment of such fees as may be prescribed.

#### **Penalty for improper use of words “limited liability partnership” or “LLP”.**

- ❖ If any person or persons carry on business under any name or title of which the words “Limited Liability Partnership” or “LLP” or any contraction or imitation thereof is or are the last word or words, that person or each of those persons shall, unless duly incorporated as limited liability partnership, be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

#### **Publication of name and limited liability.**

Every limited liability partnership shall ensure that its invoices, official correspondence and publications bear the following, namely:-

- The name, address of its registered office and registration number of the limited liability partnership; and a statement that it is registered with limited liability.
- Any limited liability partnership which contravenes the provisions of sub-section (1) shall be punishable with fine which shall not be less than two thousand rupees but which may extend to twenty-five thousand rupees.

#### **5.2.6 PARTNERS AND THEIR RELATIONS ELIGIBILITY TO BE PARTNERS**

On the incorporation of a limited liability partnership, the persons who subscribed their names to the incorporation document shall be its partners and any other person may become a partner of the limited liability partnership by and in accordance with the limited liability partnership agreement.

### **Relationship of partners**

- ❖ The mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners.
- ❖ The limited liability partnership agreement and any changes, if any, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.
- ❖ An agreement in writing made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation document may impose obligations on the limited liability partnership, provided such agreement is ratified by all the partners after the incorporation of the limited liability partnership.
- ❖ In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and the partners shall be determined by the provisions relating to that matter as are set out in the First Schedule.

### **Cessation of partnership interest**

**Agreement:** A person may cease to be a partner of a limited liability partnership in accordance with an agreement with the other partners or, in the absence of agreement with the other partners as to cessation of being a partner, by giving a notice in writing of not less than thirty days to the other partners of his intention to resign as partner.

#### **A person shall cease to be a partner of a limited liability partnership**

- ❖ On his death or dissolution of the limited liability partnership
- ❖ If he is declared to be of unsound mind by a competent court
- ❖ If he has applied to be adjudged as an insolvent or declared as an insolvent.

#### **Former partner :**

A person has ceased to be a partner of a limited liability partnership (hereinafter referred to as "former partner"), the former partner is to be regarded (in relation to any person dealing with the limited liability partnership) as still being a partner of the limited liability partnership unless-

- ❖ The person has notice that the former partner has ceased to be a partner of the limited liability partnership; or
- ❖ Notice that the former partner has ceased to be a partner of the limited liability partnership has been delivered to the Registrar,

#### **Obligation:**

The cessation of a partner from the limited liability partnership does not by itself discharge the partner from any obligation to the limited liability partnership or to the other partners or to any other person which he incurred while being a partner.

**Death or Insolvency:** Partner of a limited liability partnership ceases to be a partner, unless otherwise provided in the limited liability partnership agreement, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from the limited liability partnership —

- ❖ An amount equal to the capital contribution of the former partner actually made to the limited liability partnership; and
- ❖ Right to share in the accumulated profits of the limited liability partnership, after the deduction of accumulated losses of the limited liability partnership, determined as at the date the former partner ceased to be a partner.

**Consequence:** A former partner or a person entitled to his share in consequence of the death or insolvency of the former partner shall not have any right to interfere in the management of the limited liability partnership.

### **Registration of changes in partners**

Every partner shall inform the limited liability partnership of any change in his name or address within a period of fifteen days of such change.

### **Holding out- Section 29**

**Representation :** If any person has given any credit to the LLP on the representation of a Holding out partner the LLP is liable to that person whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit:

**Credit:** If any credit is received by the limited liability partnership as a result of such representation, the limited liability partnership is liable to the extent of credit received by it or any financial benefit derived thereon.

**Name :** After a partner's death the business is continued in the same limited liability partnership name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the limited liability partnership done after his death.

### **Unlimited liability in case of fraud (Sec 30)**

In order to check the misuse of corporate veil by a LLP for the purpose of defrauding the creditors or any other person or for any fraudulent purpose the liability of the limited liability partnership and partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the limited liability partnership;

If any such act is carried out by a partner, the limited liability partnership is liable to the same extent as the partner unless it is established by the limited liability partnership that such act was without the knowledge or the authority of the limited liability partnership.

### **Whistle blowing (Sec 31)**

The Court or Tribunal may reduce or waive any penalty leviable against any partner or employee if it is satisfied that such partner or employee of a limited liability partnership has provided useful information during investigation of such limited liability partnership; or when any information given by any partner or employee .

### **5.2.7 CONTRIBUTIONS**

#### **Form of contribution (Sec 32)**

- A contribution of a partner may consist of tangible, movable or immovable or intangible property or other benefit to the limited liability partnership, including money, promissory notes, and other agreements to contribute cash or property, and contracts for services performed or to be performed.
- The monetary value of contribution of each partner shall be accounted for and disclosed in the accounts of the limited liability partnership in the manner as may be prescribed.

#### **Obligation to contribute**

- The obligation of a partner to contribute money or other property or other benefit or to perform services for a limited liability partnership shall be as per the limited liability partnership agreement.
- A creditor of a limited liability partnership, which extends credit or otherwise acts in reliance on an obligation described in that agreement, without notice of any compromise between partners, may enforce the original obligation against such partner.

#### **Annual Return (Section 35)**

As per section 35 of the Act ever limited liability partnership shall file an annual return duly authenticated with the Registrar within sixty days of closure of its financial year in such form and manner and accompanied by such fee as may be prescribed failing which LLP shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

#### **Inspection of documents kept by Registrar-Section 36**

The incorporation document, names of partners and changes, if any, made therein, Statement of Account and Solvency and annual return filed by each limited liability partnership with the Registrar shall be available for inspection by any person in such manner and on payment of such fee as may be prescribed.

**Penalty for false statement-Section 37**

If in any return, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement

False in any material particular, knowing it to be false.

Omits any material fact knowing it to be material, he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine which may extend to five lakh rupees but which shall not be less than one lakh rupees.

**Compounding of offences-Section 39**

The Central Government may compound any offence under this Act which is punishable with fine only, by collecting from a person reasonably suspected of having committed the offence, a sum which may extend to the amount of the maximum fine prescribed for the offence.

**Conversion to Limited Liability Partnership****Conversion from firm into limited liability partnership.**

Section 55 : A firm may convert into a limited liability partnership in accordance with the provisions of Chapter X and the Second Schedule.

**Conversion from private company into limited liability partnership.**

Section 56 : A private company may convert into a limited liability partnership in accordance with the provisions of Chapter X and the Third Schedule.

**Conversion from unlisted public company into limited liability partnership**

Section 57 : An unlisted public company may convert into a limited liability partnership in accordance with the provisions of Chapter X and the Fourth Schedule

**Winding up and Dissolution of a Limited Liability Partnership**

The Act provides two ways of winding up of a LLP

- ❖ Voluntary
- ❖ Tribunal

And limited liability partnership so would up may be dissolved. (**Section 63**)

**General penalties:**

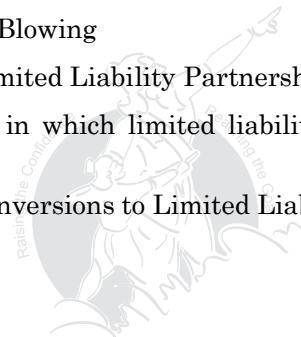
**Section 74 :** Any person guilty of an offence under this Act for which no punishment is expressly provided shall be liable to a fine which may extend to five lakh rupees but which shall not be less than five thousand rupees and with a further fine which may extend to fifty rupees for every day after the first day after which the default

**Power of registrar to strike defunct limited liability partnership off register**

**Section 75** if the Registrar has reasonable cause to believe that a limited liability partnership is not carrying on business or its operation, in accordance with the provisions of this Act, the name of limited liability partnership may be struck off the register of limited liability partnerships in such manner as may be prescribed.

## REVIEW QUESTIONS

1. Comment on the following statements based on legal provisions:A Limited Liability partnership is a body corporate
2. Write short notes on Limited Liability partnership
3. Explain about the nature of Limited Liability Partnership
4. A Limited Liability Partnership is not bound by any act of its member.Justify
5. Comment on the following based on legal provisions:Provisions of Indian Partnership Act 1932 are applicable to LLPs and the body corporate may be a partner of the LLP
6. Write explanatory notes on Persons competent to become partners
7. Comment on the following based on legal provisions:All the members of a limited partnership firm are designated members
8. Explain about the Incorporation of Limited Liability Partnership
9. Discuss about the registration of change in partners
10. Comment on the following statement:Reservation and Change of Name of Limited Liability of Partnership
11. Explain about the partners and their relations eligibility to E partners
12. Write short notes on Whistle Blowing
13. Comment: Contribution of Limited Liability Partnership
14. What are the circumstances in which limited liability partnership may be wound up by the Tribunal?
15. Discuss in detail about the conversions to Limited Liability Partnership



**RR Academy**

**SECTION-B**  
**INDUSTRIAL LAWS**  
**UNIT 7**  
**FACTORIES ACT, 1948**

**Important Definitions**

<b>Introduction</b>	<ul style="list-style-type: none"> <li>➤ The Factories Act, 1948 enacted to regulate the working conditions in factories.</li> <li>➤ <b>Case Law:</b> <b>Ravi Shankar Sharma v. State of Rajasthan, AIR 1993</b> Court held that Factories Act is a social legislation and it provides for the health, safety, welfare and other aspects of the workers in the factories.</li> </ul>
<b>Object</b>	<ul style="list-style-type: none"> <li>➤ To ensure <b>adequate safety measures and to promote the health and welfare of the workers</b> employed in factories.</li> <li>➤ The Act also <b>makes provisions regarding employment of women and young persons (including children and adolescents)</b>, annual leave with wages etc.</li> <li>➤ All <b>manufacturing processes and establishments falling within the definition of 'factory'</b> as defined under Section 2(m) of the Act.</li> <li>➤ Unless otherwise provided <b>it is also applicable to factories belonging to Central/State Governments.</b> [Section 116]</li> <li>➤ The Factories Act, 1948 extend to <b>whole of India</b> and <b>came into effect from 01.04.1949.</b></li> </ul>
<b>Competent Person [Section 2(ca)]</b>	<ul style="list-style-type: none"> <li>➤ A person or an institution recognized as such by the <b>Chief Inspector for the purposes of carrying out tests, examinations and inspections</b> required to be done in a factory under the provisions of this Act having regard to-</li> <li>➤ The <b>qualifications and experience of the person and facilities</b> available at his disposal; or</li> <li>➤ The <b>qualifications and experience of the persons employed in such institution and facilities</b> available therein, with regard to the conduct of such tests, examinations and inspections, and more than one person or institution.</li> </ul>
<b>Hazardous Process</b>	<ul style="list-style-type: none"> <li>➤ Any process or activity in relation to an industry specified in the First Schedule where, <b>unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes, or effluents thereof would-</b></li> <li>➤ Cause <b>material impairment to the health of the persons</b> engaged in or connected therewith, or result in the pollution of the general environment.</li> <li>➤ The <b>State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry</b>, specified in the said Schedule.</li> </ul>

[Section 2(cb)]	<ul style="list-style-type: none"> <li>➤ The State Government may, for purposes of advising it to consider <b>applications for grant of permission for the initial location of a factory involving a hazardous process or for the expansion of any such factory</b>, appoint a Site Appraisal Committee.</li> <li>➤ The Site Appraisal Committee shall examine an application for the establishment of a factory involving hazardous process and make its <b>recommendation to the State Government within 90 days of the receipt of such application</b>.</li> <li>➤ The Committee has the <b>power to call for any information from the person</b> making an application.</li> <li>➤ The application is <b>got approved by the State Government</b>, it shall <b>not be necessary to obtain a further approval from the Central Board of the State Board of pollution authorities</b>.</li> </ul>
Manufacturing Process [Section 2(k)]	<ul style="list-style-type: none"> <li>➤ Any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or</li> <li>➤ Pumping oil, water, sewage or any other substance; or</li> <li>➤ Generating, transforming or transmitting power; or composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or</li> <li>➤ Constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or</li> <li>➤ Preserving or storing any article in cold storage.</li> </ul>
<b>Qazi Noorul Hasan Hamid Hussain Petrol Pump V. Deputy Director, Employees' State Insurance Corporation' – 2003 LLR 476</b>	
Case Law	<ul style="list-style-type: none"> <li>➤ It was held that the definition 'manufacturing process' <b>does not depend upon and is not correlated with any end product</b> being manufactured out of a manufacturing process.</li> <li>➤ It includes even repair, finishing, oiling or cleaning process <b>with view to its use, sale, transport, delivery or disposal</b>.</li> <li>➤ It <b>cannot be restricted</b> an activity which may result into manufacturing something or production of a commercially different article.</li> <li>➤ The 'manufacturing processes <b>cannot be interpreted in a narrow sense in respect of an act which is meant for the purpose</b> connected with the social welfare.</li> </ul>
Worker [Section 2(l)]	<ul style="list-style-type: none"> <li>➤ A person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process.</li> <li>➤ But <b>does not include any member of the armed forces of the Union</b>.</li> </ul>

<b>Lal Mohammed V. Indian Railway Construction Co. Limited' – AIR 1999 SC 355</b>	
<b>Case Law</b>	<ul style="list-style-type: none"> <li>➤ An 'It was held that all the workers employed by a construction company would squarely attract the definition of the term</li> <li>➤ Working for remuneration in a manufacturing process carried out by the project.</li> </ul>
<b>Factory [Section 2(m)]</b>	<ul style="list-style-type: none"> <li>➤ Any premises including the precincts thereof whereon <b>ten or more workers are working, or were working on any day of the preceding twelve months</b>, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or</li> <li>➤ whereon <b>twenty or more workers are working, or were working on any day of the preceding twelve months</b>, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-</li> <li>➤ But does not include a mine subject to the operation of the Mines Act, 1952 or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place.</li> </ul>

**Seelan Raj V. Presiding Officer, I Additional Labor Court, Chennai' – 2001 LLR 418**

<b>Case Law</b>	<ul style="list-style-type: none"> <li>➤ An electronic data processing unit or a computer unit is installed in any premises or part thereof would not render a unit into a factory if no manufacturing process is carried on in such premises or part thereof.</li> <li>➤ The State Government may make rules relating to approval, licensing and registration of factories.</li> <li>➤ No factory can run without such license or approval.</li> <li>➤ Power to de-license and deregister is also with the State Government.</li> </ul>
<b>Occupier Section 2(n)</b>	<ul style="list-style-type: none"> <li>➤ Occupier' of a factory as the person who has ultimate control over the affairs of the factory.</li> <li>➤ In the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;</li> <li>➤ In the case of a company, any one of the directors shall be deemed to be the occupier.</li> <li>➤ In the case of a factory owned or controlled by the Central Government or anyState Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier.</li> </ul>

<b>Notice by occupier [Section 7]</b>	The occupier shall, <b>at least 15 days before he begins to occupy or use any premises as a factory, Send to the Chief Inspector</b> <ul style="list-style-type: none"> <li>➢ <b>Written notice</b> containing the name and situation of the factory</li> <li>➢ <b>The name and address of the occupier</b></li> <li>➢ <b>The nature of manufacturing process</b></li> <li>➢ <b>The details of workers etc.,</b></li> <li>➢ New manager is appointed, <b>the occupier shall send to the Inspector a written notice and to the Chief Inspector a copy thereof within seven days</b> from the date on which such person takes over charge.</li> </ul>
<b>Duties of Occupier [Section 7 A]</b>	Every occupier shall ensure, so far as is reasonably practicable, <b>the health, safety and welfare of all workers while they are at work in the factory</b>
<b>Responsibility of Occupier</b>	<ul style="list-style-type: none"> <li>✓ To lay down a <b>detailed policy with respect to the health and safety of the workers</b></li> <li>✓ To disclose <b>all the information regarding dangers including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes to the workers employed in the factory;</b></li> <li>✓ To draw up an <b>onsite emergency plan and detailed disaster control measures for the factory and make known to the workers and to the general public living in the vicinity of the factory, the safety measures required to be taken in the event of accident taking place.</b></li> <li>✓ To lay down <b>measures for the handling usage, transportation and storage of hazardous substances inside the factory premises and the disposal of such substances outside the factory premises and publicize them in the manner prescribed among the workers and the general public living in the vicinity.</b></li> <li>✓ Section 41C provides that the occupier is having <b>specific responsibilities in relation to hazardous processes.</b></li> <li>✓ Maintain the <b>health records</b> of the employees. .</li> </ul>
<b>Inspectors (Section 8)</b>	The <b>State Government may, by notification in the Official Gazette</b> , appoint any person as <ul style="list-style-type: none"> <li>✓ Chief Inspector</li> <li>✓ Additional Chief Inspectors, Joint Chief Inspectors and Deputy Chief Inspectors</li> <li>✓ District Magistrate</li> <li>✓ Public officers</li> <li>✓ Every <b>other officer appointed under this section shall be deemed to be a public servant</b> within the meaning of the Indian Penal Code (45 of 1860),</li> </ul>
	<ul style="list-style-type: none"> <li>✓ <b>Examination:</b> Make examination of the premises, plant, machinery, article or substance.</li> <li>✓ <b>Inquire:</b> Inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry;</li> <li>✓ <b>Produce:</b> Require the production of any prescribed register or any other document relating to the factory;</li> </ul>

<b>Powers of Inspectors [Section 9]</b>	<ul style="list-style-type: none"> <li>✓ <b><u>Seize</u></b> : Seize, or take copies of, any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which he has reason to believe, has been committed;</li> <li>✓ <b><u>Measurements</u></b> : Take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination under clause (b), taking with him any necessary instrument or equipment;</li> <li>✓ <b><u>Article or Substance</u></b>: In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test.</li> <li>✓ <b><u>Evidence</u></b>: No person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself.</li> </ul>
<b>Certifying Surgeons [Section 10]</b>	<ul style="list-style-type: none"> <li>✓ <b><u>Appoint</u></b> : The State Government may appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act.</li> <li>✓ <b><u>References</u></b> : A certifying surgeon shall be deemed to include references to any qualified medical practitioner when so authorized.</li> <li>✓ <b><u>Authorize</u></b> : No person shall be appointed to be, or authorized to exercise the powers of, a certifying surgeon, or having been so appointed or authorized, continue to exercise such powers, who is, or becomes the occupier of a factory.</li> <li>✓ <b><u>Certification</u></b>: The examination and certification of young persons under this Act;</li> <li>✓ <b><u>Dangerous</u></b>: The examination of persons engaged in factories in such dangerous occupations or process.</li> <li>✓ <b><u>Medical supervision</u></b> : The exercising of such medical supervision as may be prescribed for any factory or class</li> <li>✓ <b><u>Illness</u></b> : In cases of illness have occurred which it is reasonable to believe are due to the nature of the manufacturing process carried on, or other conditions of work prevailing, therein;</li> <li>✓ <b><u>Substances</u></b> : Any change in the manufacturing process carried on or in the substances used therein or by reason of the adoption of any new manufacturing process or of any new substance for use in a manufacturing process,</li> <li>✓ <b><u>Cause Injury</u></b> : Young persons are, or are about to be, employed in any work which is likely to cause injury to their health.</li> <li>✓ <b><u>Qualified medical practitioner</u></b> " means a person holding a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act,</li> </ul>

<b>Health Aspects of the Worker</b>	
<b>Occupier of the Factory</b>	<ul style="list-style-type: none"> <li>➢ Cleanliness;</li> <li>➢ Disposal of Waste and Effluents;</li> <li>➢ Ventilation and Temperature;</li> <li>➢ Dust and Fume;</li> <li>➢ Artificial Humidification;</li> <li>➢ Overcrowding;</li> <li>➢ Lighting</li> <li>➢ Drinking Water;</li> <li>➢ Latrines And Urinals;</li> <li>➢ Spittoons</li> </ul>
<b>Cleanliness [Section 11]</b>	<p>Every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and in particular-</p> <ul style="list-style-type: none"> <li>✓ Removal of accumulated dirt and refuse on floors, benches of workroom, stair cases and passages and effective disposal of the same;</li> <li>✓ Cleaning of the floor of every workroom – once in every week by washing with disinfectant or by some other effective method;</li> <li>✓ Providing effective drainage for removing water to the extent possible</li> </ul> <p><u>To ensure that interior walls and roofs etc., are kept clean the following is to be complied with-</u></p> <ul style="list-style-type: none"> <li>✓ White wash or color wash should be carried out at least once in every period of 14 months</li> <li>✓ Surface has been painted or varnished, repair or revarnish should be carried out once in every five years, if washable then once in every period of six months</li> <li>✓ Painted or varnished or where they have smooth impervious surface, it should be cleaned once in every period of 14 months by such method as may be prescribed.</li> <li>✓ All doors, windows and other framework which are of wooden or metallic shall be kept painted or varnished at least once in every period of five years</li> <li>➢ The dates on which such processes are carried out shall be entered in the prescribed register</li> </ul>
<b>Disposal of wastes and effluents [Section 12]</b>	<ul style="list-style-type: none"> <li>➢ Effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein.</li> </ul>
<b>Disposal of wastes and effluents [Section 12]</b>	<ul style="list-style-type: none"> <li>➢ Effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein.</li> </ul>
<b>Ventilation and Temperature [Section 13]</b>	<ul style="list-style-type: none"> <li>➢ Must be provision for adequate ventilation by the circulation of fresh air.</li> <li>➢ The temperature must be kept at a comfortable level.</li> <li>➢ Hot parts of machines must be separated and insulated.</li> </ul>
<b>Dust and Fume [Section 14]</b>	<ul style="list-style-type: none"> <li>✓ If the manufacturing process used, gives off injurious or offensive dust and fume steps must be taken so that they are not inhaled or accumulated.</li> <li>✓ The exhaust fumes of internal combustion engines must be conducted outside the factory.</li> </ul>

<b>Artificial humidification [Section 15]</b>	<ul style="list-style-type: none"> <li>✓ Prescribing standards of humidification</li> <li>✓ Regulating the methods used for artificially increasing the humidity of the air</li> <li>✓ Directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded</li> <li>✓ Prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the workrooms.</li> </ul>
<b>Overcrowding [Section 16]</b>	<ul style="list-style-type: none"> <li>✓ No room in any factory shall be overcrowded to an extent injurious to the health of the workers employed therein.</li> <li>✓ Shall be in every workroom in a factory at least 14.2 cubic meters of space for every worker employed therein.</li> </ul>
<b>Lighting [Section 17]</b>	<ul style="list-style-type: none"> <li>✓ Every part of a factory where workers are working or passing there shall be provided and maintained sufficient and suitable lighting, nature or artificial or both.</li> <li>✓ All glazed windows and skylights used for the lighting shall be kept clean on both the inner and outer surfaces and free from obstruction.</li> <li>✓ Effective provisions shall be made for the prevention of glare, either directly from a source of light or by reflection from a smooth or polished surface and the formation of shadows to such an extent as to cause eye strain or the risk of accident to any worker.</li> </ul>
<b>Drinking water [Section 18]</b>	<ul style="list-style-type: none"> <li>✓ Effective arrangements shall be made to provide and maintain at suitable points conveniently situated for all workers employed a sufficient supply of wholesome drinking water.</li> <li>✓ More than 250 workers are employed provision shall be made for cool drinking water during hot weather.</li> <li>✓ The water points shall be away six meters from any washing place, urinal, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination.</li> </ul>
<b>Latrines and urinals [Section 19]</b>	<ul style="list-style-type: none"> <li>✓ Sufficient latrine and urinal accommodation of prescribed types shall be provided conveniently situated and accessible to workers at all times while they are at factory;</li> <li>✓ Separate enclosed accommodation shall be provided for male and female workers;</li> <li>✓ Shall be adequately lighted and ventilated</li> <li>✓ Shall be maintained in a clear and sanitary conditions at all times;</li> <li>✓ Sweepers shall be employed to keep clean latrines, urinals and washing places.</li> </ul>
	<ul style="list-style-type: none"> <li>✓ If there are more than 250 workers are employed all latrine and urinal accommodation shall be of prescribed types.</li> <li>✓ The latrines and urinals shall be washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.</li> </ul>
<b>Spittoons [Section 20]</b>	<ul style="list-style-type: none"> <li>✓ Shall be provided a sufficient number of spittoons in convenient places.</li> <li>✓ Shall be maintained in a clean and hygienic condition</li> </ul>

<b>Safety</b>	<ul style="list-style-type: none"> <li>✓ Fencing of machinery;</li> <li>✓ Work on or near machinery in motion;</li> <li>✓ Employment of young persons on dangerous machines;</li> <li>✓ Striking gear and devices for cutting off power;</li> <li>✓ Self-acting machines;</li> <li>✓ Casing of a new machinery;</li> <li>✓ Prohibition of employment of women and children near cotton openers;</li> <li>✓ Lifting machines, chains, ropes and lifting tackles;</li> <li>✓ Revolving machinery;</li> <li>✓ Floors, stairs and means of access;</li> <li>✓ Pits, sumps openings in floors etc.,;</li> <li>✓ Excessive weights;</li> <li>✓ Protection of eyes;</li> <li>✓ Precaution against dangerous fumes, gases, etc.,</li> <li>✓ Precautions regarding the use of portable electric light;</li> <li>✓ Explosive or inflammable dust, gas etc.,</li> <li>✓ Precaution in case of fire;</li> <li>✓ Safety on buildings and machinery;</li> <li>✓ Maintenance of buildings;</li> <li>✓ Appointment of safety officers.</li> </ul>
<b>Welfare</b>	<ul style="list-style-type: none"> <li>✓ Washing Facilities</li> <li>✓ Facilities For Storing and Drying Clothing</li> <li>✓ Facilities for Sitting</li> <li>✓ First Aid Appliances</li> <li>✓ Canteens</li> <li>✓ Shelters, Rest Rooms and Lunch Rooms</li> <li>✓ Crèches</li> <li>✓ Appointment of Welfare Officers.</li> </ul>
<b>Washing facilities [Section 42]</b>	<ul style="list-style-type: none"> <li>✓ Every factory <b>adequate and suitable facilities for washing shall be provided and maintained</b> for the use of the workers.</li> <li>✓ Separate and adequately <b>screened facilities shall be provided for the use of male and female workers</b>.</li> <li>✓ The washing facility shall be <b>conveniently accessible and shall be kept clean</b>.</li> </ul>
<b>Facilities for Storing Drying Clothing [Section 43]</b>	<ul style="list-style-type: none"> <li>✓ The State Government may, in <b>respect of any factory or class or description of factories</b>.</li> <li>✓ To make rules <b>requiring the provision therein of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing</b>.</li> </ul>
<b>Facilities for sitting [Section 44]</b>	<ul style="list-style-type: none"> <li>✓ Arrangements shall be <b>made for workers to sit and take rest where their work involves a standing posture</b>.</li> </ul>
<b>First Aid appliances [Section 45]</b>	<ul style="list-style-type: none"> <li>✓ First aid boxes containing essential medicines, including cotton must be provided for <b>every department with not less than 150 workers</b>.</li> <li>✓ Where in a factory, <b>500 or more workers are employed, the occupier should provide an ambulance room</b>.</li> </ul>
<b>Canteen [Section 46]</b>	<ul style="list-style-type: none"> <li>✓ Factories employing <b>250 or more workers shall provide one or more canteens</b> as per the rules of the State government.</li> <li>✓ A <b>managing committee consisting of representatives of employees and employers</b> should manage such canteens.</li> </ul>
<b>Shelters, rest rooms and lunch rooms [Section 47]</b>	<ul style="list-style-type: none"> <li>✓ Suitable <b>shelters, rest rooms, lunch rooms with provision for drinking water</b> shall be provided.</li> <li>✓ For every factory <b>employing 150 or more workers</b>.</li> </ul>

<b>Creche [Section 48]</b>	<ul style="list-style-type: none"> <li>✓ If more than 30 women workers are employed there shall be provided and maintained a suitable room for the use of children under the age of 6 years of such women.</li> <li>✓ The same shall be adequately ventilated and shall be maintained in clear and sanitary conditions and under the charge of women trained in the care of children and infants.</li> </ul>
<b>Welfare Officers [Section 49]</b>	<ul style="list-style-type: none"> <li>✓ If 500 or more than workers are employed in a factory, the occupier shall employ in the factory such number of welfare officers as may be prescribed.</li> <li>✓ Shyam Vinyals Limited V. T. Prasad' – (1993) 83 FJR 18 (SC)</li> </ul>
<b>Working Hours of Adults</b>	
<b>Working Hours</b>	<ul style="list-style-type: none"> <li>✓ Provides for working hours in a day, weekly working hours, weekly holidays, intervals for rest. Spread over of duty, night shift etc.,</li> <li>✓ No adult worker shall be required or allowed to work in factory for more than nine hours in any day [Section 54]</li> <li>✓ The periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that the worker shall work for more than five hours before he has had an interval for rest of at least half an hour [Section 55]</li> <li>✓ Provides that the periods of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest, they shall not spread over more than ten and half hours in any day [Section 56]</li> <li>✓ No adult worker shall be required or allowed to work in a factory for more than 48 hours in any week [Section 51]</li> <li>✓ Richa &amp; Company V. Shri Suresh Chand' – 2009 LLR 333 (SN) (Del HC) it was held that increase of 15 minutes working will not be violative of Section 51 of the Act.</li> </ul>
<b>Weekly holidays</b>	<ul style="list-style-type: none"> <li>➤ No adult worker shall be required or allowed to work in a factory on the first day of the week unless-</li> <li>➤ In such cases, one day holiday must be given either out of the 3 days preceding the Sunday or out of the 3 days succeeding the Sunday.</li> <li>➤ Manager shall deliver a notice to the office of the inspector expressing his intention to that effect.</li> <li>➤ Furthermore, notice must also be displayed in the factory, intimating such change.</li> <li>➤ No substitution can however be made, in such a way that it makes a worker to work for more than 10 days consecutively.</li> <li>➤ Sunday, shall for the purpose of calculating weekly hours of work be included in the preceding week, where any worker works on a Sunday.</li> </ul>

<b>Motor and Machinery Manufacturers Limited V. State of West Bengal' – 1964</b>	
<b>Case Law</b>	<ul style="list-style-type: none"> <li>✓ It was held that the <b>primary object of the Section 52 is to provide weekly holiday for the workers</b> and such day was fixed to be the first day of the week i.e., Sunday.</li> <li>✓ But for any special reasons, it becomes <b>necessary to make Sunday the working day</b>, a <b>substitutional holiday</b> is made compulsory.</li> <li>✓ Employers will at their sweet convert successive on all the <b>Sundays primarily intended to be holidays as working days</b> and make any other working day of the week a holiday instead of Sunday.</li> </ul>
<b>Compensatory Holidays [Section 53]</b>	<ul style="list-style-type: none"> <li>✓ If a worker is deprived of <b>any of the weekly holidays he shall be allowed within the month</b> in which the holidays were due to him.</li> <li>✓ Within <b>two months immediately following that month, compensatory holidays of equal number</b> to the holidays so lost shall be given.</li> </ul>
<b>Shift Duty [Section 57]</b>	<ul style="list-style-type: none"> <li>✓ Worker in a factory works on a <b>shift which extends beyond midnight</b>.</li> <li>✓ Holiday for a whole day shall mean in his case a period of <b>24 consecutive hours beginning when his shift ends</b>.</li> <li>✓ The following day for him shall be deemed to be the period of <b>24 hours beginning when such shift ends</b>, and the hours he has worked <b>after midnight shall be counted in the previous day</b>.</li> <li>✓ Section 58 provides that the <b>work shall not be carried on in any factory by means of a system of shifts</b> so arranged that more than <b>one relay of workers is engaged in work of the same kind at the same time</b>.</li> </ul>
<b>Overtime [Section 59]</b>	<ul style="list-style-type: none"> <li>✓ Worker works in a factory <b>for more than 9 hours in any day or for more than 48 hours in any week</b>, he shall, in respect of the overtime work, be entitled to wages at the <b>rate of twice his ordinary rate of wages</b>.</li> </ul>
<b>Case Law</b>	<b>Beawar V. Labor Court, Jaipur' – 1997</b>
<b>Double employment [Section 60]</b>	<ul style="list-style-type: none"> <li>✓ Creates an obligation on the employer <b>to pay extra wages for overtime if a worker works for more than 9 hours in any day or for more than 48 hours in any week</b>.</li> <li>✓ <b>No adult worker shall be required or allowed to work in any factory on any day on which he has already been working</b> in any other factory.</li> </ul>
<b>Register of adult workers</b>	<ul style="list-style-type: none"> <li>✓ <b>The name of each adult worker</b> in the factory</li> <li>✓ <b>The nature of the work</b></li> <li>✓ <b>The group</b>, if any, in which he is included</li> <li>✓ <b>Group works on shifts</b>, the relay to which he is allotted</li> <li>✓ <b>Such other particulars as may be prescribed</b>.</li> </ul>

<b>Employment of women [Section 66]</b>	<ul style="list-style-type: none"> <li>✓ Application to <b>women in factories</b>, be supplemented by the following further restrictions</li> <li>✓ <b>No exemption from the provisions of Section 54</b> may be granted in respect of any woman;</li> <li>✓ <b>No woman shall be required or allowed</b> to work in any factory except between the hours of <b>6 a.m. and 7 p.m.</b></li> <li>✓ <b>State Government</b> may authorize the <b>employment of any women between the hours of 10 p.m. and 5 a.m.</b></li> <li>✓ <b>No change of shifts except after a weekly holiday or any other holiday.</b></li> </ul>
<b>Prohibition of employment of young children [Section 67]</b>	<ul style="list-style-type: none"> <li>✓ No child who <b>has not completed his 14th year</b> shall be <b>required or allowed to work</b> in any factory.</li> </ul>
<b>Adolescent worker [Section 68]</b>	<ul style="list-style-type: none"> <li>➤ <b>Child who has completed his 14th year or an adolescent shall not be allowed to work in any factory</b></li> <li>➤ Unless a <b>certificate of fitness</b> granted is in the custody of the <b>manager of the factory</b>.</li> <li>➤ Such child or adolescent carries while he is at work a token giving a reference to such certificate.</li> </ul>
<b>Certificate of fitness [Section 69 (1)]</b>	<ul style="list-style-type: none"> <li>➤ Certifying Surgeon shall, <b>on the application of any young person or his parent or guardian</b> accompanied by a document signed by the Manager of a factory that such person will be employed therein if certified to be fit for work in a factory.</li> <li>➤ On the <b>application of the Manager of the factory in which any young person wishes to work</b>, examine such person and ascertain his fitness for work in a factory.</li> </ul>
<b>Certifying Surgeon Section 69 [2] Grant or Renew</b>	<ul style="list-style-type: none"> <li>➤ Certificate of fitness to work in a factory <b>as a child</b>, if he is satisfied that the young person has completed his 14th year, that he has attained the prescribed physical standards and that he is fit for such work;</li> <li>➤ Certificate of fitness to work in a factory <b>as an adult</b>, if he is satisfied that the young person has completed his 15th year and is fit for a full day's work in a factory.</li> <li>➤ The certificate granted by the certifying surgeon shall be valid for a period 12 months from the date thereof.</li> <li>➤ Shall revoke any certificate granted or renewed if in his opinion the holder of it is <b>no longer fit to work in capacity</b> stated therein in a factory.</li> <li>➤ Certifying surgeon refuses to give certificate, he has to give reasons for the same.</li> <li>➤ If a certificate is given under certain conditions, the young person shall not be allowed in any factory except in accordance with those conditions.</li> <li>➤ The occupier is to pay the fee for getting the certificate from the certifying surgeon and the same shall not be recovered from the young person, his parents or guardian.</li> </ul>
<b>Working hours for children [Section 71]</b>	<ul style="list-style-type: none"> <li>➤ No child shall be <b>employed or permitted to work in any factory for more than four and a half hours in any day</b> and during night.</li> <li>➤ The <b>period of work of all children employed in a factory shall be limited to two shifts</b> which shall not overlap or spread over more than five hours each.</li> <li>➤ Each child shall be employed in only one of the relays which shall not, except with the previous permission.</li> <li>➤ No female child shall be allowed to work in any factory except between <b>8 a.m. and 7 p.m.</b></li> </ul>

<b>Register of child workers [Section 73]</b>	Manager of every factor in which <b>children are employed shall maintain a register of child workers showing-</b> <ul style="list-style-type: none"> <li>➤ Name of each child worker in the factory;</li> <li>➤ Nature of his work;</li> <li>➤ Group, if any, in which he is included;</li> <li>➤ His group works on shifts, the relay to which he is allotted; and</li> <li>➤ The number of his certificate of fitness granted under Section 69.</li> </ul>
<b>Annual leave [Section 79]</b>	<ul style="list-style-type: none"> <li>➤ Every worker who has <b>worked for a period 240 days or more in a factory</b> during a calendar year shall be allowed leave with wages for a number days calculated at the rate of-           <ul style="list-style-type: none"> <li>➤ Adult, <b>one day for every 20 days of work</b> performed by him <b>during the previous calendar year</b></li> <li>➤ Child, <b>one day for every 15 days of work</b> performed by him <b>during the previous calendar year</b>.</li> </ul> </li> </ul>
<b>Annual Leave (Computation of the Period)</b>	<ul style="list-style-type: none"> <li>➤ Any days of lay off, by agreement or contract or as permissible under the standing orders.</li> <li>➤ In the case of a female worker, <b>maternity leave for any number of days not exceeding 26 weeks</b></li> <li>➤ The leave admissible shall be exclusive of all holidays whether occurring <b>during or at either end</b> of the period of leave.</li> <li>➤ In calculating the leave fraction of leave of half a day or more shall be treated as one full day's leave and fraction of less than half a day shall be omitted.</li> </ul>
<b>Carry forward of leave</b>	<ul style="list-style-type: none"> <li>➤ The total number of leave that may be <b>carried forward shall not exceed 30 days in the case of an adult.</b></li> <li>➤ <b>40 days in the case of a child.</b></li> <li>➤ A worker, who has applied for leave with wages but has not been granted, shall be entitled to carry forward the leave refused without any limit.</li> </ul>
<b>Availing of leave</b>	<ul style="list-style-type: none"> <li>➤ Worker may, at any time, <b>apply in writing to the Manager not less than 15 days before the date</b> on which he wishes his leave to begin.</li> <li>➤ <b>Application shall be made not less than 30 days before the date</b> on which he wishes his leave to begin, if he is employed in a <b>public utility service</b>.</li> <li>➤ An application for leave <b>shall not be refused unless refusal is in accordance with the scheme</b> for the time being in operation.</li> </ul>
<b>Wages during leave period [Section 80]</b>	<ul style="list-style-type: none"> <li>➤ Worker shall be entitled to <b>wages at a rate equal to the daily average of his total full time earnings for the days</b> on which he actually worked during the month immediately preceding his leave.</li> <li>➤ <b>Exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale</b> to the worker of food grains and other articles.</li> <li>➤ In case of a worker who <b>has not worked on any day during the calendar month</b> immediately preceding his leave, he shall be paid at a <b>rate equal to the daily average of the total full time earnings for the days on which he actually worked</b> during the last calendar month preceding his leave, in which he actually worked.</li> </ul>
<b>Advance payment [Section 81]</b>	<ul style="list-style-type: none"> <li>➤ Worker who has been <b>allowed leave for not less than four days, in case of an adult.</b></li> <li>➤ <b>Five days, in the case of a child,</b> shall, before his leave begins be paid the wages due for the period of the leave allowed.</li> </ul>

<b>Encashment of leave [Section 79 [3]]</b>	<ul style="list-style-type: none"> <li>➤ If a worker is <b>discharged or dismissed from services or quits his employment or is superannuated or dies while in service</b>, during the course of the calendar year.</li> <li>➤ <b>Employee or his heir or nominee, shall be entitled to the wages in lieu of the quantum of leave to which he was entitled immediately before such termination of his services.</b></li> <li>➤ Such payment shall be made before the expiry of the second working day from the date of discharge, dismissal or quitting.</li> <li>➤ The worker is <b>superannuated or dies while in service, before the expiry of two months</b> from the date of such superannuation or death.</li> </ul>
<b>Penalties</b>	<ul style="list-style-type: none"> <li>➤ Any contravention of any of the provisions of this Act or of any rules made there under or of <b>any order in writing given, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to 2 years or with fine which may extend to Rs.1 lakh or with both.</b></li> <li>➤ If the <b>contravention is continued after conviction, with a further fine which may extend to Rs. 1,000 for each day on which the contravention so continued.</b></li> </ul>
<b>Accident Causing Death or Serious Bodily Injury</b>	<ul style="list-style-type: none"> <li>➤ If the contravention <b>resulted in an accident causing death or serious bodily injury</b>, the fine shall not be less than Rs. 25,000 <b>in the case of an accident causing death, and Rs. 5,000 in the case of accident causing serious bodily injury.</b></li> <li>➤ Case Law : <b>General Manager, Wheel and Axle Plant, Bangalore V. State of Karnataka'</b></li> <li>➤ It was held that where an offence, has been committed by an officer of the Railways.</li> <li>➤ <b>Public servant within the meaning of Section 21 of the Indian Penal Code, the requirement of obtaining sanction to prosecute is mandatory and taking cognizance of an offence in the absence of sanction cannot be allowed to stand.</b></li> </ul>
<b>Liability of owners [Section 93]</b>	<ul style="list-style-type: none"> <li>➤ Any premises <b>separate buildings are leased to different occupiers for use as separate factories</b>, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services, such as <b>approach roads, drainage, water supply, lighting and sanitation.</b></li> <li>➤ The <b>owners of the premises shall be liable as if they were the occupier or manager</b> of a factory for any contravention of the provisions of this Act.</li> </ul>
<b>Enhanced penalty [Section 94]</b>	<ul style="list-style-type: none"> <li>➤ Any person who has been convicted of any offence punishable under Section 92 of the Act is <b>again guilty of an offence involving a contravention of the same provision</b>, he shall be <b>punishable on a subsequent conviction with imprisonment for a term which may extend to 3 years or with fine which shall not be less than Rs. 10,000 but which may extend to Rs.2 lakhs or with both.</b></li> <li>➤ The Court may, for <b>any adequate and special reasons recorded in writing, impose of a fine of less than Rs. 10,000.</b></li> <li>➤ No cognizance shall be taken of any conviction <b>made more than 2 years before the commission of the offence</b> for which the person is subsequently convicted.</li> </ul>

<b>Penalty for obstructing Inspector [Section 95]</b>	<ul style="list-style-type: none"> <li>➤ Willfully <b>obstructs an Inspector in exercise</b> of any power conferred.</li> <li>➤ <b>Fails to produce on demand</b> any registers or other documents in his custody before the Inspector.</li> <li>➤ Conceals or prevents any worker in a factory from appearing before being examined by, an Inspector shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 10,000 or with both.</li> </ul>
<b>Penalty for contravention of the provisions relating to hazardous process [Section 96 A]</b>	<ul style="list-style-type: none"> <li>➤ Whoever fails to comply with or contraventions any of the provisions of Section 41B, 41C or 41H or the rules made there under, shall, in respect of such failure or contravention.</li> <li>➤ Punishable with imprisonment for a term which may extend to seven years and with fine which may extend to</li> </ul>
<b>Offences by workers [Section 97]</b>	<ul style="list-style-type: none"> <li>Rs. 2 lakhs.</li> <li>➤ In case of the <b>failure or contravention continues</b>, with additional fine which may extend to Rs. 5,000 for every day during which such failure or contravention continues after the conviction for the <b>first such failure or contravention</b>.</li> <li>➤ If the failure or contravention continues beyond a period of 1 year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to 10 years.</li> </ul>
<b>Penalty for using false certificate of fitness [Section 98]</b>	<ul style="list-style-type: none"> <li>➤ If any <b>worker employed in a factory contravenes</b> any <b>provision</b> of this Act or any rules or by order made there under.</li> <li>➤ Imposing any <b>duty or liability</b> on workers, shall be punishable with fine which may extend to Rs.500.</li> </ul>
<b>Penalty for permitting double employment of child [Section 99]</b>	<ul style="list-style-type: none"> <li>➤ Whoever knowingly uses or attempts to use, as a <b>certificate of fitness</b> granted to himself a <b>certificate granted to another person</b> or who, having procured such a certificate, knowingly allows it to be used, or an attempt to use it to be made, by another person.</li> <li>➤ Shall be punishable with imprisonment for a term which may extend to 2 months or with fine which may extend to Rs.1,000 or with both.</li> </ul>

**REVIEW QUESTIONS**

1. Explain the meaning of the term 'factory' and describe its nature
2. Write short notes on the following
  - a) Manufacturing Process
  - b) Occupier
  - c) Hazardous process
  - d) General Duties of an Occupier
3. Distinguish between the following Young person and Adult under the Factories Act. 1948
4. Explain the special provisions relating to hazardous processes under the Factories Act, 1948
5. Explain the provisions relating to health of workers under the Factories Act, 1948?
6. Explain the factors which are responsible for safety measures in factories. Describe these factors, in brief.
7. Enumerate the welfare facilities provided to workers inside and outside the factory premises?
8. Explain the provisions relating to employment of women under the Factories Act, 1948?
9. Write short notes on the following
  - a. Employment of women workers in factories
  - b. Employment of young children in factories
  - c. Working hours for children
  - d. Leave provision



**RR Academy**

## UNIT 8

### PAYMENT OF GRATUITY ACT, 1972

<b>Introduction</b>	<ul style="list-style-type: none"> <li>➤ Term 'Gratuity' is derived from the Latin word 'Gratuitous'.</li> <li>➤ Gratuity' is the payment made by the employer to the employee at the time of termination of his service.</li> <li>➤ Either by retirement on superannuation or on resignation or on termination of the service.</li> <li>➤ Old age retiral social security benefit.</li> <li>➤ A lump sum is payable in consideration of the past services rendered by the employee.</li> <li>➤ The payment of gratuity will be a relief to the retired employee or to the family members of the employee who dies during his service.</li> <li>➤ To carry out the provisions of the Act the Central Government made 'The Payment of Gratuity Rules, 1972 which came into force with effect from 16th September, 1972.</li> <li>➤ Case Law: Burhanpur Tapti Mills Limited V. Burhanpur Tapti Mills Mazdoor Sangh'</li> <li>➤ It was held that it is a gratuitous payment extended to an employee on retirement or discharge, in addition to the retrial benefits payable to the employee.</li> </ul>
<b>Object</b>	<ul style="list-style-type: none"> <li>➤ Payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto</li> <li>➤ Employing 10 or more persons (with aid of power) and 20 (without aid of power).</li> </ul>
<b>Important Definitions</b>	
<b>Appropriate Government [Section 2 (a)]</b>	<p>Appropriate Government' as- in relation to an establishment</p> <ul style="list-style-type: none"> <li>✓ belonging to, or under the control of, the Central Government</li> <li>✓ having branches in more than one State</li> <li>✓ of a factory belonging to, or under the control of, the Central Government</li> <li>✓ of a major port, mine, oilfield or railway company - the Central Government, in any other case - the State Government</li> </ul>
<b>Employee [Section 2 (e)]</b>	<ul style="list-style-type: none"> <li>➤ Employee' as any person, other than an apprentice, who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies.</li> <li>➤ But does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.</li> </ul>

	<ul style="list-style-type: none"> <li>➤ Ahmedabad Private Primary Teachers Association V. Administrative Officer' – AIR 2004 SC 1426 it was held that teacher was held to be not an employee under the Act. <b>Payment of Gratuity (Amendment) Act, 2009</b> has amended the definition of 'employee, including teachers in educational institutions within the purview of the Act.</li> </ul>
<b>Important Amendments</b>	<ul style="list-style-type: none"> <li>➤ The amendment has increased the ceiling limit of the maximum amount of gratuity payable in 2010. This upper cap prescribed by Section 4(3) of the Act, has been removed.</li> <li>➤ Section 4(5) of the Act prescribes that if the terms of employment contract provide for a higher amount of gratuity over and above the ceiling limit stated in the Act, then the employee will be entitled to such higher amount.</li> <li>➤ Ceiling of gratuity for Central Government employees has been enhanced from Rs. 10 lakhs to Rs.20 lakhs.</li> <li>➤ The amendment has modified the maternity leave period from twelve weeks to twenty-six weeks in order to keep the Act in tune with the recently amended Maternity Benefit Act.</li> </ul>
<b>Employer [Section 2 (F)]</b>	<ul style="list-style-type: none"> <li>➤ Employer', in relation to any establishment, factory, mine, oilfield, port, Railway Company or shop- belonging to, or under the control of, the Central Government or a State Government.</li> <li>➤ A person or authority appointed by appropriate Government for the supervision or control of employees, no person or authority has been so appointed, the head of the Ministry or the Department concerned belonging to, or under the control of, any local authority, the person appointed by such authority for supervision and control of employees or where no person has been so appointed, the Chief Executive Officer of the local authority;</li> <li>➤ In any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oil field, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person.</li> </ul>
<b>Family [Section 2 (h)]</b>	<ul style="list-style-type: none"> <li>✓ In case of a male employee, himself, his wife, his children, whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son, if any,</li> <li>✓ In the case of a female employee, herself, her husband, her children, whether married or unmarried, her dependent parents and the dependent parents of her husband and the widow and children of her predeceased son, if any. [Section 2(h)]</li> <li>✓ The personal law of an employee permits the adoption by him of a child, any child lawfully adopted by him shall be deemed to be included in his family.</li> <li>✓ Any child of an employee has been adopted by another person and such adoption is, under the personal law of the person making such adoption lawful, such child shall be deemed to be excluded from the family of the employee.</li> </ul>

	<ul style="list-style-type: none"> <li>✓ Rule 5 provides that a notice under the proviso to sub clause (ii) of clause (h) of section 2 shall be in <b>Form D</b> and sent in triplicate by the employee to the employer, who shall, after recording its receipt on one copy thereof, return the copy to the employee.</li> <li>✓ Send the second copy to the controlling authority of the area.</li> <li>✓ Rule 5(2) provides that an employee may withdraw the notice referred to in sub-rule (1) by giving another notice in triplicate in <b>Form 'E'</b> to the employer, who shall follow the same procedure as in sub- rule (1).</li> </ul>
<b>Retirement [Section 2(q)]</b>	<ul style="list-style-type: none"> <li>➤ Term 'retirement' as termination of the service of an employee otherwise than on superannuation.</li> </ul>
<b>Superannuation [Section 2 (r)]</b>	<ul style="list-style-type: none"> <li>➤ Superannuation' as in relation to an employee, the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment.</li> </ul>
<b>Wages [Section 2(s)]</b>	<ul style="list-style-type: none"> <li>➤ All emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or payable to him in cash and includes dearness allowance.</li> <li>➤ But does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.</li> </ul>
<b>Continuous Service [Section 2 A]</b>	<ul style="list-style-type: none"> <li>✓ Continuous service' for a period if he has, for that period been in un- interrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave, layoff, strike or a lock-out or cessation of work not due to any fault of the employee.</li> <li>✓ Such uninterrupted or interrupted service was rendered</li> </ul>
<b>Non Seasonal Establishment</b>	<ul style="list-style-type: none"> <li>✓ Not being a employee employed in Seasonal Establishment is not in Continuous service for any period of 1 year or 6 months shall be deemed to continuous service under the employer</li> </ul>
<b>For the said period of one year</b>	<p>If the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than:</p> <ul style="list-style-type: none"> <li>❖ <b>190 days in the case of an employee</b> employed below the ground in a mine or in an establishment which works for less than six days in a week.</li> <li>❖ <b>240 days in any other case.</b></li> </ul>
<b>For the said period of six months</b>	<p>If the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than:</p> <ul style="list-style-type: none"> <li>❖ <b>95 days, in the case of an employee employed below the ground in a mine</b> or in an establishment which works for less than six days in a week.</li> <li>❖ <b>120 days in any other case.</b></li> <li>❖ If an employee seasonal establishment is not in continuous</li> </ul>

	<b>service of 1 year or 6 months</b> , shall be deemed to be in continuous service for such period, if he has <b>actually worked for not less than 75% of the number of days on which the establishment was in operation during such period.</b>
<b>Computing the days the employee actually worked</b>	<ul style="list-style-type: none"> <li>❖ The days during which the employees was laid off</li> <li>❖ The days during which he has been on leave with full wages</li> <li>❖ The days on which he was absent due to temporary disablement caused by accident arising out of and in the course of his employment.</li> <li>❖ The days during which the female employee was on maternity leave, so however, that the total period of such maternity leave does not exceed 26 weeks.</li> <li>❖ Service is not continuous, <b>in case of legal termination of service and subsequent re-employment.</b></li> </ul>
<b>Disablement</b>	<ul style="list-style-type: none"> <li>➤ Incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.</li> </ul>
<b>Exemption [Section 5]</b>	<ul style="list-style-type: none"> <li>➤ Appropriate Government to give exemption to any establishment from the purview of this Act.</li> <li>➤ If it is satisfied that the employees in such establishment are in receipt of gratuity or pensionary benefits not less favorable than the benefits covered under this Act.</li> </ul>
<b>Notice of openings, change and closure of the establishment [Rule 3]</b>	<ul style="list-style-type: none"> <li>➤ Within thirty days of the rules becoming applicable to an establishment, a notice in Form A shall be submitted by the employer to the Controlling Authority of the area.</li> <li>➤ Notice in Form B shall be submitted by the employer to the controlling authority of the area within thirty days of any change in the name, address, employer or nature of business.</li> <li>➤ Employer intends to close down the business he shall submit a notice in Form C to the controlling authority of the area at least sixty days before the intended closure.</li> </ul>
<b>Display of notice [Rule 4]</b>	<ul style="list-style-type: none"> <li>➤ Employer shall display conspicuously a notice at or near the main entrance of the establishment in bold letters in English and in a language understood by the majority of the employees</li> <li>➤ Specifying the name of officer with designation authorized by the employer to receive on his behalf notices under the Act or the rules.</li> </ul>
<b>Payment of Gratuity [Section 4 (1)]</b>	<p>Gratuity is payable to a person</p> <ul style="list-style-type: none"> <li>❖ Resignation</li> <li>❖ Superannuation</li> <li>❖ Retirement</li> <li>❖ Termination on account of disablement</li> <li>❖ Death</li> </ul> <p>Payable only after an employee completes <b>five continuous years of service</b>.</p> <p>However in the case of death or disablement, the condition of <b>minimum 5 years of continuous service is not applicable.</b></p>
<b>Nomination</b>	<ul style="list-style-type: none"> <li>✓ In the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to the heirs.</li> </ul>

<b>Section 4 (2)</b>	<ul style="list-style-type: none"> <li>✓ Every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an <b>employee at the rate of fifteen days' wages based on the rate of wages last drawn</b> by the employee concerned.</li> <li>✓ In the case of <b>piece-rated employee</b>, <b>daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment</b>, and, for this purpose, the wages paid for any <b>overtime work shall not be taken into account</b>.</li> <li>✓ In the case of an employee employed in a <b>seasonal establishment</b>, the employer shall pay <b>the gratuity at the rate of seven days' wages</b> for each season.</li> </ul>
<b>Section 4(3)</b>	<ul style="list-style-type: none"> <li>➤ The <b>amount of gratuity payable to an employee shall not exceed such amount</b> as may be notified by the Central Government from time to time.</li> <li>➤ Ministry of Labour &amp; Employment vide Notification No. S.O. 1420(E) dated 29th March 2018 has notified that the <b>amount of gratuity payable to an employee under the Act shall not exceed Rs.20 lakhs</b>.</li> </ul>
<b>Section 4(4)</b>	<ul style="list-style-type: none"> <li>➤ Computing the <b>gratuity payable to an employee</b> who is employed, <b>after his disablement, on reduced wages</b>, his wages for the period <b>preceding his disablement</b> shall be taken to be the <b>wages received by him</b> during that period, and <b>his wages for the period subsequent to his disablement</b> shall be taken to be the wages as so reduced.</li> </ul>
<b>Section 4(5)</b>	<ul style="list-style-type: none"> <li>➤ Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.</li> </ul>
<b>Forfeiture of Gratuity Section 4(6)</b>	<ul style="list-style-type: none"> <li>➤ Gratuity of an employee <b>whose services have been terminated for any act of willful omission or negligence causing any damage or loss to, or destruction of, property</b> belonging to the employer, gratuity shall be forfeited to the extent of the damage or loss or caused.</li> <li>➤ The right of forfeiture is limited to the extent of damage.</li> <li>➤ In absence of proof of the extent of damage, the right of forfeiture is not available.</li> </ul>
<b>Forfeiture of Gratuity [Section 4 (6) (b)]</b>	<ul style="list-style-type: none"> <li>✓ For <b>riotous and disorderly conduct or any other act of violence</b> on his part.</li> <li>✓ For any act which constitutes an <b>offence involving moral turpitude</b> provided that such offence is committed by <b>him in the course of his employment</b>.</li> <li>✓ The right of <b>receiving the gratuity by the employee</b> is the <b>statutory right</b>.</li> <li>✓ Once it is <b>eligible to receive the gratuity</b> the employee is entitled to receive the same unless <b>otherwise restricted by the provisions of law</b>.</li> </ul>
<b>KSRTC, Bangalore V. Deputy Labor Commissioner and the Appellate Authority, Bangalore and others' – 2014</b>	
<b>Case Law</b>	<p>Held that right to gratuity is a <b>statutory right and cannot be withheld under any circumstances</b> but for the exception enumerated in Section 4(6) of the Act.</p> <p>Withheld unless <b>specifically permitted by any statutory provision</b>.</p>

<b>D.S. Nakara V. Union of India' – 1982 SCC</b>	
<b>Case Law</b>	Held that gratuity is a social welfare measure rendering socio-economic justice by providing economic security in the fall of life when physical and mental prowess is ebbing, corresponding to ageing process and when, one falls, back on savings. Such payment cannot be withheld unless specifically permitted by any statutory provision
<b>Amount of Gratuity Payable</b>	<ul style="list-style-type: none"> <li>✓ Gratuity is calculated on the basis of the continuous service rendered by the employee, for every completed year of service or part in excess of six months at the rate of fifteen days wages last drawn.</li> <li>✓ Last wage drawn <math>\times \frac{15}{26} \times</math> completed years of service</li> <li>✓ In calculation of gratuity one month is taken as 26 days.</li> </ul>
<b>Nomination [Section 6]</b>	<ul style="list-style-type: none"> <li>✓ Filing nomination for receiving the gratuity after the death of the employee.</li> <li>✓ Each employee, who has completed one year of service, shall make nomination in Form – F</li> <li>✓ May distribute the amount of gratuity payable amongst more than one nominee</li> <li>✓ If an employee has a family at the time of making a nomination, the nomination shall be made in favor of one or more members of his family.</li> <li>✓ Any nomination made by such employee in favor of a person who is not a member of his family shall be void.</li> <li>✓ If at the time of making a nomination the employee has no family, the nomination may be made in favor of any person.</li> <li>✓ Persons but if the employee subsequently acquires a family, such nomination shall forthwith become invalid and the employee shall make, within such time as may be prescribed, a fresh nomination in favor of one or more members of his family;</li> <li>✓ A nomination may, subject to above, be modified by an employee at any time, after giving to his employer a written notice in such form.</li> <li>✓ If a nominee predeceases the employee, the interest of the nominee shall revert to the employee who shall make a fresh nomination, in the prescribed form.</li> <li>✓ Every nomination, fresh nomination or alteration of nomination, as the case may be, shall be sent by the employee to his employer, who shall keep the same in his safe custody.</li> </ul>

<b>Rule 6 (1)</b>	<ul style="list-style-type: none"> <li>✓ Rule 6 (1) provides that a nomination shall be submitted in duplicate by personal service by the employee, after taking proper receipt or by sending through registered post acknowledgement due to the employer.</li> <li>✓ In the case of an employee who is already in employment for a year or more on the date of commencement of these rules, ordinarily, within ninety days from such date.</li> <li>✓ In the case of an employee who completes one year of service after the date of commencement of these rules, ordinarily within thirty days of the completion of one year of service.</li> <li>✓ Nomination in Form 'F' shall be accepted by the employer after the specified period, if filed with reasonable grounds for delay, and no nomination so accepted shall be invalid merely because it was filed after the specified period.</li> </ul>
<b>Rule 6 (2)</b>	<ul style="list-style-type: none"> <li>✓ Within thirty days of the receipt of nomination in Form 'F' under sub-rule (1), the employer shall get the service particulars of the employee, as mentioned in the form of nomination, verified with reference to the records of the establishment.</li> <li>✓ Return to the employee, after obtaining a receipt thereof, the duplicate copy of the nomination in form 'F' duly attested.</li> <li>✓ Either by the employer or an officer authorized in this behalf by him, as a token of recording of the nomination by the employer and the other copy of the nomination shall be recorded.</li> </ul>
<b>Rule 6 (3)</b>	<ul style="list-style-type: none"> <li>✓ Employee who has no family at the time of making a nomination shall, within ninety days of acquiring a family submit in the manner.</li> <li>✓ A fresh nomination, as required under sub-section (4) of section 6, duplicate in Form 'G' to the employer and thereafter the provisions of sub-rule (2) shall apply mutatis mutandis as if it was made under sub-rule (1).</li> </ul>
<b>Rule 6 (4)</b>	<ul style="list-style-type: none"> <li>✓ Notice of modification of a nomination, including cases where a nominee predeceases an employee, shall be submitted in duplicate in Form 'H' to the employer.</li> </ul>
<b>Rule 6 (5)</b>	<ul style="list-style-type: none"> <li>✓ Nomination or a fresh nomination or a notice of modification of nomination shall be signed by the employee or, if illiterate, shall bear his thumb impression, in the presence of two witnesses.</li> <li>✓ Shall also sign a declaration to that effect in the nomination, fresh nomination or notice of modification of nomination, as the case may be.</li> </ul>
<b>Rule 6 (6)</b>	<ul style="list-style-type: none"> <li>✓ Nomination, fresh nomination or notice of modification of nomination shall take effect from the date of receipt thereof by the employer.</li> </ul>

<b>Determination of the amount of gratuity [Section 7]</b>	<ul style="list-style-type: none"> <li>✓ Gratuity becomes payable, <b>the employer shall, whether the employee has made application or not</b>, determine the amount of gratuity.</li> <li>✓ Employer shall <b>give notice to the person to whom the gratuity</b> is payable and also <b>to the Controlling Authority</b>, specifying the amount of gratuity so determined. The notice <b>shall be in Form L</b>.</li> <li>✓ Employer shall arrange to <b>pay the amount of gratuity within 30 days</b> from the date of its becoming payable to the person to whom it is payable.</li> <li>✓ If it is <b>not paid within the stipulated period</b> the employer is liable to <b>pay interest at the rate of 10% per annum</b>.</li> <li>✓ If the <b>delay in payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment</b>, on this ground, no interest is payable.</li> <li>✓ If the <b>claim for gratuity is not found admissible</b>, issue a <b>notice in Form 'M'</b> to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible.</li> <li>✓ In either <b>case a copy of the notice shall be endorsed</b> to the controlling authority.</li> </ul>
<b>Dispute [Section 7 (4)]</b>	<ul style="list-style-type: none"> <li>✓ If there is a <b>dispute as to the amount of gratuity payable to the employee</b>, the employer shall <b>deposit the gratuity with the Controlling Authority</b>.</li> <li>✓ The <b>controlling authority</b> shall, <b>after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard</b>, determine the amount of gratuity payable to an employee.</li> <li>✓ If as a result of such inquiry <b>any amount in excess of the amount deposited by the employer is found to be payable</b>.</li> <li>✓ The controlling authority shall <b>direct the employer to pay such amount as is in excess of the amount deposited by him</b>.</li> <li>✓ Controlling Authority shall <b>pay the amount of the deposit-to the applicant where he is the employee</b>.</li> <li>✓ Applicant is <b>not the employee, to the nominee or heir of the employee if the controlling authority is satisfied</b> that there is <b>no dispute as to the right of the applicant to receive the amount of gratuity</b>.</li> </ul>

<b>Application for Gratuity Rule 7 (1) to 7 (6)</b>	<ul style="list-style-type: none"> <li>✓ Employee who is eligible for payment of gratuity under the Act, or any person authorized, in writing, to act on his behalf, <b>shall apply, ordinarily within thirty days from the date the gratuity became payable, in Form 'T' to the employer.</b></li> <li>✓ Date of <b>superannuation or retirement of an employee</b> is known, the employee may <b>apply to the employer before thirty days of the date of superannuation or retirement.</b></li> <li>✓ Nominee of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4 <b>shall apply, ordinarily within thirty days from the date of gratuity became payable to him, in Form 'J' to the employer.</b></li> <li>✓ An <b>application in plain paper</b> with relevant particulars shall also be accepted. The employer <b>may obtain such other particulars</b> as may be deemed necessary by him.</li> <li>✓ Legal heir of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4 <b>shall apply, ordinarily within one year from the date of gratuity became payable to him, in Form 'K' to the employer.</b></li> <li>✓ Gratuity becomes payable under the Act <b>before the commencement of these rules, the periods of limitation specified in sub-rules (1), (2) and (3) shall be deemed to be operative from the date of such commencement.</b></li> <li>✓ An application under this rule shall be <b>presented to the employer either by personal service or by registered post acknowledgement due.</b></li> </ul>
<b>Belated</b>	<ul style="list-style-type: none"> <li>✓ An application for <b>payment of gratuity filed after the expiry of the periods specified in this rule shall also be entertained by the employer</b>, if the applicant adduces sufficient cause for the delay in preferring his claim.</li> <li>✓ <b>No claim for gratuity under the Act shall be invalid merely</b></li> </ul>
<b>Application Rule 7 (5)</b>	<p>because the <b>claimant failed to present his application within the specified period.</b></p> <ul style="list-style-type: none"> <li>✓ Any dispute in this regard shall be <b>referred to the controlling authority</b> for his decision.</li> </ul>

<b>Notice for Payment of Gratuity</b>	<ul style="list-style-type: none"> <li>✓ Within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the employer shall-</li> <li>✓ if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof.</li> <li>✓ If the claim for gratuity is not found admissible, issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible.</li> <li>✓ In either case a copy of the notice shall be endorsed to the controlling authority.</li> <li>✓ Payment of gratuity is due to be made in the employer's office, the date fixed for the purpose in the notice in Form 'L' shall be re fixed by the employer.</li> <li>✓ If a written application in this behalf is made by the payee explaining why it is not possible for him to be present in person on the date specified.</li> <li>✓ If the claimant for gratuity is a nominee or a legal heir, the employer may ask for such witness or evidence as may be deemed relevant for establishing his identity or maintainability of his claim, as the case may be.</li> <li>✓ The time limit specified for issuance of notices shall be operative with effect from the date such witness or evidence, as the case may be, called for by the employer is furnished to the employer.</li> <li>✓ Notice in Form 'L' or Form 'M' shall be served on the applicant either by personal service after taking receipt or by registered post with acknowledgement due.</li> <li>✓ Notice under Section 7 (2) shall in Form 'L'</li> </ul>
<b>Mode of service of notice Rule 8(5)</b>	<ul style="list-style-type: none"> <li>✓ Notice in Form 'L' or Form 'M' shall be served on the applicant either by personal service after taking receipt or by registered post with acknowledgement due</li> </ul>
<b>Mode of payment [Rule 9]</b>	<ul style="list-style-type: none"> <li>✓ Gratuity payable under the Act shall be paid in cash or, if so desired by the payee, in Demand Draft or bank Cheque to the eligible employee, nominee or legal heir, as the case may be.</li> <li>✓ Amount of gratuity payable is less than one thousand rupees, payment may be made by postal money order after deducting the postal money order commission there for from the amount payable.</li> <li>✓ Intimation about the details of payment shall also be given by the employer to the controlling authority of the area.</li> <li>✓ In the case of nominee, or an heir, who is minor, the controlling authority shall invest the gratuity amount deposited with him for the benefit of such minor in term deposit with the State Bank of India or any of its subsidiaries or any Nationalized Bank.</li> </ul>

<b>Application for direction [Rule 10]</b>	<p>If the employer-</p> <ul style="list-style-type: none"> <li>✓ refuses to accept nomination; or</li> <li>✓ to entertain an application for gratuity; or</li> <li>✓ rejects the eligibility of gratuity; or</li> <li>✓ indicates less amount than the eligible amount of gratuity in the notice; or</li> <li>✓ fails to issue notice</li> <li>✓ The <b>eligible person to receive the gratuity may file an application in Form – N within 90 days from the date of occurrence of the cause</b>, to the <b>Controlling authority</b> for the issue of directions to the employer.</li> <li>✓ <b>Additional copies</b> are to be sent along with the application for the purpose of issuing the same to the opposite parties.</li> <li>✓ If the said application is filed after the limitation period of 90 days, the <b>Controlling Authority</b> may admit the application if the applicant shows sufficient cause for the delay in filing the application.</li> <li>✓ The said application may be submitted to the Controlling authority in person or it may be sent through registered post with acknowledgment due.</li> </ul>
<b>Directions issued by Authority [Rule 10]</b>	<ul style="list-style-type: none"> <li>✓ Controlling authority shall, by issuing a notice in Form 'O', call upon the applicant as well as the employer to appear before him on a specified date, time and place, either by himself or through his authorized representative together with all relevant documents and witnesses, if any.</li> <li>✓ Any person desiring to act on behalf of an employer or employee, nominee or legal heir, as the cases may be, shall present to the controlling authority a letter of authority from the employer or the person concerned, as the case may be, on whose behalf he seeks to act together with a written statement explaining his interest in the matter and praying for permission so to act.</li> <li>✓ The controlling authority shall record thereon an order either according his approval or specifying, in the case of refusal to grant the permission prayed for, the reasons for the refusal.</li> <li>✓ A party appearing by an authorized representative shall be bound by the acts of the representative.</li> <li>✓ The controlling authority shall record his finding as to whether any amount is payable to the applicant under the Act.</li> <li>✓ A copy of the finding shall be given to each of the parties.</li> <li>✓ If the employer concerned fails to appear on the specified date of hearing after due service of notice without sufficient cause, the controlling authority may proceed to hear and determine the application ex parte.</li> <li>✓ If the applicant fails to appear on the specified date of hearing without sufficient cause, the controlling authority may dismiss the application.</li> <li>✓ Such an order may, on good cause being shown within thirty days of the said order, be reviewed and the application re-heard after giving not less than fourteen days' notice to the opposite party of the date fixed for rehearing of the application.</li> </ul>

	<ul style="list-style-type: none"> <li>✓ The sittings of the <b>controlling authority shall be held at such times and at such places as he may fix and he shall inform the parties</b> of the same in such manner as he thinks fit.</li> <li>✓ The <b>controlling authority may authorize a clerk of his office to administer oaths</b> for the purpose of making affidavits.</li> <li>✓ The controlling authority may, at any stage of the <b>proceedings before him, either upon or without an application</b> by any of the parties involved in the proceedings before him, and on such terms as may appear to the controlling authority just, issue summons to any person in Form 'P' either to give evidence or to produce documents or for both purposes on a specified date, time and place.</li> <li>✓ Any notice, summons, process or order issued by the <b>controlling authority may be served either personally or by registered post acknowledgement due or in any other manner as prescribed under the Code of Civil Procedure, 1908.</b></li> <li>✓ Numerous persons as parties to any proceeding before the <b>controlling authority and such persons are members of any trade union or association or are represented by an authorized person, the service of notice on the Secretary, or where there is no Secretary, on the principal officer of the trade union or association, or on the authorized person</b> shall be deemed to be service on such persons.</li> <li>✓ If a finding is recorded that the applicant is entitled to payment of gratuity under the Act, the controlling authority shall issue a notice to the employer concerned in Form 'R' specifying the amount payable and directing payment thereof to the <b>applicant under intimation to the controlling authority within thirty days from the date of the receipt of the notice by the employer.</b></li> <li>✓ A copy of the notice shall be endorsed to the applicant employee, nominee or legal heir, as the case may be.</li> </ul>
<b>Powers of the Controlling Authority</b>	The following powers vested in a Civil Court <ul style="list-style-type: none"> <li>✓ <b>Summoning and enforcing the attendance of any person and examining him on oath.</b></li> <li>✓ <b>Requiring the discovery and production of documents</b></li> <li>✓ <b>Receiving evidence on affidavits.</b></li> <li>✓ <b>Issuing commissions for the examination of witnesses or documents.</b></li> </ul>
<b>Appeal against the order of controlling authority</b>	<ul style="list-style-type: none"> <li>✓ <b>Appeal:</b> Any person aggrieved by an <b>order of the controlling authority may prefer an appeal with Appropriate Government or such authority as Appropriate Government may specify in this behalf hereafter called as appellate authority.</b></li> <li>✓ <b>Receipt:</b> The <b>appeal may be filed within 60 days of receipt of order of the controlling authority.</b> However if the appellate authority is satisfied that the <b>applicant was prevented by sufficient cause from filing the appeal within the specified period of 60days, it may admit the appeal within a further period of 60 days.</b></li> <li>✓ <b>Reasonable opportunity:</b> The appellate authority shall give a <b>reasonable opportunity of being heard to the parties concerned.</b></li> <li>✓ <b>Decision:</b> The appellate authority <b>may confirm, modify or reverse the decision of the controlling authority.</b></li> </ul>

<b>Recovery of Gratuity [Section 8]</b>	<ul style="list-style-type: none"> <li>✓ If the <b>employer fails to pay gratuity within the prescribed time within 30 days</b> of termination of employment.</li> <li>✓ The <b>controlling authority is empowered to issue a certificate to the collector</b> to recover the amount of gratuity.</li> <li>✓ Before issue of such certificate, the <b>controlling authority shall give the employer a reasonable opportunity</b> of being heard.</li> <li>✓ The employer <b>shall also be liable to pay compound interest (9% per annum)</b> as such rate as may be notified by Central Government from time to time.</li> <li>✓ The gratuity shall be <b>recovered by the collector in the same manner as if it were arrears of land revenue.</b></li> <li>✓ The gratuity so recovered shall be paid to the person entitled to payment of gratuity.</li> </ul>
<b>Penalties [Section 9 (1)]</b>	<ul style="list-style-type: none"> <li>✓ Whoever, for the <b>purpose of avoiding any payment to be made by himself under this Act or enabling any other person to avoid</b> such payment, knowingly makes or causes to be made any false statement or false representation.</li> <li>✓ Shall be <b>punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both</b></li> </ul>
<b>[Section 9(2)]</b>	<ul style="list-style-type: none"> <li>✓ An employer <b>who contravenes, or makes default in complying</b> with, any of the provisions of this Act or any rule or order made there under.</li> <li>✓ Shall be punishable with <b>imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.</b></li> <li>✓ Where the <b>offence relates to non-payment of any gratuity payable under this Act.</b></li> <li>✓ The employer shall be <b>punishable with imprisonment for a term which shall not be less than three months unless the court trying the offence, for reasons to be recorded by it in writing is of opinion that a lesser term of imprisonment or the imprisonment of a fine would meet the ends of justice.</b></li> </ul>
<b>Exemption of employer from liability in certain cases [Section 10]</b>	<ul style="list-style-type: none"> <li>➤ An employer is charged with an offence punishable under this Act, he shall be entitled, upon <b>complaint duly made by him and on giving to the complainant not less than three clear days' notice in writing</b> of his intention to do so, to have any other person whom he charges as the <b>actual offender brought before the court at the time appointed for hearing the charge.</b></li> <li>➤ After the <b>commission of the offence has been proved, the employer proves to the satisfaction of the court</b>- that he has used <b>due diligence to enforce the execution of this Act.</b></li> <li>➤ <b>Other person committed the offence in question without his knowledge, consent or connivance</b>, that other person shall be convicted of the offence and <b>shall be liable and the employer shall be discharged from any liability under this act</b> in respect of such offence.</li> <li>➤ The employer may be <b>examined on oath and his evidence and that of any witness</b> whom he calls in his support shall be subject to <b>cross-examination on behalf of the person he charges as the actual offender and by the prosecutor.</b></li> </ul>

	<ul style="list-style-type: none"> <li>➤ If the person charged as the actual offender by the employer cannot be brought before the court at the time appointed for hearing the charge, the <b>court shall adjourn the hearing from time to time for a period not exceeding three months.</b></li> <li>➤ By the end of the said period the person charged as the actual offender cannot still be brought before the court, the court shall proceed to hear the charge against the employer and shall, if the offence be proved, convict the employer.</li> </ul>
Cognizance of offence [Section 11]	<ul style="list-style-type: none"> <li>✓ <b>No court shall take cognizance of any offence punishable under this Act save on a complaint made by or under the authority of the appropriate Government.</b></li> <li>✓ Amount of gratuity has <b>not been paid, or recovered, within six months from the expiry of the prescribed time.</b></li> <li>✓ The <b>appropriate Government</b> shall authorize the <b>controlling authority to make a complaint against the employer</b>, whereupon the controlling authority shall, <b>within fifteen days from the date of such authorization</b>, make such complaint to a magistrate having jurisdiction to try the offence.</li> <li>✓ <b>No court inferior to that of a Presidency Magistrate or a Magistrate of the first class</b> shall try any offence punishable under this Act.</li> </ul>
Protection of Gratuity [Section 13]	<ul style="list-style-type: none"> <li>✓ <b>No gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.</b></li> </ul>
<b>Act to override other enactments etc. [Section 14]</b>	
Case Law	<p>The Supreme Court reasoned that the Payment of Gratuity Act was a general act and the Working Journalists and Other Newspaper Employees (Conditions of service) and Misc. Provisions of Act, 1955 was a special enactment will prevail when there is a conflict between a general act and a special act.</p> <p>Thus if the service of an employee has been terminated by way of disciplinary action under the Working Journalists and other Newspaper Employees (Conditions of Service) and Misc. Provisions of Act, 1955, he is not entitled to gratuity.</p>
Display of	<ul style="list-style-type: none"> <li>➤ The employer shall <b>display an abstract</b> of the Act.</li> </ul>
Abstract of the Acts and Rules	<ul style="list-style-type: none"> <li>➤ Rules made there under as given in <b>Form 'U' in English and in the language understood by the majority of the employees</b> at conspicuous place.</li> <li>Near the <b>main entrance</b> of the establishment.</li> </ul>

## REVIEW QUESTIONS

1. Write short notes on Concept of Continuous service for the payment of gratuity under the Payment of Gratuity Act, 1972?
2. Write short notes on Rights and obligations of the employer and employee under the Payment of Gratuity Act, 1972?
3. Write short notes on Forfeiture of Gratuity under the Payment of Gratuity Act, 1972 ?
4. Write short notes on Protection of Gratuity under the Payment of Gratuity Act, 1972 ?
5. Difference between Partial forfeiture and Total forfeiture of gratuity under the Payment of Gratuity Act, 1972 ?

## UNIT 9

### EMPLOYEES PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

<b>Introduction</b>	<ul style="list-style-type: none"> <li>✓ The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a <b>social welfare legislation</b>.</li> <li>✓ The Act aims at <b>providing social security and timely monetary assistance to industrial employees and their families</b> when they are in distress.</li> <li>✓ The following three schemes have been framed under the Act by the Central Government: <ul style="list-style-type: none"> <li>○ The Employees' Provident Fund Schemes, 1952;</li> <li>○ The Employees' Pension Scheme, 1995; and</li> <li>○ The Employees' Deposit-Linked Insurance Scheme; 1976.</li> </ul> </li> <li>✓ It provides <b>social security benefits on workers and their dependents</b></li> <li>✓ These schemes taken together provide to the employees an <b>old age and survivorship benefits, a long term protection and security</b> to the employee.</li> <li>✓ The Act is now applicable to <b>employees drawing pay not exceeding Rs.15,000 per month</b>.</li> <li>✓ The Act extends to <b>whole of India</b>.</li> <li>✓ Pay includes <b>basic wages with dearness allowance, retaining allowance (if any), and cash value of food concession</b>.</li> </ul>
<b>Applicability [Section 1(3)]</b>	<p><b>The Act applies to:</b></p> <ul style="list-style-type: none"> <li>✓ Every factory engaged in industry <b>specified in Schedule I and in which 20 or more persons are employed</b></li> <li>✓ Other establishment <b>employing 20 or more persons notified by Central Government in the Official Gazette</b>.</li> <li>✓ The Central Government may after <b>giving not less than 2 months' notice in the Official Gazette apply the provisions of this Act to any establishment employing such number of persons less than 20</b>.</li> <li>✓ Any establishment can get itself <b>covered under the Act with mutual consent of employee and employer</b>.</li> <li>✓ The <b>Central PF Commissioner on an application by employer and the majority of employees of any establishment</b> apply the provisions of this Act to that establishment.</li> <li>✓ An establishment to which the <b>EPF Act applies shall continue to be governed by the Act even if the number of persons employed falls below 20 at any time</b>.</li> </ul>
<b>Goods Shepherd Public School V. EPF organization'</b> – 2014 LLR 611 (Del HC)	
<b>Case Law 1</b>	<p>It was held that a school <b>rightly covered under PF when the principal has affirmed about employment of 20 employees</b>.</p>

<b>M/s Nasiruddin Beedi Merchant Limited V. CPF Commissioner' – AIR 2001 SC 850</b>	
<b>Case Law 2</b>	The Supreme Court held that this Act would apply even in respect of home workers engaged through contractors and cannot be objected any more.
<b>Annamma Iype V. Regional Provident Fund Commissioner' – 1993 LLR 287</b>	
<b>Case Law 3</b>	It was held that wherein an establishment the strength of the employees at a particular time is below 20, it cannot be contended by the employer that the establishment is no longer within the purview of the Act.
<b>Non applicability of the Act Section 16(1)</b>	<ul style="list-style-type: none"> <li>✓ <b>Co-operative Societies</b> : Establishments registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than 50 persons and working without the aid of power.</li> <li>✓ <b>Government</b> : Any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund.</li> <li>✓ <b>Pension</b>: Old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits.</li> </ul>
<b>Important Definitions</b>	
<b>Appropriate Government [Section 2 (a)]</b>	<ul style="list-style-type: none"> <li>✓ In relation to an establishment belonging to, or under the control of, the Central Government or in relation to an establishment connected with- <ul style="list-style-type: none"> <li>✓ Railway company</li> <li>✓ Major port;</li> <li>✓ Mine or an Oil field; or</li> <li>✓ Controlled industry; or</li> <li>✓ Relation to an establishment having departments or branches in more than one State, the appropriate Government is the 'Central Government';</li> <li>✓ In relation to any other establishment, the appropriate Government is the 'State Government'</li> </ul> </li> </ul>
<b>Authorized Officer [Section 2 (aa)]</b>	<ul style="list-style-type: none"> <li>✓ Central Provident Fund Commissioner;</li> <li>✓ Additional Central Provident Fund Commissioner;</li> <li>✓ Deputy Provident Fund Commissioner;</li> <li>✓ Regional Provident Fund Commissioner</li> <li>✓ Such other officer as may be authorized by the Central Government, by Notification in the Official Gazette</li> </ul>
<b>Basic Wages [Section 2 (b)]</b>	<p>Basic wages means all emoluments which are earned by an employee while on duty or on leave or on holiday with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him.</p> <p><b>But does not include:</b></p> <ul style="list-style-type: none"> <li>✓ Cash value of any food concession.</li> <li>✓ Dearness allowance, house rent allowance, overtime allowance, bonus, commission or any other similar allowance.</li> <li>✓ Presents made by the employer.</li> </ul>

<b>Contribution [Section 2 (c)]</b>	<ul style="list-style-type: none"> <li>➤ As a contribution payable in respect of a member under a scheme</li> <li>➤ The contribution payable in respect of an employee to whom the Insurance scheme applies</li> </ul>
<b>Fund [Section 2 (h)]</b>	It means Provident Fund established under the Scheme
<b>Employer [Section 2 (e)]</b>	<p><b>In relation to an establishment which is a factory</b></p> <ul style="list-style-type: none"> <li>✓ Owner or occupier of the factory, including the agent of such owner or occupier</li> <li>✓ Legal representative of a deceased owner or occupier.</li> <li>✓ Person named as a manager under the Factories Act, 1948 <b>In relation to any other establishment</b></li> <li>✓ The person who or the authority which has the ultimate control over the affairs of the establishment.</li> <li>✓ Entrusted to a manager, managing director, or managing agent, such manager, managing director or managing agent.</li> </ul>
<b>Employee [Section 2 (f)]</b>	<ul style="list-style-type: none"> <li>✓ The term 'employee' as any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person-</li> <li>✓ Employed by or through a contractor in or in connection with the work of the establishment;</li> <li>✓ Engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 or under the Standing orders of the establishment.</li> </ul>
<b>Prakash D. Shah V. Union of India'- 2004 LLR 218 (Bom)</b>	
<b>Case Law</b>	High Court held that a partner of a firm having a status of beneficiary will not be employee either
<b>Factory [Section 2(g)]</b>	<ul style="list-style-type: none"> <li>✓ Any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on.</li> <li>✓ With the aid of power or without the aid or power.</li> </ul>
<b>Occupier of a factory Section 2 (k)</b>	<ul style="list-style-type: none"> <li>✓ Occupier of a factory as the person who has ultimate control over the affairs of a factory, and, where the said affairs are entrusted to a managing agent.</li> <li>✓ Such agent shall be deemed to be the occupier of the factory.</li> </ul>
<b>Srikanta Dutta Narasimharava Wodiyar V. Enforcement Officer, Mysore'- 1993 LLR 497</b>	
<b>Case Law 1</b>	<ul style="list-style-type: none"> <li>✓ It was held that the person who is in charge or responsible for the management or ultimate control over the affairs of the factory.</li> <li>✓ Establishment, in the event of entrustment to a managing agent, such managing agent shall also be deemed to be the occupier of the factory.</li> </ul>
<b>K. Basu V. Regional Provident Fund Commissioner'- 2002 LLJ 512 (Cal)</b>	
<b>Case Law 2</b>	<ul style="list-style-type: none"> <li>✓ The High Court held that the 'occupier' indicates a person, who is in actual possession and control.</li> <li>✓ It may be an individual or a firm.</li> <li>✓ Unless a notice is given, notifying the individual or a firm, all the members of the firm are to be liable.</li> </ul>
<b>Schemes</b>	<p>The Act provides three types of schemes for the benefit of the employees as detailed below-</p> <ul style="list-style-type: none"> <li>✓ Section 5 – Employees' Provident Fund Schemes</li> <li>✓ Section 6A – Employees' Pension Scheme</li> <li>✓ Section 6C – Employees' Deposit Linked Insurance Scheme.</li> </ul>

<b>Employees' Provident Fund Schemes [Section 5]</b>	<ul style="list-style-type: none"> <li>✓ Central Government framed a scheme called the <b>Employees' Provident Fund Scheme</b> for the establishment of provident funds for employees.</li> <li>✓ The Central Government framed 'The Employees' Provident Fund Scheme, 1952 which came into effect from 2nd September, 1952.</li> <li>✓ The fund shall vest in and be administered by the Central Board constituted under Section 5A of the Act.</li> <li>✓ The scheme framed may provide for all or any of the matters specified in Schedule II.</li> <li>✓ The scheme may provide that any of the provisions shall take effect either prospectively or retrospectively on such date as may be specified in the scheme.</li> </ul>
<b>Central Board [Section 5 A]</b>	<ul style="list-style-type: none"> <li>✓ Establishment of Central Board by the Central Government.</li> <li>✓ The Board consists of a <b>Chairman</b> and a Vice Chairman to be appointed by the Central Government.</li> <li>✓ The Central Provident Fund Commissioner is ex officio.</li> <li>✓ Members to this Board are being appointed by the Central Government as per the provisions.</li> </ul>
<b>Section 5AA</b>	<ul style="list-style-type: none"> <li>✓ Provides for the appointment an Executive Committee by the Central Government to assist the Central Board in the performance of its functions.</li> <li>✓ The members of the Executive Committee are appointed by the Central Government.</li> </ul>
<b>State Board [Section 5B]</b>	<ul style="list-style-type: none"> <li>✓ Gives powers to the Central Government, in consultation with the Government of any State, constitutes for that State, a Board of Trustees to exercise such powers.</li> <li>✓ Perform such duties as the Central Government may assign to it from time to time.</li> </ul>
<b>Contributions [Section 6]</b>	<ul style="list-style-type: none"> <li>✓ The contribution which shall be paid by the employer to the Fund shall be 10% of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or through a contractor and the employees contribution shall be equal to the contribution payable by the employer.</li> <li>✓ Employees, if they desire, may make contribution exceeding the prescribed rate but subject to the condition that employer shall not be under any obligation to contribute over and above the contribution payable as prescribed by the Government from time to time under the Act.</li> <li>✓ The Government has raised the rate of <b>Provident Fund Contribution</b> from the current 8.33% to 10% in general and in cases of establishments specially notified by the Government, from 10% to 12% with effect from September 22, 1997.</li> <li>✓ Each contribution shall be calculated to the nearest rupee, fifty paise or more to be counted as the next higher rupee and fraction of a rupee less than fifty paise to be ignored.</li> <li>✓ Dearness allowance shall include the cash value of any food concession allowed to an employee. Retaining allowance is the allowance payable to an employee for retaining his services, when the establishment is not working.</li> <li>✓ The Provident Fund Scheme has made the payment of contribution mandatory and the Act provides for no exception under which a specified employer can avoid his mandatory liability.</li> </ul>

<b>Wage limit</b>	<ul style="list-style-type: none"> <li>✓ Contribution is paid up to a <b>maximum of Rs. 15,000 by employer and employee with effect from 01.09.2014.</b></li> <li>✓ To pay a contribution on higher wages, a joint request from <b>employee and employer</b> is required.</li> <li>✓ In such case the <b>employer has to pay administrative charges on the higher wages.</b> International worker wage ceiling of <b>Rs.15,000</b> is not applicable.</li> </ul>
<b>Applicability of the scheme</b>	<ul style="list-style-type: none"> <li>✓ Apply to <b>all factories and other establishments</b> to which the Act applies.</li> <li>✓ <b>Not applicable to the tea factories</b> in the State of Assam.</li> </ul>
<b>Withdrawal from the fund</b>	<ul style="list-style-type: none"> <li>✓ For the purchase of a <b>dwelling house/flat or for the construction of a dwelling house including the acquisition</b> of a suitable site for this purpose;</li> <li>✓ For <b>repayment of loans</b> in special cases</li> <li>✓ <b>Withdrawal within one year</b> before the retirement;</li> <li>✓ Withdrawal <b>upto 75% of the balance, if not employed</b> from one month or more, subject to approval of P.F.</li> <li>✓ <b>Commissioner or any officer</b> authorized by him.</li> <li>✓ Such <b>withdrawals are not required to be repaid.</b></li> </ul>
<b>Advances from the fund</b>	<ul style="list-style-type: none"> <li>✓ For illness in certain cases;</li> <li>✓ For marriages or post matriculation education of children;</li> <li>✓ In abnormal conditions such as calamity of exceptional nature such as flood, earthquakes or riots – (non-refundable)</li> <li>✓ Granted to members affected by cut in the supply of electricity; (non-refundable)</li> <li>✓ Grant of advance to members who are physically handicapped; (non-refundable)</li> </ul>
<b>Employees' Pension Scheme Section 6A</b>	<ul style="list-style-type: none"> <li>✓ <b>Superannuation pension</b></li> <li>✓ <b>Retiring pension or permanent total disablement pension</b> to the employees of any establishment or class of establishments to which this Act applies; and</li> <li>✓ <b>Widow or widower's pension;</b></li> <li>✓ <b>Children pension or orphan pension</b> payable to the beneficiaries of such employees.</li> <li>✓ The <b>Pension Scheme may provide for all or any of its provisions shall take effect either prospectively or retrospectively</b> on such date as may be specified in that behalf in that scheme.</li> </ul>
<b>Contribution</b>	<ul style="list-style-type: none"> <li>✓ <b>No contribution from the employee.</b></li> <li>✓ Employer is to contribute <b>8.33% of the basic wages, dearness allowance and retaining allowance</b>, if any of the concerned employees as may be specified in the pension scheme.</li> <li>✓ Contribution is <b>not payable when the employee crosses 58 years of age</b> since the scheme ceases on completion of 58 years.</li> </ul>
	<ul style="list-style-type: none"> <li>✓ The <b>Pension Fund shall vest in and administered by the Central Board.</b></li> <li>✓ The <b>pension scheme may provide for all or any of the matters in Schedule II</b></li> <li>✓ The <b>portion of employers' contribution to the Provident Fund</b> which shall be entitled to the Pension Fund and the manner in <b>which it is credited</b></li> <li>✓ The <b>minimum qualifying service for being eligible for pension</b> and the manner in which the <b>employees may be granted the benefits of their past service</b></li> <li>✓ The regulation of the manner in which and the period of service, for</li> </ul>

<b>Pension Fund</b>	<p>which no contribution is received</p> <ul style="list-style-type: none"> <li>✓ The manner in which the employees' interest will be protected against default in payment of contribution by the employer.</li> <li>✓ The manner in which the accounts of the <b>Pension fund shall be kept and investment of moneys belonging to Pension Fund</b> to be made subject to such pattern of investment as may be determined by Central Government;</li> <li>✓ The form in which an <b>employee shall furnish particulars about himself and the members of his family</b> whenever required;</li> <li>✓ The <b>forms, registers and records to be maintained in respect of employees</b>, required for the administration of the Pension Scheme;</li> <li>✓ The scale of <b>pension and pensionary benefits and the conditions relating to the grant</b> of such benefits to the employees;</li> <li>✓ The manner in which the <b>exempted establishments have to pay contribution towards the pension scheme</b> and the submission of returns relating thereto</li> <li>✓ The <b>mode of disbursement of pension and arrangements</b> to be entered into with such disbursing agencies as may be specified for the purpose;</li> <li>✓ The manner in which the <b>expenses for administering the Pension Scheme</b> will be met from the income of the Pension Fund.</li> <li>✓ Any other matter which is to be <b>provided for in the Pension Scheme</b> or which may be necessary for the purpose of implementation of the Pension Scheme.</li> </ul>
<b>Employees deposit Link Insurance Scheme [Section 6 ( c )]</b>	<ul style="list-style-type: none"> <li>✓ The <b>Central Government made the Employees' Deposit Linked Insurance Scheme, 1976</b> which came into effect from <b>01.09.1976</b>.</li> <li>✓ It applies to all <b>factories and other establishments</b> to which the Act applies except tea factories in State of Assam.</li> <li>✓ The <b>wage ceiling limit under Employees Deposit linked Insurance Scheme</b> has been increased from <b>Rs. 6,500</b> to <b>Rs. 15,000</b>.</li> <li>✓ The insurance benefit under the scheme shall be an amount between <b>2.5 lakhs and 6 lakhs</b></li> </ul>
<b>Contribution</b>	<ul style="list-style-type: none"> <li>✓ The employer shall pay such <b>amount not being more than 1% of the aggregate of basic wages, dearness allowance and retaining allowance</b> of every such employee in relation to whom he is the employer.</li> <li>✓ The <b>employer shall pay into the Insurance Fund such further amount of money not exceeding one fourth of the contribution</b> which is required to make as the Central Government may from time to time</li> <li>✓ To determine <b>to meet all the expenses in connection with the administration of the scheme other than the expenses towards the cost of any benefits</b> provided by or under that scheme.</li> <li>✓ Where the <b>monthly pay of an employee exceeds Rs. 15,000 the contribution payable is restricted to the amounts payable on a monthly pay of Rs. 15,000, dearness allowance, retaining allowance and cash value of food concession.</b></li> </ul>

<p><b>Determination of moneys due from employers [Section 7 A]</b></p>	<p><b>Officer empower to make an enquiry</b></p> <p><b><u>Power of Civil Courts</u></b></p> <p>The officer <b>conducting the inquiry shall have same power of Civil Courts</b> as per the Code of Civil Procedure, 1908.</p> <p><b><u>Inquiry shall be judicial proceeding</u></b></p> <p>Any such inquiry shall be deemed to be judicial proceeding within the meaning of the Indian Penal Code.</p> <ul style="list-style-type: none"> <li>✓ For the purpose of <b>conducting inquiry the Authority shall have the same powers as are vested in a court</b> under CPC for trying a suit in respect of the following matters-</li> <li>✓ <b>Enforcing the attendance of any person or examining him on oath</b></li> <li>✓ Requiring the <b>discovery and production of documents</b></li> <li>✓ Receiving <b>evidence on affidavit</b></li> <li>✓ Issuing commissions for the <b>examination of witnesses</b>.</li> </ul> <p><b><u>Opportunity of being heard</u></b></p> <p>Employer concerned <b>should be given a reasonable opportunity of being heard</b> before passing any order.</p> <p><b><u>Ex-part order</u></b></p> <ul style="list-style-type: none"> <li>✓ If employer, employee or any other person fails to attend such inquiry without assigning any valid reason.</li> <li>✓ Fails to produce any document/report/return, the officer <b>conducting the inquiry</b> may determine the amount due from any employer on the basis of the evidence adduced during <b>enquiry and documents available on record</b>.</li> </ul> <p><b><u>Setting aside of ex-part order</u></b></p> <ul style="list-style-type: none"> <li>✓ If an <b>ex-part is passed against an employer</b> he may apply within 3 months from the date of communication of order, to setting aside order.</li> <li>✓ Such applicant can be <b>made if he satisfies to the officer that the show cause notice was not duly served</b> or that he was prevented by any sufficient cause from appearing when the inquiry was held.</li> <li>✓ If officer satisfies he <b>shall set aside his earlier order and shall appoint a fresh date for inquiry</b>.</li> </ul>
	<p><b><u>Appeal</u></b></p> <p>If appeal is <b>filed against ex-part order</b>, application for setting aside the order shall not lie.</p> <p><b><u>Notice</u></b></p> <p>No order shall be set <b>unless notice thereof has been served</b> on the opposite party. (i.e. departmental officer)</p>

<b>Review of order under Section 7A [Section 7 B]</b>	<p><b><u>Review on application</u></b> Any person aggrieved by an <b>order made u/s 7A</b> can make an <b>application for review of order</b> in following cases: -</p> <p><b><u>Evidence</u></b> If new and important <b>evidence is discovered which could not be produced by him at the time</b> when the order was made.</p> <p><b><u>Error</u></b> Some mistakes or error apparent on the face of the record.</p> <p><b><u>Sufficient Reason:</u></b> Any other sufficient reason.</p> <p><b><u>Review by officer on own motion</u></b> Officer can <b>review his order on his own motion if he is satisfied that it is necessary to do so.</b></p> <p><b><u>Form &amp; time limit</u></b> Every <b>application for review shall be filed in prescribed form and within prescribed time.</b></p> <p><b><u>Allow or reject application for review</u></b> Where it appears to the <b>officer receiving an application for review that there is sufficient ground for- review</b>, he shall allow the application or otherwise reject the same.</p> <p><b><u>No appeal</u></b> Appeal cannot be filed against the order for reflecting an <b>application for review.</b></p>
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#### Balu Fire Clay Mines V. Union of India – 2003 LLR 578

<b>Case Law</b>	<ul style="list-style-type: none"> <li>✓ It was held that review is a statutory remedy.</li> <li>✓ A review petitioner should also be disposed of by a speaking order.</li> </ul>
<b>Determination of escaped amount [Section 7 (c)]</b>	<ul style="list-style-type: none"> <li>✓ The officer can <b>re-open the case within five years from the date of order passed under Section 7A or Section 7B.</b></li> <li>✓ If he has <b>reason to believe that by reason of omission or failure on the part of the employer to make any document or report available, or to disclose fully and truly all material facts any amount so due from such employer for any period has escaped his notice.</b></li> <li>✓ The <b>Officer may pass appropriate orders re- determining the amount due from the employer</b> in accordance with the provisions of this Act.</li> </ul>
<b>EPF Appellate Tribunal</b>	<ul style="list-style-type: none"> <li>✓ Section 7D provides for the <b>appointment of EPF Appellate Tribunal to hear the appeal against the order passed by the Central Government or any authority under Section 7A or 7B or 7C.</b></li> <li>✓ The Appellate Tribunal may, after giving reasonable opportunities to the parties decided the appeal either confirming, modifying or annulling the order appealed against.</li> <li>✓ Refer the case back to the authority which passed such order with such directions as the Tribunal may think fit.</li> <li>✓ Rectify any mistake apparent from the record within five years from the date of its appeal order.</li> <li>✓ No appeal by the employer shall be entertained unless he has deposited with it 75% of the amount due from him.</li> <li>✓ Reasons to be recorded in writing, waive or reduce the amount to be deposited.</li> </ul>

<b>Protection against attachment [Section 10]</b>	<ul style="list-style-type: none"> <li>✓ Amount standing to the credit of any member of the Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree.</li> <li>✓ Any court in respect of any debt or liability incurred by the member and neither the Official assignee nor any receiver shall be entitled to, or have any claim on, any such amount.</li> </ul>
<b>Employer not to reduce wages [Section 12]</b>	<ul style="list-style-type: none"> <li>✓ No employer in relation to an establishment to which any scheme or the insurance scheme applies shall, by reason only of his liability for the payment of any contribution to the fund.</li> <li>✓ Any charges or the scheme or the insurance scheme, reduce, whether directly or indirectly, the wages of any employee to whom they apply.</li> </ul>
<b>Transfer of Accounts [Section 17 A]</b>	<p><b>Leaves his employment</b></p> <ul style="list-style-type: none"> <li>✓ An employee of an establishment to which PF Act applies leaves his employment.</li> </ul> <p><b>Obtains re-employment in another establishment to which PF Act does not apply</b></p> <ul style="list-style-type: none"> <li>✓ But has provident funds of its own then the amount to his credit in the fund shall be transferred to the credit of his account in the provident fund of the establishment in which he is re-employed.</li> </ul> <p><b>Act not Apply</b></p> <ul style="list-style-type: none"> <li>✓ An employee employed in an establishment to which this Act does not apply but has provident funds of its own, leaves his employment.</li> </ul> <p><b>Transfer to the credit of his account</b></p> <ul style="list-style-type: none"> <li>✓ Obtains re-employment in another establishment to which this Act applies, the amount to the credit of such employee in the provident fund of the establishment left by him be transferred to the credit of his account in the provident fund of the establishment in which he is re-employed.</li> </ul>
<b>Penalties [Section 14 (1) &amp; (1A)]</b>	<ul style="list-style-type: none"> <li>✓ Avoiding any payment whoever knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to one year, or with fine of Rs.5,000 or with both.</li> <li>✓ An employer, who contravenes or makes default in complying with the provisions of Section 6 as it relates to the payment of inspection charges, administrative charges shall be punishable with imprisonment for a term which may extend to three years but- <ul style="list-style-type: none"> <li>✓ Shall not be less than one year and fine of Rs. 10,000 in case of default of payment of the employees' contribution</li> <li>✓ Shall not be less than six months and a fine of Rs. 5,000 in any other case.</li> </ul> </li> </ul>
<b>Section 14(1B)</b>	<ul style="list-style-type: none"> <li>✓ An employer who contravenes or makes default in complying with the provisions of Section 6C in so far as it relates to the payment of inspection charges.</li> <li>✓ Shall be punishable with imprisonment for a term which may extend to one year but which shall not be less than six months.</li> <li>✓ Shall also be liable to fine which may extend to Rs. 5,000.</li> </ul>

<b>Section 14(2)</b>	<ul style="list-style-type: none"> <li>✓ The Scheme, the <b>Pension Scheme or the Insurance scheme may provide that any person who contravenes or makes default</b> in complying with, any of the provisions thereof</li> <li>✓ Shall be <b>punishable with imprisonment for a term which may extend to one year or with fine which may extend to Rs. 4,000 or with both</b></li> </ul>
<b>Section 14(3)</b>	<ul style="list-style-type: none"> <li>✓ Provides that whoever, <b>contravenes or makes default in complying with any provision of this Act or of any condition</b> subject to which exemption was granted.</li> <li>✓ Shall, if no other penalty is elsewhere provided by or under this Act for such contravention or noncompliance, be <b>punishable with imprisonment which may extend to six months but which shall not be less than one month and shall be liable to fine which may extend to Rs. 5,000.</b></li> </ul>
<b>Offences by companies [Section 14A (1)]</b>	<ul style="list-style-type: none"> <li>✓ Every person who at the time of the offence was committed was <b>in charge of, and was responsible to, the company for the conduct of the business of the company.</b></li> <li>✓ As well as the company, shall be deemed to be <b>guilty of the offence and shall be liable to be proceeded against and punished accordingly.</b></li> </ul>
<b>Section 14A(2)</b>	<ul style="list-style-type: none"> <li>✓ <b>Offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company.</b></li> <li>✓ Such <b>director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.</b></li> </ul>

## REVIEW QUESTIONS

1. Write short notes on Employees Deposit linked Insurance.
2. Write short notes on Protection from attachment (EPFACT 1952)
3. When and under what circumstances a person can receive pension under employees provident Funds Scheme?
4. Under what circumstances pension under E.P.F. Can be applied for by an employee?
5. What are the benefits a member of an Employees provident fund & Misc. Provisions Act 1952 can get on retirement/death?

## UNIT 10

### EMPLOYEES STATE INSURANCE ACT,1948

<b>Introduction</b>	<ul style="list-style-type: none"> <li>✓ Employees' State Insurance Act, 1948 is the <b>first major legislation on social security for the employees in India.</b></li> <li>✓ To provide <b>social protection to employees in contingencies such as illness, long term sickness or any other health risks due to exposure to employment injury or occupational hazards.</b></li> <li>✓ The <b>medical facilities are also made available to legal dependents of the employees who are insured person.</b></li> <li>✓ Facility is also extended to <b>retired persons also.</b></li> <li>✓ Act Extends to whole of India</li> </ul>
<b>Object of the Act</b>	<ul style="list-style-type: none"> <li>✓ To provide for certain benefits to <b>employees in case of sickness, maternity and employment injury.</b></li> <li>✓ To make provision for <b>certain other matters</b> in relation thereto.</li> </ul>
<b>Applicability</b> <b>[Section 1(4)]</b>	<ul style="list-style-type: none"> <li>✓ <b>Include</b> All factories (including factories belonging to the government) other than seasonal factories.</li> <li>✓ <b>Extend</b> Enabling provision under which the appropriate Government is empowered to extend the provision of the Act to other establishment-industrial, commercial, agricultural or otherwise.</li> <li>✓ <b>Establishment</b> Enabling provisions most of the State Governments have extended the provision to new classes of establishments namely shops, hotels, restaurants, Cinema Halls including PVR, Road Motor Transport undertaking and Newspaper establishments employing 20 or more coverable employees.</li> <li><b>Institution</b></li> <li>✓ The employees have been extended to Educational Institution employing twenty or more employees in most of the States.</li> <li>✓ <b>Exclude</b> Employees of factories/establishments mentioned above in the implemented areas and drawing wages excluding overtime not exceeding ` 21,000 per month are covered under the Act.</li> </ul>
<b>Employees' State Insurance Corporation V. Premalal' – 2009 LLR 282 (Ker HC)</b>	
<b>Case Law 1</b>	<ul style="list-style-type: none"> <li>✓ It was held that ESI scheme will be applicable to <b>establishment preparing sweets with the aid of LPG.</b></li> </ul>
Employees State Insurance Corporation, Orissa Region V. Gujarat Co-operative Milk Marketing Federation Limited' – 2009 LLR 615 (Ori.HC)	
<b>Case Law 2</b>	<ul style="list-style-type: none"> <li>✓ It was held that in the <b>absence of required number of employees in Milk Federation, ESI Act could not be extended upon it.</b></li> </ul>
Kuriacose V. Employees' State Insurance Corporation' – (1988) 2 CLR 301 (Ker)	
<b>Case Law 3</b>	<ul style="list-style-type: none"> <li>✓ It was held that once the Act has <b>become applicable to a factory or an establishment, its application will be continuous.</b></li> </ul>
<b>Important Definitions</b>	
<b>Appropriate Government Section 2 (1)</b>	<p>Term 'appropriate Government', in respect of establishments <b>under the control of the Central Government or a railway administration or a major port or a mine or oilfield, the Central Government</b>, and in all other cases, the State Government.</p>

<b>Confinement [Section 2 (3)]</b>	Confinement as labour resulting in the issue of a <b>living child or labour after 26 weeks of pregnancy resulting in the issue of a child</b> , whether alive or dead.
<b>Dependant [Section 2(6A)]</b>	<p>Dependant" means any of the following <b>relatives of a deceased insured person</b>, namely,-</p> <ul style="list-style-type: none"> <li>✓ <b>A widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter</b></li> <li>✓ <b>Widowed mother</b></li> <li>✓ If wholly dependent on <b>the earnings of the insured person at the time of his death</b>, a <b>legitimate or adopted son or daughter</b> who has attained the <b>age of twenty five years</b> and is infirm.</li> </ul>
If wholly or in part dependant on the earnings of the insured person at the time of his death	
<b>At the time of his Death</b>	<ul style="list-style-type: none"> <li>✓ Parent other than a <b>widowed mother</b>.</li> <li>✓ <b>A minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate.</b></li> <li>✓ <b>Adopted or illegitimate if married</b> and a minor or if widowed and a minor.</li> <li>✓ <b>A minor brother or an unmarried sister</b> or a widowed sister if a minor.</li> <li>✓ <b>A widowed daughter-in-law</b>.</li> </ul>
<b>Employment injury [Section 2 (8)]</b>	<ul style="list-style-type: none"> <li>✓ Employment injury' as a <b>personal injury to an employee caused by accident or an occupational disease arising out of and in the course of employment</b>, being an insurable employment,</li> <li>✓ Whether the <b>accident occurs or the occupation disease is contracted</b> within or outside the territorial limits of India.</li> </ul>
<b>Employee [Section 2 (9)]</b>	<p>Employee means any person <b>employed for wages in or in connection with the work of a factory or establishment</b> to which this Act applicable. The term employer further includes the following:</p> <ul style="list-style-type: none"> <li>❖ Persons employed through contractor</li> <li>❖ Apprentices other than those covered under the Apprentices Act. However, an apprentice shall be treated as an employee whose training period is extended to any length of time.</li> </ul> <p>It may be noted that <b>only those employees who are drawing wages upto Rs.21,000 per month are covered</b> under this act.</p>
<b>Employee does not include</b>	Any person working in the capacity of a member of the <b>Armed Forces of the Union</b> .
<b>Following Categories –Purview of Term Employee</b>	
<b>Canteen Workers</b>	Employees State Insurance Corporation V. Shri Ram Chemical Industries' (1978)
<b>Employees who are working in a show room or sales office</b>	Bhopal Motors Private Limited V. Employees' State Insurance Corporation (1982)
<b>Workers rendering services outside the place of establishment or shop</b>	Hindu Jea Band V. Regional Director, Employees' State Insurance Corporation ( 1986)

<b>Part time employees employed on daily rate basis</b>	Hindu Jea Band
<b>Casual workers</b>	Regional Director, Employees' State Insurance Corporation V. South India Flour Mill (Pvt) Limited (1986)
<b>Director, Hassan Co-operative Milk Producer's Society Union Limited V. Assistant Regional Director, Employees' State Insurance Corporation' AIR 2010 SC 2109</b>	
<b>Case Law 1</b>	It was held that merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'; he must not only be employed in connection with the work of the establishment but also be shown to be employed in or other of the three categories mentioned in Section 2(9) of the Act
<b>Employees' State Insurance Corporation V. Tata Engineering &amp; Locomotive Co., Limited' – AIR 1976 SC 66</b>	
<b>Case Law 2</b>	It was held that an apprentice who is mere trainee for a distinct purpose is not an employee.
<b>Regional Director, Employees' State Insurance Corporation V. Ramanuja Match Industries' – AIR 1985 SC 278</b>	
<b>Case Law 3</b>	<p>It was held that a partner is not an employee</p> <p>The term 'family' as all or any of the following relatives of an insured <b>person</b></p> <ul style="list-style-type: none"> <li>✓ Spouse</li> <li>✓ Minor legitimate or adopted child dependent upon the insured person;</li> <li>✓ Child who is wholly dependent on the earnings of the insured person and who is receiving education, till he or she attains the age of 21 years</li> <li>✓ An unmarried daughter</li> </ul>
<b>Child</b>	Infirm by reason of <b>any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person</b> , so long as the infirmity continues
<b>Dependent Person</b>	Income from all sources <b>does not exceed such income as may be prescribed by the Central Government</b>
<b>Insured Person</b>	In case the insured person is <b>unmarried and his or her parents are not alive</b> , a minor brother or sister wholly dependent upon the earnings of the insured person
<b>Factory [Section 2 (12)]</b>	<ul style="list-style-type: none"> <li>✓ Any premises including the precincts thereof whereon <b>ten or more persons are employed or were employed on any day of the preceding 12 months</b>.</li> <li>✓ Any part of which a <b>manufacturing process is being carried on or is ordinarily so carried on</b>.</li> <li>✓ But <b>does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed</b>.</li> </ul>
<b>Immediate employer [Section 2 (13)]</b>	<ul style="list-style-type: none"> <li>✓ Immediate employer' in relation to <b>employees employed by or through him, as a person who has undertaken the execution</b>, on the premises of a factory.</li> <li>✓ An establishment to which this Act applies or under the supervision of the principal employer or his <b>agent, of the whole or any part of any work which is ordinarily part of the</b></li> </ul>

	<p><b>work of the factory</b> or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment.</p> <ul style="list-style-type: none"> <li>✓ Includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent on hire to the principal employer and includes a contractor</li> </ul>
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### **Employees' State Insurance Corporation V. T. Shankar Singh T. Byali' (1988)**

<b>Case Law</b>	<p>It was held that a <b>person will be the immediate employer and not the principal employer even if the employees have been employed by him</b>, if he supplied services to a factory or establishment</p>
<b>Insured Person [Section 2 (14)]</b>	<p>Insured person' as a person <b>who is or was an employee in respect of whom contributions are or were payable under the Act</b> and who is by reason thereof, entitled to any of the benefits provided by this Act.</p>
<b>Permanent Partial Disablement [Section 2(15A)]</b>	<ul style="list-style-type: none"> <li>✓ Disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement.</li> <li>✓ Every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement.</li> </ul>
<b>Permanent Total Disablement [Section 2 (15B)]</b>	<ul style="list-style-type: none"> <li>✓ Disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident in such disablement.</li> <li>✓ The permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule</li> <li>✓ Any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to 100% or more.</li> </ul>
<b>Principal Employer [Section 2 (17)]</b>	<ul style="list-style-type: none"> <li>✓ Factory, the owner or occupier of the factory and includes the managing agent of such owner</li> <li>✓ Occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named</li> <li>✓ Any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department</li> <li>✓ Any other establishment, any person responsible for the supervision and control of the establishment.</li> </ul>
<b>Seasonal factory [Section 2(19A)]</b>	<p>Factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortications of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not</p>

	<b>exceeding seven months in a year</b> <ul style="list-style-type: none"> <li>✓ In any process of blending, packing or repacking of tea or coffee.</li> <li>✓ Such other manufacturing process as the Central Government may, by notification in the Official Gazette.</li> </ul>
<b>Temporary disablement [Section 2 (21)]</b>	<ul style="list-style-type: none"> <li>✓ Temporary disablement' as a condition resulting from an employment which requires medical treatment</li> <li>✓ Renders an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of the injury.</li> </ul>
<b>Wages</b>	<ul style="list-style-type: none"> <li>✓ All remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled.</li> <li>✓ It includes any payment to an employee in respect of any period of authorized leave, lock-out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months.</li> </ul>
<b>But does not include</b>	<ul style="list-style-type: none"> <li>✓ Contribution paid by the employer to any pension fund or provident fund, or under this Act.</li> <li>✓ Travelling allowance</li> <li>✓ Reimbursement of the expense incurred by the employee</li> <li>✓ Gratuity</li> </ul>
<b>Regional Director, Employees' State Insurance Corporation (1994)</b>	
<b>Case Law 1</b>	<p>It was held that bonus or ex-gratia amount is not 'wages'. The following are treated as wages</p> <ul style="list-style-type: none"> <li>✓ LIC Premium subsidy</li> <li>✓ House rent allowance, heat, gas and dust allowance and incentive allowance</li> <li>✓ Incentive bonus</li> <li>✓ Over time allowance</li> </ul>
<b>Employees' State Insurance Incorporation [Section 3]</b>	<ul style="list-style-type: none"> <li>✓ Establishment of Employees' State Insurance Corporation with effect from 01.10.1948.</li> <li>✓ Corporation is a body corporate having perpetual succession and a common seal</li> <li>✓ Shall by the said name sue and be sued.</li> </ul>
<b>Constitution of Corporation [Section 4]</b>	<ul style="list-style-type: none"> <li>✓ Corporation shall consist of a Chairman, a Vice Chairman and other members representing the interests of employers, employees, state governments, union territories and medical professions.</li> <li>✓ Three members of the Parliament and the Director General of the Corporation are its ex-officio members.</li> <li>✓ Section 5 provides for the term of office of members of Corporation.</li> <li>✓ Section 6 provides for the eligibility for re-nomination or re-election.</li> <li>✓ All orders and decisions of the Corporation shall be authenticated by the signature of the Director General</li> </ul>

<b>Regional Boards [Section 25]</b>	<ul style="list-style-type: none"> <li>➤ Section 25 provides that the Corporation may appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner and delegate to them such powers and functions, as may be provided by the regulations.</li> </ul>
<b>Other bodies of Corporation</b>	
<b>Standing Committee [Section 8]</b>	<ul style="list-style-type: none"> <li>✓ Chairman</li> <li>✓ Three members of the Corporation</li> <li>✓ Three members of the Corporation representing such three State Governments</li> </ul> <p><b>Eight members elected by Corporation</b></p> <ul style="list-style-type: none"> <li>✓ Three members from among the members of the Corporation representing employers;</li> <li>✓ Three members from among the members of the Corporation representing employees;</li> <li>✓ One member from among the members of the Corporation representing medical profession; and</li> <li>✓ One member from among the members of the Corporation elected by Parliament.</li> <li>✓ The Director General of the Corporation, ex-officio.</li> </ul>
<b>Term of office [Section 9]</b>	<ul style="list-style-type: none"> <li>✓ Member of the Standing Committee shall be two years from the date on which his election is notified.</li> <li>✓ A member of the Standing Committee shall cease to hold office when he ceases to be a member of the Corporation.</li> </ul>
<b>Powers of the Standing Committee [Section 18]</b>	<ul style="list-style-type: none"> <li>✓ Standing Committee shall administer the affairs of the Corporation and may exercise any of the powers and perform any of the functions of the Corporation.</li> <li>✓ Standing Committee shall submit for the consideration and decision of the Corporation all such cases and matters as may be specified in the regulations made in this behalf.</li> <li>✓ The Standing Committee may, in its discretion, submit any other case or matter for the decision of the Corporation.</li> </ul>
<b>Meetings of Standing Committee, Corporation and Medical Benefit Council [Section 20]</b>	<ul style="list-style-type: none"> <li>✓ Standing Committee shall meet at such times and places and shall observe such rules or procedure.</li> <li>✓ In regard to transaction of business at their meetings as may be specified in the regulations made in this behalf.</li> </ul>
<b>Supersession of the Corporation and Standing Committee [Section 21]</b>	<ul style="list-style-type: none"> <li>✓ If in the opinion of the Central Government, the Corporation or the Standing Committee persistently makes default in performing the duties imposed on it by or under this Act.</li> <li>✓ Abuses its powers, that Government may, by notification in the Official Gazette, supersede the Standing Committee in consultation with the Standing Committee.</li> <li>✓ Before issuing a notification the Standing Committee shall be given a reasonable opportunity to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Standing Committee.</li> <li>✓ On such superseding all the members shall be deemed to vacate their office.</li> <li>✓ A new Standing Committee shall be immediately constituted.</li> </ul>

<b>Medical Benefit Council [Section 10]</b>	<ul style="list-style-type: none"> <li>✓ Director General of ESI, ex-officio – Chairman</li> <li>✓ Director General, Health Services, ex-officio – Co-Chairman</li> <li>✓ Medical Commissioner of the Corporation – ex-officio</li> <li>✓ One member each representing each state other than Union territories</li> <li>✓ Three members representing employers</li> <li>✓ Three members representing employees</li> <li>✓ Three members representing the medical profession; among them one shall be a woman.</li> </ul>
<b>Term of office</b>	Members of Medical Benefit Council (last three categories) <b>shall be four years from the date on which the appointment is notified</b>
<b>Duties of Medical Benefit Council [Section 22]</b>	<ul style="list-style-type: none"> <li>✓ Advise the Corporation and the Standing Committee on matters relating to the administration of medical benefit</li> <li>✓ Powers and duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with the medical treatment and attendance.</li> <li>✓ Perform such other duties in connection with the medical treatment and attendance as may be specified in the regulations.</li> </ul>
<b>Disqualification [Section 13]</b>	<ul style="list-style-type: none"> <li>✓ Person shall be disqualified as a member of the Corporation, the Standing Committee or the Medical Benefit Council</li> <li>✓ Declared to be of unsound mind by a competent court</li> <li>✓ Undischarged insolvent</li> <li>✓ Directly or indirectly by himself or by his partner any interest in a subsisting contract with, or any work being done for, the Corporation except as a medical practitioner or as a shareholder of a company</li> <li>✓ Before or after commencement of this Act, he has been convicted of an offence involving moral turpitude.</li> </ul>
<b>Member of the Corporation, the Standing Committee or the Medical Benefit Council</b>	
<b>Resignation [Section 11]</b>	<ul style="list-style-type: none"> <li>✓ May resign his office by notice in writing to the Central Government.</li> <li>✓ Seat fall vacant on the acceptance of the resignation by Government.</li> </ul>
<b>Cessation [Section 12]</b>	<ul style="list-style-type: none"> <li>✓ Shall cease to be a member if he fails to attend three consecutive meetings.</li> <li>✓ Corporation, the Standing Committee or the Medical Benefit Council may restore the membership subject to the rules made by the Government.</li> </ul>
<b>Registration of employees</b>	<ul style="list-style-type: none"> <li>✓ Registration is the process of obtaining and recording information about his employment which is insurable employment.</li> <li>✓ Also identifies to provide the benefits available under the Act that are related to the contributions paid by the employer on behalf of insured employees.</li> <li>✓ Employee is required to give his details and his family details to his employer.</li> <li>✓ A family photo is also to be provided so that the employer can register the employee.</li> </ul>

	<ul style="list-style-type: none"> <li>✓ Benefits under the Act which are related to the contributions paid by the employer on behalf of each of the insured persons.</li> <li>✓ Registering an employee has to be a <b>one time exercise in life time of an employee.</b></li> <li>✓ Insurance number generated on the <b>first occasion of registration is to be used throughout his life time irrespective of change of employment</b> including change of place.</li> </ul>
<b>Employees' State Insurance Fund [Section 26]</b>	<ul style="list-style-type: none"> <li>✓ Provides for the creation of Employees' State Insurance Fund held and administered by the Corporation.</li> <li>✓ All contributions paid under this Act and all other moneys received on behalf of the corporation shall be paid into this fund.</li> <li>✓ Grants, donations and gifts received from the Central Government or any State Government, local authority or any individual or body whether incorporated or not, are also paid into this Fund.</li> </ul>
<b>Purposes for which the fund may be expended [Section 28]</b>	<p><b><u>Central Government may utilize the State Insurance Fund only for the following purposes:</u></b></p> <ul style="list-style-type: none"> <li>✓ Payment of benefits and provision of <b>medical treatment and attendance to insured persons and, where the medical benefit is extended to their families</b>, the provision of such medical benefit to their families in accordance with the provisions of this Act and <b>defraying the charges and costs in connection therewith</b>;</li> <li>✓ Payment of <b>fees and allowances to members of the Corporation</b>, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils</li> <li>✓ Payment of <b>salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund</b> of officers and servants of the Corporation and meeting the expenditure in respect of offices.</li> <li>✓ Establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families</li> <li>✓ Payment of <b>contributions to any State Government, local authority or any private body or individual, towards the cost of medical treatment and attendance</b> provided to insured persons.</li> <li>✓ Medical benefit is extended to their families, including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation.</li> <li>✓ Defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of its assets and liabilities and Employees' Insurance Courts set up under this Act;</li> <li>✓ Payment of any sums under any contract by the Corporation or the Standing Committee or by any officer duly authorized by the Corporation or the Standing Committee in that behalf</li> <li>✓ Payment of sums under any decree, order or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty</li> </ul>

	<ul style="list-style-type: none"> <li>✓ <b>Compromise or settlement of any suit or other legal proceeding</b> or claim instituted or made against the Corporation</li> <li>✓ <b>Defraying the cost and other charges of instituting or defending any civil or criminal proceedings</b> arising out of any action taken under this Act;</li> <li>✓ Defraying expenditure, within the limits prescribed, on measures for the <b>improvement of the health, welfare of insured persons and for the rehabilitation and re-employment</b> of insured persons who have been disabled or injured</li> <li>✓ Such other purposes as <b>may be authorized by the Corporation</b> with the previous approval of the Central Government.</li> </ul>
Contributions	<p><b><u>Contribution payable under this Act is of two types</u></b></p> <ul style="list-style-type: none"> <li>✓ One is the <b>contribution of the employer</b> and the other is the <b>contribution of the employee</b> which is recovered from his wages and remitted to the Fund.</li> <li>✓ Rate contribution is <b>3.25% and 0.75%</b> of workers' wages by <b>employers and employees respectively</b>.</li> <li>✓ Contribution against <b>employee must be deposited within due date</b>.</li> <li>✓ <b>One shall not be able to deposit contribution online after 42 days from the end date</b> of the contribution period.</li> <li>✓ Employee whose <b>salary per day is Rs. 176 or less</b> need not to pay <b>Employee's contribution</b> and the same will be paid by the Govt. However, employer will have to pay their share of contribution.</li> <li>✓ The employer is required to file monthly contributions online through <b>ESIC portal</b> on a monthly basis in respect of all its employees after duly registering them.</li> <li>✓ Employer has to file employee wise number of days for which wages paid and the amount of the wages paid respectively to ascertain the amount of contributions payable.</li> <li>✓ The total amount of <b>contribution, both by the employer and the employee</b>, for each month is to be deposited in any branch of SBI in cash or by <b>cheque or demand draft</b> on generation of such a challan through ESIC portal using credentials.</li> <li>✓ The contributions can also be paid through <b>SBI internet banking</b>.</li> </ul>
Principal employer to pay contribution in the first instance [Section 40(1) & 40 (4)]	<ul style="list-style-type: none"> <li>✓ Principal employer shall pay in respect of all employer, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.</li> <li>✓ Any sum deducted by the principal employer from wages shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.</li> <li>✓ Principal employer shall bear the expenses of remitting the contributions to the corporation.</li> </ul>
Recovery of contribution from immediate employer	<ul style="list-style-type: none"> <li>✓ Principal employer, who has paid contribution in respect of an employee employed through an immediate employer.</li> <li>✓ Shall be entitled to recover the amount of the contribution so paid from the immediate employer.</li> </ul>

[Section 41]	<ul style="list-style-type: none"> <li>✓ Either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer.</li> <li>✓ The immediate employer shall maintain a register of employees employed by or through him and submit the same to the principal employer before the settlement of any amount payable by him.</li> </ul>
Method of Payment of Contribution [Section 43]	<ul style="list-style-type: none"> <li>✓ Corporation may make regulations for payment and collection of contributions payable.</li> <li>✓ Manner and time of payment of contributions</li> <li>✓ Payment of contributions by means of adhesive or other stamps affixed to or impressed upon books, card or otherwise and regulating the manner, times and conditions, in, at and under which, such stamps are to be affixed or impressed</li> <li>✓ Date of which evidence of contributions have been paid is to be received by the Corporation</li> <li>✓ The entry in or upon books or cards of particulars of contributions paid and benefits distributed in the case of the insured persons to whom such books or cards relate and the issue, sale, custody, production, inspection and delivery of books or card and the replacement of books or cards which have been lost, destroyed or defaced.</li> </ul>
Recovery of contributions [Section 45 B & 45 C]	<p>Any contribution payable under this Act may be recovered as an arrear of land revenue.</p> <p><u>Authorized officer may issue certificate to Recovery Officer, who in turn proceed to recover the amount by one or more of the modes mentioned below-</u></p> <ul style="list-style-type: none"> <li>✓ Attachment and sale of moveable or immovable property of the factory or establishment or, as the case may be, the principal, or immediate employer;</li> <li>✓ Arrest of the employer and his detention in prison</li> <li>✓ Approving a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer.</li> <li>✓ The attachment shall first be effected against the properties of the factory or the establishment.</li> <li>✓ Such attachment and sale is insufficient for recovering the whole of the amount of arrears.</li> <li>✓ The Recovery Officer may take such proceedings against the property of the employer.</li> </ul>
Provides that the insured persons, their dependents shall be entitled to the following benefits	
Benefits [Section 46]	<ul style="list-style-type: none"> <li>✓ Periodical payments to any insured person in case of his sickness</li> <li>✓ Periodical payments to an insured woman in case of confinement or mis-carriage or sickness arising out of the pregnancy, confinement, premature birth of child or miscarriage</li> <li>✓ Periodical payments to an insured person suffering from a disablement as a result of an employment injury sustained as an employee</li> </ul>

	<ul style="list-style-type: none"> <li>✓ Periodical payments to such <b>dependants of an insured person who dies as a result of an employment injury</b> sustained as an employee</li> <li>✓ Medical treatment for and <b>attendance on insured persons</b></li> <li>✓ Payment to the <b>eldest surviving member of the family</b> of an insured person, who has <b>died, towards the expenditure on the funeral</b> of the deceased insured person</li> <li>✓ If the injured person <b>at the time of his death does not have a family</b>, the <b>funeral payment will be paid to the person who actually incurs the expenditure.</b></li> <li>✓ The amount of such <b>payment shall not exceed such amount</b> as may be prescribed by the Central Government.</li> <li>✓ The <b>claim for such payments shall be made within 3 months of the death of the insured person or within such extended period as the Corporation allow in this behalf.</b></li> </ul>
<b>Bar against receiving compensation under any other law [Section 53]</b>	<ul style="list-style-type: none"> <li>✓ An insured person or his <b>dependants shall not be entitled to receive or recover, whether from the employer or from any other person</b>, any compensation or damages under the Workmen Compensation Act, 1923</li> <li>✓ Any other law for the time <b>being in force or otherwise in respect of an employment injury sustained by the insured person as an employee.</b></li> </ul>
<b>Medical Benefit [Section 56]</b>	<ul style="list-style-type: none"> <li>✓ An <b>insured person or a member of his family whose condition requires medical treatment and attendance</b> shall be entitled to receive medical benefits.</li> <li>✓ Medical benefit may be <b>given either in the form of out-patient treatment and attendance in a hospital or dispensary</b>, clinic or other institution or by visits to the home of the insured person or treatment as in-patient in a hospital or other institution.</li> <li>✓ A person shall be entitled to <b>medical benefit during any period for which contributions are payable in respect of him</b> or which he is <b>qualified to claim sickness benefit or maternity benefit or is in receipt of such disablement benefit</b> as does not disentitle him to medical benefit under the regulations.</li> </ul>
<b>Establishment of hospital by Corporation [Section 59]</b>	<ul style="list-style-type: none"> <li>✓ Corporation may, with the <b>approval of the State Government, establish and maintain in a State such hospitals, dispensaries and other medical.</b></li> <li>✓ Surgical services as it may think fit for the <b>benefit of insured persons and their families.</b></li> </ul>
<b>Benefits not assignable [Section 60]</b>	<ul style="list-style-type: none"> <li>✓ Right to receive any payment or any benefit under this act <b>shall not be transferable or assignable.</b></li> </ul>
<b>Benefits not to be combined [Section 65]</b>	<ul style="list-style-type: none"> <li>✓ An <b>insured person shall not be entitled to receive</b> for the same period</li> <li>✓ Both Sickness Benefit and Maternity benefit</li> <li>✓ Both Sickness Benefit and Disablement Benefit for Temporary Disablement</li> <li>✓ Both Maternity Benefit and Disablement Benefit for Temporary Disablement.</li> <li>✓ Where a person is entitled to <b>more than one of the benefits</b> he shall be entitled to choose which benefit he shall receive.</li> </ul>

<b>Repayment of benefit improperly received [Section 70]</b>	<ul style="list-style-type: none"> <li>✓ Any person has received any benefit or payment under this Act when he is now lawfully entitled to receive the same, he shall be liable to the Corporation the value of the benefit.</li> <li>✓ The amount of such payment, or in the case of his death his representative shall be liable to repay the same from the assets of the deceased.</li> <li>✓ The amount recoverable may be recovered as if it were an arrear of land revenue or by the Recovery Officer.</li> </ul>
<b>Employer not to reduce wages etc. [Section 72]</b>	<ul style="list-style-type: none"> <li>✓ No employer by reason only of his liability for any contributions payable under this Act shall, directly or indirectly reduce the wages of any employee, or except as provided by the regulation.</li> <li>✓ Discontinue or Reduce benefits payable to him under the conditions of his service, which are similar to the benefits conferred by this Act</li> </ul>
<b>Employer not to dismiss or punish the employee during sickness etc. [Section 73]</b>	<ul style="list-style-type: none"> <li>✓ No employer shall dismiss or discharge or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit</li> <li>✓ It further provides that no notice of dismissal or discharge or reduction given to an employee during such period shall be valid or operative.</li> </ul>
<b>Adjudication of disputes and claims [Section 74]</b>	<ul style="list-style-type: none"> <li>✓ State Government shall constitute an ESI Court for such local area as may be specified in the notification.</li> <li>✓ Judge of such court should be either</li> <li>✓ Judicial Officer</li> <li>✓ Legal practitioner for atleast 5 years</li> <li>✓ EIC needs to perform the function of both adjudicating disputes as well as determining the claims.</li> <li>✓ The State Government may appoint the same court for two or more local areas or two or more courts for the same local area and may regulate the distribution of business between them</li> </ul>

#### Section 75 provides that ESI Court

<b>Any Question or Dispute Arises</b>	<ul style="list-style-type: none"> <li>✓ Any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution</li> <li>✓ Rate of wages or average daily wages of an employee for the purposes of this Act</li> <li>✓ Rate of contribution payable by a principal employer in respect of any employee</li> <li>✓ The person who is or was the principal employer in respect of any employee</li> <li>✓ The right of any person to any benefit and as to the amount and duration thereof</li> <li>✓ Any direction issued by the Corporation on a review of any payment of dependents' benefit</li> </ul>
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<b>Any Other Matter Which is in Dispute Between</b>	<ul style="list-style-type: none"> <li>✓ Principal employer and the Corporation</li> <li>✓ Principal employer and an immediate employer</li> <li>✓ Person and the Corporation</li> <li>✓ Employee and a Principal or Immediate employer</li> </ul>
<b>Claims shall be decided by ESI Court</b>	<ul style="list-style-type: none"> <li>✓ Claim for the <b>recovery of contributions from the principal employer</b></li> <li>✓ Claim by a <b>principal employer to recover contributions</b> from any immediate employer;</li> <li>✓ Claim against a <b>principal employer</b></li> <li>✓ Claim for the <b>recovery of the value or amount of the benefits received by a person</b> when he is not lawfully entitled thereto</li> <li>✓ Any claim for the <b>recovery of any benefit admissible</b> under the Act.</li> <li>✓ An <b>appeal shall lie to the High Court from an order of ESI Court</b> if it involves a substantial question of law.</li> <li>✓ The <b>appeal shall be filed within 60 days</b> from the date of the order of ESI Court.</li> </ul>
<b>Jurisdiction of Civil Court [Section 75(3)]</b>	<ul style="list-style-type: none"> <li>✓ <b>No Civil Court have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability</b></li> <li>✓ Decided by a <b>medical board or a medical appeal tribunal or ESI Court.</b></li> </ul>
<b>ESI Corporation V. Jalandhar Gymkhana Club'- 1972</b>	
<b>Case Law</b>	It was held that a <b>civil court cannot determine whether this Act is applicable to an establishment or not.</b>
<b>Penal Provisions under Sections 84 to 86 of ESI Act, 1948</b>	
<b>Section 84 Wrong / False Statements Made by the Insured Persons</b>	<ul style="list-style-type: none"> <li>✓ Offence punishable under Act with imprisonment for a term which may extend to six months or with fine which may extend to Two thousand rupees or with both</li> </ul>
<b>Insured person is convicted by the Court for an offence committed</b>	<ul style="list-style-type: none"> <li>✓ Shall <b>not be entitled to any cash benefits available under the Act for such a period as may be prescribed by the Central Government.</b></li> </ul>
<b>Non-compliance with the various provisions [Section 85]</b>	<ul style="list-style-type: none"> <li>✓ Constitutes an offence committed by the <b>employer of a covered Factory / Establishment which is punishable under Section 85(a) to 85(g) of the Act.</b></li> </ul>
<b>Employer fails to pay any contribution [Section 85(a)]</b>	<ul style="list-style-type: none"> <li>✓ Punishable with imprisonment for a term which <b>may extend to three years u/s 85(i) of the Act, provided it shall not be less than 1 year and fine of Rs. 10,000 u/s 85(i) (a) of the Act</b></li> <li>✓ Where employees' share of contribution is deducted by the employer from their wages but not paid.</li> <li>✓ In other case where <b>term of imprisonment shall not be less than 6 months and fine of Rs. 5,000 u/s 85(i) (b)</b></li> </ul>
<b>Employer commits an offence [Section 85(b) to 85(g)]</b>	<ul style="list-style-type: none"> <li>✓ Punishable with imprisonment for a term which <b>may extends to 1 year or with fine up to Rs. 4,000 or with both.</b></li> </ul>
<b>Employer convicted by a Court</b>	<ul style="list-style-type: none"> <li>✓ Offence punishable under the Act, committing the same offence, <b>shall, for every such subsequent offence, be punished with</b></li> </ul>

[Section 85-A]	<b>imprisonment for a term which may extend to 2 years and with fine of Rs. 5,000.</b>
Failure to pay contribution- Subsequent Offence	<ul style="list-style-type: none"> <li>✓ Punished with imprisonment for a term which may extend to 5 years but which shall not be less than 2 years and shall be liable to pay fine of Rs. 25,000.</li> </ul>
Corporation may recover damages from the Employer [Section 85B]	<ul style="list-style-type: none"> <li>✓ If any employer fails to pay contribution payable within the specified time-limit</li> <li>✓ Pays contribution belatedly provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.</li> <li>✓ Amount of damages may not exceed the amount of contribution paid / payable</li> </ul>
Employer is convicted for an offence of non-payment [Section 85C]	<ul style="list-style-type: none"> <li>✓ Employer still fails to pay the contribution and submit returns within the time given by the court or within the extended time period given, the employer is deemed to have committed a further offence.</li> <li>✓ Shall be punishable with imprisonment under Section 85 and is also liable to pay a fine which may extend to one thousand rupees for every day of default.</li> </ul>
Section 86	<ul style="list-style-type: none"> <li>✓ No prosecution shall be instituted without previous sanction of the Insurance Commissioner or of such other officer of the corporation as may be authorized in this behalf by the Director General of the Corporation.</li> <li>✓ No Court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act.</li> <li>✓ No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof.</li> </ul>
Deals with provisions for Adjudication of Disputes & claims [Section 75]	<ul style="list-style-type: none"> <li>✓ If any employer or employee under the Act has any disputes/questions that may be settled by ESI Court after adjudicating the matter.</li> <li>✓ Subject to the condition that 50 % security deposit is required to be made u/s.75 (2B) (unless it is waived/reduced for the reasons recorded by the Court).</li> </ul>
Penalty [Section 138 of N.I. Act]	<ul style="list-style-type: none"> <li>✓ Employer submits a cheque to the corporation towards payment of contribution, interest, damages or any other amount due, which is bounced subsequently by the Bank for the reasons of Insufficient Fund.</li> <li>✓ Commits an offence</li> <li>✓ Punished with imprisonment for a term up to One year or with fine which may extend to twice the amount of cheque or with both.</li> </ul>
Penalty [Section 405/406/409 of I.P.C ]	<ul style="list-style-type: none"> <li>✓ If an employer deducts employees' share of contribution from their wages but does not pay the said contribution.</li> <li>✓ Commits an offence of criminal Breach of Trust</li> <li>✓ Punishable under this section with imprisonment which may extend to 3 years or with fine or with both.</li> </ul>

## REVIEW QUESTIONS

1. Can an insured woman be entitled to sickness benefit and maternity benefit together for the same period?-
2. Difference between Principal and Immediate Employer?
3. Write short notes on Employment injury under the ESI Act, 1948 ?
4. Write short notes on Purposes for Which ESI fund may be expended under the ESI Act,1948 ?
5. Write short notes on Dependent under ESI Act,1948 ?
6. Write a short note on Benefits to which insured persons are entitled ?
7. Difference between Sickness Benefit and Medical Benefit under the ESI Act, 1948 ?
8. Write short notes on Employees Insurance Court under ESI Act, 1948



**RR Academy**

## UNIT 11

### THE CODE ON WAGES, 2019

<b>Introduction</b>	<ul style="list-style-type: none"> <li>✓ The Code on Wages, 2019 was enacted in 2020 which enlists the provisions relating to payment of wages, overtime, bonus, minimum wages and other provisions incidental to existing labour laws.</li> <li>✓ Four Central labour legislations namely the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1976.</li> <li>✓ Not only regulates the wages of workmen but also the wages of employees performing managerial, supervisory functions.</li> <li>✓ The Central Government under Section 68 of the Code lays down that in case of any difficulty, the Central Government shall notify provisions not inconsistent with the provisions of this Code, as may appear to be necessary for removing the difficulty within a period of three years from the commencement of this Code.</li> <li>✓ The Code on Social Security, 2020, the Industrial Relations Code, 2020 and the Occupational Safety, Health and Working Conditions Code, 2020, have also been enacted by the Government simultaneously.</li> </ul>
<b>Section 2(y) of the Code</b>	<p>All remuneration whether by way of salaries, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes:</p> <ul style="list-style-type: none"> <li>✓ Basic pay</li> <li>✓ Dearness allowance</li> <li>✓ Retaining allowance, if any</li> </ul>
<b>But does not include</b>	<ul style="list-style-type: none"> <li>✓ Any other allowance which the employee is for the time being entitled</li> <li>✓ The value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles.</li> <li>✓ Any travelling concession.</li> <li>✓ Any bonus (including incentive, production and attendance bonus)</li> <li>✓ Any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force.</li> <li>✓ Any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex-gratia payment made to him.</li> <li>✓ Any commission payable to the employee. [Section 2(21)]</li> </ul>
<b>Section 3 of the Code</b>	<ul style="list-style-type: none"> <li>✓ No discrimination in an establishment or any unit thereof among employees on the ground of gender in matters relating to wages by the same employer, in respect of the same work or work of a similar nature done by any employee.</li> <li>✓ <u>No employer shall</u></li> <li>✓ Reduce the rate of wages of any employee</li> <li>✓ Make any discrimination on the ground of sex while recruiting any employee for the same work or work of similar nature and in the</li> </ul>

	<p>conditions of employment.</p> <ul style="list-style-type: none"> <li>✓ Except where the <b>employment of women in such work is prohibited or restricted by</b> or under any law for the time being in force.</li> </ul>
<b>Minimum Rate of Wages [Section 7]</b>	<ul style="list-style-type: none"> <li>✓ Basic wage and special allowance to be adjusted with cost of living allowance index number</li> <li>✓ Basic wage rate with or without cost of living allowance and cash value concession in respect of supplies of essential commodities at concessional rates</li> <li>✓ All inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions</li> </ul>
<b>Procedure for Fixing Wages [Section 8]</b>	<ul style="list-style-type: none"> <li>✓ Appropriate Government appoint committee to hold enquiries and advise it in respect of such fixation or revision of minimum wages.</li> <li>✓ After considering the advice of the committee the appropriate government shall fix or revise the minimum rate of wages by notification in the official gazette</li> <li>✓ Every committee appointed by the appropriate government shall consist of persons a) Representing employers and b) Representing employees which shall be equal in number of members.</li> <li>✓ Independent persons not exceeding one third of the total members of the committee.</li> </ul>
<b>Fix the Minimum Wages [Section 6]</b>	<p><b><u>The Appropriate Government may fix minimum rate of wages</u></b></p> <ul style="list-style-type: none"> <li>✓ Minimum time rate</li> <li>✓ Minimum piece rate</li> <li>✓ Guaranteed time rate for those employed in piece work and for the purpose of securing to such employees a minimum rate of wages on a time work basis.</li> <li>✓ Over time rate</li> </ul> <p><b><u>Different minimum rates of wages may be fixed</u></b></p> <ul style="list-style-type: none"> <li>✓ Different scheduled employments</li> <li>✓ Different classes of work for same scheduled employments</li> <li>✓ Adults, adolescents, children and apprentices</li> <li>✓ Different localities</li> </ul> <p><b><u>Wages may be fixed by any one or more of the following wage periods, namely:</u></b></p> <ul style="list-style-type: none"> <li>✓ By the hour</li> <li>✓ By the day</li> <li>✓ the month or</li> <li>✓ By such other large wage periods as may be prescribed.</li> </ul> <p>Where such rates are fixed by the day or by the month, the manner of calculating wages for month or for a day as the case may be, may be indicated.</p> <p><b><u>Purpose of fixation of minimum rate of wages under this section, the appropriate Government</u></b></p> <ul style="list-style-type: none"> <li>✓ Shall primarily take into account the skill of workers required for working under the categories of unskilled, skilled, semi-skilled and highly-skilled or geographical area or both; and</li> <li>✓ <b>Minimum rate of wages for certain category of workers, take into account their arduousness of work like temperature or humidity normally difficult to bear, hazardous occupations or processes or underground work as may be prescribed by that Government; and</b></li> <li>✓ The norms of such <b>fixation of minimum rate of wages</b> shall be such as may be prescribed.</li> </ul> <p>Section 67 of the Code mentions <b>all the grounds over which the appropriate governments would have the power to make rules.</b></p>

<b>Fixing and Revising Minimum Wages [Section 8]</b>	<p>Fixing <b>minimum rates of wages for the first time or in revising minimum rates</b> of wages under this Code, the appropriate Government shall either:</p> <ul style="list-style-type: none"> <li>✓ Appoint as <b>many committees as it considers necessary to hold enquiries and recommend in respect of such fixation or revision</b>, as the case may be</li> <li>✓ By notification <b>publish its proposals for the information of persons likely to be affected thereby and specify a date not less than two months</b> from the date of the notification on which the proposals shall be taken into consideration.</li> </ul> <p><b><u>Every committee appointed by the appropriate Government</u></b></p> <ul style="list-style-type: none"> <li>✓ Representing employers</li> <li>✓ Representing employees which shall be equal in number of the members specified in clause</li> <li>✓ Independent persons, not exceeding one-third of the total members of the committee.</li> </ul> <p><b><u>Recommendation of the committee appointed under clause</u></b></p> <ul style="list-style-type: none"> <li>✓ All representations received by it before the date specified in the notification under clause</li> <li>✓ Revise the minimum rates of wages and unless such notification otherwise provides, it shall come into force <b>on the expiry of three months from the date of its issue</b></li> <li>✓ Consult concerned <b>Advisory Board constituted under section 42</b>.</li> <li>✓ The appropriate Government shall <b>review or revise minimum rates of wages ordinarily at an interval not exceeding five years</b>.</li> </ul>
<b>Section 9 of the Code</b>	<ul style="list-style-type: none"> <li>✓ The Central Government shall <b>fix floor wage taking into account minimum living standards of a worker</b> in such manner as may be prescribed:</li> <li>✓ Provided that different floor wage may be fixed for different geographical areas.</li> <li>✓ Section 6 shall <b>not be less than the floor wage and if the minimum rates of wages fixed by the appropriate Government earlier is more than the floor wage</b>.</li> <li>✓ The appropriate Government <b>shall not reduce such minimum rates of wages</b> fixed by it earlier.</li> <li>✓ The Central Government may, before <b>fixing the floor wage obtain the advice of the Central Advisory Board</b> constituted under Section 42 (1) and consult State <b>Governments</b> in such manner as may be prescribed.</li> </ul>
<b>Section 10 of the Code</b>	<ul style="list-style-type: none"> <li>✓ Period <b>less than the requisite number of hours</b> constituting a normal working day</li> <li>✓ Shall be entitled to <b>receive wages for that day</b> as if he had worked for a full working day.</li> </ul> <p><b><u>Shall not receive wages for full normal working day</u></b></p> <ul style="list-style-type: none"> <li>✓ If his <b>failure to work is caused by his unwillingness to work</b> and not by omission of the employer to provide him with work</li> <li>✓ Such <b>other cases and circumstances</b> as may be prescribed</li> </ul>
<b>Section 11 of the Code</b>	<ul style="list-style-type: none"> <li>✓ If an employee <b>does two or more classes of work</b> for which different minimum wages are fixed then employer</li> <li>✓ Also shall pay <b>minimum wages in proportion to time spent</b> in each class of work</li> </ul>

<b>Section 12 of the Code</b>	<ul style="list-style-type: none"> <li>✓ Minimum time rate wages for <b>piece work</b>.</li> <li>✓ Person is employed on <b>piece work for which minimum time rate and not a minimum piece rate</b> has been fixed under this Code.</li> <li>✓ Employer shall pay to such <b>person wages at not less than the minimum time rate</b></li> </ul>
<b>Fixing hours of Work for normal working day</b>	<ul style="list-style-type: none"> <li>✓ One or more specified intervals</li> <li>✓ Provide for a <b>day of rest in every period of seven days</b> which shall be allowed to all employees</li> <li>✓ Provide for <b>payment of work on a day of rest at a rate not less than the overtime rate</b>.</li> <li>✓ Worker works in a factory for more than nine hours <b>in any day or for more than 48 hours</b> in any week, he shall in respect of <b>overtime work, be entitled to wages at the rate of twice his ordinary rate of wages</b></li> </ul>
<b>Following classes of employees only to such extent and subject to such conditions as may be prescribed</b>	
<b>Classes of Employees</b>	<ul style="list-style-type: none"> <li>✓ <b>Urgent work</b> Engaged on urgent work, or in any emergency, which could not have been foreseen or prevented.</li> <li>✓ <b>Complementary</b> Employees engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working in the employment concerned.</li> </ul>
	<ul style="list-style-type: none"> <li>✓ <b>Essential</b> Employees whose employment is essentially intermittent.</li> <li>✓ <b>Reason</b> Employees engaged in any work which for technical reasons, has to be completed before the duty is over.</li> <li>✓ <b>Except</b> Employees engaged in any work which <b>could not be carried on except at times dependent on the irregular action of natural forces</b>.</li> <li>✓ Employment of an employee is essentially <b>intermittent when it is declared to be so by the appropriate Government on the ground that the daily hours of duty of the employee</b></li> <li>✓ If there be no daily hours of duty as such for the employee, <b>the hours of duty normally include periods of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention</b>.</li> <li>✓ If minimum wages is <b>fixed by hours, then the workers will be paid overtime if he works more than the hours prescribed</b>.</li> <li>✓ The <b>overtime rate will be as fixed in this law or other law as applicable</b>.</li> <li>✓ Payment for <b>overtime work can be claimed only by the employees who are getting minimum rate of wages</b> under the Act and not by those getting better wages.</li> </ul>
<b>Wages for Overtime work [Section 14]</b>	<ul style="list-style-type: none"> <li>✓ An employee whose <b>minimum rate of wages has been fixed under this Code by the hour, by the day or by such a longer wage-period as may be prescribed</b>, works on any day in excess of the number of hours constituting a normal working day.</li> <li>✓ The employer shall <b>pay him for every hour or for part of an hour so worked in excess</b>, at the overtime rate which shall not be less than twice the normal rate of wages.</li> </ul>

<b>Mode of payment of wages [Section 15]</b>	<ul style="list-style-type: none"> <li>✓ Shall be paid in current coin and currency notes or both.</li> <li>✓ With written authorization, by cheque or crediting in the bank account after obtaining the written authorization of the employed person or by electronic mode</li> </ul>
<b>Fixation of wage Period [Section 16]</b>	<ul style="list-style-type: none"> <li>✓ Every person shall be <b>responsible for the payment of wages under shall fix periods, known as wage-periods</b>, in respect of which such wages shall be payable .</li> <li>✓ Wage-period may be <b>daily, weekly, fortnightly but shall not exceed one month</b>.</li> <li>✓ Purpose of fixing a wage period is to ensure <b>that inordinate delay is not caused in payment of wages</b>.</li> </ul>
<b>Time limit for payment of wages</b>	
<b>Section 17</b>	<ul style="list-style-type: none"> <li>✓ If number <b>of workers is less than 1000 (including daily rated workers)</b> wages must be paid before the expiry of the seventh day after the last day of the wage period</li> <li>✓ In <b>another cases before the 10<sup>th</sup> day</b></li> <li>✓ In case of <b>termination, 2<sup>nd</sup> working day</b></li> <li>✓ In the case of <b>dock, mine, jetty, the balance due on completion is of the kind to manage, before the expiry of the 7<sup>th</sup> day after such completion</b></li> <li>✓ All payment of wages shall be <b>done on a working day</b></li> </ul>
<b>Deductions which may be made from wages [Section 18] [Section 19] and [Section 20]</b>	
Deduction from the wages payable to an employed person	<p>The Act prohibits all kind of deductions except those which are authorized by or under the Act.</p> <p><b>Explanation 1:</b></p> <ul style="list-style-type: none"> <li>✓ Any loss of <b>wages resulting from the imposition, for good and sufficient cause, upon a person employed</b> of any of the following penalties namely</li> <li>✓ The <b>withholding of increment or promotion</b> (including the stoppages of increment at an efficiency bar),</li> <li>✓ The <b>reduction to a lower post or time-scale or to a lower stage in a time-scale, or</b></li> <li>✓ <b>Suspension</b></li> </ul>
<b>Permissible deductions</b>	
<b>Fine</b>	<ul style="list-style-type: none"> <li>✓ Fines with the <b>previous approval of the state government</b></li> <li>✓ The notice specifying the act be <b>exhibited in the prescribed manner</b> on the work place</li> <li>✓ Prior to the fine, show <b>cause opportunity be given</b></li> <li>✓ Should <b>not exceed 3% of wage</b> in that wage period</li> <li>✓ No <b>fine</b> for those <b>below 15 years</b></li> <li>✓ A fine <b>cannot be recovered by instalments or after 90 days</b> from the day of the act or omission for which it is imposed.</li> <li>✓ All fines and realizations need to be <b>recorded in a register</b> in a prescribed form</li> </ul>
<b>Deductions for absence from duty</b>	<ul style="list-style-type: none"> <li>✓ From the place where he is <b>registered to work</b></li> <li>✓ Refuses to <b>carry out work</b> (stay in strike)</li> <li>✓ The ratio between the <b>period of absence and total wage period should not exceed the amount of deduction</b></li> <li>✓ If 10 or more persons <b>absent without notice and reasonable cause fine can be of not exceeding 8 days wage</b> in lieu of notice</li> </ul>
<b>Deductions for damage or loss</b>	<ul style="list-style-type: none"> <li>✓ Loss of goods or money due to <b>neglect or default</b></li> <li>✓ Deductions shall <b>not exceed the actual cost of loss</b></li> <li>✓ Prior to that <b>show cause opportunity</b> needs to be given</li> <li>✓ All deductions for such purpose <b>need to be recorded in a register</b></li> </ul>

<b>Deductions for accommodation and services</b>	<ul style="list-style-type: none"> <li>✓ Such services have been <b>accepted by the employed person</b> as a term of his employment</li> <li>✓ Services <b>do not include the supply of tools and raw materials</b> required for the purpose of the employment</li> <li>✓ The <b>amount of deduction should not exceed an amount equivalent to the value of accommodation / services</b></li> <li>✓ The <b>amenities and services must be authorized by the state government</b> by a general or special order</li> </ul>
<b>Deductions for the recovery of advance</b>	<ul style="list-style-type: none"> <li>✓ Advance given prior to <b>employment should be deducted from the first payment</b>, but not travelling expenses</li> <li>✓ Advances after employment began shall be subject to <b>what state government imposes</b></li> </ul>
<b>Deductions for recovery of loans</b>	<ul style="list-style-type: none"> <li>✓ Any fund constituted for the <b>welfare of labour and the interest due provided the fund</b> is constituted as per the rules of state government</li> </ul>
<b>Deductions for payment to co-operatives, insurance schemes etc.</b>	<ul style="list-style-type: none"> <li>✓ <b>Co-operative or scheme</b> needs to be approved by state government</li> <li>✓ With <b>written authorization</b> of the person employed</li> <li>✓ Applies to person <b>employed in a factory, railway or industrial establishment or other establishment</b>.</li> <li>✓ <b>Three months' notice</b> – class of persons and class of establishment</li> <li>✓ Deduction from wages on <b>account of expenses</b>: like <b>LIC, Post office savings etc.</b> – cannot be made without authorization of the employee.</li> </ul>
<b>Other Deduction</b>	<ul style="list-style-type: none"> <li>✓ Income tax</li> <li>✓ Directed by a court order</li> <li>✓ Repayment of advances from PF a/c</li> <li>✓ Insurance premium on fidelity guarantee bonus</li> <li>✓ Recovery of loss due to failure to raise invoice to bill (in railway administration)</li> <li>✓ Any refund incorrectly granted due to neglect</li> <li>✓ Written authorization to contribute to Prime Minister's relief</li> <li>✓ Contribution to insurance schemes framed by central government</li> </ul>
<b>Illegal Deduction</b>	<ul style="list-style-type: none"> <li>✓ Damage or loss is not directly attributed to his neglect</li> <li>✓ Deductions for tools and raw materials supplied to him</li> <li>✓ Deductions for insurance premium without written authorization</li> </ul>
<b>Limits on the amount</b>	<ul style="list-style-type: none"> <li>✓ Any wage period from the <b>wages of an employee shall not exceed fifty per cent of such wages</b>.</li> </ul>
<b>Bonus</b>	<ul style="list-style-type: none"> <li>✓ All employees whose <b>wages do not exceed a specific monthly amount, notified by the central or state government</b>, will be entitled to an annual bonus.</li> <li>✓ The bonus will be <b>at least: (i) 8.33% of his wages, or (ii) Rs 100, whichever is higher</b>.</li> <li>✓ In addition, the <b>employer will distribute a part of the gross profits amongst the employees</b>.</li> <li>✓ Distributed in <b>proportion to the annual wages</b> of an employee.</li> <li>✓ An employee can receive a <b>maximum bonus of 20% of his annual wages</b></li> </ul>

<b>Section 26 onwards the code talks about provisions relating to payment of bonus</b>	
<b>Eligibility for Bonus</b>	<ul style="list-style-type: none"> <li>✓ Every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has <b>worked in the establishment for not less than thirty working days</b> in that year.</li> <li>✓ An annual minimum bonus calculated at the <b>rate of eight and one-third percent of the wages earned by the employee or one hundred rupees</b>, whichever is higher.</li> </ul>
<b>Allocable Surplus</b>	<ul style="list-style-type: none"> <li>✓ The allocable surplus exceeds the <b>amount of maximum bonus payable to the employees in the establishment</b>, then, the <b>excess shall, subject to a limit of 20% of the total salary or wage</b> of the employees employed in the establishment in that accounting year.</li> <li>✓ In computing the allocable surplus under this section, the <b>amount set on or the amount set off under the provisions of section 36</b> shall be taken into account in accordance with the provisions of that section.</li> <li>✓ First five accounting years following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be, from such establishment, bonus shall be</li> </ul>
<b>Surplus</b>	payable only in respect of the accounting year in which the <b>employer derives profit from such establishment and such bonus shall be calculated in accordance with the provisions of this Code</b> in relation to that year, but without applying the provisions of section 36.
From such establishment, the <b>provisions of section 36 shall apply subject to the following modifications, namely</b>	
<b>6<sup>th</sup> Year Accounting Year</b>	<ul style="list-style-type: none"> <li>✓ <b>Set on or Set off</b>, as the case may be, shall be made, in the manner as may be prescribed by the Central Government, taking into account the <b>excess or deficiency, if any, as the case may be, of the allocable surplus set on or set off in respect of the fifth and sixth accounting years</b></li> </ul>
<b>7<sup>th</sup> Accounting Year</b>	<ul style="list-style-type: none"> <li>✓ <b>Set on or Set off</b>, as the case may be, shall be made, in the manner as may be prescribed by the Central Government, taking into account the <b>excess or deficiency, if any, as the case may be, of the allocable surplus set on or set off in respect of the fifth, sixth and seventh accounting years</b></li> </ul>
<b>8<sup>th</sup> Accounting Year</b>	<ul style="list-style-type: none"> <li>✓ The <b>employer sells the goods produced or manufactured by him or renders services, as the case may be, from such establishment</b>.</li> <li>✓ The <b>provisions of section 36 shall apply</b> in relation to such establishment as they apply in relation to any other establishment.</li> </ul>
<b>An employer shall not be deemed to have derived profit in any accounting year</b>	
<b>Unless</b>	<ul style="list-style-type: none"> <li>✓ Made <b>provision for depreciation</b> of that year to which he is entitled under the Income-tax Act or, as the case may be, under the agricultural income tax law.</li> <li>✓ The <b>arrears of such depreciation</b> and losses incurred by him in respect of the establishment for the <b>previous accounting years have been fully set off against his profits</b></li> </ul>
<b>Bonus Linked with Productivity</b>	<ul style="list-style-type: none"> <li>✓ Any <b>demand for bonus in excess of the bonus referred to in sub-section (1), either on the basis of production or productivity</b> in an accounting year for which the bonus is payable shall be determined by an <b>agreement or settlement between the employer and the employees</b></li> <li>✓ The total bonus including the annual minimum bonus referred to in sub-section (1) shall not exceed <b>twenty per cent of the wages earned by the employee in the accounting year</b>.</li> </ul>

<b>Proportionate Reduction in Bonus [Section 27]</b>	<ul style="list-style-type: none"> <li>✓ An employee has <b>not worked for all the working days in an accounting year, the minimum bonus of one hundred rupees or, as the case may be, of sixty rupees.</b></li> <li>✓ If such bonus is <b>higher than 8.33 per cent of his salary or wage</b> for the days he had worked in that accounting year, shall be proportionately reduced.</li> </ul>
<b>Computation of Working days [Section 28]</b>	<ul style="list-style-type: none"> <li>✓ <b>Laid off under an agreement</b> or as permitted by standing orders under the Industrial Employment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment;</li> <li>✓ Leave with <b>salary or wages</b></li> <li>✓ <b>Absent due to temporary disablement</b> caused by accident arising out of and in the course of his employment</li> <li>✓ The employee has been on <b>maternity leave with salary or wages</b>, during the accounting year</li> </ul>
<b>Disqualification of Bonus</b>	<ul style="list-style-type: none"> <li>✓ Fraud</li> </ul>
<b>Section 29</b>	<ul style="list-style-type: none"> <li>✓ Riotous or violent behaviour while on the premises of the establishment</li> <li>✓ Theft, misappropriation or sabotage of any property of the establishment</li> <li>✓ Conviction for sexual harassment.</li> </ul>
<b>Relating to establishments- Include departments, undertakings and branches [Section 30]</b>	<ul style="list-style-type: none"> <li>✓ An establishment consists of <b>different departments or undertakings or has branches, whether situated in the same place or in different places</b>, all such departments or undertakings or branches shall be treated as <b>parts of the same establishment</b> for the purpose of <b>computation of bonus</b> under this Code</li> <li>✓ Provided that where <b>for any accounting year a separate balance sheet and profit and loss account are prepared and maintained in respect of any such department or undertaking or branch</b>, then, <b>such department or undertaking or branch shall be treated as a separate establishment for the purpose of computation of bonus</b>, under this Code for that year.</li> <li>✓ Unless such <b>department or undertaking or branch was, immediately before the commencement of that accounting year treated as part of the establishment</b> for the purpose of computation of bonus.</li> </ul>
<b>Section 31 of the Code</b>	<ul style="list-style-type: none"> <li>✓ <b>67% in case of company (other than a banking company) and 60% in other cases</b>, shall be the "allocable surplus" which is the amount available for payment of bonus to employees.</li> <li>✓ Audited accounts of companies shall not normally be questioned.</li> <li>✓ Any dispute regarding the quantum of bonus, the authority notified by the appropriate Government having jurisdiction may call upon the employer to <b>produce the balance sheet before it, but the authority shall not disclose any information</b> contained in the balance sheet unless agreed to by the employer.</li> </ul>

Set On & Set Off [Section 36]	<ul style="list-style-type: none"> <li>✓ The allocable surplus exceeds the amount of maximum bonus payable to the employees in the establishment under Section 26, then, the excess shall, subject to a limit of 20% of the total salary or wage of the employees employed in the establishment in that accounting year, be carried forward for being set on in the succeeding accounting year and so on up to and inclusive of the fourth accounting year to be utilized for the purpose of payment of bonus in the manner illustrated in the Fourth Schedule.</li> <li>✓ No available surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees then such minimum amount or the deficiency , as the case may be shall be carried forward for being set off in the succeeding accounting year up to 4<sup>th</sup> accounting year.</li> </ul>
Customary Bonus or Interim Bonus [Section 37]	<ul style="list-style-type: none"> <li>✓ An employer has paid any puja bonus or other customary bonus to an employee.</li> <li>✓ An employer has paid a part of the bonus payable under this Act to an employee before the date on which such bonus becomes payable</li> </ul>
Section 38	<ul style="list-style-type: none"> <li>✓ An employee is found guilty of misconduct causing financial loss to the employer, then, it shall be lawful for the employer to deduct the amount of loss from the amount of bonus payable by him to the employee under this Code in respect of that accounting year only.</li> <li>✓ Employee shall be entitled to receive the balance, if any.</li> </ul>
Section 39 of the Code	<ul style="list-style-type: none"> <li>✓ All amounts payable to an employee by way of bonus under this Code shall be paid by crediting it in the bank account of the employee by his employer within a period of eight months from the close of the accounting year.</li> <li>✓ An application made to it by the employer and for sufficient reasons, by order, extend the said period of eight months to such further period or periods as it thinks fit; so, however, that the total period so extended shall not in any case exceed two years.</li> <li>✓ Dispute regarding payment of bonus pending before any authority, such bonus shall be paid, within a period of one month from the date on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute</li> <li>✓ Dispute for payment at the higher rate, the employer shall pay eight and one-third per cent of the wages earned by the employee as per the provisions of this Code within a period of eight months from the close of the accounting year.</li> </ul>
Section 40 of the Code	<ul style="list-style-type: none"> <li>✓ Public sector sells goods produced or manufactured or renders any services in competition with an establishment in private sector and the income from such sale or services or both is not less than 20% of the gross income of the establishment in public sector for that year then the provisions of this act.</li> <li>✓ Shall apply to such establishment in public sector as they apply in relation to establishment in private sector.</li> </ul>

<b>Section 41 of the Code</b>	<ul style="list-style-type: none"> <li>✓ Employees employed by any insurer carrying on general insurance business and the employees employed by the Life Insurance Corporation of India</li> <li>✓ Seamen as defined in clause (42) of Section 3 of the Merchant Shipping Act, 1958.</li> <li>✓ Employees registered or listed under any scheme made under the Dock Workers (Regulation of Employment) Act, 1948 and employed by registered or listed employers.</li> <li>✓ Employees employed by an establishment engaged in any industry called on by or under the authority of any department of Central Government or a State Government or a local authority.</li> </ul> <p><b><u>Employees employed by</u></b></p> <ul style="list-style-type: none"> <li><input type="radio"/> The Indian Red Cross Society or any other institution of a like nature including its branches.</li> <li><input type="radio"/> Universities and other educational institutions.</li> <li><input type="radio"/> Institutions (including hospitals, chambers of commerce and social welfare institutions) established not for the purpose of profit</li> </ul> <p><b><u>Employees employed by the Reserve Bank of India</u></b></p> <ul style="list-style-type: none"> <li><input type="radio"/> The Industrial Finance Corporation of India</li> <li><input type="radio"/> Any Financial Corporation established under Section 3, or any Joint Financial Corporation established under Section 3A of the State Financial Corporations Act, 1951</li> <li><input type="radio"/> The Deposit Insurance Corporation</li> <li><input type="radio"/> The National Bank for Agriculture and Rural Development</li> <li><input type="radio"/> The Unit Trust of India</li> <li><input type="radio"/> The Industrial Development Bank of India</li> </ul>
	<ul style="list-style-type: none"> <li><input type="radio"/> The Small Industries Development Bank of India established under Section 3 of the Small Industries Development Bank of India Act, 1989</li> <li><input type="radio"/> The National Housing Bank</li> </ul>
<b>Advisory boards [Central Advisory Board] [Section 42]</b>	<ul style="list-style-type: none"> <li>✓ The central and state governments will constitute advisory boards.</li> <li>✓ Employers</li> <li>✓ Employees (in equal number as employers)</li> <li>✓ independent persons, and</li> <li>✓ Five representatives of state governments. State Advisory Boards will consist of employers, employees, and independent persons.</li> <li>✓ Further, one-third of the total members on both the central and state Boards will be women.</li> </ul>
<b>Advise the Representative Government</b>	<ul style="list-style-type: none"> <li>✓ Fixation of minimum wages</li> <li>✓ Increasing employment opportunities for women.</li> </ul>
<b>Section 44 – Undisbursed due</b>	<p>If such amounts <b>could not or cannot be paid on account of his death</b> before payment or on account of his whereabouts not being known:</p> <ul style="list-style-type: none"> <li>✓ <b>Person nominated by him in this behalf in accordance with the rules</b> made under this Code</li> <li>✓ <b>No such nomination has been made or where for any reasons such amounts cannot be paid to the person so nominated,</b> be deposited with the such authority</li> </ul> <p><b><u>All amounts payable to an employee under this Code</u></b></p> <ul style="list-style-type: none"> <li>✓ Paid by the <b>employer to the person nominated by the employee</b></li> <li>✓ Deposited by the <b>employer with the authority then the employer shall be discharged of his liability to pay those amounts.</b></li> </ul>

<b>Section 45 of the Code</b>	<ul style="list-style-type: none"> <li>✓ The Appropriate Government may <b>appoint one or more authority to hear and decide any claim arising out of payment of less than the minimum wages</b> or in respect of the payment of <b>remuneration for the days of rest or of wages at the rate of overtime work.</b></li> <li>✓ Any commissioner for Workmen compensation</li> <li>✓ Any officer of the Central Government exercising functions as Labour Commissioner for any region.</li> <li>✓ Any officer of the State Government not below the rank of Labour Commissioner.</li> <li>✓ Any other officer with experience as a Judge of a Civil Court or as the Stipendiary Magistrate.</li> </ul>
<b>Payment of Compensation</b>	<ul style="list-style-type: none"> <li>✓ Payment of compensation in addition to the <b>claim determined, which may extend to ten times of the claim</b> determined.</li> <li>✓ Shall be made by the <b>authority to decide the claim within a period of three months.</b></li> <li>✓ The authority shall issue a <b>certificate of recovery to the Collector or District Magistrate of the district where the establishment is located.</b></li> <li>✓ Shall recover the same as <b>arrears of land revenue and remit the same to the authority</b> for payment to the concerned employee.</li> </ul>
<b>Application</b>	<ul style="list-style-type: none"> <li>✓ <b>Single application may be filed</b> under this section on behalf or in respect of <b>any number of employees employed</b> in an establishment.</li> <li>✓ The application may be filed within a period of three years from the date on which claims referred</li> </ul>
	<ul style="list-style-type: none"> <li>✓ Entertain the application after three years on sufficient cause being shown by the applicant for such delay</li> </ul>
<b>Claims under Minimum Wages</b>	<p><b>The following person can make an application to prescribed authorities</b></p> <ul style="list-style-type: none"> <li>✓ The employee himself.</li> <li>✓ Any legal practitioner.</li> <li>✓ Any authorized official of a registered trade union</li> <li>✓ Any inspector acting with the permission of the Authority</li> </ul>
<b>Appellate Authority [Section 49]</b>	<ul style="list-style-type: none"> <li>✓ The appellate authority appointed under sub-section (1) of section 49, shall have all the powers of a civil court under the Code of Civil Procedure, 1908.</li> <li>✓ Purpose of taking evidence</li> <li>✓ Enforcing the attendance of witnesses</li> <li>✓ Compelling the production of documents</li> <li>✓ Every such authority or appellate authority shall be deemed to be a civil court</li> </ul>

Provisions relating Appellate Procedures	<ul style="list-style-type: none"> <li>✓ Any person aggrieved by an order passed by the authority <b>may prefer an appeal, to the appellate authority having jurisdiction</b> appointed by the appropriate Government, by notification, for such purpose, <b>within ninety days from the date of such order.</b></li> <li>✓ Appellate authority may entertain the <b>appeal after ninety days if it satisfied that the delay in filing the appeal has occurred due to sufficient cause.</b></li> <li>✓ The appellate authority shall be appointed from the officers of the appropriate Government holding the <b>post at least one rank higher than the authority.</b></li> <li>✓ The appellate authority shall, after hearing the parties in the appeal, <b>dispose of the appeal and endeavour shall be made to dispose of the appeal within a period of three months.</b></li> <li>✓ The <b>outstanding dues under the orders of the appellate authority</b> shall be recovered by the authority referred to in section 45, by issuing the certificate of recovery.</li> </ul>
Maintenance of Register & Record [Section 50]	<ul style="list-style-type: none"> <li>✓ Work performed <b>by employees.</b></li> <li>✓ <b>Receipts given by employees</b> to show that they have received minimum wages. Other prescribed particulars.</li> <li>✓ Every employer is also required to <b>exhibit notices in the prescribed form at the place of work.</b></li> <li>✓ Every employer is also required to <b>maintain wage books or wage-slips in prescribed manner</b> and the <b>entries made therein will have to be authenticated by the employer or his agent</b></li> </ul>
Powers of Inspectors Section 51	<ul style="list-style-type: none"> <li>✓ <b>Examination</b>: Make examination of the premises, plant, machinery, article or substance;</li> <li>✓ <b>Inquire</b> : Inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry;</li> <li>✓ <b>Produce</b> : Require the production of any prescribed register or any other document relating to the factory;</li> <li>✓ <b>Seize</b> : Seize, or take copies of, any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which he has reason to believe, has been committed;</li> </ul>
	<ul style="list-style-type: none"> <li>✓ <b>Measurements</b> : Take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination under clause (b), taking with him any necessary instrument or equipment;</li> <li>✓ <b>Article or Substance</b> : In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test.</li> <li>✓ <b>Evidence</b>: No person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself.</li> </ul>
Section 52	<ul style="list-style-type: none"> <li>✓ No court shall take <b>cognizance of any offence punishable under this Code, save on a complaint made by or under the authority of the appropriate Government</b> or an officer authorised in this behalf.</li> <li>✓ By an <b>employee or a registered Trade Union registered under the Trade Unions Act, 1926</b> or an Inspector-cum-Facilitator.</li> <li>✓ <b>No court inferior to that of a Metropolitan Magistrate</b> or Judicial Magistrate of the first class shall try the offences under this Code.</li> </ul>

<b>Penalties [Section 54]</b>	
<b>Less than the Amount</b>	✓ Punishable with fine which may extend to fifty thousand rupees
<b>Found Guilty of Similar Offence</b>	<p>✓ Within <b>five years</b> from the date of the <b>commission of the first or subsequent offence</b>, he shall, on the second and the subsequent commission of the offence under this clause.</p> <p>✓ Punishable with imprisonment for a term <b>which may extend to one month or with fine which may extend to forty thousand rupees, or with both.</b></p>
<b>Contravenes any other provision</b>	✓ Punishable with fine which may extend to <b>twenty thousand rupees</b>
<b>Non Maintenance of Record</b>	✓ The employer shall be punishable with fine which <b>may extend to ten thousand rupees.</b>
<b>Offences by Companies [Section 55]</b>	
<b>Company &amp; Every Person-At the time of Offence</b>	<p>✓ At the time the offence was <b>committed was in charge of, and was responsible to the company for the conduct of business of the company</b>, as well as the company, shall be deemed to be guilty of the offence</p> <p>✓ The offence was committed <b>without his knowledge or that he exercised all due diligence to prevent the commission</b> of such offence.</p>
<b>Offence Committed with the Consent</b>	<p>✓ Offence has been committed with the <b>consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company</b>, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence.</p> <p>✓ Shall be liable to be <b>proceeded against and punished accordingly.</b></p>

## EVIEW QUESTIONS

1. Describe the scope and object of the Payment of Bonus under Code on Wages 2019
2. Write short notes on:
  - a. Accounting year;
  - b. Allocable surplus;
  - c. Employee and employer;
  - d. Salary and wages.
3. What is allocable surplus? How does it differ from available surplus?
4. Enumerate the categories of employees who are not covered under the Payment of Bonus under Code on Wages 2019
5. What is the eligibility limit for payment of bonus? Who is disqualified from getting bonus under the Act?
6. Explain the salient features of Minimum Wages under Code on Wages 2019
7. Describe briefly about the basis for fixing minimum rates under Minimum wages under Code on Wages 2019
8. Explain Cost of living Index Number under the Minimum wages under Code on Wages 2019
9. Explain committee method and notification method for fixation of Minimum Wages under the Code on Wages 2019
10. Write explanatory notes on Maintenance of Registers and Records under Minimum Wages under Code on Wages 2019
11. Write short notes on Time Payment of Wages under Code on Wages 2019
12. Discuss about the Responsibility of Wages under Code on Wages 2019
13. Write notes on Permissible deduction of Wages under Code on Wages 2019
14. What are the conditions to deduct for recover of the advances made under Payment of Wages under Code on Wages 2019
15. Explain filing of application under Payment of Wages Act under Code on Wages 2019

## PRACTICAL QUESTIONS

### SECTION B

### INDUSTRIAL LAWS

#### **FACTORIES ACT 1948**

[J] 2012 — Drinking water shall be provided at suitable points which shall not be situated within sixmetres of any washing place/urinal.

[J] 2012 — In every factory wherein more than 250 workers are ordinarily employed, cooling drinking water during hot weather shall be provided.

[J] 2012 — Non person shall spit except in the spittoons provided for in factory and whoever spits in contravention shall be punishable with fine of INR

[J] 2012 – In every factory wherein 500 workers are ordinarily employed, welfare Officer as may be prescribed shall be employed.

[D] 2012 – No child shall be employed or permitted to work in any factory for more than four and a half hours in a day.

[D] 2012 – No female Child shall be required or allowed to work in any factory except between 8 AM and 7 PM.

[D] 2012 – No Child shall be employed during the Night and Night means a period of at least twelve consecutive hours which shall include the interval between 10PM and 6 AM.

D] 2012 – No woman shall be required or allowed to work in any factory except between the hours of 6 AM and 6 PM.

J] 2013 – No adult worker shall be required to allow to work in a factory

- ✓ For more than 48 hours in any week.
- ✓ For more than 9 hours in any day.
- ✓ The period of work of adult workers in a factory shall be so fixed that no period shall exceed 5 hours

D] 2008 – Personnel Manager told to Director that at least one canteen shall be provided in every factory. Do you agree ?

#### **Questions & Answers**

## **RR Academy**

**As per Factories Act, Canteen is mandatory in all the factories.**

Ans. As per Section 46 of the Factories Act, 1948 the State Government may make rules requiring that in any specified factory wherein more than 250 workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers. Thus, canteen is not mandatory in every factory unless specified.

**As per provision of factories Act, every factory is to appoint at least one welfare officer — Do you agree? Answer citing rules**

Ans. As per Section 49, in every factory wherein 500 or more workers are ordinarily employed the occupier shall employ in the factory such number of welfare officers as may be prescribed. Hence, only in factories where five hundred or more workers are ordinarily employed are required to employ welfare officers. [

**Creches are compulsory in a factory where women employees are employed.**

Ans. As per Section 48, in every factory wherein more than 30 women workers are ordinarily employed there shall be provided and maintained a suitable room or rooms for the use of children under the age of 6 years of such women. Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants. Thus, where 30 or more than 30 women workers are employed there creches are compulsory in a factory.

**As per factories Act, adequate shelters, rest rooms and lunch rooms are mandatory in all the factories. Do you agree? Give correct answer.**

are ordinarily employed, adequate and suitable shelters or rest rooms and a suitable lunch room, with provision for drinking water, where workers can eat meals brought by them, shall be provided and maintained for the use of the workers. The shelters or rest rooms or lunchrooms to be provided shall be sufficiently lighted and ventilated and shall be maintained in a cool and clean condition.

**Manager of the factory fixed the working hours of women from 6:00 P.M. to 1:00 A.M. during the period from Monday to Friday of first week of May 2010. Whether it is permissible, cite with Rule position.**

Ans. As per Section 66, No woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M. The State Government may, by notification in the Official Gazette, vary the limits but not between the hours of 10 P.M. and 5 A.M. There shall be no change of shifts except after a weekly holiday or any other holiday. In terms of above given provision, the working hours of women from 6 PM to 1 AM during the period from Monday to Friday is not permissible

## PAYMENT OF GRATUITY ACT 1972

**Sukumar joined M/s Reputed Manufacturing Ltd., on 25.12.1998 and superannuated on 31.05.2003. Determine gratuity if his last salary was Rs.7,000.00 per month.**

Section 4 of the Payment of Gratuity Act, 1972 provides that gratuity shall be payable to an employee after he has rendered continuous service for not less than five years,- (i) on his superannuation, or (ii) on his retirement or resignation. or (iii) on his death or disablement due to accident or disease. In the present case, Sukumar has not rendered continuous service for 5 years but only for 4 years 6 months hence, he is not eligible to any gratuity.

**Quantum of gratuity depends on the length of service of an employee.**

Ans. Section 4 of the Payment of Gratuity Act, 1972 provides the following provisions for payment of gratuity: (a) After 5 years of continuous service — Gratuity shall be payable to an employee after he has rendered continuous service for not less than five years,(i) on his superannuation, or (ii) on his retirement or resignation, or

On his death or disablement due to accident or disease. (b) Less than 5 years of continuous service — Gratuity shall be payable on the death or disablement due to accident or disease of an employee even if he has rendered continuous service for less than five years. In the case of death of the employee, gratuity payable to him shall be paid (i) to his nominee, or, (ii) if no nomination has been made, to his heirs and Where any such nominees or heirs is a minor, the share of such minor shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in specified bank or other financial institution, until such minor attains majority.

**Mr. Sham, who retired on 30/11/2009, did not vacate office quarter which was provided by his employer. Employer withheld the Gratuity to force him to vacate the quarter.**

Ans. In terms of the Gratuity Act, gratuity cannot be withheld if any employee did not vacate the quarter given to him by his employer. Similar judgment was made in AIR India v. Authority. (1998) CLA 34 Born 66. Hence the employer cannot withhold the gratuity payment of Mr. Sham.

**Payment of Gratuity Act, 1972 applies to all the factories**

Ans. The Payment of Gratuity Act applies to the following: Every factory, mine oilfield, plantation, port and railway company mine. Every shop or establishment within the meaning of any law for the time being enforce in relation to shops and establishments laws in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. Such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

**Retirement and superannuation (under Payment of Gratuity Act) are same—Comment.**

Ans. Retirement and Superannuation are not the same. Retirement means termination of the service of an employee otherwise than on superannuation whereas, superannuation in relation to an employee means the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment.

**Mr. A. B. Roy a dissatisfied worker willfully causing damage of a machine. Employer had to spent Rs.10,000/- to get the machine rectified. Hence his gratuity was forfeited. — Whether justified.**

Ans. Section 4 of the Payment of Gratuity Act, 1972 provides that gratuity payable to an employee shall be forfeited to the extent of the damage or loss caused by him if his services have been terminated for any act, willful omission or negligence causing any damage or loss or destruction of the property belonging to the employer. Gratuity of Mr. A. B. Roy can be forfeited to the extent Rs.10,000 if his service has been terminated as stated in the provision.

**Mr. S.K Paul employed in seasonal establishment and was not employed throughout the year claimed gratuity at the rate of 15 days wages for each year of service. But Employer refused to pay any Gratuity to employees of seasonal establishment.**

Ans. Where an employee, employed in a seasonal establishment, is not in continuous service, he shall be deemed to be in continuous service under the employment for such period if he has actually worked for not less than 75% of the number of days on which the establishment was in operation during such period. If Mr. Paul is employed for 75% of the number of days on which the establishment was in operation during such period, he is entitled to gratuity.

**Mr. Ram joined Bells Assam Ltd. on 26.11.1980 and superannuated on 31.5.2006. On the date of retirement, his monthly salary was Rs. 24,000/. He also received overtime of Rs. 2,000/. Calculate the amount of Gratuity.**

Ans. Section 4 of the Payment of Gratuity Act, 1972 provides the following provisions for computation of gratuity: The employer shall pay gratuity to an employee at the rate of 15 days' wages based on the rate of wages last drawn by the employee concerned for every completed year of service or part thereof in excess of six months. The 15 days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

Gratuity = Last drawn salary  $\times$  (15/26)  $\times$  completed year of service or part thereof in excess of 6 months. Thus, in the given case amount of gratuity of Mr. Ram will be: Rs. 24,000  $\times$  15/26  $\times$  26=Rs. 3,60,000

**Calculate the amount of gratuity of Mr. X who joined the company on 1.5.78 and retired on 30.11.08 when his salary was Rs. 26,000/- per month. During November, 2008 he received overtime and incentive Rs. 5,000/-**

Ans. Section 4 of the Payment of Gratuity Act, 1972 provides the following provisions for computation of gratuity: The employer shall pay gratuity to an employee at the rate of 15 days' wages based on the rate of wages last drawn by the employee concerned for every completed year of service or part thereof in excess of six months. The 15 days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.  
 Gratuity = Last drawn salary  $\times$  (15/26)  $\times$  completed year of service or part thereof in excess of 6 months. Thus, in the given case amount of gratuity of Mr. X will be : Rs. 26,000  $\times$  15/26  $\times$  31 = Rs.4,65,000

**Every employee, whose salary is not more than Rs. 3500 per month is entitled to gratuity as per Payment of Gratuity Act. State the legal provision if not correct.**

Ans. Section 2(e) provides that 'employee' means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity. Thus, every employee is entitled to gratuity as per the Payment of Gratuity Act, 1972.

**Whether Mr. Sham who joined the company on 01/07/2009 and died on 30/11/2009 is entitled to Gratuity. Answer citing Rules.**

Ans. Section 4 provides for payment of gratuity in case of death or disablement. Gratuity shall be payable on the death or disablement due to accident or disease of an employee even if he has rendered continuous service for less than five years. In the case of death of the employee, gratuity payable to him shall be paid to his nominee, or, if no nomination has been made, to his heirs. Thus, Mr. Shyam's nominee or heir is entitled to receive gratuity.

**Mr. Saxena on superannuation on 30.09.2011 submitted an application in prescribed form to his employer on 05.10.2011 for payment of gratuity of Rs.15,00,000/- He has not received any payment till 10.12.2011 inspite of reminders. Advise the steps to be taken by him and the benefits which he may receive.**

Ans. As per Section 4 of the Payment of Gratuity Act, 1972, the employer shall pay gratuity to an employee at the rate of 15 days' wages based on the rate of wages last drawn by the employee concerned for every completed year of service or part thereof in excess of six months.

The 15 days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by 26 and multiplying the quotient by 15. A person who is eligible for payment of gratuity or any person authorised, in writing, to act on his behalf shall send a written application in Form 'T', within 30 days from the date the gratuity became payable, for payment of such gratuity. As soon as gratuity becomes payable, the employer shall, whether an application has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined. As per Section 8 of the Act, if the amount of gratuity payable is not paid by the employer within 30 days, the person may apply to the controlling authority. The controlling authority shall, on receipt of such application, issue a certificate for that amount to the Collector. The Collector shall recover the amount of gratuity together with compound interest thereon at such rate as the Central Government may, by notification, specify, from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto.

**ABC Pvt. Ltd. incorporated on 2nd January 1980 carrying on business from the date of incorporation employing 50 persons. Due to loss, the number of employees reduced to five w.e.f 02.06.2011. Mr. 'A' who retired on 31.05.2013 was refused gratuity on the ground that the total number of employees is below 10 (ten). Whether employer was justified?**

Ans. As provided in Section 1 of the Gratuity Act, a shop or establishment to which the Act has become applicable shall continue to be governed by the Act even if the number of persons employed therein at any time

## CODE ON WAGES 2019

### PAYMENT OF WAGES

**Wages of all the workers shall be paid before 5<sup>th</sup> of following month.**

Ans. Wages of every person employed upon or in any railway, factory or industrial or other establishment upon or in which less than 1000 persons are employed, shall be paid before the expiry of the seventh day. The wages of every person employed upon or in any other railway, factory or industrial or other establishment, shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable. In the case of persons employed on a dock, wharf or jetty or in a mine, the balance of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid before the expiry of the seventh day from the day of such completion.

**Mr. Malhotra, Factory Manager, stated that payment of wages can also be made in kind. (Minimum Wages under Code of Wages 2019)—offer your views.**

Ans. All wages shall be paid in current coin or currency notes or in both. The employer may, after obtaining the written authorisation of the employed person, pay him the wages either by cheque or by crediting the wages in his bank account. In the given case, the statement of Mr. Malhotra, Factory Manager is not correct.

**Works Manager has deducted INR 500 from wages towards the cost of tools and raw materials supplied to workers for purpose of employment (Payment of Wages under Code of Wages 2019)**

Ans. Payment of Wages provides certain deductions to be made from the wages. Cost of tools and raw materials supplied to workers for purpose of employment are not eligible for deductions.

**Mr. Sham was terminated from employment by the employer on 25/11/2009. Personnel Manager directed him to collect his wages earned on 01/12/2009. Mr. Sham objected to the date. State legal provisions as to the date of payment**

Ans. The employment of any person is terminated by or on behalf of the employer, the wages earned by him shall be paid before the expiry of the second working day from the day, on which his employment is terminated. As per given provision Mr. Sham's objection is correct. The wages shall be paid to him before expiry of the second day i.e. 27.11.09

**Manager of ABC Ltd. told that total amount of deduction which may be made from the wages of any workman during a month shall not exceed 90% of such wages. – State legal provisions.**

Ans. The total amount of deductions in any wage period from the wages of any employed person shall not exceed — (i) In cases where such deductions are wholly or partly made for payments to co-operative societies, 75% of such wages, and (ii) In any other case, 50% of such wages. Where the total deductions exceed 75% or, as the case may be, 50% of the wages, the excess may be recovered in such manner as may be prescribed. Thus, the contention of the Manager is incorrect. The deduction cannot be made more than as stated above.

## MINIMUM WAGES

**Manager of ABC Ltd. told that total amount of deduction which may be made from the wages of any workman during a month shall not exceed 90% of such wages. – State legal provisions.**

Ans. The total amount of deductions in any wage period from the wages of any employed person shall not exceed — (i) In cases where such deductions are wholly or partly made for payments to co-operative societies, 75% of such wages, and (ii) In any other case, 50% of such wages. Where the total deductions exceed 75% or, as the case may be, 50% of the wages, the excess may be recovered in such manner as may be prescribed. Thus, the contention of the Manager is incorrect. The deduction cannot be made more than as stated above.

## PAYMENT OF BONUS

**A part time employee engaged on regular basis is eligible for Bonus under Payment of Bonus under Code of Wages 2019**

Ans. True. A part time employee as a sweeper engaged on a regular basis is entitled to bonus as held in Automobile KarmachariSaugh V. Industrial Tribunals, 1970 (38) FJR 268

**All the employees who are covered under Bonus were paid Holi Bonus of Rs.500/- each. Latter on due to loss, the Employer paid minimum Bonus @ 8.33% but after deduction of said Rs.500/- Whether employer was Justified.**

Ans. In any accounting year an employer has paid any puja (festival) bonus or other customary bonus to an employee then, the employer shall be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him to the employee under the Act in respect of that accounting year and the employee shall be entitled to receive only the balance. Therefore, the employer was Justified.

## SECTION C

### THE COMPANIES ACT, 2013

#### **MEANING AND DEFINITION OF A COMPANY**

According to Sec 2(20) “company” means a company incorporated under this Act or under any previous company law.

The word ‘company’ is derived from the Latin word (Com=with or together; panis =bread), and it originally referred to an association of persons who took their meals together.

Lord Justice Lindley has defined a company as “an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business and who share the profit and loss arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contributed in it or form it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his “share”. The shares are always transferable although the right to transfer them may be restricted.”

#### **CORPORATION**

The word ‘corporation’ is derived from the Latin term ‘corpus’ which means ‘body’. Accordingly, ‘corporation’ is a legal person created by a process other than natural birth. It is, for this reason, sometimes called artificial legal person. As a legal person, a corporate is capable of enjoying many rights and incurring many liabilities of a natural person.

#### **CHARACTERISTICS OF A COMPANY**

##### **CORPORATE PERSONALITY / SEPARATE LEGAL ENTITY :**

- A company incorporated under the Act is vested with a corporate personality and is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual.
- Its members are its owners and a shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital because of this Separate Legal entity character.
- The shareholders are not the agents of the company and so they cannot bind it by their acts.
- ‘Incorporation’ is the act of forming a legal corporation as a juristic person. the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law
- ***Case Law : Salomon v. Salomon and Co. Ltd.***

#### **LEGAL PERSON**

- A Company is an artificial person created by law. It is considered as a legal person who can enter into contracts, possess properties in its own name, sue and can be sued by others etc.
- However, Company is not a citizen as Section 2(f) of Citizenship Act, 1955 expressly excludes a company or association or body of individuals from citizenship.
- Though it is established through judicial decisions that a company cannot be a citizen, yet it has nationality, domicile and residence.

### LIMITED LIABILITY

- The company, being a separate person, is the owner of its assets and bound by its liabilities.
- The liability of the member towards the company is limited. In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets.
- In the case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

### PERPETUAL SUCCESSION

- Perpetual Succession means Continuous existence. The membership of a company may keep changing from time to time, but that shall not affect its continuity.
- Company, being an artificial juridical person, does not die a natural death. Generally, the existence of a Company is terminated by means of winding up. However, to avoid winding up, sometimes companies adopt strategies like reorganisation, reconstruction and amalgamation.
- Professor L.C.B. Gower rightly mentions, "Members may come and go, but the company can go on forever. During the war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived — not even a hydrogen bomb could have destroyed it".

### COMMON SEAL

- Since company is an artificial person and it can act through natural persons, the company cannot sign as a natural person. Common Seal was considered as signature of a company.
- However with effect from 29<sup>th</sup> May 2015 as per the Companies (Amendment) Act, 2015 the mandatory requirement of Common seal has been omitted. The Company may or may not adopt a common seal.
- If the company has common seal, it should be affixed on specified documents.
- If it does not have, the document can be authorized by two directors / one director and company Secretary, wherever the company appointed a company secretary.

### DOCTRINE OF LIFTING OF OR PIERCING THE CORPORATE VEIL

The separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. In such cases the Court is empowered to look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company.

It is the power of Court and the shareholders cannot ask for the lifting of the veil for their purposes.

#### LIFTING OF CORPORATE VEIL UNDER JUDICIAL INTERPRETATION

Protection of Revenue	The Court may ignore the Separate Legal Entity status of a Company, where it is used for tax invasion or circumventing tax obligation.
Determination of enemy character of the Company	Company being an artificial person cannot be enemy or friend. But during war, it may become necessary to lift the corporate veil and see the persons behind it to determine whether they are friends or enemy. This is due to the reason that though a company enjoys Separate Legal Entity but its affairs are run by individuals. (Daimler Co. Ltd. Vs Continental Tyre & Rubber Co. Ltd.)
Prevention of fraud	Where a Company is used for committing frauds or improper conduct, the Court may lift the corporate veil and look at the realities of the situation. (Jones vs Lipman)

Protection of public policy	The Court shall lift the Corporate Veil without any hesitation to protect the public policy and prevent transaction opposed to public policy.
Company mere sham or cloak	Where the Company is a mere sham and was really a ploy used for committing illegalities and to defraud people, the Court shall lift the Corporate Veil. ( <i>Gilford Motor Company vs Horne</i> )
Where a Company acts as an agent of its shareholders	If there is an arrangement between the shareholders and a Company to the effect that the Company will act as agent of shareholders for the purpose of carrying on the business, the business is essentially of that of the shareholders and will have unlimited liability.
Avoidance of Welfare Legislation	Where a Company tries to avoid its legal obligations, the corporate veil shall be lifted to look at the real picture. ( <i>Workmen of Associated Rubber Industry Ltd. Vs Associated Rubber Industry Ltd.</i> )
To punish for contempt of Court	Company being an artificial person cannot disobey the orders of the Court. Therefore, the persons at fault should be identified.

### TYPES OF COMPANIES

#### CLASSIFICATION OF COMPANIES

The three basic types of companies which may be registered under the Act are:

- (a) Private Companies;
- (b) Public Companies; and
- (c) One Person Company (to be formed as Private Limited)

Section 3 (1) of the Companies Act 2013 states that a company may be formed for any lawful purpose by—

- (a) seven or more persons, where the company to be formed is to be a public company;
- (b) two or more persons, where the company to be formed is to be a private company; or
- (c) one person, where the company to be formed is to be One Person Company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration

A company formed under sub-section (1) may be either—

- (a) a company limited by shares; or
- (b) a company limited by guarantee; or
- (c) an unlimited company

#### CLASSIFICATION ON THE BASIS OF INCORPORATION

STATUTORY COMPANIES	REGISTERED COMPANIES
These are constituted by a special Act of Parliament or State Legislature. The provisions of the Companies Act, 2013 do not apply to them. Examples of these types of companies are Reserve Bank of India, Life Insurance corporation of India, etc.	The companies which are incorporated under the Companies Act, 2013 or under any previous company law, with ROC fall under this category.

CLASSIFICATION ON THE BASIS OF LIABILITY		
Unlimited Liability Companies	Companies limited by guarantee	Companies limited by shares
In these types of companies members liability is unlimited. Such companies may or may not have share capital. They may be either a public company or a private company. Note : Even though Act provides for companies with unlimited liability, it is rare in real scenario.	Liability of its members limited to such amount as the members may respectively undertake, by the memorandum, to contribute to the assets of the company in the event of its being wound-up. This can be further classified as with share capital or without share capital.	Company that has the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them is termed as a company limited by shares.

### STATUTORY COMPANY / CORPORATIONS

1. A Company formed under an Act of Parliament or State Legislature is called a Statutory Company/ Corporation.
2. Such companies do not use the word "limited" as part of their names.
3. It is owned by the State.
4. A basic feature of a statutory corporation is its immunity from Parliamentary enquiry into its day-to-day working, as distinct from matters of policy.
5. Its employees are not civil servants and are not governed by Government regulations in respect of conditions of service.
6. Each statutory corporation is a body corporate and can sue and be sued, enter into contracts and acquire property in its own name.
7. It obtains funds by borrowing either from the Government or, in some cases, from the public and through revenues derived from the sale of goods and services, and has the authority to use and re-use its revenue.

### PRIVATE COMPANY

According to Sec 2(68) "private company" means a company which by its articles

- (i) Restricts the right to transfer its shares;
- (ii) Except in case of One Person Company, limits the number of its members to two hundred: Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

- (A) persons who are in the employment of the company; and
- (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and
- (iii) Prohibits any invitation to the public to subscribe for any securities of the company.

### SMALL COMPANY

As per section 2(85) "small company" means a company, other than a public company,—

- (i) paid-up share capital of which does not exceed Four Crore rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; **AND**
- (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed Forty crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees."

Provided that nothing in this definition shall apply to—

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act;

### PUBLIC COMPANY

By virtue of Section 2(71), a public company means a company which:

- (a) is not a private company;
- (b) has a minimum paid-up share capital, as may be prescribed.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

### HOLDING COMPANY

As per Section 2(46), holding company, in relation to one or more other companies, means a company of which such companies are subsidiary companies.

### SUBSIDIARY COMPANY

Section 2(87) provides that subsidiary company or subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company—

- (i) controls the composition of the Board of Directors; or
- (ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation.—For the purposes of this clause,—

- (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;
- (b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- (c) the expression "company" includes any body corporate;
- (d) "layer" in relation to a holding company means its subsidiary or subsidiaries.

### SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY – SEC 19

This section insists that the subsidiary company cannot be a member of its holding company.

Section 19(1) seeks to provide that subsidiary company shall not either by itself or through its nominees hold shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company **shall be void**.

#### Exception to the above provision:

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or
- (c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

However, the subsidiary company referred above shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in item (a) or (b) aforesaid.

### ASSOCIATE COMPANY

As per Section 2(6), "Associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation to section 2(6) provides that

- (a) the expression "significant influence" means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;
- (b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

## FOREIGN COMPANIES

As per section 2(42), "foreign company" means any company or body corporate incorporated outside India which—

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

- As per Section 386(c), having a share transfer office or share registration office will constitute a place of business. In a certain case, it was held that mere holding of property cannot amount to having a place of business.
- Where representatives of a company incorporated outside the country frequently visited and stayed in a hotel for looking after purchase of machinery and other articles, it was held that the company had a place of business in the hotel.
- A company incorporated outside India having shareholders who are all Indian citizens and having its business outside India is not a foreign company.
- , a company incorporated in India but having all foreign shareholders shall be an Indian company and not a foreign company.
- Hence It is important to note here that foreign companies are defined in terms of its place of incorporation.

## GOVERNMENT COMPANIES

Section 2(45) defines a "Government Company" as any company in which not less than fifty one per cent. of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

For the purposes of this clause, the "Paid up share capital" shall be construed as "total voting power".

- The Government Company is neither a Government department nor a Government establishment.
- Employees of Government companies are not Government servants, they have no legal right to claim that the Government should pay their salary. It is the responsibility of the company to pay them the salaries

## PUBLIC FINANCIAL INSTITUTIONS

According to Section 2(72), "Public financial institution" means—

(i) the Life Insurance Corporation of India, established under section 3 of the Life Insurance Corporation Act, 1956;

(ii) the Infrastructure Development Finance Company Limited, referred to in clause (vi) of sub-section (1) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act;

(iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002;

(iv) institutions notified by the Central Government under sub-section (2) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act;

(v) such other institution as may be notified by the CG in consultation with the RBI:

However, no institution shall be so notified unless—

(A) it has been established or constituted by or under any Central or State Act; or

(B) not less than fifty-one per cent. of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.

## ONE PERSON COMPANY

Section 2(62) defines One Person Company as a company which has only one person as a member.

1. One Person Company will be formed as a “Private Limited Co”.
2. An OPC may be formed either as a company limited by shares or a company limited by guarantee; or an unlimited liability company
3. The words “One Person Company” will have to be mentioned in brackets below the name of such company.
4. No requirement of Minimum paid-up and subscribed capital.
5. One individual can form only one OPC.
6. An Indian citizen and even NRI can form OPC.
7. Nominee is required to hold a valid PAN.
8. A person who is already a member of one OPC can become a nominee in not more than 1 OPC
9. OPC cannot be converted into a Section 8 company.
10. A minor, person incapacitate to contract, any other person apart from living person are disqualified for OPC membership.
11. OPC can engage in any sort of business activities apart from Non Banking Financial Investment.
12. In case of death of the sole member nominee will assume the position of the member.
13. Within 15 days of becoming the member, he will have to appoint a nominee and intimate the ROC within 30days of change in membership.
14. OPC can be converted into any other kind of company at any point of time.
15. Share certificate shall be issued under the seal, if any, of the company, which shall be affixed in the presence of and signed by one Director or a person authorized by the Board.

## BENEFITS ENJOYED BY OPC

- ⇒ An OPC does not need to prepare a cash-flow statement under Section 2(40);
- ⇒ The abridged annual return can be signed by the Director and not necessarily a Company Secretary (Section 92)
- ⇒ No need to conduct an AGM in OPC - Section 96
- ⇒ Specific provisions relating to EGM and AGM do not apply to OPCs as per Section 100 and 111.
- ⇒ The entry of resolutions in the minute's book of the company under Section 122, compliance is said to have been done for OPCs.
- ⇒ According to Section 137 OPC's financial statements can be filed within six months from the close of the financial year.
- ⇒ Compliance by an OPC is much lesser in terms of filing returns, balance sheets, audit etc.
- ⇒ Any business which is required to be transacted at an AGM / EGM by means of an ordinary or special resolution, it shall be sufficient if the resolution is communicated by the member to the company and entered in the minutes book, signed and dated by the member and such date shall be deemed to be the date of meeting for all purposes under this Act.
- ⇒ In case of Board meeting where there is only one director on the Board of a OPC, any business which is required to be transacted at the meeting o the Board of Directors of a company, it shall be sufficient if, in such OPC, the resolution by director is entered in the minutes book and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all purposes under this Act.

**NOMINEE**

The proviso to Section 3(1) provides that the memorandum of One person company (OPC) shall indicate the name of the other person as nominee in Form No. INC.-32 (SPICe). The prior written consent of the other person shall be obtained in the Form No. INC.3.

The nominee may withdraw his consent by giving a notice in writing to such sole member and to the One Person Company. The sole member shall nominate another person as nominee within 15 days of the notice of the withdrawal and shall intimate ROC the name of another person nominated by the sole member in Form No. INC.4. The subscriber or member of OPC may change the name of such other person nominated by him at any time for any reason including in case of death or incapacity to contract of nominee. He may nominate another person after obtaining the prior consent of such another person.

Where the shareholder of OPC ceases to be the member in the event of death or incapacity to contract, his nominee becomes the member of such OPC. Such new member shall nominate a person within 15 days of becoming member.

**CONVERSION OF ONE PERSON COMPANY INTO A PUBLIC COMPANY OR A PRIVATE COMPANY.**

- 1) The One Person company shall alter its memorandum and articles by passing a resolution to give effect to the conversion and to make necessary changes incidental thereto.
- (2) A One Person company may be converted into a Private or Public Company, other than a company registered under section 8 of the Act, after increasing the minimum number of members and directors to two or seven members and two or three directors, as the case may be, and maintaining the minimum paid-up capital as per the requirements of the Act for such class of company and by making due compliance of section 18 of the Act for conversion
- 3 The company shall file an application in e-Form No. INC-6 for its conversion into Private or Public Company, other than under section 8 of the Act, alongwith fees as provided in the Companies (Registration Offices and Fees) Rules, 2014 with altered e-MOA and e-AOA.
- 4 On being satisfied that the requirements have been complied with, the Registrar after examining the latest audited financial statement shall approve the form and issue certificate.

**CONVERSION OF PRIVATE COMPANY INTO ONE PERSON COMPANY**

- (1) A private company other than a company registered under section 8 of the Act may convert itself into one person company by passing a special resolution in the general meeting.
- (2) Before passing such resolution, the company shall obtain No objection in writing from members and creditors.
- (3) The one person company shall file copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in Form No. MGT.14.
- (4) The company shall file an application in e-Form No. INC-6 for its conversion into One Person Company alongwith fees as provided in the Companies (Registration Offices and Fees) Rules, 2014 by attaching the following details or documents, namely:-

  - (i) altered e-MOA and e-AOA;
  - (ii) copy of NOC of every creditors with the application for conversion;
  - (iii) affidavit of directors confirming that all the members of the company have given their consent for conversion.

- (5) On being satisfied and complied with requirements stated herein the Registrar shall issue the Certificate.

### **ASSOCIATION NOT FOR PROFIT – SEC 8 COMPANY**

1. This types of companies otherwise termed as “Licensed Company”
2. An association of persons registered under the Act as a limited Company can obtain license to omit the words “Limited” or “Private Limited” from its name, provided
  - i. it is intended to form a company for promoting commerce, art, science, sports, education, research, social welfare, religion, charity protection of environment or any such other object; and
  - ii. the company prohibits payment of any dividend to its members but intends to apply its profits or other income in promotion of its objects.
3. License shall be obtained from the Central Government. (Power delegated to ROC)
4. A Company, which has been granted license under Section 8 cannot alter the provisions of its Memorandum or articles except with the previous approval of CG.
5. A firm may be a member of the company registered under this section.
6. A company registered under section 8 may convert itself into company of any other kind only after complying with such conditions.
7. The Central Government may by order at any time revoke the licence whereupon the word ‘Limited’ or ‘Private Limited’ as the case may be, shall have to be used as part of its name and the company will lose the exemptions that might have been granted by the CG.
8. On winding up or dissolution of Sec 8 company ,there remains, after the satisfaction of its debts and liabilities, any asset, may be transferred to another company registered under this Section and having similar objects, subject to such conditions, as the Tribunal may impose or may be sold and proceeds thereof credited to the Rehabilitation and Insolvency Fund formed under Section 269.
9. Sec 8 company can be merged only with another sec 8 company having similar objects.

### **REVOCATION OF LICENCE**

Section 8(6) provides that the Central Government may, by order, revoke the licence granted to the company registered under this section-

- if the company contravenes any of the requirements of this section; or
- any of the conditions subject to which a licence is issued; or
- the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company  
or prejudicial to public interest.

The Central Government shall direct the company to convert its status and change its name to add the words ‘Limited’ or ‘Private Limited’ to its name. No such order will not be passed without giving opportunity to the company of being heard. A copy of such order shall be given to the Registrar. The Registrar shall, without prejudice to any action taken, on application, in the prescribed form, register the company accordingly.

### **CONVERSION OF SECTION 8 COMPANY INTO A COMPANY OF ANY OTHER KIND**

- a) Pass Special Resolution at general meeting for conversion
- b) File Form Mgt 14 with ROC with Certified True Copy (CTC) of such Resolution along with notice.
- c) File INC 18 with RD for approval of such conversion along with the necessary attachments of Special Resolution and a copy of Notice including the explanatory statement with proof of dispatch
- d) File copy of application with similar attachments with ROC
- e) Publish notice within a week from (c) in one vernacular and one English newspaper and also on website.

- f) File Form INC19 along with the said notice with RD
- g) Send copy of notice, application with attachments by RPAD or hand delivery to the specified authorities such as Chief Commissioner of Income Tax, the Charity Commissioner, the Chief Secretary of the State...
- h) RD will wait for sixty days to receive any representation from the above specified authorities.
- i) Declaration from Directors that no portion of the income or property of the company has been paid by way of dividend or bonus.
- j) NOC from specified authorities w.r.t. any special privileges, grant enjoyed by the company.
- k) Approval from Regional Director subject to certain terms and conditions.
- l) Pass special resolution for amending the MOA and AOA.
- m) File form INC 20 within 30 days from the date of approval from RD along with amended MOA, AOA, and declaration from Directors.
- n) ROC will issue a fresh Certificate of Incorporation.

**Conditions :**

- The company shall attach with the application a certificate from PCA/PCS/PCMA that the conditions laid down in the Act have been complied with.
- The returns required to be filed under the Act shall be up to date of submitting the application to the Regional Director.
- If the company had acquired any immovable property free of cost or at a concessional cost from any Government or authority, it may be required to pay the difference between the cost and the market price of such property at the time of conversion either to the Government or to the authority that provided the immovable property.
- Any accumulated profit or unutilized income shall be transferred to the IEPF within thirty days of receiving the approval for conversion.

### **PRODUCER COMPANIES**

A producer company is a body corporate having objects or activities specified in Section 581B and which is registered as such under the provisions of the Act. The membership of producer companies is open to such people who themselves are the primary producers, which is an activity by which some agricultural produce is produced by such primary producers.

Primary produce has been defined under the Companies Act as produce arising from agriculture by a farmer which includes animal husbandry, floriculture, horticulture, viticulture, re-vegetation, bee raising, forestry, forest products and farming plantation products, produce of hand-loom, handicraft and other cottage industries

Producer Company can be formed by 10 individuals (or more) or 2 institutions (or more) or by a combination of both (10 individuals and 2 institutions) having their business objective as one of the following :

Procurement / Production / Harvesting / Grading / Pooling / Handling /Marketing / Selling or Export of the primary produce of the Members or import of goods or services for their benefit.

The main objective of the producer company is to facilitate the formation of co-operative business as companies and to make it possible to convert the existing co-operative business into companies.

### INCORPORATION OF COMPANIES

Section 7 of the Companies Act, 2013 provides for the procedure to be followed for the incorporations of a company. The promotor of the company shall submit the following documents to the Registrar of companies within whose jurisdiction the registered office of the company is proposed to be situated for registration.

- a) Memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed;
- b) A declaration in the prescribed form by an Advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, who is engaged in the formation of the company and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of the Act and rules made thereunder in respect of registration;
- c) A declaration from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles stating that - (Form No. INC-9)
  - i) he is not convicted of any offence in connection with the promotion, formation or management of any company, or
  - ii) he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years and
  - iii) that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;
- d) The address for correspondence till registered office is established;
- e) All particulars of every subscriber to the memorandum along with the proof of identity;
- f) The particulars of the persons mentioned in the articles as the first directors of the company;
- g) The consent to act as directors of company in such form as may be prescribed.

The memorandum of association and articles of association are the basic essential documents of the company.

Every company shall file a declaration within 180 days of incorporation stating that every subscriber has paid for the shares as agreed and the registered office has been verified by filing necessary returns. Under 12A (new in section) the name of the company may be struck off if no office is found on physical verification.

### SIGNING OF MEMORANDUM AND ARTICLES

Rule 13 provides for signing of memorandum and articles. The Memorandum and articles shall be signed in the following manner:

- The memorandum and articles of association of the company shall be signed by each subscriber to the memorandum. The name, address, description and occupation, if any, are to be added. One witness shall attest the signature of the subscriber. The witness also is to sign and furnish his full details.
- The witness shall state that –“I witness to subscriber/subscriber(s) who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details for their identification and satisfied myself of his/her/their identification particulars filled in”.
- Where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark which shall be described as such by the person, writing for him, who shall place

the name of the subscriber against or below the mark and authenticate by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him;

- Such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the memorandum and articles of the association;

Where the subscriber is a body corporate, the memorandum and articles of association shall be signed by director, officer or employee of the body corporate duly authorized in this behalf by a resolution of the board of directors of the body corporate. Where the subscriber is an LLP, it shall be signed by a partner of the LLP, duly authorized by a resolution approved by all the partners of the LLP. In either case, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of association;

- Where the subscriber is a foreign national residing outside India-

- ❖ in a country in any part of the Commonwealth , his signatures and address on the memorandum and articles of association and proof of identity shall be notarized by a Notary Public in that part of the Commonwealth;
- ❖ in a country which is a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized before the Notary Public of the Country of his origin and be duly apostillised in accordance with the Hague Convention;
- ❖ in a country outside the commonwealth and not a party to the Hague Apostille Convention, 1961, his signatures and address shall be notarized before the Notary Public of that country and the certificate of the Notary Public shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf
- ❖ visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa.

#### OTHER NOTABLE POINTS ON INCORPORATION

Full details of every subscriber and the first director of the company such as his personal data, address, communication details, identity proof, residential proof, proof for nationality are to be furnished.

If the subscriber is already a director or promoter of a company, the particulars relating to his name of the company, CIN number etc., are to be furnished.

The Registrar on the basis of the documents and information filed shall register all documents and information in the register and issue a certificate of incorporation in the Form No. INC-11 to the effect that the proposed company is incorporated under this Act along with the Corporate Identity Number (CIN)

Every company shall maintain and preserve at its registered office copies of all documents and information as originally filed with the Registrar till its dissolution under this Act.

#### PUNISHMENT

Section 7(5) provides that if any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company he shall be liable for action under Section 447.

Section 7(6) provides that where at any time after the incorporation of the company, it is proved that the company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating the company, or by fraudulent action, the promoters, persons named as first directors of the company and the persons making declaration shall each be liable for action under Section 447.

Section 7(7) provides that where a company has got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in

any one of the documents or declarations filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants-

- pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- direct that liability of members shall be unlimited; or
- direct removal of the name of the company from the register of companies; or
- pass an order for the winding up of the company; or
- pass such other orders as it may deem fit.

Before making any order the company shall be given a reasonable opportunity of being heard in the matter and the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

### MEMORANDUM OF ASSOCIATION

- According to Section 2(56) of the Act “Memorandum” means the memorandum of association of a company as originally framed and altered, from time to time, in pursuance of any previous company law or this Act.
- Memorandum defines the scope of the company's activities and its relations with the outside world.
- The MOA which is the charter of the company of a company contains the objects of the company which it shall pursue.
- It determines the scope of its operations beyond which its actions cannot go. If anything is done beyond these powers that will be ultra vires (beyond the powers) of the company and so void.
- Companies Act, 2013 shall override the provisions in the Memorandum and Articles of a company, if the latter contains anything contrary to the provisions in the Act (Section 6).

### FORM OF MEMORANDUM OF ASSOCIATION

- (i) Table A is applicable in the case of companies limited by shares;
  - (ii) Table B is applicable to companies limited by guarantee not having a share capital;
  - (iii) Table C is applicable to the companies limited by guarantee having a share capital;
  - (iv) Table D is applicable to unlimited companies not having a share capital;
  - (v) Table E is applicable to unlimited companies having a share capital.
- A company shall adopt any of the model Forms of the memorandum of association mentioned above, as may be applicable to it.
  - The memorandum should be printed, numbered and divided into paragraphs. It should also be signed by the subscribers of the company.

### CONTENTS OF MEMORANDUM

Name Clause	The name of the company with “Limited” as its last word in the case of a public company; and “Private Limited” as its last words in the case of a private company. Not applicable to Sec 8 Company & Govt Company.
Situation Clause	The State in which the registered office of the company is to be situated
Objects clause	The objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.
Liability Clause	The liability of members of the company, whether limited or unlimited.

Capital Clause	The amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share per subscriber and the number of shares each subscriber to the memorandum intends to take, indicated opposite his name.
Nominee Clause	Applicable only to OPC. The name of the person who, in the event of the death of the subscriber, shall become the member of the company.
Note : Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.	

## ALTERATION OF MEMORANDUM OF ASSOCIATION

### ALTERATION OF NAME CLAUSE

1. The name of the company can be altered by a special resolution and with the approval of the Central Government in writing.
2. However, Approval of the Central Government is not required , in case where the change in the name of the company relates to the addition/deletion of the word 'Private' to the name of the company consequent to the conversion of a company into a public company and *vice versa*.
3. When any change in the name of a company is made, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and such change in the name shall be complete and effective only on the issue of such a certificate.
4. An application shall be filed in Form No. INC-24 along with the fee for change in the name of the company and a new certificate of incorporation in Form No. INC-25 shall be issued to the company consequent upon change of name.

Note : According to Rule 29 of Companies (Incorporation) Rules, 2014, the change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon. Provided that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

### MANDATORY NAME CHANGE:

If a company is registered through inadvertence or otherwise by a name which is **identical with an existing company**, the newly formed company itself shall change the name by **ordinary resolution** at the direction of the Central Government. In such a case, the company should pass an ordinary resolution within three months from the date of issue of the direction. There is **no time limit** for Central Government to issue such direction.

A registered proprietor may apply with Central government **within three years** of incorporation or registration or change of name of the company for direction to the company for change of its name. Where, in the opinion of the Central Government the name is **identical with or too nearly resembles to an existing trademark**, it may direct the company to change its name. The company shall by adopting an **ordinary resolution** change its name within a period of three months from the issue of such direction.

If a company is in default in complying with any direction given under mandatory name change, the CG shall allot a new name to the company and the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name, which the company shall use thereafter. Provided that nothing in this sub-section shall prevent a company from subsequently changing its name in accordance with the provisions of section 13.

**POST REQUIREMENTS :**

- a. Intimate all concerned persons/authorities about the changed name of the Company, particularly the Stock Exchanges, NSDL, CDSL, other authorities and stakeholders.
- b. Arrange for a new Common Seal (if any) and have the same adopted at a meeting of the Board of directors and keep it under safe custody and get stationery printed with the new name and/or affix rubber stamp of the new name on all the existing documents.
- c. Get the new name of the Company painted on all the signboards or name boards wherever they are displayed.
- d. Correct all records, registers including the Register of Members, every copy of Memorandum and Articles of Association, other books and documents pertaining to the company's business and affairs to display the new name.
- e. It is also to be noted that in every document as above-mentioned the company shall paint, affix or print as the case may be the former name or names so changed during the period of last two years.

**ALTERATION OF REGISTERED OFFICE CLAUSE**

Change within the local limits of same town	Change outside the local limits of any city, town or village	Change within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC	Change of Registered office from one State to another
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**CHANGE WITHIN THE LOCAL LIMITS OF SAME TOWN**

- A company by passing Board Resolution can change the situation of its registered office within the limits of same city, town or village. An intimation of the change of registered office and verification of registered address shall be given to the registrar in e-form INC-22.
- This does not involve alteration of memorandum.

**CHANGE OUTSIDE THE LOCAL LIMITS OF ANY CITY, TOWN OR VILLAGE**

- After passing a special resolution in a general meeting by shareholders, the registered office of the company may be changed outside the local limits of any city, town or village.
- In case of company having more than 200 members the resolution shall be passed through postal ballot.
- This does not involve alteration of memorandum.
- MGT 14+INC 22

**CHANGE WITHIN THE SAME STATE FROM THE JURISDICTION OF ONE ROC TO THE JURISDICTION OF ANOTHER ROC**

No company shall change the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director. An application seeking confirmation from RD shall be filed by the company with the Regional Director in **Form No. INC- 23** along with the fee and following details and documents,-

- a) Board Resolution for shifting of registered office
- b) Special Resolution of the members
- c) a declaration given by the KMP or any two directors authorised by the Board, that the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof

- d) a declaration not to seek change in the jurisdiction of the Court where cases for prosecution are pending  
e) acknowledged copy of intimation to the Chief Secretary of the state as to the proposed shifting and that the employees interest is not adversely affected consequent to proposed shifting

Regional Director, after hearing the parties shall pass necessary orders within a period of fifteen days from the date of the receipt of the application. Thereafter, the company concerned shall file a copy of the said order with ROC within a period of thirty days from the date of the confirmation order by Regional Director.

The said ROC shall record the ordered changes in its records. The ROC of the state where the registered office of the company was previously situated shall transfer all the documents and papers to the new ROC.

MGT 14+ INC23+ INC 28+ INC 22

<b>CHANGE OF REGISTERED OFFICE FROM ONE STATE TO ANOTHER</b>	
Step 1	<p>Conduct a Board Meeting to pass the following resolutions: –</p> <ul style="list-style-type: none"> <li>&gt; Shifting of Registered office from One State to Another</li> <li>&gt; Alteration of Situation Clause of MOA</li> <li>&gt; Fix up the date, time, and place for conducting the GM.</li> </ul>
Step-2	<p>Conduct the GM and pass special resolutions for 2 items , file Form MGT-14 with ROC within 30 days of passing the resolution with the following attachments: –</p> <ul style="list-style-type: none"> <li>&gt; Copy(s) of Special Resolution(s) along with copy of notice with exp. Stt</li> <li>&gt; Altered MOA.</li> </ul>
Step-3	<p>Prepare the following List of Creditors and Debenture Holders, if any up to date not more than 1 month preceding the date of application i.e. INC-23</p> <ul style="list-style-type: none"> <li>&gt; The names and address of every creditor and debenture holders;</li> <li>&gt; The nature and respective amounts due to them in respect of debts, claims or liabilities:</li> </ul> <p>The list should be duly verified by an affidavit and should be verified by the Statutory Auditors of the Company. The List also shall be kept open for inspection at the Registered Office</p>
Step-4	<p>Publish a notice in Form No.INC.26, in local language and one in English language The copy of advertisement immediately on its publication shall be served to the Central Government (RD) and to followings by RPAD:-</p> <ul style="list-style-type: none"> <li>&gt; Individual Notice shall be sent for inviting objection from the Creditors and Debenture Holders, if any not more than 30 days before filing of INC-23;</li> <li>&gt; A notice together with the copy of application/petition to RoC, SEBI [If applicable], Chief Secretary of the concerned State Government and any other concerned regulatory authority not more than 30 days before filing of INC-23.</li> </ul>
Step-5	<p>Application/Petition shall be filed with ROC in e-form GNL-1 with the following documents/ attachments: –</p> <ul style="list-style-type: none"> <li>&gt; The detailed application/petition and it should be Serially Numbered</li> <li>&gt; Proof of service of the application to the Chief Secretary.</li> </ul>
Step-6	<p>File E-form INC-23 for application to RD within 1 month of list of creditors along with the following documents/ attachments: –</p> <ul style="list-style-type: none"> <li>a) Copy of MOA and AOA;</li> <li>b) Copy of notice of the general meeting along with relevant explanatory statement;</li> <li>c) Copy of special resolution sanctioning alteration;</li> <li>d) Copy of the minutes of the general meeting authorizing such alteration;</li> <li>e) Power of attorney/vakalatnama/Board resolution</li> </ul>

	<p>f) List of creditors and debenture holders ( Latest list not more than one month preceding the date of filing);</p> <p>g) Affidavit from Directors verifying the application</p> <p>h) Affidavit by the CS of the company and directors w.r.t the correctness of list of creditors and affairs of the company;</p> <p>i) Affidavit by directors about no retrenchment of employees;</p> <p>j) Details of prosecution/inspection/inquiry filed against the company and its officers in default;</p> <p>k) Copy of newspaper advertisement for notice of shifting the registered office;</p> <p>l) Proof of service of application to ROC, Chief secretary of the state, SEBI or any other regulatory authority (if applicable), creditors, debenture holders;</p> <p>m) Copy of objections (if received any)</p> <p>n) The document relating to payment of application fee.</p>
Step-7	Submit Hard copy of the Application/Petition along with all documents and file INC-23 along with challan at Concerned Regional Director Office.
Step-8	Where no objection has been received from any person then the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within 15 days of the receipt of the application. Where an objection has been received, the RD shall hold a hearing and pass an order within 60 days of filing application.
Step-9	File the order received from RD in E-form INC-28 to the RoC for its registration within 30 days from the date of receipt of certified copy of the order with the following documents/ attachments: – <ul style="list-style-type: none"> <li>➤ The order received from RD Cost of payment receipt of penalty imposed by RD in its order</li> </ul>
Step-10	File E-form INC-22 for notice of change of situation of registered office of the company within 30 days of approval of the new address along with the following attachments; <ul style="list-style-type: none"> <li>&gt; Proof of Registered Office Address i.e. Sale Deed, Lease deed, rent Agreement etc.;</li> <li>&gt; Copy of Utility Bill not older than 2 months;</li> <li>&gt; Altered MOA;</li> <li>&gt; Certified true copy of order of RD;</li> <li>&gt; Cost of payment receipt of penalty imposed by RD in its order</li> <li>&gt; Certified true copy of Special resolution</li> <li>&gt; NOC from Owner of the premises;</li> <li>&gt; List of all companies having the same registered office address, if any.</li> </ul> <p>If the documents are in order, Registrars of both states will approve the form and registered office change will be updated in register of Registrar and new Certificate of Incorporation will be issued by the Registrar of the State within 30 days, where the company's registered office is going to be shifted</p>
Step-11	<ul style="list-style-type: none"> <li>a) Make alteration in the MOA with respect to the state in every copy of Memorandum.</li> <li>b) Each stationery, banner, signboard, bills, invoice etc. should show the new address and necessary advice should be sent to shareholders, debenture holders, and other concerned parties.</li> <li>c) Necessary changes are required to be made in the letter heads, books, records etc. of the company.</li> <li>d) The necessary changes are required to be made in PAN, TAN or various returns under the GST etc and inform all the Government departments, banks, customers and others wherever required.</li> </ul>

- Note (i) Company having members > 200 are required to transact any business through postal ballot.
- (ii) In Case of Listed Company, at least 7 days before of the Board Meeting, publish notice of the board meeting in the newspaper. Send copies to SE.
- (iii) Inform SE about passing of BR and SR at least within 24 hrs.

### OBJECTS CLAUSE

The objects clause is of great importance because it determines the purpose and the capacity of the Company.

It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified.

The acts beyond this ambit are *ultra vires* and hence void. Even the entire body of shareholders cannot ratify such acts.

Although express powers are necessary, a company may do anything which is incidental to and consequential upon the powers specified, and the act will not be *ultra vires*. Ex : trading company has an implied power to borrow money.

The objects should not be illegal and against the provisions of the Companies Act, 2013.

### DOCTRINE OF ULTRA VIRES

- In the case of a company whatever is not stated in the memorandum as the objects or powers is prohibited by the doctrine of *ultra vires*.
- As a result, an act which is *ultra vires* is void, and does not bind the company.
- Neither the company nor the contracting party can sue on it.
- The company cannot make it valid, even if every member assents to it.
- An act which is *intra vires* the company but outside the authority of the directors may be ratified by the company in proper form.
- *Ultra vires* borrowing does not create the relationship of creditor and debtor.
- Where a company's money has been used *ultra vires* to acquire some property, the company's right over such property is held secure and the company will be the right party to protect the property. This is because, though the property has been acquired for some *ultra vires* object, it represents the money of the company.
- Where a company's borrowings has been used *ultra vires* to pay off lawful debt of the company then the lender steps in to the shoes of such creditor. This is termed as subrogation.
- If the *ultra vires* borrowings are not at all used then the lender can take back the money which is termed as restitution.
- The *ultra vires* acts are null and void *ab initio*. The company is not bound by this acts.

### ALTERATION OF OBJECTS CLAUSE OF THE COMPANY

- 1) At a duly convened Board meeting, Pass BR, Fix time, place and date for GM, Approve notice and authorize CS /Director. Note : Company having members > 200 are required to transact any business through postal ballot.
- 2) Issue notice along with the explanatory statement to members. Hold the general meeting and pass the special resolution.
- 3) File MGT – 14 with ROC along with a copy of the special resolution passed by the company with a copy of the explanatory statement annexed to the notice of the meeting and the amended copy of memorandum of association attached to the e-form, within 30 days of passing of the resolution.
- 4) Obtain a Certificate of registration of the alteration of MOA from ROC
- 5) Amend each copy of MOA available in the office or in the alternative fresh copies of memorandum of association be got printed.

### **ADDITIONAL REQUIREMENT – IN CASE MONEY IS RAISED THROUGH PROSPECTUS**

(1) If the company has raised money from public through prospectus and has any unutilized amount, it shall not change the objects for which the money so raised is to be applied unless a special resolution is passed through postal ballot and the notice in respect of the resolution for altering the objects shall contain the following particulars, namely:-

- the total money received;
- the total money utilized for the objects stated in the prospectus;
- the unutilized amount out of the money so raised through prospectus,
- the particulars of the proposed alteration or change in the objects;
- the justification for the alteration or change in the objects;
- the amount proposed to be utilised for the new objects;
- the estimated financial impact of the proposed alteration on the earnings and cash flow of the company;

(2) The advertisement ( one in English and one in vernacular language) giving details of such resolution to be passed for change in objects which shall be published simultaneously with the dispatch of postal ballot notices to shareholders. The notice shall also be placed on the website of the company, if any.

(3) The dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

(4) Also, for deleting any portion of the objects clause, the procedure laid down in this section has to be followed. A company may wish to alter its objects stated in its memorandum due to various reasons e.g. if a company wishes to cut-back i.e. where it feels it has diversified in various directions and that management of the company has become difficult or uneconomical, it may alter its objects to sell or dispose of whole or part of its undertaking(s).

(5) No alteration of object clause of Memorandum of Association shall have any effect until it has been registered in accordance with the provisions of this section.

### **ALTERATION OF LIABILITY CLAUSE**

According to section 13(1), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can change the liability clause of its memorandum of association by passing a special resolution.

File MGT – 14 with ROC along with a copy of the special resolution passed by the company with a copy of the explanatory statement annexed to the notice of the meeting and the amended copy of memorandum of association attached to the e-form, within 30 days of passing of the resolution.

### **ALTERATION OF CAPITAL CLAUSE - SECTION 61 READ WITH SECTION 64**

If article provides, by passing an ordinary resolution, following can be altered-

- (a) Increase in authorised capital
- (b) Consolidate or sub-divide the whole or any part of existing shares into shares of larger or smaller denominations.
- (c) Convert its fully paid up shares into stock or vice-versa.
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that the proportion between the amount paid and unpaid shall remain the same.
- (e) Cancel its unsubscribe shares by diminishing authorised capital.
  - If article doesn't provide for alteration, first alter the article by passing special resolution.
  - File copy of resolution and altered memorandum within 30 days to ROC- SH -7
  - It must be noted that cancellation of shares in pursuance of section 61(1) does not amount to reduction of share capital.

- All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders shall not take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

### ARTICLES OF ASSOCIATION

According to Section 2(5) of the Companies Act, 2013, 'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

- The articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business.
- The articles play a very important role in the affairs of a company.
- It deals with the rights of the members of the company inter se.
- They are subordinate to and are controlled by the memorandum of association
- The memorandum lays down the scope and powers of the company and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.
- But neither the articles nor the memorandum can authorise the company to do anything so as to contravene any of the provisions of the Act.

### FORM OF ARTICLES

Table F - Company limited by shares.

Table G - Company limited by guarantee and having a share capital.

Table H - Company limited by guarantee and not having share capital

Table I - Unlimited Company having a share capital.

Table J - unlimited Company not having a share capital

A company may adopt all or any of the regulations contained in the model articles applicable to such company.

### ENTRENCHMENT PROVISIONS

1. The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with.
2. The entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions greater than those prescribed under the Act (such as obtaining 100% consent).
3. This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.
4. The provisions for entrenchment shall be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.
5. After such amendment intimate ROC within 30 days of alteration vide MGT-14.

### **ALTERATION OF ARTICLES**

1. A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum.
2. Any alteration having the effect of conversion of a public company into a private company shall not take effect except with the approval of the Tribunal which shall make such order as it may deem fit. For effecting the conversion of a private company into a public company or vice versa, company shall file the application in Form No.INC -27 along with the prescribed fee.
3. Where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company.
4. Where a resolution was passed expelling a member and authorising the director to register the transfer of his shares without an instrument of transfer, the resolution was held to be invalid as being against the provisions of the act.
5. The articles must not include anything which is illegal or opposed to public policy.
6. The alteration must not constitute a fraud on the minority by a majority.
7. Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing .
8. The articles of association cannot be altered so as to have retrospective effects. The articles only operate from the date of the amendment.
9. Every alteration of the articles under this section and a copy of the order of the tribunal approving the alteration as per section 14(1) shall be filed with the registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

**Note :**

1. Alteration binds members in the same way as original articles.
2. Section 8 Company cannot alter Articles except with the prior approval of CG

### **ALTERATIONS OF MEMORANDUM OR ARTICLES TO BE NOTED IN EVERY COPY.**

If a company makes any default in complying with the provisions of section 15(1), the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the memorandum or articles issued without such alteration.

### **SERVICE OF DOCUMENTS – (SECTION 20)**

Section 20 provides that a document may be served on a company or an officer by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier or by leaving it at its registered office or by means of such electronic or other mode as may be prescribed.

A document may be served on the Registrar or any member through electronic transmission. The term ‘electronic transmission’ means a communication-

a) delivered by-

- facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, which the Registrar or the member has provided from time to time for sending communications to the Registrar or the number respectively;
- posting of an electronic message board or network that the Registrar or the member has designated for such communications, and which transmission shall be validly delivered upon the posting; or

- other means of electronic communication in respect of which the Registrar or the member has put in place reasonable systems to verify that the sender is the person purporting to send the transmission; and
  - b) that creates a record that is capable of retention, retrieval and review, and which may thereafter be rendered into clearly legible tangible form.
- In case of delivery by post such service shall be deemed to have been affected-
- in the case of a notice of a meeting, at the expiration of 48 hours after the letter containing the same is posted; and
  - in any other case, at the time which the letter would be delivered in the ordinary course of post.

## PROSPECTUS AND ITS TYPES

### PROSPECTUS

Section 2(70) of the Companies Act, 2013 defines a prospectus as “any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.”

### CONDITIONS TO BE SATISFIED TO CALL IT A PROSPECTUS

- (a) There must be an invitation to the public;
- (b) The invitation must be made “by or on behalf of the company or in relation to an intended company”;
- (c) The invitation must be “to subscribe or purchase”;
- (d) The invitation must relate to any securities of the company.

Explanation:

Here, it is pertinent to note that the prospectus is an invitation issued to the public. It is not the persons who receives the document but the persons who can apply for the securities in response to the invitation.

That is the reason when it comes to private placement it is specifically mentioned that the letter of offer shall be addressed only to identified persons. If it is not an identified person it will be termed as Public issue.

### MATTERS TO BE STATED IN THE PROSPECTUS

Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the SEBI in consultation with the CG.

The prospectus shall state the name or names of the stock exchange in which the securities shall be dealt with. (Sec 40(1))

## TYPES OF PROSPECTUS

### **SHELF PROSPECTUS**

Shelf Prospectus is a single prospectus for multiple public offers. A prospectus in respect of which the securities are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. Validity of shelf prospectus is one year. The validity period shall commence from the date of opening of the first offer of securities under that prospectus.

### **INFORMATION MEMORANDUM (IM)**

Prior to the issue of a second or subsequent offer of securities under the shelf prospectus the company has to issue IM which shall consist of new charges created, changes in the financial position of the company, such other changes as may be prescribed. Format of IM is PAS – 2

### **SHELF PROSPECTUS + INFORMATION MEMORANDUM = COMPLETE PROSPECTUS**

### **RED HERRING PROSPECTUS (RHP)**

Red herring Prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. Company proposing to issue a red herring prospectus shall file it with ROC at least 3 days prior to the opening of the subscription list and the offer. A red herring prospectus shall carry the same obligations as are applicable to prospectus.

Upon the closing of the offer of securities, the prospectus stating therein the total capital raised, Whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the RHP shall be filed with ROC and SEBI.

Red herring prospectus is issued during book building process RHP contains either the floor price of securities offered or a price band.

### **ABRIDGED PROSPECTUS**

A statement containing such salient features of a prospectus as may be specified by the SEBI  
An application form cannot be issued for the purchase of any securities of a company without abridged prospectus.

#### **Exceptions of issue of Abridged Prospectus:**

1. if it is to underwriters
2. if it is privately placed
3. if it is a Rights issue
4. If the shares offered are in all respects uniform with shares already issued and quoted on a recognised stock exchange.

### **OFFER FOR SALE**

Public Offer includes or an offer for sale (OFS) of securities to the public by an existing shareholder, through issue of a prospectus. Any document by which the offer or sale of shares or debentures to public is made shall for all purposes be treated as prospectus. The document "Offer for sale" is an invitation to the general public to purchase the shares of a company through an intermediary, such as an issuing house or a merchant bank.

All enactments and rules of law as to the contents of prospectus and as to liability in respect of misstatements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply to Offer for sale.

Section 28 of the Act permits certain members of a company, in consultation with Board of directors, to offer the whole or a part of their holdings of shares to the public. The document by which the offer of sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.

The rules in this context provide that the provisions of Part I of Chapter III namely "Prospectus and Allotment of Securities" and rules made there under shall be applicable to an offer of sale referred to in section 28 except for the following, namely:-

- (a) the provisions relating to minimum subscription;
- (b) the provisions for minimum application value;
- (c) the provisions requiring any statement to be made by the Board of Directors in respect of the utilization of money; and
- (d) any other provision or information which cannot be compiled or gathered by the offer or, with detailed justifications for not being able to comply with such provisions.

Further the rules provide that such offer document or prospectus issued under the section shall disclose the name of the entity bearing the cost of making the offer for sale along with reasons.

### **LIABILITY FOR MIS-STATEMENT**

If there is any mis-statement in the prospectus, then it would attract the liability on the issuer. The liability may be civil or criminal. Section 34 provides for criminal liability and section 35 provides for civil liability.

Section 34 provides that where a prospectus includes any untrue statement or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorizes the issue of such prospectus shall be liable under Section 447.

The criminal liability will not arise if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of the issue of prospectus believe, that the statement was true or the inclusion or omission was necessary.

Section 35 provides that where a person has subscribed for securities of a company based on the mis-statement in the prospectus and he has sustained any loss or damage as a consequence thereof, the company and every person who-

- is a director of the company at the time of the issue of the prospectus;
- has authorized himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately or after an interval of time;
- is a promoter of the company;
- has authorized the issue of the prospectus; and
- is an expert,

shall be liable to pay compensation to every person who has sustained such loss or damage. This liability is without prejudice to any punishment to which any person may be liable under Section 36.

No person shall be liable if he proves-

- that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

that, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder.

Section 35(3) provide that if it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or any fraudulent purpose, every person as referred above shall be personally responsible without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

#### PUNISHMENT FOR FRAUDULENTLY INDUCING PERSONS TO INVEST MONEY

Any person who fraudulently inducing another person to invest money, by intentionally concealing any material facts or knowingly make any statement which is false or misleading, such person shall be liable for action under Sec 447.

#### PUNISHMENT FOR PERSONATION

Any person who—

- (a) makes or abets making of an application in a fictitious name to a company for acquiring, or subscribing for, its securities; or
- (b) makes or abets making of multiple applications to a company in different names or in different combinations of his name or surname for acquiring or subscribing for its securities
- (c) otherwise induces directly or indirectly a company to allot, or register any transfer of, securities to him, or to any other person in a fictitious name,

Shall be liable for action under section 447.

#### PROVISIONS RELATING TO ALLOTMENT OF SECURITIES

**MINIMUM SUBSCRIPTION:** No allotment of any securities of a company offered to the public for subscription shall be made unless the amount stated in the prospectus as the minimum amount has been subscribed and the sums payable on application for the amount so stated have been paid to and received by the company by cheque or other instrument. – section 39 (1).

**MINIMUM APPLICATION MONEY:** The amount payable on application on every security shall not be less than five per cent. of the nominal amount of the security – Section 39(2).

#### MONEY TO BE RETURNED IF MINIMUM APPLICATION MONEY IS NOT RECEIVED:

If it is not received within a period of 30 days from the date of issue of the prospectus, or such other period as may be specified by the SEBI, the amount so received shall be returned within 15 days from the closure of the issue. If any such money is not so repaid within such period the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at 15% P.A.

**COMPANY TO FILE RETURN OF ALLOTMENT:** PAS- 3 to be filed with ROC within 30 days from the date of allotment. Professional certification is mandatory.

Attachments to PAS- 3:

1. If consideration for securities is other than cash, a copy of contract duly stamped and a report of a registered valuer in respect of valuation of the consideration.
2. In the case of issue of bonus shares, a copy of the resolution passed in the general meeting.
3. A list of allottees stating their names, address, occupation, if any, and number of securities allotted to each of the allottees shall be an attachment to PAS 3 and shall be certified by professionals.
4. In case of preferential allotment, valuation report of Registered Valuer.

**PENALTY FOR DEFAULT:** In case of any default, the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

### PAYMENT OF COMMISSION

Rule 13 provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions:

1. the payment of such commission shall be authorized in the company's articles of association;
2. the commission may be paid out of proceeds of the issue or the profit of the company or both;
3. the rate of commission paid or agreed to be paid shall not exceed, in case of shares, 5% of the price at which the shares are issued or a rate authorized by the articles, whichever is less, and in the case of debentures, shall not exceed 2.5% of the price at which the debentures are issued, or as specified in company's articles, whichever is less;
4. the prospectus of the company shall disclose the name of the underwriters, the rate and amount of the commission payable to the underwriter and the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally;
5. commission shall not be paid to any underwriter on securities which are not offered to the public for subscription;
6. a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

### TYPES OF SHARE CAPITAL

Nominal / Authorized / Registered Share capital	Maximum amount of share capital of the company, authorized by MOA	Sec 2(8)
Issued Capital	Part of Authorized capital which the company issues for the time being for public subscription and allotment. This is computed at the face value.	Sec 2(50)
Subscribed Capital	Part of Issued capital which has been subscribed for or taken up by the subscribers of shares in the company.	Sec 2(86)
Called up capital	Part of Subscribed capital which has been called for payment.	Sec 2(15)
Paid up share capital	Amount received as paid-up in respect of shares issued.	Sec 2(64)

Note : As per Sec 60(1) wherever the company contains a statement of amount of the authorized capital such statement shall also contain a statement about the subscribed and amount paid up.

## KINDS OF CAPITAL

2. Equity Share capital :
  - With all rights
  - With Differential Rights (dividend, voting or otherwise)
3. Preference Share Capital :
  - A share capital which has preferential rights
  - to the payment of dividend either fixed or at a fixed rate
  - to the repayment of share capital on a winding up,
  - to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.
  - Types May be : Convertible/ non Convertible, Cumulative / Non Cumulative, Participating / Non Participating, Redeemable Preference Shares.

## SHARES WITH DIFFERENTIAL RIGHTS

A company limited by shares may issue equity shares with differential rights as to dividend, voting or otherwise, provided it satisfies the following conditions.

## CONDITIONS FOR ISSUING SHARES WITH DIFFERENTIAL RIGHTS

- Authorization in AOA
- Ordinary resolution to be passed. (Listed company through postal ballot)
- Exp stt shall contain: Total number of shares/ details of differential Rights / total % of DR / Reason for issuance of DR / Price and its basis / Details about directors , KMP, promoters who are all participating in this issue / Change in control, if any / Diluted EPS / pre , post shareholding pattern.
- Shares with differential rights shall not exceed 74% of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time.
- Company to have track record of distributable profits and not a defaulting company for the last three years in all respects such as repayment of deb / repayment of loan/ filing of financials / annual return / employee benefits etc.
- The company has not been penalized by any authority in the last 3 years.
- **Conversion of existing equity share capital into differential voting rights and vice-versa not possible.**
- Disclosure in Board's report. (All the details in Explanatory statement shall be in Boards report also)
- Register of members to be updated.

## SHARE CERTIFICATES

1. At a duly convened Board Meeting pass Board resolution for allotment of shares.
2. Issue shares Certificate in Form No. SH-1 and specify the name of person in whose favour the certificate is issued, shares to which it relates and the amount paid-up thereon.
3. Certificate shall be issue under the common seal, if any, of the company and signed by two directors or by a director and the CS, wherever, the company has appointed a CS.
4. Particulars of shares certificates to be entered in the Register of Members.
5. Every share in a company having a share capital shall be distinguished by a distinctive number. Shares held in demat form shall not be distinguished by its distinctive number.
6. Director signature can be by way of digital signature, facsimile signature by means of any machine, equipment such as engraving in metal or lithography but not by means of a rubber stamp.

<b>DUPLICATE SHARE CERTIFICATES</b>	
A duplicate certificate of shares may be issued, if such certificate — (a) is proved to have been lost or destroyed; or (b) has been defaced, mutilated or torn and is surrendered to the company.	
<b>CONDITIONS</b>	<ol style="list-style-type: none"> <li>1. Duplicate to be issued on surrender of old Certificate – If torn</li> <li>2. Duplicate to be issued based on indemnity bond – If lost.</li> <li>3. It shall be stated on the face of duplicate share certificate and be recorded in the Register maintained for the purpose, that it is “Issued in lieu of share certificate No.....”.</li> </ol>
<b>FEE</b>	Company may charge fee for issuing duplicate share certificate not exceeding Rs. 50 per certificate.
<b>APPROVAL</b>	Company shall issue any duplicate share certificate only with the prior consent of Board. ( Power may be delegated to Committee by Board)
<b>TIME LIMIT</b>	If the company is listed then the duplicate share certificates shall be issued within 45days. If the company is unlisted it shall issue the certificates within 3 months from the date of submission of complete documents.
<b>FORMAT</b>	The particulars of renewed and duplicate share certificate to be entered in Form No. SH.2.The register to be kept at registered office of the company.
<b>PENALTY</b>	On fraudulent issue the company shall be punishable with: fine which shall not be less than five times the face value of shares involved which may extend to ten times. Officer in default shall be liable under section 447.

<b>TIME LIMIT FOR DELIVERY OF CERTIFICATES</b>	
(i) Within 2 months from the date of incorporation, in the case of subscribers to MOA; (ii) Within 2months from the date of allotment, in the case of any allotment of any of its shares; (iii) Within 1 month in case of transfer or transmission of securities. (iv) Within 6 months from the date of allotment in the case of any allotment of debentures.  Where any default is made in complying with the above provisions, the company shall be punishable with fine which shall not be less than Rs 25,000 but which may extend to Rs 5 lakh and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs 10,000 but which may extend to Rs.1,00,000.	

<b>RENEWED SHARE CERTIFICATES</b>	
Company may issue the certificate of any share/ shares either in exchange for those which are subdivided or consolidated or where the pages on the reverse for recording transfers have been duly utilised / pursuant to scheme of arrangement sanctioned by the High Court.	
<b>CONDITIONS</b>	<ol style="list-style-type: none"> <li>1. Generally renewal to be made on surrender of old Certificate.</li> <li>2. A company may replace all the existing certificates by new certificates upon sub-division or consolidation of shares or merger or demerger or any reconstitution without requiring old certificates to be surrendered subject to compliance of these rules.</li> <li>3. It shall be stated on the face of share certificate and be recorded in the Register maintained for the purpose, that it is “Issued in lieu of share certificate No.....”.</li> </ol>

<b>FEE</b>	Company may charge fee for issuing duplicate share certificate not exceeding Rs. 50 per certificate. No fee shall be payable pursuant to scheme of arrangement sanctioned by the High Court or Central Government.
<b>APPROVAL</b>	Company shall issue any duplicate share certificate only with the prior consent of Board. (Power may be delegated to Committee by Board)
<b>FORMAT</b>	The particulars of renewed and duplicate share certificate to be entered in Form No. SH.2. The register to be kept at registered office of the company.
<b>PENALTY</b>	On fraudulent issue the company shall be punishable with: fine which shall not be less than five times the face value of shares involved which may extend to ten times. Officer in default shall be liable under section 447.

#### **ISSUE OF SWEAT EQUITY SHARES – SEC 54**

Sweat equity shares mean equity shares issued by a company to its directors or employees at a discount or for consideration, other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

#### **CONDITIONS FOR ISSUE OF SWEAT EQUITY SHARES**

1. Special Resolution to be passed
  2. Explanatory Statement to Special Resolution shall contain all particulars of the person to whom shares to be issued, details about shares, pricing, consideration, reason, class of shares, directors / promoters, KMP participation , if any etc
  3. Validity of Special Resolution – 12 months
  4. Limits : 15% of existing paid up equity cap OR shares of the issue value of 5 crores whichever is higher in a year. However it shall not exceed 25% percent, of the paid up equity capital of the Company at any time.
- Note :** A start up company may issue Sweat equity not exceeding 50% of its paid up capital upto 10 years from the date of incorporation.
5. Lock –in period: 3 Years from the date of allotment.
  6. Disclosure in Board's report.
  7. Register to be maintained: SH 3.
  8. Shares issued under sweat equity shall rank pari-passu with other equity shares.
  9. The price of Sweat Equity shares is to be determined by a registered valuer.
  10. Sweat Equity can be issued at Discount.

#### **TREATMENT OF NON CASH CONSIDERATION**

If the Sweat Equity shares are issued for other than cash consideration, valuation report of Registered valuer is mandatory for both valuation of shares and valuation of the consideration .(Ex: IPR)

- Where the non cash consideration takes the form of a depreciable or amortizable asset it shall be carried to Balance sheet in accordance with Accounting Standards.
- In any other case it shall be expensed as provided in Accounting Standards.

#### **BONUS SHARES**

When a company is prosperous and accumulates large distributable profits, it converts these accumulated profits into capital and divides the capital among the existing members in proportion to their entitlements. It is termed as Bonus issue.

[[No cash flow is the benefit for the company to issue bonus shares. No need to pay any amount for getting further shares is the benefit for the shareholders. Hence it is a win-win situation.

## SOURCES FOR ISSUE OF BONUS SHARES

A company may issue fully paid up bonus shares to its members, out of

1. Free Reserves
  2. Security Premium Account
  3. Capital Redemption Reserve Account
- Note: No bonus shares shall be made out of Revaluation Reserve.

## CONDITIONS FOR ISSUE OF BONUS SHARES

- Authorization in AOA
- On the recommendation of Board, shall be authorised in the General meeting.
- Not a defaulting company regarding deposits / debt securities repayment or its interest.
- No default in employees' statutory dues, such as Gratuity, PF and bonus.
- Bonus shares should not be in lieu of dividend.
- Once declared shall not be withdrawn.
- Partly paid up shares, if any outstanding on the date of allotment are made fully paid up.

## EMPLOYEE STOCK OPTION SCHEME: 62(1)(b)

An option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

## WHO IS AN EMPLOYEE ( Employee definition for both ESOP and Sweat Equity shares)

(a) a permanent employee of the company who has been working in India / outside India; or (b) a director of the company, whether a whole time director or not but excluding an independent director; or

(c) an employee as defined in clauses (a) or (b) of a subsidiary, in India or outside India, or of a holding company of the company **but does not include-**

- an employee who is a promoter or a person belonging to the promoter group; or
- a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than 10% of the outstanding equity shares of the company.

## CONDITIONS FOR ESOP

1. Special Resolution to be passed.
2. Separate resolution for granting options to employees of holding/subsidiary companies etc
3. Minimum one year vesting period.
4. Free pricing in conformity with accounting policies.
5. Company has freedom to specify lock-in period.
6. Varying the terms of ESOP requires special resolution.
7. No right of dividend or voting till exercise of option.
8. At the time of option – For ex :25% to be paid.
9. At the time of exercise – balance 75% to be paid. If not exercised – 25% already paid would be forfeited.
10. However amount may be refunded to the employees if the options are not vested due to non-fulfilment of conditions relating to vesting of option as per the Employees Stock Option Scheme.
11. Option granted to employees shall not be transferable to any other person.
12. Option granted to the employees shall not be pledged, hypothecated, mortgaged or otherwise encumbered or alienated in any other manner.
13. No person other than the employees to whom the option is granted shall be entitled to exercise the option.

14. Employee shall not have any right to vote or right to receive dividend in respect of the options granted to him, till shares are issued after exercise of option.
15. In the event of the death of an employee while in employment, all the options granted to him till such date shall vest in the legal heirs or nominees of the deceased employee.
16. In case the employee suffers a permanent incapacity while in employment, all the options granted to him as on the date of permanent incapacitation, shall vest in him on that day itself.
17. In the event of resignation or termination of employment, all options not vested in the employee as on that day shall expire. However, the employee can exercise the options granted to him which are vested within the period specified in this behalf, subject to the terms and conditions under the scheme granting such options as approved by the Board.
18. Disclosure in the Board's Report. ( full details shall be provided such as options granted/ vested/ exercised / lapsed/ price, money received etc)
19. Maintenance of Register – SH 6.
20. Listed company has to comply with the SEBI guidelines.

### **VOTING RIGHTS OF MEMBERS**

- Every member of a company limited by shares and holding equity share capital therein, shall have right to vote on every resolution placed before the company and his voting right on a poll shall be in proportion to his share in the paid up equity share capital of the company.
- A company limited by shares shall be entitled to issue (i) equity share capital with voting rights or (ii) with differential rights as to dividend, voting or otherwise in accordance with such rules.
- A company may, if authorised by its articles, accept from any member the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up. Such advance payment, however, shall not confer on the member concerned any voting rights.

### **VOTING RIGHTS OF PREFERENCE SHAREHOLDERS**

Preference shareholders ordinarily vote only on matters directly affecting the rights attached to preference share capital and on any resolution for winding up of the company or for the repayment or reduction of the equity or preference share capital. The voting right of a preference shareholder on poll shall be in proportion to his share in the paid-up preference share capital of the company.

where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

### **RIGHTS OF DISSENTING SHAREHOLDERS UNDER SECTION 48**

Where the rights of any class of shares are varied, the holders of not less than 10% of the issued shares of that class, being persons who did not consent to such variation or vote in favour of the special resolution for the variation, can apply to the Tribunal to have the variation cancelled.

Where any such application is made to the Tribunal, the variation will not be effective unless and until it is confirmed by the Tribunal.

The above application shall be made within 21 days after the date on which the consent was given or the resolution was passed and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

Company shall file the order of NCLT with ROC within 30 days of order.

### ALTERATION OF SHARE CAPITAL

**Section 61** of the Companies Act, 2013 provides that a company limited by shares or guarantee and having a share capital may, if so authorised by its articles, alter its share capital by an ordinary resolution, its memorandum.

The various ways by which the share capital can be altered:

1	<b>Increase</b> the authorised share capital by such amount, as it thinks expedient
2	<b>Consolidate</b> and divide, all or any of its existing shares into a larger denomination than of its existing shares. Ex : 10 shares of ten each into one share of Rs.100 each
3	<b>Convert</b> all or any of its fully paid-up shares into stock or reconvert that stock into fully paid-up shares of any denomination.
4	<b>Sub-divide</b> its existing shares or any of them into smaller denomination than fixed by its MOA. However, it must keep the existing proportion between the paid-up and unpaid amount. Ex : one share of Rs 100 each, Rs 60 paid up and be sub-divided into ten shares of Rs 10 each, Rs 6 paid-up per share.
5	<b>Cancel</b> shares which have not been taken up or agreed to be taken by any person and diminish the amount of the share capital by the amount of the shares so cancelled.
	<p>Note :</p> <ol style="list-style-type: none"> <li>1. If there is a provision in AOA for alteration: Alter MOA by Ordinary resolution</li> <li>2. If there is no provision in AOA for alteration: First Alter AOA by Special resolution and then alter MOA by Ordinary resolution.</li> <li>3. Fee paid to ROC for registering the increase of capital is a capital expenditure.</li> <li>4. When a company alters its share capital / an order is passed by the Government increasing the authorized capital of the company in pursuance 62(4) or 62(6) / a company redeems any redeemable preference shares, Form No. SH.7 along with the fee shall be filed with ROC within 30 days of such alteration / increase / redemption as the case may be.</li> </ol>

### **PENALTY FOR CONTRAVENTION**

Company & Officer In Default (OID)	500 per day during which default continues subject to a maximum of ₹ 5 lakhs & Rs.1 Lakh in case of OID
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### **REDUCTION OF CAPITAL (SECTION 66)**

A company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in particular, may—

- (a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; OR
- (b) either with or without extinguishing or reducing liability on any of its shares,—
  - i. Cancel any paid-up capital which is lost/ is unrepresented by available assets; or
  - ii. Pay off any paid-up share capital which is in excess of the wants of the company,

Alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

### **CONDITIONS TO BE CHECKED**

- The company which is in arrears in the repayment of any deposits accepted by it, or the interest payable thereon cannot reduce its share capital.
- Reduction of share capital requires Special Resolution.
- Accounting Standards to be complied

<b>PROCEDURE FOR REDUCTION OF SHARE CAPITAL</b>	
At a duly convened Board meeting pass Resolution for reduction and approve draft notice for GM.	
Hold the general meeting and have the Special resolution passed.	
File MGT 14 with ROC within 30 days of passing the resolution.	
An application to NCLT shall be made for seeking their confirmation for such proposed reduction as approved by members.	
Attachments :	
<ul style="list-style-type: none"> <li>a. List of creditors certified by MD indicating their names, addresses and amount due.</li> <li>b. Certificate from Auditor – w.r.t point (a) is correct as per records of the company.</li> <li>c. Certificate by auditor + declaration by director – No default w r t deposits</li> <li>d. Certificate by auditor - for maintaining accounting standards.</li> </ul>	
Note: copy of list of crs shall be available at registered office.	
Tribunal shall within 15 days of above application give notice to CG / any statutory authority / ROC/ SEBI for their representations.	
Objections, if any, can be made by anyone within 3 months from the date of advertisement.	
After hearing, Tribunal will pass the order for reduction of share capital by approving the Minutes of Shareholders which includes	
<ul style="list-style-type: none"> <li>(a) the amount of share capital;</li> <li>(b) the number of shares into which it is to be divided;</li> <li>(c) the amount of each share; and</li> <li>(d) the amount, if any, at the date of registration deemed to be paid-up on each share</li> </ul>	
Order of Tribunal shall be filed with ROC within 30 days. – INC 28.	
ROC to issue a certificate confirming such reduction and minutes.	
Alter the capital clause in all the copies of the MOA & AOA lying at the registered office of the company so that no unaltered copy thereof is issued to any person.	
Penalty :	
If any officer of the company—	
<ul style="list-style-type: none"> <li>(a) knowingly conceals the name of any creditor entitled to object to the reduction;</li> <li>(b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or</li> <li>(c) abets or is privy to any such concealment or misrepresentation as aforesaid,</li> </ul> <p>he shall be liable under section 447.</p>	

<b>FURTHER ISSUE OF SHARES - SEC 62</b>	
<b>RIGHTS ISSUE - U/S 62(1)(a)</b>	
A rights issue is an invitation to existing shareholders to purchase additional new shares in the company. Cash-strapped companies can turn to rights issues to raise money when they really need it. In these rights offerings, companies grant shareholders the right but not the obligation to buy new shares. This can be generally at a differential pricing, but not always.	
Pre-emptive rights	A pre-emptive right is a privilege that may be extended to certain shareholders of a corporation that grants them the right to purchase additional shares in the company prior to shares being made available for purchase by the general public.
To whom	Existing Shareholders In proportion to their paid-up share capital on those shares
Time limit	Not less than 7 days and not more than 30 days. (in case of private company lesser period is allowed , if 90% of the members given their consent either in writing or E-mode)

Letter of offer	Further shares shall be offered to existing shareholders by sending them, a Letter of offer. Letter of offer (LOO) is an invitation to the existing members which specifies the number of shares offered. Notice (LOO) shall be dispatched at least 3 days before the opening of the issue to all existing shareholders through RPAD / Speed post/ e-mode/ Courier/ hand delivery.
Rights of shareholders	Either they can <ul style="list-style-type: none"> <li>➤ Accept the shares offered to them</li> <li>➤ Decline the offer</li> <li>➤ Renounce the offer in favour of any person</li> </ul>
Privilege	Right to renounce even to a non member, either fully or partly, if it is not prohibited by AOA.
If the offer is neither utilized by shareholders nor renounced to any other person (member / non member) within the time specified in the notice afore said, the Board of Directors may dispose of them in such manner which is not disadvantageous to the shareholders and the company.	

### ISSUE OF SECURITIES AT A PREMIUM

A company may issue securities at a premium when it is able to sell them at a price above par or above nominal value.

when a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a "Securities Premium Account"

### UTILIZATION OF SECURITY PREMIUM

In accordance with the provisions of Section 52(2) of the Act, the securities premium can be utilised only for:

- (a) issuing fully paid bonus shares to members;
- (b) writing off the balance of the preliminary expenses of the company;
- (c) writing off commission paid or discount allowed, or the expenses incurred on issue of shares or debentures of the company;
- (d) for providing for the premium payable on redemption of any redeemable preference shares or debentures of the company; or
- (e) for the purchase of its own shares or other securities under section 68.

The securities premium account may be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133,—

- (a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or
- (b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or
- (c) for the purchase of its own shares or other securities under section 68.

#### Note :

- Premium cannot be treated as profit and as such the amount of premium is not available for distribution as dividend.
- Amount of premium whether received in cash or in kind must be kept in a separate account, known as the "Securities Premium Account".
- The amount of premium is to be maintained with the same sanctity as the share capital. Any reduction in securities premium account, for the purpose other than specified above, will be treated as reduction of share capital which requires Tribunal approval.
- Any premium paid does not give the shareholder any preferential rights in case of a winding up.
- Monies in the securities premium account cannot be treated as free reserves, as they are in the nature of capital reserve.

### ISSUE OF SECURITIES AT A DISCOUNT

- A company shall not issue shares at a discount.
- Any share issued by a company at a discount shall be void.

Exceptions:

1. Issue of Sweat Equity Shares
2. A company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the RBI under the RBI Act, 1934 or the Banking (Regulation) Act, 1949.

### PENALTY IN CASE OF CONTRAVENTION

Where any company fails to comply with the provisions of this section, such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of 12% Per annum from the date of issue of such shares to the persons to whom such shares have been issued.

### ISSUE AND REDEMPTION OF PREFERENCE SHARES – SEC 55

Preference Share Capital :

- A share capital which has preferential rights
- to the payment of dividend either fixed or at a fixed rate
- to the repayment of share capital on a winding up,
- to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid.

Types May be : Convertible/ non Convertible, Cumulative / Non Cumulative, Participating / Non Participating, Redeemable Preference Shares.

- No company limited by shares shall issue any preference shares which are irredeemable.
- A company limited by shares may, if so authorised by its articles, issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue.

#### EXCEPTION:

Company engaged in the setting up and dealing with of infrastructural projects may issue preference shares for a period exceeding twenty years but not exceeding thirty years, subject to the redemption of a minimum ten percent of such preference shares per year from the twenty first year onwards or earlier, on proportionate basis, at the option of the preference shareholders.

#### CONDITIONS FOR ISSUANCE

- Provision in AOA
- Issuance shall be authorized by Special Resolution
- Not a defaulting company regarding redemption of already issued preference shares or any interest thereon.

#### DETAILS TO BE MENTIONED IN EXPLANATORY STATEMENT

<ol style="list-style-type: none"> <li>1. The size of the issue</li> <li>2. Number of preference shares</li> <li>3. Nominal value of each share</li> <li>4. Purpose of this issue</li> <li>5. Valuation report if it is at premium</li> <li>6. Terms and conditions of redemption</li> </ol>	<ol style="list-style-type: none"> <li>7. Nature of share ( cumulative / non cumulative / participating / non participating / convertible / non convertible)</li> <li>8. Share holding pattern – before and after issue</li> </ol>
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## REDEMPTION CONDITIONS

Preference shares may be redeemed:

1. After a fixed time or on the happening of a particular event or any time at the company's option or any time at the shareholder's option.
2. Out of the profits of the company which would otherwise be available for dividend.
3. Out of the proceeds of a fresh issue of shares made for the purposes of such redemption.
4. Only fully paid up shares can be redeemed.
5. If shares are proposed to be redeemed out of the profits of the company, there shall, out of such profits, be transferred, a sum equal to the nominal amount of the shares to be redeemed, to a reserve, to be called the Capital Redemption Reserve account. The capital redemption reserve account may be applied by the Company, for issuing fully paid bonus shares.

When a company is not in a position to redeem any preference shares or to pay dividend, it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed.

## VOTING RIGHTS OF PREFERENCE SHAREHOLDERS

Preference shareholders ordinarily vote only on matters directly affecting the rights attached to preference share capital and on any resolution for winding up of the company or for the repayment or reduction of the equity or preference share capital. The voting right of a preference shareholder on poll shall be in proportion to his share in the paid-up preference share capital of the company.

where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

## VARIATION OF SHAREHOLDERS' RIGHTS

Section 48 provides for the variation of shareholders' rights. A company may have different classes of shares.

The rights attached to the shares of any class may be varied. The rights may be varied-

- with the consent in writing of the holders of not less than three fourths of the issued shares of that class; or
- by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class.

There shall be a provision in the articles or memorandum of the company with respect to such variation. In the absence of such provision in the articles or memorandum, if such variation is not prohibited by the terms of issue of the shares of that class, then the voting rights may be varied.

## RIGHTS OF DISSENTING SHAREHOLDERS UNDER SECTION 48

Where the rights of any class of shares are varied, the holders of not less than 10% of the issued shares of that class, being persons who did not consent to such variation or vote in favour of the special resolution for the variation, can apply to the Tribunal to have the variation cancelled.

Where any such application is made to the Tribunal, the variation will not be effective unless and until it is confirmed by the Tribunal.

The above application shall be made within 21 days after the date on which the consent was given or the resolution was passed and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

Company shall file the order of NCLT with ROC within 30 days of order.

## BUY BACK OF SECURITIES

### BUY BACK OF SECURITIES

**Buy Back(BB) :** Company may purchase its own shares or other specified securities  
Sec 68 of the companies Act deals with the provision of Buy Back.

#### **Advantages of buyback :**

1. It is an alternate mode of reduction of capital without requiring NCLT approval.
2. To improve the earnings per share.
3. To improve return on capital, return on net worth and to enhance the long-term shareholders value.
4. To provide an additional exit route to shareholders when shares are undervalued or thinly traded.
5. To enhance consolidation of stake in the company.
6. To prevent unwelcome takeover bids.
7. To return surplus cash to shareholders.
8. To achieve optimum capital structure.
9. To support share price during periods of sluggish market condition.
10. To serve the equity more efficiently.

#### **1. Sources of BB:**

- (i) Its free reserves; or
- (ii) The securities premium account; or
- (iii) The proceeds of the issue of any shares or other specified securities. However, no buy-back of any kind of shares or other specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

#### **2. From Whom?**

- (a) From the existing shareholders or security holders on a proportionate basis;
- (b) From the open market;
- (c) By purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

#### **3. Quantum:**

- Board of directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company.
  - Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company.
  - In respect of Buy Back of Equity shares in any financial year, the shareholders can approve by special resolution upto 25% of total paid up equity capital in that year.
- Note : For the purpose of this Section – Free Reserves includes Security Premium.

#### **OTHER CONDITIONS OF BB:**

1. Authorization in AOA
2. Special resolution to be passed
3. Special Resolution to be accompanied by Explanatory Statement
4. Letter of Offer to be Filed with Registrar of Companies before Buy-Back
5. letter of offer shall be dispatched to the shareholders within 21 days from its filing with ROC
6. Shares/Securities being Bought Back are to be Fully Paid up
7. Post buy-back debt-equity ratio not to exceed 2:1
8. BB shall remain open for a period of not less than 15 days and not exceeding 30 days
9. Time gap between two buybacks – at least One year
10. Time limit for completion of buyback – within one year
11. Declaration of solvency signed by at least two directors of the company to be filed with ROC.

12. Physically destroy the shares so bought back within 7 days of the last date of completion of buy-back.
13. Prohibition of further issue of shares or securities for next 6 months. (Exceptions : Conversion of preference / debenture / stock options/ warrants)
14. Register of buy-back to be maintained
15. Return of buyback to be filed with ROC within 30 days of completion of BB
16. Board shall certify that the buyback of securities has been made in compliance with the provisions of the Act.
17. In case of Listed Company follow SEBI Buyback Guidelines

#### **PUNISHMENTS**

The company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than Rupees one lakh but which may extend to Rupees three lakhs.

#### **CAPITAL REDEMPTION RESERVE ACCOUNT – SECTION 69**

When a company purchases its own shares out of free reserves or securities premium account, a sum equal to the nominal value of the shares so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet. The CRR may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

#### **CIRCUMSTANCES PROHIBITS BUY-BACK - SECTION 70**

No company shall directly or indirectly purchase its own shares or other specified securities—

- through any subsidiary company including its own subsidiary companies.
- through any investment company or group of investment companies; or
- if a default, is made by the company, in the repayment of deposits accepted, interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable thereon to any financial institution or banking company: However, the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist.
- No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has not complied with the provisions of (sec 92) Annual Return (sec 123)Declaration of Dividend, (sec 127)punishment for failure to distribute dividend and (sec 129)Financial Statement.

#### **RIGHTS OF DISSENTING SHAREHOLDERS UNDER SECTION 48**

Where the rights of any class of shares are varied, the holders of not less than 10% of the issued shares of that class, being persons who did not consent to such variation or vote in favour of the special resolution for the variation, can apply to the Tribunal to have the variation cancelled.

Where any such application is made to the Tribunal, the variation will not be effective unless and until it is confirmed by the Tribunal.

The above application shall be made within 21 days after the date on which the consent was given or the resolution was passed and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

Company shall file the order of NCLT with ROC within 30 days of order.

#### **PROVISIONS RELATING TO TRANSFER OF SHARES UNDER COMPANIES ACT 2013**

- Section 44 of the Companies Act, 2013 states that the shares or debentures or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company.

- As per section 58(2), the securities or other interest of any member in a public company shall be freely transferable.
- In terms of Section 2(68), a private company is required to restrict the right to transfer its shares by its articles. (But Not prohibited)
- Section 56 of the Companies Act deals with transfer and transmission of securities.
- Proviso to Section 58(2) provides that any contract or arrangement between two or more Persons in respect of transfer of securities shall be enforceable as a contract.
- Form for transfer is SH-4

#### **TIME LIMIT FOR DELIVERY OF CERTIFICATES**

- (i) Within 2 months from the date of incorporation, in the case of subscribers to MOA;
- (ii) Within 2 months from date of allotment, in the case of any allotment of any of its shares;
- (iii) Within 1 month in case of transfer or transmission of securities.
- (iv) Within 6 months from the date of allotment in the case of any allotment of debentures.

#### **INSTRUMENTS OF TRANSFER TO BE PRESENTED TO THE COMPANY**

- A proper instrument of transfer (SH-4)
- duly stamped, (As per Indian Stamp Act : Proper stamp, for a proper value, properly affixed and properly cancelled)
- dated and executed
- by or on behalf of the transferor and the transferee
- shall be delivered to the company
- by the transferor or transferee
- within a period of sixty days
- from the date of execution
- along with the certificate relating to the securities, or
- if no such certificate is in existence, then along with the letter of allotment.

#### **REGISTRATION OF PARTLY PAID UP SHARES – NOTICE TO THE TRANSFEE**

Where an application is made by the transferor alone and relates to partly paid shares, the transfer shall be registered by the company after giving the notice in Form No. SH.5 to the transferee and the transferee gives 'no objection' to the transfer within two weeks from the receipt of the notice.

#### **TRANSFER OF SECURITIES BY A LEGAL REPRESENTATIVE WHO IS NOT A MEMBER**

The transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

#### **POWER TO REFUSE REGISTRATION AND APPEAL AGAINST REFUSAL – PRIVATE COMPANY**

Company to intimate the reason for refusing to Transferor and Transferee	Within 30 days of receipt of Transfer instrument.
Transferee may appeal to the Tribunal against the refusal.	Within 30 days from the date of receipt of the notice from company.
In case no notice has been sent by the company	Within 60 days from the date on which the instrument had been delivered to the company.

<b>POWER TO REFUSE REGISTRATION AND APPEAL AGAINST REFUSAL – PUBLIC COMPANY</b>	
Company to intimate the reason for refusing to Transferor and Transferee	Within 30 days of receipt of Transfer instrument.
Transferee may appeal to the Tribunal against the refusal	Within 60 days from the date of receipt of the notice from company.
In case no notice has been sent by the company	Within 90 days from the date on which the instrument had been delivered to the company.

<b>RECTIFICATION OF REGISTER OF MEMBERS (SECTION 59)</b>	
<b>GROUNDS OF APPEAL</b>	
(i) The name of any person is entered in the register of members; or	
(ii) The name of any person having entered in the register of members is without sufficient cause omitted therefrom; or	
(iii) Default or unnecessary delay is being made in entering in the register, the fact of any person having become a member; or	
(iv) Default or unnecessary delay is being made in entering in the register, the fact of any person having ceased to be a member	
The person aggrieved, or any member of the company, or the company may appeal in such form as may be prescribed, to the Tribunal. In case of foreign members or debenture holders residing outside India, the appeal shall be filed in a competent court outside India as may be specified by the Central Government by notification.	
The Tribunal, while dealing with an appeal made as stated above may, after hearing the parties, either dismiss the appeal, or by order—	
direct that the transfer or transmission shall be registered by the company and the company shall comply with such order <u>within 10 days of the receipt of the order</u> ; or	
(b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.	
<b>PENAL CLAUSE:</b>	
If a person contravenes the order of the Tribunal, he shall be punishable with imprisonment for a term which shall not be less than 1 year but which may extend to 3 years <u>AND</u> with fine which shall not be less than Rs.1 lakh but which may extend to Rs.5 lakh.	

## DEBENTURE

<b>DEBENTURE:</b>
According to Section 2(30) of Companies Act 2013 “debenture” includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;
<b>ISSUE OF DEBENTURES – SEC 71</b>
Company may issue debentures with an option to convert such debentures into shares, either wholly or partly at the time of redemption Issue of convertible debentures shall be approved by a special resolution. No company shall issue any debentures carrying any voting rights.

### CONDITIONS FOR ISSUE OF SECURED DEBENTURES

1. An issue of secured debentures may be made, provided the date of its redemption shall not exceed ten years from the date of issue.
2. A company engaged in the setting up of infrastructure projects may issue secured debentures for a period exceeding ten years but not exceeding thirty years.
3. Such debentures shall be secured by the creation of a charge on the property of the company/ its holding / subsidiary/ associate company in favour of debenture trustee.
4. Shall appoint a debenture trustee before the issue of prospectus
5. After the allotment of the debentures execute a debenture trust deed within 3 months from the closure of issue.

Note : Not applicable to Government Company if repayment is fully guaranteed by CG / SG/ both.

### DEBENTURE TRUSTEES

- Company shall not issue prospectus to public or to its members exceeding 500 for subscription of debentures unless it is appointing one or more debenture trustees.
- The names of the debenture trustees shall be stated in letter of offer.
- Written consent shall be obtained from such debenture trustee.

The following persons cannot be appointed as debenture Trustees. The person who,

- (i) beneficially holds shares in the company;
- (ii) is a promoter, director or KMP or any other officer or an employee of the company or its holding, subsidiary or associate company;
- (iii) is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;
- (iv) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;
- (v) has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;
- (vi) has any pecuniary relationship with the company amounting to two per cent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;
- (vii) is relative of any promoter/ any director / KMP.

### REMOVAL OF DEBENTURE TRUSTEE

Any debenture trustee may be removed from office before the expiry of his term only if it is approved by the holders of not less than three fourth in value of the debentures outstanding, at their meeting.

The Board may fill any casual vacancy in the office of the trustee. Till such appointment the remaining trustee or trustees, if any, may act.

When such vacancy is caused by the resignation of the debenture trustee, the vacancy shall only be filled with the written consent of the majority of the debenture holders.

### DUTIES OF DEBENTURE TRUSTEES

Golden Legacy	Ensure that Letter of offer does not contain any inconsistent matters.
Trust deed	Ensure that contents are not prejudicial to the interest of the debenture holders.
Prompt Communication to debenture Holders	Ensure about payment of interest / redemption of debentures /Breach of terms of issue, if any

Appointment of nominee director in Board	In the event of- <ul style="list-style-type: none"> <li>(i) two consecutive defaults in payment of interest to the debenture holders; or</li> <li>(ii) default in creation of security ; or</li> <li>(iii) default in redemption of debentures.</li> </ul>
Creation of Security / DRR	Ensure that the assets of the company are sufficient to discharge the interest and principal amount at all times and such assets are free from any other encumbrances. Ensure the implementation of the conditions regarding creation of DRR.
Terms and conditions	Ensure that the debentures have been converted or redeemed in accordance with the terms of the issue of debentures.

#### RIGHTS OF DEBENTURE TRUSTEES

1. Call for periodical status or performance reports from the company.
2. Take reasonable steps as may be necessary to remedy any breach of terms committed by company.
3. Do such acts as are necessary in the event the security becomes enforceable.
4. Call for reports on the utilization of funds raised by the issue of debentures.
5. Take steps to convene a meeting of the holders of debentures as and when such meeting is required to be held.
6. Perform such acts as are necessary for the protection of the interest of the debenture holders.
7. Do all other acts as are necessary in order to resolve the grievances of the debenture holders.
8. When the assets are insufficient to discharge the principal amount as and when it becomes due, the debenture trustee may file a petition before the Tribunal.

#### DEBENTURE TRUST DEED

1. Debenture Trust deed format : SH-12.
2. It is a written instrument legally conveying property to a trustee often for the purpose of securing a loan or mortgage.
3. It contains the names, powers and duties of the trustees, the identity of the beneficiaries and the nature of the trust property.
4. If the trust deed would have the effect of exempting a trustee there of, or indemnifying him against, any liability for breach of trust, where he fails to show the degree of care and due diligence required of him as a trustee is **VOID**.
5. However, liability of the debenture trustee shall be subject to such exemptions as may be agreed upon by a majority of debenture -holders holding not less than three-fourths in value of the total debentures at a meeting held for the purpose.
6. It shall be open for inspection to any member or debenture holder of the company.
7. Copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within seven days of the making thereof, on payment of fee.

#### DEBENTURE REDEMPTION RESERVE :

1. of the profits of the company, available for payment of dividend.
2. The amount credited to such account shall not be utilised by the company except for the redemption of debentures.
3. DRR is not required to be created for the convertible part of partly convertible debentures.

4. Creation of Debenture Redemption Fund : Every company required to create DRR shall on or before the 30<sup>th</sup> day of April in each year, invest or deposit, a sum which shall not be less than 15%, of the amount of its debentures maturing during the year ending on the 31<sup>st</sup> day of March of the next year, in any one or more of the following methods, namely:-
- in deposits with any scheduled bank, free from any charge or lien;
  - in unencumbered securities of the CG/ SG;
  - in unencumbered securities mentioned as per sec 20 of the Indian Trusts Act, 1882;
  - in unencumbered bonds issued by any other company which is notified U/S 20(f) Indian Trusts Act, 1882;

### **CONVERSION OF LOAN OR DEBENTURES UPON ORDER OF GOVERNMENT**

where any debentures have been issued, or loan has been obtained from any Government by a company, and if that Government considers it necessary in the public interest so to do, it may, by order, direct that such debentures or loans or any part thereof shall be converted into shares in the company even if terms of the issue of such debentures or the raising of such loans do not include a term for providing for an option for such conversion:

where the terms and conditions of such conversion are not acceptable to the company, it may, within sixty days from the date of communication of such order, appeal to the Tribunal which shall after hearing the company and the Government pass such order as it deems fit.

Where the Government has, by an order made, directed that any debenture or loan or any part thereof shall be converted into shares in a company and where no appeal has been preferred to the Tribunal by the company or where such appeal has been dismissed by Tribunal, the memorandum of such company shall, where such order has the effect of increasing the authorised share capital of the company, stand altered and the authorised share capital of such company shall stand increased by an amount equal to the amount of the value of shares for which such debentures or loans have been converted into.

### **ACCEPTANCE OF DEPOSITS**

#### **ACCEPTANCE OF DEPOSITS**

**(Chapter V – Sec 73 – 76)**

### **WHAT IS A DEPOSIT ?**

Section 2(31) of the Companies Act 2013 defines deposit as “deposit” includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

### **WHAT IS NOT A DEPOSIT? RULE 2(1)(C )**

“Deposit” includes any receipt of money by way of deposit or loan or in any other form, by a company, **but does not include**-

- any amount received from the Government(SG/ CG / Local authority/ statutory authority constituted under an Act of Parliament or a State Legislature)
- any amount received from foreign Governments , foreign/international banks , multilateral financial institutions foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities.
- any amount received as a loan or facility from any banks or banking company.
- any amount received as a loan or financial assistance from PFI.
- any amount received against issue of commercial paper.
- any amount received by a company from any other company.
- any amount received towards subscription to any securities, Exempted upto 60+15 days.

8. any amount received from the director, with declaration – not out of borrowings.( For private company, money can be accepted even from relatives of directors)
9. any amount raised by the issue of bonds or debentures.( Sec>Listed/ Compulsory Convertible)
10. any amount received from an employee not exceeding his annual salary.
11. any non-interest bearing amount received and held in trust.
12. any amount received in the course of or for the purposes of the business of the company
13. any amount brought in by the promoters of the company :
- the loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance; and
  - the loan is provided by the promoters themselves or by their relatives or by both; and
  - the exemption under this sub-clause shall be available only till the loans of financial institution or bank are repaid and not thereafter.
14. any amount accepted by a Nidhi Company. Check point : Interest rate shall be determined by RBI.
15. any amount received by way of subscription in respect of a chit.
16. any amount received by the company under any collective investment scheme in compliance regulations framed by SEBI
17. an amount of twenty five lakh rupees or more received by a start-up company
18. Any amount received by a company from AIF, Domestic Venture Capital Funds and Mutual Funds, Real Estate Investment Trust registered with SEBI.

### **WHO IS DEPOSITOR?**

'Depositor' means —

- (i) any member of the company who has made a deposit with the company in accordance with subsection (2) of section 73 of the Act, or
- (ii) any person who has made a deposit with a public company in accordance with section 76 of the Act. [Rule 2(1)(d)]

### **ELIGIBLE COMPANY**

"eligible company" means

- a public company as referred to in sub-section (1) of section 76,
- having a net worth of not less than 100 crore rupees OR
- a turnover of not less than 500 crore rupees
- obtained the prior consent in general meeting by means of a special resolution
- filed the said resolution with the ROC before making any invitation to the Public for acceptance of deposits.

Provided that an eligible company, which is accepting deposits within the limits specified under Sec 180 (1) (c), may accept deposits by means of an ordinary resolution.

### **PROCEDURE FOR ACCEPTANCE OF DEPOSITS**

1. Pass a resolution in general meeting.
2. File a copy of circular to ROC in DPT-1 atleast 30 days before it is circulated to members.\*
3. If it is secured deposit create a charge on assets and file CHG – 1 with ROC \*.  
(Excluding intangible assets)
4. The company shall ensure that the total value of the security by way of charge on company's assets shall not be less than the amount of deposits accepted and the interest payable thereon.
5. If it not secured mention it as "unsecured deposit" in all circular / advt etc.
6. Issuance of a circular to its members by RPAD/ speed post/e- mail and also newspapers advertisement\*.

7. Details w.r.t.: Financial position; Credit rating obtained; Total number of depositors; Previous deposits due.\*
8. Collect duly signed application form along with money
9. Issue deposit receipt within 21 days of the receipts of money/realization of cheque.
10. Maintain register of deposits at its registered office.
11. Create DRR - Remit 20% of deposit maturing during the year
12. Submit return of deposits in Form DPT-3 on or before 30th June each year w.r.t 31st March of that year.

### **EXEMPTED COMPANIES**

Provisions under Sections 73 to 76 of the Companies Act 2013 and the Companies (Acceptance of Deposits) Rules, 2014 shall apply to all companies except

a banking company and

- a non-banking financial company as defined in the Reserve Bank of India Act, 1934 and
- a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987; and
- such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

### **PUNISHMENT FOR CONTRAVENTION:**

If a company fails to repay the deposit or part thereof or any interest due thereon within the time specified under section 73 or section 76 or rules made there under or such further time as may be allowed by the Tribunal under section 73 punishable as follows :

- (a) Company : In addition to the repayment of the amount of deposit or part thereof and the interest due, be punishable with fine: not less than Rs.1 crore to 10 Crores.
- (b) Officer in Default : Imprisonment - 7 Years **AND** Fine :Rs.25 Lakhs TO Rs.2 Crores.

Provided that if it is proved that the officers of the company, has contravened knowingly or wilfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, he shall be liable for action under section 447.”

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### **GLOBAL DEPOSITORY RECEIPT**

Section 41 of the Act provides for the issue of global depository receipt. A company may issue depository receipts in any foreign currency. For this purpose, special resolution is to be passed in the General Meeting.

A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of Foreign Exchange Management Rules and Regulations.

The Board of Directors of the company shall pass a resolution authorizing the company to do so;

- The Company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting. A special resolution passed under Section 62 for issue of shares underlying the depository receipts, shall be deemed to be a special resolution for this purpose;
- The depository receipts shall be issued by an overseas depository bank appointed by the company;
- The underlying shares shall be kept in the custody of a domestic custodian bank;
- The company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before and after the issue of depository receipts;
- The company shall appoint a merchant banker; or a practising Chartered Accountant; or a practising Cost Accountant; or a practising Company Secretary to oversee all the compliances relating to issue of depository receipts;

The compliance report taken from the above professionals shall be placed at the meeting of the Board of Directors of the Company or of the committee of the Board of Directors authorized by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts. The committee of the Board of Directors shall have at least one independent director, if the company requires to have independent director;

### **OTHER NOTABLE POINTS**

The depository receipts can be issued by way of public offering or private placement or in any other manner prevalent abroad and may be listed or traded in an overseas listing or trading platform or may be sponsored against shares held by shareholders of the company.

The underlying shares shall be allotted in the name of the overseas depository bank and against such shares, the depository receipts shall be issued by the overseas depository bank abroad.

The holder of depository receipts may become a member of the company. The overseas depository shall be entitled to vote on behalf of the holders of depository receipts until the conversion of depository receipts to shares is taken place. For this purpose, there would be an agreement entered into between the overseas depository, holders of depository receipts and the company.

The proceeds of issues of depository receipts shall either be remitted to a bank account in India or deposited in an Indian Bank operating abroad or any foreign bank, which is a Scheduled Bank under the Reserve Bank of India Act, 1934, having operations in India

The provisions of the Act and rules issued thereunder for the public issue of shares or debentures or the provisions as applicable to a prospectus or an offer document are not applicable for the GDR issue.

## CREATION AND REGISTRATION OF CHARGES

### WHAT IS CHARGE?

According to Section 2(16) of the Act, “charge” means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

### REGISTRATION OF CHARGES

Any charge created within/outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India Shall be registered.

### TIME LIMIT FOR REGISTRATION / MODIFICATION OF CHARGE

- (a) Within 30 days - From creation / modification of charge, if not
- (b) Within next 30 days ( ie within 60 days from the date of creation / modification)- Additional time, with additional fee; and
- (c) Within Next 60 days ( ie after the expiry of above 60 days ), with additional and Advalorem fees if the Registrar is satisfied that there was sufficient reason for the delay.

The application for delay shall be made and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect rights of any other intervening creditors of the company.

Period of delay	Small Companies and OPC	Other than Small Companies and OPC
Up to 30days of Delay (up to 60 Days from Creation)	3 times normal fee	6 times normal fee
More than30 days and up to 90 days delay (up to 120 days from the date of Creation)	3 times of normal fees + an Ad valorem fee of 0.025% of the amount secured by the charge, subject to the maximum of Rs.1 Lakh	6 times of normal fees + an Ad valorem fee of 0.05% of the amount secured by the charge, subject to the maximum of Rs.5 Lakhs.

### SATISFACTION OF CHARGE

A company shall give intimation to the Registrar in Form CHG- 4, within a period of 30 days, about the payment or satisfaction in full of any charge registered.

Registrar may, on an application by the company / charge holder, allow such intimation of satisfaction to be made within a period of 300 hundred days with additional fees.

ROC shall, on receipt of such intimation will send a notice to lender about such satisfaction for which the lender shall revert back with in 14 days. If the lender accepts the same or there is no reply by such lender with in the stipulated time mentioned in the notice , ROC shall order that a memorandum of satisfaction shall be entered in the register of charges kept by him and shall inform the company that he has done so, through CHG-5.

### **POWER OF REGISTRAR TO MAKE ENTRIES OF SATISFACTION AND RELEASE IN ABSENCE OF INTIMATION FROM COMPANY [SECTION 83]**

Section 83 of the Companies Act, 2013 empowers the Registrar to make entries with respect to the satisfaction and release of charges even if no intimation has been received by him from the company. This situation would arise where the property subject to a charge is sold to a third-party and neither the company nor the charge-holder has intimated the Registrar regarding satisfaction of the earlier charge.

Accordingly, with respect to any registered charge if evidence is shown to the satisfaction of Registrar that the debt secured by charge has been paid or satisfied wholly or in part or that the part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, then he may enter in the register of charges a memorandum of satisfaction that:

- the debt has been satisfied in whole or in part; or
- part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking.

This power can be exercised by the Registrar despite the fact that no intimation has been received by him from the company.

According to Section 82 (4), Section 82 shall not be deemed to affect the powers of the Registrar to make an entry in the register of charges under section 83 or otherwise than on receipt of an intimation from the company i.e. even if no intimation is received by him from the company.

**Information to affected parties:** According to Section 83 (2), the Registrar shall inform the affected parties within 30 days of making the entry in the register of charges.

**Issue of Certificate:** As per Rule 8 (2), in case the Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.

### **REGISTER OF CHARGES MAINTAINED IN ROC'S OFFICE**

ROC shall maintain a register containing particulars of the charges registered in respect of every company on MCA portal and it shall be deemed to be the register of Charges for the purpose of Sec 81. This register shall be open to inspection by any person on payment of fee.

### **INTIMATION OF APPOINTMENT OF RECEIVER OR MANAGER**

The notice of appointment or cessation of a receiver who is being appointed to handle the property, which is subject to charge, shall be filed with the Registrar in Form No. CHG.6 along with fee within a period of thirty days from the date of making of such appointment.

### **COMPANY'S REGISTER OF CHARGES**

Every company shall keep at its registered office a register of charges in Form No. CHG.7 which shall include therein all charges and floating charges affecting any property or assets of the company.

The entries in the register of charges maintained by the company shall be made forthwith after the creation, modification or satisfaction of charge.

All the entries in the register shall be authenticated by a director or the secretary of the company or any other person authorized by the Board for the purpose.

The register of charges shall be **preserved permanently**.

Instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

The register of charges and the instrument of charges kept by the company shall be open for inspection –

- a) by any member or creditor of the company without fees;
- b) by any other person on payment of fee subject to AOA.

<b>CHG-1</b>	Appn for registration of creating / modifying the charge (other than debentures)
<b>CHG-2</b>	Certificate of registration
<b>CHG-3</b>	Certificate of modification of charge
<b>CHG-4</b>	intimation of the satisfaction to the Registrar
<b>CHG-5</b>	Memorandum of satisfaction of charge
<b>CHG-6</b>	Notice of appointment or cessation of receiver or manager
<b>CHG-7</b>	Register of charges
<b>CHG-8</b>	Condonation of Delay
<b>CHG-9</b>	Creating or modifying the charge in (for debentures including rectification)

## REGISTERS

### REGISTER OF MEMBERS ETC.

Section 88 of the Companies Act, 2013 lays down:

- (1) Every company shall keep and maintain the following registers namely:—
  - (a) Register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;
  - (b) Register of debenture-holders; and
  - (c) Register of any other security holders.
- (2) Every register maintained under sub-section (1) shall include an index of the names included therein.
- (3) The register and index of beneficial owners maintained by a depository, shall be deemed to be the corresponding register and index for the purposes of this Act.
- (4) Foreign register.

PENALTY: Company - Rs.3 Lakh & Officer in Default :Rs.50,000.

### MAINTENANCE OF REGISTER OF MEMBERS

- Every company limited by shares shall from the date of its registration maintain a register of its members in Form No. MGT-1.
- The entries in the register shall be made within 7 days of allotment or transfer.
- The entries in the register shall be made within 7 days of any corporate actions such as buyback / Esop / merger / sub- division, cancellation etc.
- Changes in membership due to transfer, transmission, insolvency shall be entered.
- Rectification due to order of competent authority shall be indicated properly.
- In case of companies whose securities are listed on a stock exchange in or outside India, the particulars of any pledge, charge, lien or hypothecation created by the promoters in respect of any securities of the company held by the promoter including the names of Pawnee and any revocation therein shall be entered in the register within 15 days from such an event.
- The registers shall be maintained at the registered office of the company.
- If a special resolution is passed in a general meeting authorising the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than 1/10<sup>th</sup> of the total members entered in the register of members reside.
- The entries in the registers maintained under section 88 and index included therein shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose, and the date of the board resolution authorising the same shall be mentioned.
- In a voluntary winding up, the liquidator may accept share transfers and alter the register accordingly.

### INDEX OF MEMBERS

- Every register maintained under sub-section (1) of section 88 shall include an index of the names entered in the respective registers and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found, provided the number of members is more than 50.
- The company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.

### INSPECTION OF REGISTERS

- The registers and their indices, except when they are closed under the provisions of this Act, and the copies of all the returns shall be open for inspection by any member, debenture-holder, other security holder or beneficial owner, during business hours without payment of any fees and by any other person on payment of such fees as may be specified in the articles of association of the company but not exceeding Rs. 50 for each inspection.
- Any SUCH member, debenture-holder, other security holder or beneficial owner or any other person may—
  - take extracts from any register, or index or return without payment of any fee; or
  - require a copy of any such register or entries therein or return on payment of such fees as may be specified in AOA of the company but not exceeding Rs 10 for each page.
- If any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default shall be liable, for each such default, to a penalty of Rs.1000 for every day subject to a maximum of Rs.1,00,000 during which the refusal or default continues. Further the CG may also, by order, direct an immediate inspection of the document, or direct that the extract required shall forthwith be allowed to be taken by the person requiring it.”

### FOREIGN REGISTER

- “A company may, if so authorised by its articles, keep in any country outside India, in such manner as may be prescribed, a part of the register referred to in sub-section (1), called “foreign register” containing the names and particulars of the members, debenture holders, other security holders or beneficial owners residing outside India.”
- Foreign register is deemed to be a part of the company’s principal register and it should be kept in the same manner as the principal register and be likewise open to inspection.
- A duplicate of such register should be maintained at the registered office in India and all entries made in the foreign register should be made in the duplicate register at the registered office as soon as possible.
- The company shall, within thirty days from the date of the opening / change/ discontinuance of any foreign register, file with the Registrar notice of the situation of the office in Form No.MGT.3 along with the fee where such register is kept;
- If a foreign register is kept by a company in any country outside India, the decision of the appropriate competent authority in regard to the rectification of the register shall be binding.
- The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register.

### REGISTER -AN EVIDENCE

- A register of members is *prima facie* evidence of the truth of its contents.
- Accordingly, if a person's name, to his knowledge, is there in the register of members of a company, he shall be deemed to be a member and onus lies on him to prove that he is not a member.
- However, when a person knows that his name is included in the register of shareholders and he stands by and allows his name to remain, he is holding out to the public that he is a shareholder and thereby he loses his right to have his name removed.

### DECLARATION BY PERSONS NOT HOLDING BENEFICIAL INTEREST IN ANY SHARE

Section 89 of the Companies Act, 2013 makes it obligatory on the part of a person, whose name is entered in the register of members of a company as the holder of shares but who does not hold beneficial interest in such shares to make a declaration to the company specifying the name and other particulars of the person who holds the beneficial interest in such shares in **FORM MGT 4**.

Sub-section (2) of the Section 89 makes it obligatory for any person who holds beneficial interest in a share of a company to make a declaration to the company specifying the nature of his interest, the particulars of the person in whose name the shares stand registered in the books of the company in **FORM MGT 5**.

Where any change occurs in the beneficial interest in such shares, the person referred in sub-section (1), and the beneficial owner specified under sub-section (2) shall make a declaration within thirty days.

Where any declaration under section 89 is received by the company, the company shall make a note of such declaration in the register of members and shall file, within a period of thirty days from the date of receipt of declaration by it, a return in **FORM MGT-6** with the Registrar in respect of such declaration with fee.

### PROVISIONS RELATING TO BOOK CLOSURE / RECORD DATE – SECTION 91

Book closure refers to the time period when a company will not handle adjustments to the register, or requests to transfer shares. The book closure date is often used to identify the cut-off date determining which investors of record will be sent a given dividend payment or the issue of right or bonus shares or issue of shares for conversion of debentures.

- (1) A company may close the register of members / debenture-holders /other security holders a period not exceeding 30 days at one time and 45 days in a year.
- (2) A Listed company closing such register/s shall give at least seven days previous notice by paper advertisement ( one in English and one in vernacular language )and on company's web site.
- (3) **PENALTY FOR VIOLATION:** The company and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for every day subject to a maximum of one lakh rupees during which the register is kept closed.
- (4) The provisions regarding paper advertisement shall not be applicable to a private company which shall provide notice to all members not less than seven days prior to closure of the such register/s.

### ANNUAL RETURN

- a) Financial Statements give information on the financial performance of a company, it is the Annual Return which gives extensive disclosure and greater insight into the non-financial matters of the company and the people behind management of the company.
- b) It provides in a nutshell, very comprehensive information about various aspects of a company.
- c) It is the most important document required to be filed by every company with the ROC in MGT 7 / MGT7A as the case may be.
- d) It is to be filed with the Registrar within 60 days from the date on which AGM is actually held or from the last day on which AGM should have been held.
- e) Every company is required to prepare the Annual Return in Form No. MGT-7 / MGT - 7A containing the particulars as they stood on the close of the financial year.
- f) Every foreign company shall prepare and file, within a period of 60 days from the last day of its financial year, to ROC in Form FC-4, containing the particulars as they stood on the close of the financial year.
- g) Every company shall place the copy of annual return on the website of the company, if any, and the web link shall be disclosed in the Boards' report.

Note : MGT 7A is for small companies and OPC.

### CONTENTS OF ANNUAL RETURN - SECTION 92

Annual Return shall contain the following particulars in consonance with the Section 92(1) of the Act:

- (1) its registered office, principal business activities, particulars of its holding, subsidiary and associate companies;
- (2) its shares, debentures and other securities and shareholding pattern;
- (3) its members and debenture-holders along with changes therein since the close of the previous financial year;
- (4) its promoters, directors, KMP along with changes therein since the close of the previous financial year;
- (5) meetings of members or a class thereof, Board and its various committees along with attendance details;
- (6) remuneration of directors and KMP;
- (7) penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;
- (8) matters relating to certification of compliances, disclosures as may be prescribed;
- (9) details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors and
- (10) such other matters as may be prescribed.

### SIGNING OF ANNUAL RETURN

- (a) The Annual Return is required to be signed both by a director and the Company Secretary, or where there is no Company Secretary, by a Company Secretary in Practice.
- (b) The Annual Return of One Person Company and Small Company shall be signed by the Company Secretary or where there is no company secretary, by the director of the company.

### PRESERVATION OF ANNUAL RETURN

Rule 15 of the Companies (Management and Administration) Rules, 2014:

1. The Company is required to keep and maintain copies of the Annual Return filed under Section 92 of the Companies Act, 2013 at the registered office of the company.
2. However, such copies of Annual Return may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members resides, if approved by a special resolution passed at a general meeting of the company.
3. Copies of all Annual Returns and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of eight years from the date of filing with the Registrar.

### CERTIFICATION OF ANNUAL RETURN

The Annual Return of a

- (a) Listed company or
- (b) Company having a paid up share capital of Rs. 10 crores or more or
- (c) Turnover of Rs. 50 Crores or more

shall be certified by a Company Secretary in Practice in the Form No. MGT- 8.

1. The certificate shall state that the Annual Return discloses the facts correctly and adequately and that the company has complied with all the provisions of this Act.
2. If a Company Secretary in Practice certifies the annual return otherwise than in conformity with the requirements of section 92 he shall be liable to a penalty of Rs.2 lakh.

### CONTRAVICTION AND CONSEQUENCES

If any company fails to file its annual return under section 92(4), before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to a penalty of Rs.10,000 and in case of continuing failure, with further penalty of Rs.100 / day during which such failure continues, subject to a maximum of Rs.2 Lakhs in case of a company and Rs.50,000 in case of an officer who is in default.

## GENERAL MEETING

1. A General meeting is a meeting of the members of the company. Members or directors of a company can exercise their powers and can bind the company only when they act as a body at a validly convened and held meeting. An individual member or shareholder, irrespective of his shareholding cannot bind a company by his individual act.
2. Every gathering or assembly does not constitute a meeting. The meetings must be convened and held in perfect compliance with the various provisions of the Companies Act.
3. There must be at least two persons to constitute a meeting, generally.
4. General meetings of the members provide a platform to express their will in regard to the management of the affairs of the company.

### NOTICE OF MEETING - SECTION 101

General meeting of a company may be called by giving not less than 21 clear days' notice either in writing or through electronic mode. In case of section 8 company, 14 days' clear notice is required instead of 21 days.

1. 'Clear days' means days exclusive of the day of the notice of service and of the day on which the meeting is held.
2. If notice is sent by post, it shall be deemed to be served at the expiration of 48 hours. ie additional two days shall be added.
3. In case a valid special notice under the Act has been received from Member(s), the company shall give Notice of the Resolution to all its Members at least seven days before the Meeting, exclusive of the day of dispatch of Notice and day of the Meeting.

### SHORTER NOTICE

IN CASE OF AN AGM	IN CASE OF AN EGM
An AGM may be called after giving a shorter notice also if consent is given in writing or by electronic mode by not less than 95% of the members entitled to vote at such meeting.	<p>By members of the company—</p> <p>(a) holding, if the company has a share capital, majority in number of members entitled to vote and who represent not less than 95% of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or</p> <p>(b) having, if the company has no share capital, not less than 95% of the total voting power exercisable at that meeting.</p>

### NOTABLE POINTS ON CONTENTS OF NOTICE

1. Every notice of a meeting shall specify the place, date day and the hour of the meeting and shall contain a statement of the business to be transacted at such meeting.
2. Notice shall contain complete particulars of the venue of the Meeting including route map and prominent land mark for easy location.
3. Statement of the business to be transacted (Agenda) at the general meeting should be given in the notice. In case, the meeting is to transact a special business, an explanatory statement should be attached about such item.
4. Such explanatory statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely —

The nature of concern of interest, financial or otherwise, if any in respect of each items of-

- a) every director and the manager, if any;
- b) every other key managerial personnel; and
- c) relatives of the persons mentioned above;

Any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

5. Where any item of business refers to any document, which is to be considered at the meeting, the time and place where such document can be inspected shall be specified in the explanatory statement.
6. where as a result of non-disclosure or insufficient disclosure in any statement made by a promoter, director, manager, KMP, any benefit accrues to such of the persons or their relatives, either directly or indirectly, such persons shall hold the benefit in trust for the company and such persons are liable to compensate the company to the extent of the benefit received by them.
7. Penalty to such OID :50000 or 5 times the benefit accrued whichever is higher.

#### **PERSONS ENTITLED TO RECEIVE NOTICE**

- (a) Every member of the company, legal representative of any deceased member or the assignee of an insolvent member;
- (b) The auditor or auditors of the company; and
- (c) Every director of the company.

#### **NOTICE THROUGH ELECTRONIC MODE**

1. A notice may be sent through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator (URL) for accessing such notice.
2. The e-mail shall be addressed to the person entitled to receive such e-mail as per the records of the company or as provided by the depository.
3. E-mail attachment (Notice and other documents) shall be in PDF format (Non editable mode)
4. The subject shall state the name of the company, notice of the type of meeting, place and date on which the meeting is scheduled.
5. The company should ensure that it uses a system which produces confirmation of the total number of recipients mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained by or on behalf of the company as 'proof of sending'.
6. The company is not responsible for the failure in transmission beyond its control;
7. If a member fails to provide or update relevant e-mail address to the company or to the depository participant, the company shall not be in default for not delivering notice via e-mail;
8. The company may send e-mail through in-house facility or its registrar and transfer agent or authorize any third party agency providing bulk e-mail facility;
9. The notice of the general meeting of the company shall be simultaneously placed on the website of the company if any.

## BUSINESSES TRANSACTED AT AN AGM

### ORDINARY BUSINESS :

- (i) the consideration of financial statements and the reports of the Board of Directors and auditors;
- (ii) the declaration of any dividend;
- (iii) the appointment of directors in place of those retiring;
- (iv) the appointment of, and the fixing of the remuneration of, the auditors

### SPECIAL BUSINESS:

Any other business, other than the above shall be deemed to be special business.

Note :

1. Explanatory statement is not required for transacting any item of ordinary business.
2. In an EGM every business is special business.

## QUORUM FOR MEETINGS – SEC 103

Quorum refers to the minimum number of members required to constitute a valid meeting.

### QUORUM FOR PUBLIC COMPANY:

If number of members as on the date of meeting is	Quorum
Upto 1000	5 members personally present
More than 1000 but up to 5000	15 members personally present
Exceeds 5000	30 members personally present

**QUORUM FOR PRIVATE COMPANY:** 2 members personally present, shall be the quorum for a meeting of the private company.

### NOTE:

Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business.

Where the quorum provided in the Articles is higher than that provided under the Act, the quorum shall be in accordance with AOA.

Proxies shall be excluded for determining the quorum

## CONSEQUENCES OF NO QUORUM

If the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company shall stand adjourned to the same day in the next week at the same time and place, **OR** to such other date and such other time and place as the Board may determine.

If at the adjourned meeting also, a quorum is not present within half an-hour from the time appointed for holding meeting, the members present, will constitute the quorum.

In case of requisitionists meeting, If the quorum is not present within half-an-hour, meeting stands cancelled.

## NOTICE OF AN ADJOURNED MEETINGS

If the meeting stands adjourned to the same day in the next week at the same time and place, or to such other day, not being a National Holiday, or at such other time and place as the Board may determine, there the company shall give at least 3 days notice to the members either individually or by publishing an advertisement in 2 newspapers (one in English and one in vernacular language).

If a Meeting is adjourned sine-die (without mentioning the future date) or for a period of thirty days or more, a Notice of the adjourned Meeting shall be given in accordance with the provisions of Act. (ie 21 clear days notice)

### **CHAIRMAN OF MEETINGS – SECTION 104**

Section 104(1) provides that unless the Articles of the Company provide otherwise, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands.

Section 104(2) provides that if a poll is demanded on the election of the Chairman, it shall be taken forthwith in accordance with the provisions of this Act. The Chairman elected on a show of hands shall continue to be the Chairman of the meeting until some other person is elected as Chairman as a result of the poll. Such other person shall be the Chairman for the rest of the meeting.

### **PROXIES – SECTION 105**

1. A person who is appointed by a member to attend and vote at a meeting in the absence of the member at the meeting is termed as proxy. Thus proxy is an agent of the member appointing him.
2. The term 'proxy' is also used to refer to the instrument by which a person is appointed as proxy.
3. Proxy need not be a Member.
4. Proxy shall be a Member in case of Sec 8 company.
5. A Proxy can act on behalf of Members not exceeding fifty and holding in the aggregate not more than 10% of the total share capital of the company carrying Voting Rights.
6. However a Member holding more than 10% of the total share capital of the company carrying Voting Rights may appoint a single person as Proxy for his entire shareholding and such person shall not act as a Proxy for another person or shareholder.
7. A proxy cannot vote on a show of hands.
8. A proxy has the right to vote only on a poll.
9. A proxy, if eligible under section 109, has the right to demand a poll.
10. A proxy shall not have the right to speak at the meeting.
11. A proxy is not counted for the purpose of quorum.
12. Proxy shall prove his identity at the time of attending the Meeting.
13. An authorized representative of a body corporate or of the President of India or of the Governor of a State, holding shares in a company, may appoint a Proxy under his signature.
14. If after appointment of proxy, the member himself attends the meeting, it amounts to automatic revocation of proxy. But once the proxy has voted, it cannot be revoked.
15. If a Proxy had been appointed for the original meeting and such meeting is adjourned, any Proxy given for the adjourned Meeting revokes the Proxy given for the original Meeting.
16. Every notice calling a meeting of a company which has a share capital, or the articles of which provide for voting by proxy at the meeting, should carry with reasonable prominence, a statement that a member entitled to attend and vote is entitled to appoint a proxy, or, where that is allowed, one or more proxies, to attend and vote instead of himself, and that a proxy need not be a member.

### **PROXY FORM:**

1. The prescribed form for appointing a proxy is Form No. MGT. 11.
2. The proxy form must be deposited with the company, 48 hours before the meeting. Any provision contained in the articles, requiring a longer period than 48 hours shall not have any effect and it will be considered as if a period of 48 hours had been specified.

3. Proxy form shall be accepted even on a holiday if the last date by which it could be accepted is a holiday.
4. Proxies received by the company shall be recorded chronologically in a register kept for that purpose.
5. Any Proxy entered in the register is rejected, the reasons there for shall be entered in the remarks column.
6. The instrument of Proxy shall be signed by the appointer or his attorney duly authorized in writing, or if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorized by it.
7. An instrument appointing a Proxy shall be either in the Form specified in the Articles or in the Form set out in the Act(ie MGT-11)
8. An instrument appointing a proxy, if in MGT-11, shall not be questioned on the ground that it fails to comply with any special requirement specified for such instrument by the article of a company.
9. An instrument of Proxy duly filled, stamped and signed, is valid only for the Meeting to which it relates including any adjournment thereof.
10. Proxy form which does not state the name of the Proxy shall not be considered valid.
11. Undated proxy shall not be considered valid.
12. If a company receives multiple proxies for the same holdings of a Member, the Proxy which is dated last shall be considered valid.
13. If they are not dated or bear the same date without specific mention of time, all such multiple Proxies shall be treated as invalid.
14. A proxy later in date revokes any Proxy/Proxies dated prior to such Proxy.
15. Proxy is valid until written notice of revocation has been received by the company before the commencement of the Meeting.
16. A Proxy need not be informed of the revocation of the Proxy issued by the Member.

### **INSPECTION OF PROXY**

Every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, is entitled to inspect the proxies lodged with the company, if at least 3 days notice in writing is given to the company. Such notice shall be received at least three days before the commencement of the Meeting.

Such inspection can be taken during the period beginning 24 hours before the time fixed for the commencement of the meeting, during the business hours of the company, and ending with the conclusion of the meeting.

### **REPRESENTATION OF PRESIDENT AND GOVERNERS IN MEETINGS – SECTION 112**

- (1) The President of India or the Governor of a State, if he is a member of a company, may appoint any person to act as his representative at any meeting of the company or at any meeting of any class of members of the company.
- (2) A person so appointed be deemed to be a member of such a company and shall be entitled to exercise the same rights and powers, including the right to vote by proxy and postal ballot, as the President or, the Governor could exercise as a member of the company.

### **REPRESENTATION OF CORPORATIONS AT MEETING - SECTION 113**

If a body corporate is a member of a company, it can authorize, by way of Board resolution, any person to act as its representative at any meeting.

A person so appointed shall be entitled to exercise the same rights and powers, including the right to vote by proxy and postal ballot, on behalf of the body corporate.

### **RESTRICTION ON VOTING RIGHTS – SECTION 106**

The articles of a company may provide that a member shall not exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid or on which company has exercised any right or lien.

On a poll taken at a meeting of a company, a member entitled to more than one vote, or his proxy, where allowed, or other person entitled to vote for him, need not, if he votes, use all his votes or cast in the same way all the votes he uses.

### **VOTING BY SHOW OF HANDS -SECTION 107**

At any general meeting, a resolution put to the vote of the meeting shall in the first instance be decided on a show of hands, unless-

- (a) A poll is demanded under section 109 of the Act.
- (b) Voting is carried out electronically under section 108 of the Act.

A declaration by the Chairman of the meeting of the passing of a resolution (that the resolution has been passed or failed, as the case may be) on show of hands and an entry to that effect in the minutes book shall be conclusive evidence of the fact of passing of such resolution.

### **DEMAND FOR POLL -SECTION 109**

Before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting.

Poll can be demanded by the following persons:

- a. Chairman , on his own motion
- b. By the members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power or holding shares on which an aggregate sum of not less than Rs.5,00,000/- has been paid up - in case a company having a share capital.
- c. By any member or members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power - in case a company not having share capital.

**Note :**

1. The Chairman shall get the validity of the demand verified.
2. The demand for a poll may be withdrawn at any time by the persons who made the demand.

### **TIME FOR TAKING POLL AND DECLARATION OF RESULT**

1. A poll shall be taken forthwith, if it is demanded for adjournment of the meeting or appointment of Chairman of the meeting.
2. A poll shall be taken at such time, not being later than 48 hours from the time when the demand was made on any other question.
3. The Chairman shall announce the date, venue and time of taking the poll to enable members to have adequate and convenient opportunity to exercise their votes.
4. The Chairman may permit any member who so desires to be present at the time of counting the votes.
5. The Chairman of the meeting shall appoint scrutinizer.
6. The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

### **OTHER NOTABLE POINTS**

1. The Polling paper shall be in Form No. MGT.12.
2. The Scrutinizers keep a record of the polling papers issued.
3. The Scrutinizers lock and seal an empty polling box in the presence of the members and proxies.
4. The Scrutinizers open the Polling box in the presence of two persons as witnesses after the voting process is over.
5. In case of ambiguity about the validity of a proxy, the Scrutinizers decide the validity in consultation with the Chairman.
6. The Scrutinizers' report shall mention total votes cast, valid votes, votes in favour and against the resolution including the details of invalid polling papers and votes comprised therein.
7. The Scrutinizers submit the Report to the Chairman who shall counter-sign the same.
8. The Chairman declares the result of Voting on poll. The result may either be announced by him or a person authorized by him in writing.
9. The scrutinizer/s appointed for the poll, shall submit a report to the Chairman of the meeting in Form No. MGT 13 within 7 days from the date the poll is taken.

### **VOTING THROUGH ELECTRONIC MEANS -SECTION 108**

General meetings of companies are held at their registered offices and it is not possible for every member specially members holding minor shares to travel up to the registered office of the company and participate in the general meetings of the company. To eliminate this type of difficulty and to enhance the participation of minority members, concept of e-voting has been introduced and now a member can cast his vote easily through e-mode without physically attending the general meeting.

E-voting does not eliminate members' right to physically attend and vote at the general meeting. However he cannot cast vote in that general meeting.

The facility of Remote e-voting does not dispose with the requirements of holding a General Meeting by the company.

A resolution proposed to be considered through voting by electronic means shall not be withdrawn.

### **APPLICABILITY:**

Section 108 of the Act shall apply to such companies as may be prescribed by the Central Government. The prescribed class of companies, for this purpose, are-

- (i) All companies whose equity shares are listed on a recognized stock exchange; and
- (ii) All companies having 1000 or more members.

### **NON APPLICABILITY OF THE ABOVE PROVISION:**

1. Companies having whose debenture/preference shares are only listed.
2. Companies listed on SME trading platform.
3. Companies listed on Institutional Trading Platform.(ITP)

### **CONDITIONS OF E-VOTING:**

#### **BEFORE GENERAL MEETING:**

1. Decide the cut-off date for the purpose of reckoning the names of Members who are entitled to Voting Rights.
2. Dispatch the notice of meeting.
3. Indicate the process and manner for voting by electronic means, by providing the details of Login ID and password in the notice.
4. The company shall cause a public notice by way of an advertisement to be published, immediately on completion of dispatch of notice of general meeting.

5. The facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting.
6. At the end of the remote e-voting period, the facility shall forthwith be blocked.
7. Once a member has cast his vote on a resolution, he shall not be allowed to change it subsequently or cast the vote again.
8. Board to appoint one or more scrutinisers for e-voting or the ballot process.
9. Prior consent to act as scrutiniser(s) shall be obtained from the scrutinizer(s) and placed before the Board for noting.

#### **DURING GENERAL MEETING:**

- (i) During general meeting, a company may opt to provide the same electronic voting system as used during remote e-voting. In such a case, the members attending the general meeting and who have not exercised their right to vote through remote e-voting, shall be entitled to vote using the electronic voting system.
- (ii) At the general meeting, after conclusion of the discussion, the chairman shall, with the assistance of scrutinisers, allow voting on the resolutions, by use of polling paper or by using an electronic voting system for all those members who are present at the general meeting but have not cast their votes by availing the remote e-voting facility.

#### **AFTER GENERAL MEETING:**

1. The scrutinizer shall, immediately after the conclusion of voting at the general meeting, first count the votes cast at the meeting, thereafter unblock the votes cast through remote e-voting in the presence of at least two witnesses not in the employment of the company.
2. The scrutinizer(s) shall maintain a register to record the assent or dissent received, mentioning the particulars of members.
3. The scrutiniser(s) is required to submit his report within a period of three days from the date of the meeting.
4. The Chairman or any other director so authorized shall countersign the scrutiniser's report so received.
5. The Chairman or a person authorized by him in writing shall declare the result of the voting forthwith.
6. The result of the voting, with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not shall be displayed on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any.
7. Further, the results of voting along with the scrutinizer's report shall also be placed on the website of the company.

#### **WHO CAN BE A SCRUTINIZER**

The scrutinizer(s) may be a Chartered Accountant in practice, Cost Accountant in practice, or Company Secretary in practice or an Advocate, or any other person who is not in employment of the company and is a person of repute who, in the opinion of the Board can scrutinise the voting and remote e-voting process in a fair and transparent manner. At least one of the scrutinisers shall be a member who is present at the Meeting provided such members are available and willing to be appointed.

#### **OTHER NOTABLE POINTS**

1. The scrutinizers' register, report and other related papers received from the scrutinizer(s) shall be kept in the custody of the Company Secretary or any other person authorised by the Board for this purpose.
2. If the requisite numbers of votes are cast in favour of the resolution, the resolution shall be deemed to be passed on the date of relevant general meeting.
3. In case of listed companies, the company shall forward the results to the concerned stock exchange/s and such stock exchange/s shall place the results on its website.

### **POSTAL BALLOT -SECTION 110**

1. As per section 2(65) “postal ballot” means voting by post or through any electronic mode.
2. It includes voting by shareholders by postal or electronic mode instead of voting personally for transacting businesses in a general meeting of the company.
3. Each item proposed to be passed through postal ballot shall be in the form of a Resolution and shall be accompanied by an explanatory statement which shall set out all such facts as would enable a Member to understand the meaning, scope and implications of the item of business and to take a decision thereon.
4. A company shall send a notice and draft resolution by registered post to all shareholders explaining the reasons and requesting them to send their assent or dissent in writing on a postal ballot.
5. If a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

### **RESTRICTION ON CERTAIN ITEMS**

A company may use postal ballot for transacting any item of business, other than

- (i) Ordinary business and
- (ii) Any business in respect of which directors or auditors have a right to be heard at any meeting.

### **BUSINESS TO BE TRANSACTED THROUGH POSTAL BALLOT**

- (a) Alteration of the objects clause of the Memorandum
- (b) Alteration of AOA in relation to insertion or removal of definition of a private company.
- (c) Change in place of registered office outside the local limits of any city, town or village.
- (d) Change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised.
- (e) Issue of shares with differential rights as to voting or dividend or otherwise.
- (f) Variation in the rights attached to a class of shares or debentures or other securities.
- (g) Buy-back of shares by a company.
- (h) Election of a ‘small shareholders’ director.
- (i) Sale of the whole or substantially the whole of an undertaking of a company.
- (j) Giving loans or extending guarantee or providing security exceeding 60% of its paid up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account.
- (k) Any other resolution prescribed under any applicable law, rules or regulations.

### **EXEMPTED COMPANIES**

Following companies are not required to transact any business through postal ballot.

- (i) One person company
- (ii) All other companies having members up to 200.

### **NOTABLE POINTS ON POSTAL BALLOT:**

1. Notice of the postal ballot shall be given in writing to every Member of the company.
2. MODE: Registered post / speed post / by courier / by e-mail.
3. The Notice shall be accompanied by the postal ballot form with the necessary instructions for filling, signing and returning the same within a period of 30 days from the date of dispatch of the notice.

4. Notice shall also be given to the Directors, Auditors, and Debenture Trustees, if any.
5. Notice shall specify the day, date, time and venue where the results of the voting will be announced and the link of the website where such results will be displayed.
6. In case the facility of e-voting has been made available, the provisions relating to conduct of e-voting shall apply, mutatis mutandis, as far as applicable.
7. Notice shall clearly specify that any Member cannot vote both by post and e-voting.
8. If a member votes both by post & e-voting, his vote by post will be treated as invalid.
9. The company shall issue an advertisement to be published at least in 2 newspapers. (1 English+1 vernacular)
10. Notice and the advertisement shall clearly mention the record date.
11. Notice to be placed on the website
12. Appointment of scrutinizer ( Prior consent shall be obtained from scrutinizer)
13. The scrutinizer shall submit his report within 7 days from the last date of receipt of postal ballots.
14. Register to be maintained by scrutinizer either electronically or manually.
15. The postal ballot and all other papers relating to postal ballot including voting by electronic means, shall be under the safe custody of the scrutinizer till the chairman considers, approves and signs the minutes.
16. A Resolution passed by postal ballot shall not be cancelled otherwise than by a Resolution passed subsequently through postal ballot.
17. No amendment or modification shall be made to any Resolution passed by means of postal ballot.

#### **TYPES OF RESOLUTIONS – SECTION 114**

##### **Ordinary Resolution :**

A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.

##### **IN SHORT : VOTE FOR SHALL BE GREATER THAN VOTE AGAINST**

##### **Special Resolution :**

A resolution shall be a special resolution when:

- (a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
- (b) the notice required under this Act has been duly given; and
- (c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

##### **IN SHORT : VOTE FOR SHALL BE NOT LESS THAN 3 TIMES VOTE AGAINST**

**Note :** If the notice convening the meeting (where at special business will be transacted) does not state the nature of the special business, the meeting would be deemed to have been convened irregularly. Consequently, that special business cannot be dealt with at the meeting.

#### **RESOLUTIONS REQUIRING SPECIAL NOTICE – SECTION 115**

Section 115 provides that where by any provision contained in the Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of the total voting power or holding shares on which such aggregate sum not exceeding Rs.5 lakh, as may be prescribed, has been paid up.

### **RESOLUTIONS PASSED AT ADJOURNED MEETING – SECTION 116**

Where a resolution is passed at an adjourned meeting of—

- (a) a company; or
- (b) the holders of any class of shares in a company; or
- (c) the Board of Directors of a company,

the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

### **RESOLUTIONS AND AGREEMENTS TO BE FILED WITH THE REGISTRAR – SECTION 117**

Section 117 provides that a copy of every resolution and an agreement in respect of matters specified therein together with the explanatory statement shall be filed in Form No. MGT.14 with the Registrar, within thirty days of its passing or making thereof.

**Resolutions and agreements to be filed with the Registrar are as under:**

- (a) special resolutions;
  - (b) resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
  - (c) any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
  - (d) resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members;
  - (e) resolutions requiring a company to be wound up voluntarily passed in pursuance of section 59 of the Insolvency and Bankruptcy Code 2016;
  - (f) Resolutions passed in pursuance of sub-section (3) of section 179. No person shall be entitled under Section 399 to inspect or obtain copies of such resolutions; This clause shall not apply to a banking company in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business.
- (NOTE : This sub-clause (f) is not applicable to private companies)**
- (g) any other resolution or agreement as may be prescribed and placed in the public domain.

### **MINUTES OF MEETINGS – SECTION 118**

The minutes refer to a written record of business transacted at a meeting.

Every company shall prepare, sign and keep minutes of proceedings of every general meeting, including requisitionists meeting, class / Board / committee meeting and also resolution passed by postal ballot within 30 days of the conclusion of every such meeting concerned. The date of entry in the Minutes Book shall be recorded by the Company Secretary, if any.

The chairman shall exercise his absolute discretion in respect of inclusion or non-inclusion of the matters which is regarded as defamatory of any person, irrelevant or detrimental to company's interest in the minutes.

Minutes kept shall be evidence of the proceedings recorded in a meeting and containing fair and correct summary of the proceeding thereat.

### **SECRETARIAL STANDARD ON MINUTES – SS2**

1. A distinct Minutes Book shall be maintained for Meetings of the Members of the company, creditors and others as may be required under the Act.
2. Minutes in electronic form shall be maintained with Time stamp.
3. The pages of the Minutes Books shall be consecutively numbered.

4. In the event any page or part thereof in the Minutes Book is left blank, it shall be scored out and initialled by the Chairman who signs the Minutes.
5. Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.
6. Minutes of Meetings, if maintained in loose-leaf form, shall be bound periodically depending on the size and volume.
7. Minutes Books shall be kept at the Registered Office of the company or at such other place, as may be approved by the Board.
8. Minutes shall state, at the beginning the Meeting, name of the company, day, date, venue and time of Commencement and conclusion of the Meeting.
9. In case a Meeting is adjourned, the Minutes shall be entered in respect of the original Meeting as well as the adjourned Meeting.
10. Minutes shall record the names of the Directors and the Company Secretary present at the Meeting.
11. The names of the Directors shall be listed in alphabetical order or in any other logical manner, but in either case starting with the name of the person in the Chair.
12. Minutes shall contain a fair and correct summary of the proceedings of the Meeting.
13. The Company Secretary shall record the proceedings of the Meetings. Where there is no Company Secretary, any other person authorised by the Board or by the Chairman in this behalf shall record the proceedings.
14. Minutes shall be written in clear, concise and plain language.
15. Minutes shall be written in third person and past tense. Resolutions shall however be written in present tense.
16. Each item of business taken up at the Meeting shall be numbered.

#### **SIGNING OF MINUTES**

- Minutes of a General Meeting shall be signed and dated by the Chairman of the Meeting or in the event of death or inability of that Chairman, by any Director who was present in the Meeting and duly authorised by the Board for the purpose, within thirty days of the GM.
- The Chairman shall initial each page of the Minutes, sign the last page and append to such signature the date on which and the place where he has signed the Minutes. Any blank space in a page between the conclusion of the Minutes and signature of the Chairman shall be scored out.
- If Minutes are maintained in electronic form, the Chairman shall sign the Minutes digitally.

#### **MAINTENANCE OF MINUTES**

- Minutes of all Meetings shall be preserved permanently in physical or in electronic form with Timestamp.
- Minutes books shall be preserved permanently and kept in the custody of the company secretary or any director duly authorized by the Board for the purpose and shall be kept in the registered office.
- Where under a scheme of arrangement, a company has been merged or amalgamated with another company, Minutes of all Meetings of the transferor company, as handed over to the transferee company, shall be preserved permanently by the transferee company, notwithstanding that the transferor company might have been dissolved.

#### **ANNUAL GENERAL MEETING – SECTION 96**

1. Annual general meeting should be held once in each calendar year. Hence it shall not be necessary for the company to hold any AGM in the year of its incorporation.
2. First AGM should be held within 9 months from the closing of the first financial year. Subsequent AGM of the company should be held within 6 months from the date of closing of the relevant financial year.
3. The gap between two annual general meetings shall not exceed 15 months.

### **EXTENSION OF VALIDITY PERIOD OF AGM**

In case, it is not possible for a company to hold an AGM within the prescribed time, the Registrar may, for any special reason, extend the time within which any annual general meeting shall be held. Such extension can be for a period not exceeding 3 months. No such extension of time can be granted by the Registrar for the holding of the first annual general meeting.

### **DATE, TIME AND PLACE FOR HOLDING AN AGM**

An Annual general meeting can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day WHICH IS NOT A NATIONAL HOLIDAY.

1. **LISTED COMPANY:** AGM should be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.
2. **UNLISTED COMPANY:** AGM may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance.
3. **GOVERNMENT COMPANY:** Central Government may approve such other place for holding AGM, if the place is other than registered office.
4. **SECTION 8 COMPANY:** the time, date and place of each AGM are decided upon before-hand by the Board having regard to the directions, if any, given in this regard by such company in the general meeting.

### **TRIBUNAL POWER - IN CASE OF DEFAULT IN HOLDING AGM – SECTION 97**

If any default is made in holding the AGM of a company, any member of the company may make an application to the Tribunal to call or direct the calling of, an AGM of the company and give such ancillary or consequential directions as the Tribunal thinks expedient. Such directions may include that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

### **REPORT ON ANNUAL GENERAL MEETING – SECTION 121**

Every listed public company shall prepare a report on each AGM and shall be filed with the Registrar in Form No. MGT.15 within 30 days of the conclusion of AGM along with the fee.

- (a) the report under this section shall be prepared in addition to the minutes of AGM;
- (b) the report shall be signed and dated by the Chairman of the meeting or in case of his inability to sign, by any two directors of the company, one of whom shall be the Managing director, if there is one and company secretary of the company;
- (c) the report shall contain the details in respect of the following, namely:-
  - (i) the day, date, hour and venue of the annual general meeting;
  - (ii) confirmation with respect to appointment of Chairman of the meeting;
  - (iii) number of members attending the meeting;
  - (iv) confirmation of quorum;
  - (v) confirmation with respect to compliance of the Act, Rules & secretarial standards ;
  - (vi) business transacted at the meeting and result thereof;
  - (vii) particulars with respect to any adjournment, postponement, change in venue; and
  - (viii) any other points relevant for inclusion in the report.
- (d) the Report shall contain fair and correct summary of the proceedings of the meeting.

**PENAL CLAUSE :** Company : Rs.1 Lakh to 5 Lakh ; Officer in Default : Rs.25,000 to Rs.1 Lakh

### **EXTRA-ORDINARY GENERAL MEETING (SECTION 100)**

All general meetings other than AGM are called extra-ordinary general meetings (EGM).

#### **NEED FOR AN EGM :**

There are so many matters relating to the business of a company, which requires approval or consent of members in general meeting. It is always not possible for consideration of such matters to wait until the next AGM. The articles of association of the company of the company make provisions for convening general meeting other than AGM.

#### **TYPES OF EGM**

1. By the Board Suo motu
2. By Board on requisition of members
3. By Requisitionists
4. By Tribunal – Sec 98

#### **BY THE BOARD SUO MOTU – SEC 100(1)**

The Board may, whenever it deems fit, call an EGM of the company. An EGM of the company shall be held at any place in India.

An EGM of a company which is wholly owned subsidiary of a company incorporate outside India, may be held outside India.

#### **BY BOARD ON REQUISITION OF MEMBERS – SEC 100(2)**

The Board shall, call an EGM on receipt of the requisition from the following members:

- (a) in the case of a company having a share capital: Members who hold, on the date of the receipt of the requisition, not less than 1/10<sup>th</sup> of such of the paid-up share capital of the company as on that date carries the right to vote.
- (b) in the case of a company not having a share capital: members who have, on the date of receipt of the requisition, not less than 1/10<sup>th</sup> of the total voting power of all the members having on the said date a right to vote.

#### **CONDITIONS TO BE SATISFIED:**

1. The requisition made as above, shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company.
2. The Board is required to proceed to call a meeting within 21 days from the date of receipt of a valid requisition, to convene a meeting which should be held within 45 days of such deposit of the requisition with the company.

#### **BY REQUISITIONIST – SEC 100(4)**

If the Board does not within 21 days from the date of receipt of a valid requisition in regard to any matter, proceed to call a meeting for the consideration of that matter on a day not later than 45 days from the date of receipt of such requisition, the meeting may be called and held by the requisitionist themselves.

#### **NOTABLE POINTS RELATED TO REQUISITIONIST MEETING :**

1. The meeting should be held within a period of 3 months from the date of the requisition.
2. Such requisition shall not pertain to any item of business that is required to be transacted mandatorily through postal ballot.
3. In case, the quorum is not present within half-an-hour from the time appointed for holding a meeting called by requisitionist, the meeting shall stand cancelled.
4. The notice shall specify the place, date, day and hour of the meeting and shall contain the business to be transacted at the meeting.

5. Such meeting shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.
6. Such meeting can happen on any day which is not a national holiday.
7. The notice shall be signed by all the requisitionists or by a requisitionists duly authorized in writing by all other requisitionists on their behalf or by sending an e-mode request attaching therewith a scanned copy of such duly signed requisition.
8. No explanatory statement as required under section 102 need be annexed to the notice of an EGM convened by the requisitionists and they may disclose the reasons for the resolution(s) which they propose to move at the meeting.
9. The notice of the meeting shall be given to those members whose names appear in the Register of members of the company within 3 days on which the requisitionists deposit with the Company a valid requisition for calling an EGM.
10. The notice of the meeting shall be given by speed post or registered post or through electronic mode. Any accidental omission to give notice to, or the non-receipt of such notice by, any member shall not invalidate the proceedings of the meeting.

#### **DATE, TIME AND PLACE FOR HOLDING AN EGM**

1. EGM may be held at any place within India.
2. EGM can be held on any day. (National Holiday restriction is only for AGM).
3. Requisitionists meeting can be convened on any day which is not a National Holiday.
4. There is no restriction of timings in case of an extraordinary general meeting.

In case of Section 8 Company, the time, date and place of each AGM are decided upon beforehand by the directors having regard to directions, if any, given in this regard by the company in its general meeting.

#### **APPOINTMENT AND QUALIFICATION OF DIRECTORS**

Section 2(10) of the Companies Act, 2013 defines that “Board of Directors” or “Board”, in relation to a company, means the collective body of the directors of the company. The term ‘Board of Directors’ means a body duly constituted to direct, control and supervise the affairs of a company.

Members of the Board of directors are known as directors, who unless especially authorised by the Board of directors of the Company, do not possess any power of management of the affairs of the company. The Board of Directors oversees how the management serves and protects the long term interests of all the stakeholders of the company.

**ONLY INDIVIDUALS CAN BE DIRECTORS.** Thus, no body corporate, association or firm shall be appointed as director.

Appointment of directors can happen when first directors are appointed to the company, when directors are appointed at general meeting, when directors are appointed by the Board of Directors, when a resident director is appointed and when independent directors are appointed. Board of Directors can appoint additional directors, alternate directors, nominee directors and can even fill up casual vacancies.

#### **BOARD COMPOSITION**

Type of Company	Minimum Number of Directors
Public Company	3
Private Company	2
One Person Company	1

Maximum Number of Director is 15, which can be increased by passing a special resolution.

### **APPLICATION FOR ALLOTMENT OF DIRECTOR IDENTIFICATION NUMBER – SECTION 153**

No person shall be appointed as a director of the company unless he has been allotted a Director Identification Number (DIN). Section 153 requires that every individual intending to be appointed as director of a company shall make an application for allotment of DIN to the Central Government in DIR-3 with such fees as may be prescribed. However, the Central Government may prescribe any other identification number as a DIN.

### **DUTIES OF DIRECTORS – SECTION 166**

A director of a company shall : -

- a) Act in accordance with the Articles of the company
- b) Act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- c) Exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- d) Not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- e) Not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
- f) Not assign his office and any assignment so made shall be void.

**NOTE:** If a director of the company contravenes the provisions of this section such director shall be punishable with fine Rs.1 lakh to Rs.5 lakh.

### **DISQUALIFICATIONS FOR APPOINTMENT OF DIRECTOR – SECTION 164**

- 1) A person shall not be eligible for appointment as a director of a company, if —
  - (a) He is of unsound mind and stands so declared by a competent court;
  - (b) He is an undischarged insolvent;
  - (c) He has applied to be adjudicated as an insolvent and his application is pending;
  - (d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company.
  - (e) An order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;
  - (f) He has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;
  - (g) He has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or
  - (h) He has not complied with sub-section (3) of section 152.(DIN)
  - (i) Not complying Sec 165
- (2) No person who is or has been a director of a company which—
  - (a) has not filed financial statements / annual returns for any continuous period of 3 financial years; or
  - (b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more, shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

If any person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

Note :

1. A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2).
2. The disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification.

## QUALIFICATIONS

The Companies Act does not prescribe any academic or professional qualifications for directors. There is also no mandatory share qualification as per the Act, unless the Articles of Association of the company prescribes for the same. Therefore, a director neither needs any minimum professional qualification nor any share qualification unless the articles of a company suggest for the same.

## APPOINTMENT OF DIRECTORS – SECTION 152

The Articles of a company may provide that all directors of the company shall retire at every AGM or it may provide that they shall retire by rotation.

Not less than 2/3rd of total number of directors of a public company shall be liable to be retired by rotation and be appointed by company in general meeting.

At the first AGM of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent AGM, 1/3rd of such of the directors for the time being as are liable to retire by rotation.

The directors to retire by rotation at every AGM shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

If their number is neither 3 nor multiple of 3, then, the number nearest to 1/3rd shall retire.

The remaining directors (i.e. non-rotational/non-retiring/permanent directors) in the case of public company shall be appointed as per provisions contained in the articles of the company.

Where a director retires by rotation at the annual general meeting of a company, the company at the same meeting may appoint: i. the retiring director; or ii. some other person in the vacancy.

## RESIGNATION OF DIRECTORS – SECTION 168

1. A director may resign from its office by giving a notice with the reasons of resignation in writing to the company.
2. The resignation shall be effective from the date on which the notice is received by the company or the date specified by the Director in the notice whichever is later.
3. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate ROC in Form DIR-12 and post the information on its website.
4. The Board shall mention the facts of such resignation in its Boards' report.
5. The Concerned director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in DIR- 11.
6. The director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
7. Where all the directors of a company resign from their offices, the promoter or, in his absence, the CG shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

### **REMOVAL OF DIRECTORS – SECTION 169**

shareholders have been given the inherent right to remove the directors appointed by them. It is not necessary that there should be proof of mismanagement, breach of trust, misfeasance or other misconduct on the part of the directors. Where the shareholders feel the policies pursued by the directors or any of them are not to their liking, they have the option to remove the directors by passing an ordinary resolution in the same way as they have the right to appoint directors by passing an ordinary resolution. However, In Queen Kuries & Loans (p.) Ltd. vs Sheena Jose [1993], it was held that the notice must disclose the ground on which the director is proposed to be removed.

- 1) A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.
- 2) A vacancy created by the removal of a director under this section may be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given.
- 3) A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.
- 4) If the vacancy is not filled, it may be filled as a casual vacancy. However, the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

Under Section 242 of the Companies Act, 2013, where an application has been made to the Tribunal under Section 241, against oppression and mismanagement of a company's affairs, the Tribunal may order for the termination or setting aside of an agreement which the company might have made with any of its directors. It may also order the removal of any of the directors of the company. A director so removed shall not be entitled to claim any compensation from the company for the loss of office under Section 243. Additionally such a director shall not be entitled to serve as a manger, managing director or director of the company without leave of the Tribunal for a period of five years from the date of Tribunal's order terminating or setting aside his contract with the company.

### **OVERALL MANAGERIAL REMUNERATION OF PUBLIC COMPANIES – SEC 197**

Directors including MD, WTD and Manager	11% of the Net Profits
One - MD/ Whole time director/ Manager	5% of the Net Profits
More than one MD/ WTD/ Manager	10% of the net profits
Directors who are neither MD nor WTD	1% of the net profits (If there is a MD or WTD)
Directors who are neither MD nor WTD	3% of the net profits (if there is no MD or WTD)

Note : Sec 197 is not applicable to Government Company, Private Company and IFSC

The limit of 11% can be exceeded with the prior approval of members.

### **REMUNERATION TO DIRECTORS IN OTHER CAPACITY [SECTION 197(4)]**

The remuneration payable to the directors including MD or WTD or Manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:

- (a) the services rendered are of a professional nature; and
- (b) in the opinion of the Nomination and Remuneration Committee the director possesses the requisite qualification for the practice of the profession.

### **POWERS OF BOARD – SECTION 179**

Section 179 of the Act deals with the powers of the board; all powers to do such acts and things for which the company is authorised is vested with board of directors. But the board can act or do the things for which powers are vested with them and not with general meeting.

The following powers of the Board of directors shall be exercised only by means of resolutions passed at meetings of the Board, namely:

- (1) to make calls on shareholders in respect of money unpaid on their shares;
- (2) to authorise buy-back of securities under section 68;
- (3) to issue securities, including debentures, whether in or outside India;
- (4) to borrow monies;
- (5) to invest the funds of the company;
- (6) to grant loans or give guarantee or provide security in respect of loans;
- (7) to approve financial statement and the Board's report;
- (8) to diversify the business of the company;
- (9) to approve amalgamation, merger or reconstruction;
- (10) to take over a company / acquire a controlling or substantial stake in another company;
- (11) to make political contributions;
- (12) to appoint or remove key managerial personnel (KMP);
- (13) to appoint internal auditors and secretarial auditor;
- (14) Such other matters as may be prescribed

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (4) to (6) on such conditions.

**NOTE:**

1. The banking company is not covered under the purview of this section.
2. Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section.

### **KEY MANAGERIAL PERSONNEL**

Section 2(51) “key managerial personnel”, in relation to a company, means—

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer;
- (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- (vi) such other officer as may be prescribed.

### **OPERATIONAL AND FINANCIAL CONTROL**

A financial controller is responsible for the financial function of an overall organization. An operational controller job title specifies the responsibilities for a particular part of a company, so those duties vary from business to business depending on its operations. While there are some similarities of an operations or business controller versus financial controller, they are definitely two distinct roles within an organization. Both positions usually involve budgeting, forecasting and financial reporting. The financial control deals with the organization's daily accounting operations. It includes overseeing accounting, payroll, accounts payable and accounts receivable departments. By managing the organizational budget and the preparation and publishing of regulatory and monthly financial reporting, the financial controller gauges fiscal efficacy. Unlike a financial controller, the role of operation control includes reporting and budgeting responsibilities including fiscal reporting for a particular unit within the larger company.

### **INTERNAL FINANCIAL CONTROL FOR FINANCIAL REPORTING**

#### **PERSONS SIGNING FINANCIAL STATEMENT – 134(1)**

The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the Chairperson of the company where he is authorised by the Board; or by 2 directors out of which one shall be Managing director, if any, AND Chief Executive Officer, Chief Financial Officer and Company secretary of the company, wherever they are appointed.

**Note:** In the case of OPC, only by one director, for submission to the auditor for his report thereon.

#### **DISCLOSURES IN BOARDS REPORT AS PER SECTION 134(3)**

There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include—

(a) The web address, if any, where annual has been placed

(b) Number of meetings of the Board

(c) Directors' responsibility statement

C(a) Details in respect of frauds reported by auditors other than those which are reportable to the CG.

(d) a statement on **declaration given by independent directors** under Sec 149(6).

(e) Details about Nomination remuneration Committee and its policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and such other matters.

(f) Explanations or comments by the Board on every **qualification**, reservation or adverse remark or disclaimer made—

(i) by the auditor in his report (Including cost audit report); and  
(ii) by the company secretary in practice in his secretarial audit report;

(g) The particulars of loans given, guarantees provided or investments in securities and acquisition made during the year under **section 186** of the Act should be attached to the Board's Report.

(h) Particulars of contracts or arrangements with related parties referred to in **sec 188**

(i) The **state of the company's affairs**

(j) The amounts, if any, which it proposes to carry to any reserves

(k) The amount, if any, which it recommends should be paid by way of **dividend**.

(l) **Material changes and commitments**, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the financial statements relate and the date of the report.

(m) The conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed.

(n) A statement indicating development and implementation of a **risk management policy** for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company.

(o) The details about the policy developed and implemented by the company on **corporate social responsibility** initiatives taken during the year.

(p) In case of a listed company and every other public company having such paid-up share capital of twenty five crore rupees or more, a statement indicating the manner in which **Formal annual evaluation** of the performance of the Board, its Committees and of individual directors has been made.

(q) **SUCH OTHER MATTERS AS MAY BE PRESCRIBED.**

## AUDITORS

The auditor, being a professional, must adhere to the Code of Ethics and the Code of Professional Conduct. Part of this involves confidentiality and due care in the performance of his duties. Another important requisite is professional skepticism. In simple words, the auditor must have a questioning mind, must be alert to possible mishaps, errors and frauds in the financial statements.

### Assistance in an investigation

In the case where the company is under the scope of an investigation, it is the duty of the auditor to provide assistance to the officers as required for the same. Hence, it can be seen that the duties of the auditor are pretty diverse, it has an all-round and far-reaching impact. The level of assurance provided by a set of audited financial statements is comparatively far higher as compared to regular unaudited financial statements.

## AUDIT REPORT

An audit report, in simple terms, is an appraisal of a business's financial position. The auditor is responsible for preparing an audit report based on the financial statements of the company. The books of accounts so examined by him should be maintained in accordance with the relevant laws.

The auditor's report has a high degree of assurance and reliability because it contains the auditor's opinion on the financial statements. Where the auditor feels that the statements do not depict a true and fair view of the financial position of the business, he is also entitled to form an adverse opinion on the same.

## POWERS AND DUTIES OF AUDITORS AND AUDITING STANDARDS – SECTION 143

Every auditor can access at all times to the books of accounts, vouchers and seek such information and explanation from the company and enquire such matters as he considers necessary.

It is the duty of every auditor to make proper enquiry regarding these matters, besides other matters and if he is satisfied, it is not necessary to disclose this fact in his report.

- (a) whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members.
- (b) whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company.
- (c) where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company.
- (d) whether loans and advances made by the company have been shown as deposits.
- (e) whether personal expenses have been charged to revenue account.
- (f) where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.

## AUDIT REPORT

Auditor shall make a report to the members of the company on the accounts examined by him.

The Audit report shall be in accordance with Accounting Standards.

The Audit report shall be in accordance with Auditing standards.

The Audit report should state that:

1. To the best of his information and knowledge, the said accounts and financial statements give a true and fair view of the state of the company's affair as at the end of the financial year.
2. He has sought and obtained all the information and explanations which were necessary.
3. Proper books of account as required by law have been kept by the company.
4. Proper returns adequate for the purposes of his audit have been received from branches not Visited by him.
5. Any director is disqualified from being appointed as a director under section 164 (2).
6. Any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith.
7. The company has adequate internal financial controls with reference to financial statements in place and the operating effectiveness of such controls.
8. Such other matters as may be prescribed.

The auditor is required to provide the reasons, where any of the matters required to be included in the audit report under this clause is answered in negative or with a qualification.

## POWERS OF CAG OF INDIA IN CASE GOVERNMENT COMPANY

1. The Auditor appointed by CAG shall conduct the audit and give the report to CAG.
2. The CAG, if needed, shall have a right to the conduct a **supplementary audit** within 60 days from the date of receipt of audit report.
3. Any comments given by the CAG upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements and also be placed before the AGM in the same manner as the audit report.

The CAG may, by an order, cause **test audit** to be conducted of the accounts of company, if needed.

## BRANCH AUDIT

Accounts of branch office can be audited by –

1. The company's auditor; or
2. Any other person, qualified to be and appointed as an auditor as per the provisions of the Act as branch auditor.

In case of foreign branch, by the company's auditor or by an accountant or a competent person appointed in accordance with the prevailing laws of the foreign country.

The branch auditor shall prepare a report on the accounts of the branch examined by him and shall submit his report to the company's auditor.

The company's auditor shall deal with such report in his audit report in a manner as he considers necessary.

Provisions relating to reporting of fraud by the auditor shall also extend to such branch auditor to the extent it relates to the concerned branch.

### **REPORTING OF FRAUDS BY AUDITOR**

1. If an auditor of a company, in the course of the performance of his duties as statutory auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of Rs.1 crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to CG.
2. The auditor shall report it to the Board or the Audit Committee, immediately within 2 days of his knowledge, seeking their reply or observations within 45 days;
3. On receipt of reply or observations of the Board / Audit Committee along with his comments shall send it to the CG within 15 days from the date of receipt of reply.
4. In case the auditor fails to get any reply from the Board / the Audit Committee within 45 days, he shall forward his report to CG along with a note containing the details of his report that was earlier forwarded to the Board / the Audit Committee for which he has not received any reply.
5. The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same.
6. The report shall be on the letter-head of the auditor containing address, e-mail address and contact telephone number and be signed by the auditor with his seal and membership Number.
7. The report shall be in the Form ADT-4.
8. In case of a fraud involving lesser than the amount specified above, the auditor shall report the matter to Audit Committee or to the Board immediately within 2 days of his knowledge of the fraud and he shall report the matter specifying the following:-
  - (a) Nature of Fraud with description;
  - (b) Approximate amount involved; and
  - (c) Parties involved.
9. The fraud reported to the Audit Committee or the Board during the year shall be disclosed in the Board's Report along with the remedial measures taken for the same.
10. The provision of this rule shall also apply, mutatis mutandis, to a Cost Auditor and a Secretarial Auditor during the performance of his duties under section 148 and section 204 respectively.
11. If any auditor, cost accountant, or company secretary in practice does not comply with the provisions of section 143 (12), he shall,—
  - (a) in case of a listed company, be liable to a penalty of five lakh rupees; and
  - (b) in case of any other company, be liable to a penalty of one lakh rupees.

### **AUDIT COMMITTEE – SECTION 177**

Audit Committee is one of the main pillars of the corporate governance mechanism in any company. This Committee is charged with the principal oversight of financial reporting and disclosure and aims to enhance the confidence in the integrity of the company's financial reporting, the internal control processes and procedures and the risk management systems.

<b>CONSTITUTION OF AUDIT COMMITTEE</b>	<ol style="list-style-type: none"> <li>(i) Every listed Public companies;</li> <li>(ii) All public companies with a paid up capital of Rs.10 crore or more;</li> <li>(iii) All public companies having turnover of Rs.100 crore or more;</li> <li>(iv) All public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs.50 crore or more.</li> </ol>
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The Audit Committee shall consist of a minimum of 3 directors with independent directors forming a majority. Majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.

### **ROLE OF AUDIT COMMITTEE**

1. The recommendation for appointment, remuneration and terms of appointment of auditors of the Company.
2. Review and monitor the auditor's independence and performance, and effectiveness of audit Process.
3. Examination of the financial statements and the auditors' report thereon.
4. Approval or any subsequent modification of transactions of the company with RP.
5. Scrutiny of inter-corporate loans and investments.
6. Valuation of undertakings or assets of the company, wherever it is necessary.
7. Evaluation of internal financial controls and risk management systems.
8. Monitoring the end use of funds raised through public offers and related matters.

### **POWERS OF THE AUDIT COMMITTEE**

1. To call for the comments of the auditors about internal control systems.
2. To investigate into any matter in relation to the items specified in terms of reference or referred to it by the board and for this purpose the committee has power to obtain professional advice from external sources. The committee for this purpose shall have full access to information contained in the records of the company.
3. To seek any information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if it considers necessary.

### **OMNIBUS APPROVAL FOR RELATED PARTY TRANSACTIONS ON ANNUAL BASIS**

The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:-

- (a) Maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year;
- (b) The maximum value per transaction which can be allowed;
- (c) Extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval;
- (d) Review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made;
- (e) Transactions which cannot be subject to the omnibus approval by the Audit Committee.

### **LIMIT FOR OMNIBUS APPROVAL**

Where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.

### **ESTABLISHMENT OF VIGIL MECHANISM**

- (1) Every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances-
  - (a) the Companies which accept deposits from the public;
  - (b) the Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.
- (2) In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

(3) The vigil mechanism under sub-section (9) shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.

(4) The details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report.

## RIGHTS OF SHAREHOLDERS

### MEMBERS

According to Section 2(55) of the Companies Act, 2013, member, in relation to a company, means,

- (1) The subscribers to the memorandum of a company who shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members;
- (2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall, be a member of the company;
- (3) Every person holding shares of a company and whose name is entered as a beneficial owner in the records of a depository shall be deemed to be a member of the concerned company

### MODES OF ACQUIRING MEMBERSHIP

As per Section 2(55) of the Companies Act, 2013, a person may acquire the membership of a company:

- (a) by subscribing to the Memorandum of Association (deemed agreement); or
- (b) by agreeing in writing to become a member:
  - (i) by making an application to the company for allotment of shares; or
  - (ii) by executing an instrument of transfer of shares as transferee; or
  - (iii) by consenting to the transfer of share of a deceased member in his name; or
  - (iv) by acquiescence or estoppels.
- (c) by holding shares of a company and whose name is entered as beneficial owner in the records of a depository (Under the Depositories Act, 1996)

and on his name being entered in the register of members of company. Also every such person holding shares of the company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be the member of the concerned company.

### RIGHTS OF MEMBERS

- So long a person's name stands registered in the books as a member, even if he has sold the share and has given the share certificates and the blank transfer deed duly signed, he alone is entitled to exercise the rights of membership. These rights are derived by virtue of the membership contract between the company and the member and the general law.
- Some of these rights can be exercised by him individually and others along with other members unless member himself holds shares equivalent to the minimum holding prescribed under the various provisions of the Companies Act, 2013.

### INDIVIDUAL RIGHTS

#### EVERY MEMBER HAS A RIGHT TO

- (a) Inspect statutory registers/returns and get copies thereof
- (b) Attend meetings of the shareholders and Vote
- (c) To transfer shares
- (d) To resist and safeguard against increase in his liability without his written consent.
- (e) To receive dividend when declared.
- (f) To have rights shares (**PRE-EMPTIVE RIGHTS** – Right to Renounce if AOA permits)
- (g) To appoint directors.
- (h) To share the surplus assets on winding up
- (i) To apply to Tribunal under Section 48

- (j) To appoint proxy
- (k) To nominate any person for his securities
- (l) Right to receive copies of (i) Abridged financial statement and auditor's report in the case of a listed company (Section 136) (ii) Report of the Cost Auditor, if so directed by the Government (iii) Notices of the general meetings of the company.

### **COLLECTIVE RIGHTS**

1. Right to be exercised collectively by passing a special resolution and intimating the same to the Central Government for investigation of the affairs of the company.
2. Right to make application collectively to the Tribunal for relief in cases of oppression and mismanagement.
3. Right to file class action suits before the Tribunal.
4. Right to file a suit or take any other action in case of any misleading statement or the inclusion or omission of any matter in the prospectus.
5. Right to convene a Requisitionist meeting.

### **VARIOUS FORMS**

Inc.1 RUN	Application for reservation of Name
Inc.3	Nominee Consent Form
Inc.4	Change in Member/ Nominee
Inc.5	Intimation of exceeding threshold
Inc.6	Application for Conversion of Private Limited to OPC or vice versa
Inc -8	Declaration by an Advocate / CA / Cost Accountant / PCS that all requirements of the companies act and rules pertaining to incorporation have been complied with ( inbuilt in Spice)
Inc-9	Declaration by subscriber / first director
Inc-11	Certificate of Incorporation
Inc-11 A	Certificate of Incorporation on conversion of unlimited to Limited
Inc -11B	Certificate of Incorporation on conversion from a company limited by guarantee to a company limited by shares
Inc-12	Application for grant of License under section 8
Inc-13	Memorandum of Association For Sec 8 Company
Inc-14	Declaration by Professionals for Sec 8 Company
Inc-15	Declaration by persons making the application
Inc-16	Licence under section 8
Inc-17	License for existing companies ( Sec 25 of CA 1956)
Inc -18	Application to RD for conversion of section 8 company into any other kind of company
Inc-19	Notice in case of conversion of Sec 8 company into any other company ( Paper Advt)
Inc -20A	Commencement of Business
Inc.22	Notice of situation or change of situation of registered office
Inc 22A	ACTIVE - Active Company Tagging Identities and Verification
Inc.23	Application to the RD for approval to shift the RO from one state to another state or from jurisdiction of one Registrar to another within the same State.
Inc.24	Application for approval of CG for change of name
Inc-25	COI pursuant to change of name
Inc-25 A	Advertisement to be published in a newspaper when a public company is converted into a private company

Inc-26	Advertisement to be published in the newspaper For Licence under Sec 8 For shifting from one state to another
Inc.27	Conversion of public company into private company or Vice versa.
Inc.28	Notice of Order of the Court or any other competent authority
Inc.32	Simplified Proforma for Incorporating Company electronically (SPICe)
Inc.33	E- MOA
Inc.34	E-AOA
Inc.35	Application for Goods and services tax Identification number, employees state Insurance corporation registration plus Employees provident fund organisation registration(AGILE-PRO)

MGT-1	Register of members
MGT-2	Register of debenture holders/ other securities holders
MGT-3	Notice of situation where foreign register shall be kept
MGT-4	Declaration by the registered owner of shares who does not hold the beneficial interest in such shares
MGT-5	Declaration by the beneficial owner who holds or acquires beneficial interest in shares but whose name is not entered in the register of members
MGT-6	Return to the Registrar in respect of declaration under section 89 received by the company
MGT-7	Annual Return
MGT-8	Certificate by a Company Secretary in Practice
MGT-9	Extract of Annual Return
MGT-10	Changes in shareholding position of promoters and top ten shareholders
MGT-11	Proxy form
MGT-12	Polling Paper
MGT-13	Report of Scrutinizer
MGT-14	Filing of Resolutions and agreements to ROC
MGT-15	Form for filing Report on Annual General Meeting

CHG.1	Form for registration of creation, modification of charge - within 30 days
CHG-2	Certificate of registration of charge
CHG-3	Certificate of registration of modification of charge
CHG.4	Particulars for satisfaction of charge –within 30 days
CHG-5	Memorandum of satisfaction of charge
CHG.6	Notice of appointment or cessation of receiver or Manager
CHG-7	Register of charges
CHG-8	Condonation of Delay
CHG-9	Creating or modifying the charge for debentures- within 30 days

SH-1	Share Certificate
SH-2	Register of Renewed and Duplicate Share Certificates
SH-3	Register of Sweat Equity Shares
SH-4	Securities Transfer Form

SH-5	Notice for transfer of partly paid securities
SH-6	Register of Employee Stock Options
SH-7	Notice to Registrar of any alteration of share capital – within 30 days of such event
SH-8	Letter of Offer
SH-9	Declaration of Solvency
SH-10	Register of shares or other securities bought-back
SH-11	Return in respect of buy-back of securities
SH-12	Debenture Trust Deed
SH-13	Nomination Form
SH-14	Cancellation or Variation of Nomination
SH-15	Certificate of compliance in respect of buy-back of securities



**RR Academy**

**SECTION D**  
**BUSINESS ETHICS**  
**UNIT 13**

**BUSINESS ETHICS AND EMOTIONAL INTELLIGENCE**

<b>Ethics- Meaning, Importance and Nature</b>	
<b>Introduction</b>	<ul style="list-style-type: none"> <li>✓ Business ethics is an essential skill.</li> <li>✓ Every company now has a business ethics program, mostly because technology and digital communication have made it easier to identify and publicize ethical missteps.</li> <li>✓ To avoid the negative implications, companies are devoting more resources to business ethics.</li> <li>✓ Companies are creating ethical workplaces by hiring employees with high integrity and honesty.</li> <li>✓ Business successes is very intrinsically linked to ethics in the workplace</li> </ul>
<b>Ethics</b>	<ul style="list-style-type: none"> <li>✓ Ethics is a set of rules that define right and wrong conduct.</li> <li>✓ The term 'ethics' derived from Latin word 'ethos' which means character.</li> <li>✓ Ethics is a social science which deals with concepts such as right and wrong, moral and immoral, good and bad behaviour of dealing with one another.</li> </ul>
<b>Types of Ethics</b>	<p><b>TYPE OF ETHICS</b></p> <p>Ethics may be divided into three types as follows:</p> <ul style="list-style-type: none"> <li>✓ Meta ethics;</li> <li>✓ Normative ethics;</li> <li>✓ Applied ethics.</li> </ul> <p><b>Meta ethics</b> deal with the nature of moral judgment. It looks at the origins and meanings of ethical principles.</p> <p><b>Normative ethics</b> is concerned with the content of moral judgments and the criteria for what is right or wrong.</p> <p><b>Applied ethics</b> looks at controversial topics like war, animal rights and capital punishment.</p>
<b>Importance of Ethics</b>	<ul style="list-style-type: none"> <li>✓ Public expects business to exhibit high levels of ethical performance and social responsibility</li> <li>✓ Encouraging business firms and their employees to behave ethically is to prevent harm to society</li> <li>✓ Promoting ethical behavior is to protect business from abuse by unethical employees or unethical competitors</li> <li>✓ High ethical performance also protects the individuals who work in business.</li> </ul>
<b>Ethics- Nature &amp; Relevance to Business</b>	
Organizational culture, Management Philosophy & Ethics	<ul style="list-style-type: none"> <li>✓ Business each have an impact on how well a business performs in the long term.</li> </ul>
Long Term Success	<ul style="list-style-type: none"> <li>✓ No matter the size, industry or level of profitability of an organization, business ethics are one of the most important aspects of long-term success.</li> </ul>

Ethical Practices	<ul style="list-style-type: none"> <li>✓ The <b>prevailing management philosophy</b> is based on ethical practices.</li> <li>✓ <b>Behaviour, leaders within an organization</b> can direct employees.</li> </ul>
Better Decision	<ul style="list-style-type: none"> <li>✓ Employees make <b>better decisions in less time with business ethics as a guiding principle.</b></li> <li>✓ <b>Increases productivity</b> and overall employee morale.</li> </ul>
Profitability of the Company	<ul style="list-style-type: none"> <li>✓ With all business initiatives, the ethical operation of a company is directly <b>related to profitability in both the short and long term</b></li> </ul>
Ethical Foundation	<ul style="list-style-type: none"> <li>✓ To <b>retain a positive image, businesses</b> must be committed to operating on an ethical foundation.</li> <li>✓ It relates to <b>treatment of employees, respect to the surrounding environment and fair market practices</b> in terms of price and consumer treatment</li> </ul>

#### Seven Principles of Public Life by Lord Nolan (1995)

Selflessness	<ul style="list-style-type: none"> <li>✓ Holders of <b>public office should act solely in terms of the public interest</b></li> </ul>
Integrity	<ul style="list-style-type: none"> <li>✓ Holders of <b>public office must avoid placing themselves under any obligation to people or organizations</b> that might try <b>inappropriately to influence them</b> in their work.</li> <li>✓ <b>Not act or take decisions</b> in order to <b>gain financial or other material benefits for themselves, their family, or their friends.</b></li> <li>✓ Must <b>declare and resolve any interests and relationships.</b></li> </ul>
Objectivity	<ul style="list-style-type: none"> <li>✓ Holders of <b>public office must act and take decisions impartially, fairly and on merit</b>, using the <b>best evidence and without discrimination or bias.</b></li> </ul>
Accountability	<ul style="list-style-type: none"> <li>✓ Holders of <b>public office are accountable to the public for their decisions and actions</b> and must submit themselves <b>to the scrutiny necessary to ensure this.</b></li> </ul>
Openness	<ul style="list-style-type: none"> <li>✓ Holders of <b>public office should act and take decisions in an open and transparent manner.</b></li> <li>✓ <b>Information should not be withheld from the public</b> unless there are <b>clear and lawful reasons</b> for so doing</li> </ul>
Honesty	<ul style="list-style-type: none"> <li>✓ Holders of <b>public office should be truthful</b></li> </ul>
Leadership	<ul style="list-style-type: none"> <li>✓ Holders of public office should <b>exhibit these principles in their own behaviour.</b></li> <li>✓ Should actively <b>promote and robustly support</b> the principles and be <b>willing to challenge poor behavior</b> wherever it occurs.</li> </ul>

#### Relationship between Ethics and Law

Ethics & Law	<ul style="list-style-type: none"> <li>✓ Law Is Essentially An <b>Institutionalisation Or Codification Of Ethics</b> Into The Specific Social Rules, Regulations And Prescriptions.</li> <li>✓ <b>Business Ethics Can Be Said To Begin Where Law Ends.</b></li> <li>✓ <b>Business Ethics Is Primarily Concerned With Those Issues Not Completely Covered By Law</b></li> <li>✓ No Definite Consensus On Whether <b>Something Is Right Or Wrong.</b></li> </ul>
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	<ul style="list-style-type: none"> <li>✓ Business Ethics Is About The ‘Grey Areas’ Of Business Where Values Are In Conflict.</li> <li>✓ Laws Alone Are Not Enough To Promote Ethical Behaviour.</li> <li>✓ Laws Can Never Be So Exhaustive To Cover Each And Every Scenario Possible.</li> <li>✓ Laws Cannot Exist, And Have Strict Laws To Scrutinize Every Small Act Of Corruption.</li> <li>✓ Even With Laws, Some Unethical Practices Continue To Exist Such As Violence Against Women.</li> <li>✓ Laws And Ethics Are Equally Important And Go Hand In Hand.</li> </ul>
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### Values and Attitudes of Professional Accountants

Professional Accountants	<ul style="list-style-type: none"> <li>✓ The roles, professional accountants take on a vast array of other roles in businesses of all sorts including in the <b>public sector, not-for-profit sector, regulatory or professional bodies, and academia</b>.</li> </ul>
Overall Stability and Progress of Society	<ul style="list-style-type: none"> <li>✓ Professional accountants in business play important roles that contribute to the <b>overall stability and progress of society</b>.</li> </ul>
Value may be Misinformed	<ul style="list-style-type: none"> <li>✓ Without public understanding of all these diverging roles and responsibilities of <b>different accounting specialists working in business, public perceptions of their value may be misinformed</b>.</li> </ul>
Knowledge of the Company’s Financials	<ul style="list-style-type: none"> <li>✓ Individuals employ an inquiring mind to their work founded on the basis of their <b>knowledge of the company’s financials</b></li> </ul>
Planning and control of Costs	<ul style="list-style-type: none"> <li>✓ Cost management is an activity of managers related to <b>planning and control of costs</b></li> </ul>
To support the Operating Plan	<ul style="list-style-type: none"> <li>✓ Managers have to take decisions regarding use of materials, processes, product designs and have to <b>plan costs or expenses to support the operating plan for their department or section</b></li> </ul>

### Role of Management Accounting

Problem solving	<ul style="list-style-type: none"> <li>✓ The role of accounting in <b>problem solving is to provide information useful in evaluating alternatives</b>.</li> </ul>
Scorekeeping	<ul style="list-style-type: none"> <li>✓ Scorekeeping records the <b>results of various actions of the managers and helps in assessing whether the results expected from the various actions are realized or not</b>.</li> </ul>
Attention directing	<ul style="list-style-type: none"> <li>✓ The scorekeeping function in combination with expected results, and comparative analysis of <b>scores of various companies, divisions and departments, comparative analysis of present period scores or</b></li> <li>✓ <b>Results with previous periods</b> show opportunities of focusing attention of managers to improve things.</li> </ul>

### Value Chain

	<ul style="list-style-type: none"> <li>✓ Value chain is a <b>visualization of complete business as a sequence of activities</b> in which usefulness is <b>added to the products or services produced and sold by an</b></li> </ul>
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<b>Introduction</b>	<b>organization.</b> ✓ Management accountants provide <b>decision support for managers in each activity of value chain.</b>
<b>Customer focus</b>	✓ The challenge for <b>managers it invests sufficient resources to enhance customer satisfaction.</b> ✓ Enhanced <b>profitability or maintained profitability</b> for the organization
<b>Key Success Factors</b>	✓ <b>Non financial factors</b> which have an <b>effect on the economic viability of the organization.</b> Cost, quality, time and innovation are important key success factors
<b>Continuous Improvement</b>	✓ <b>Continuous improvement or kaizen</b> is a popular theme. Innovation related to this area in costing is kaizen costing.
<b>Value Chain and Supply Chain Analysis</b>	✓ Value chain as a <b>strategic framework for analysis of competitive advantage</b> was promoted by Michael Porter.
<b>Professional Ethics</b>	
<b>Introduction</b>	✓ Like other professionals, accountants also <b>face ethical dilemmas.</b> ✓ Need <b>ethical guidelines.</b> ✓ <b>Competence, Confidentiality, Integrity and Objectivity</b> shall be the important themes of the guidance note.
<b>Mission Statement of ICAI</b>	
<b>Ethical Conduct for Practitioners</b>	✓ Maintain at all times <b>independence of thought and action</b> ✓ <b>Not to express an opinion on cost / financial reports or statements</b> without first assessing her or his relationship with her or his client to determine whether such <b>Member might expect her or his opinion to be considered independent.</b> ✓ <b>Inform his or her employer or client of any business connections or interests</b> of which such Member's employer or client would reasonably expect to be informed; ✓ Not, in the course of exercising his or her duties on behalf of such Member's employer or client, <b>hold, receive, bargain for or acquire any fee, remuneration or benefit without such employer's or client's knowledge and consent</b> ✓ Conduct himself or herself toward other Members with <b>courtesy and good faith</b> ✓ <b>Not to attempt to gain an advantage</b> over other Members by <b>paying or accepting a commission in securing management accounting work</b> ✓ <b>Not to act maliciously</b> or in any other way this may adversely reflect on the <b>public or professional reputation or business of another Member</b> ✓ At all times <b>maintain the standards of competence</b> expressed by the institute from time to time ✓ Competent to perform by virtue of his or her training and experience and will, where it would be in the <b>best interests of an employer or client, engage, or advise the employer or client to engage, other specialists.</b>

<b>Primary Norms of Business Ethics</b>	
<b>Personal Responsibility</b>	<ul style="list-style-type: none"> <li>✓ Each person who works for a business, <b>whether on the executive level or the entry-level, will be expected to show personal responsibility.</b></li> </ul>
<b>Corporate Responsibility</b>	<ul style="list-style-type: none"> <li>✓ Businesses have <b>responsibilities to their employees, clients or customers, and board of directors.</b></li> <li>✓ May be <b>contractual or legal obligations</b>, others may be promises</li> </ul>
<b>Loyalty</b>	<ul style="list-style-type: none"> <li>✓ <b>Both businesses and their employees</b> are expected to show loyalty.</li> <li>✓ <b>Employees should be loyal to their co-workers, managers, and the company.</b></li> <li>✓ To speak <b>positively about the business in public and only addressing personnel or corporate issues in private.</b></li> <li>✓ <b>Customer or Client loyalty</b> is important to a company <b>not only to maintain good business relations</b> but also to attract business through a good reputation.</li> </ul>
<b>Respect</b>	<ul style="list-style-type: none"> <li>✓ Respect is an important business ethics, <b>both in the way the business treats its clients, customers and employees, and also in the way its employees treat one another.</b></li> </ul>
<b>Trustworthiness</b>	<ul style="list-style-type: none"> <li>✓ Business cultivates <b>trustworthiness with its clients, customers and employees through honesty, transparency and reliability.</b></li> <li>✓ <b>Trust the business to keep to the terms of their employment.</b></li> <li>✓ <b>Clients and customers should be able to trust the business with the money, data, contractual obligations and confidential information.</b></li> <li>✓ Encourage people to do <b>business and helps to maintain a positive reputation.</b></li> </ul>
<b>Fairness</b>	<ul style="list-style-type: none"> <li>✓ Applies the <b>same standards for all employees regardless of rank.</b></li> <li>✓ The expectations with regard to <b>honesty, integrity and responsibility placed upon the entry-level employee</b> also apply to the CEO.</li> <li>✓ The business <b>will treat its customers with equal respect, offering the same goods and services</b> to all based on the same terms.</li> </ul>
<b>Internal Code of Ethics</b>	<ul style="list-style-type: none"> <li>✓ According to the CFAI's website, Members of CFA Institute, including CFA, and candidates for the CFA designation.</li> </ul>
<b>Code of Ethics</b>	<ul style="list-style-type: none"> <li>✓ Act with <b>integrity, competence, diligence, respect, and in an ethical manner with the public, clients, prospective clients, employers, employees, colleagues in the investment profession</b>, and other participants in the global capital markets.</li> <li>✓ Place the <b>integrity of the investment profession</b> and the <b>interests of clients</b> above their own personal interests.</li> <li>✓ Use <b>reasonable care and exercise independent professional judgment</b> when conducting investment analysis, making investment recommendations, <b>taking investment</b></li> </ul>

	<p>actions, and engaging in other professional activities.</p> <ul style="list-style-type: none"> <li>✓ Practice and encourage others to practice professionally and ethically that will reflect credit on themselves and the profession.</li> <li>✓ Promote the integrity and viability of the global capital markets for the ultimate benefit of society.</li> <li>✓ Maintain and improve their professional competence and strive to maintain and improve the competence of other investment professionals</li> </ul>
<b>Ethics in Business Dealing</b>	
<b>Meaning</b>	<ul style="list-style-type: none"> <li>✓ Business ethics deals with <b>morality</b> in the business.</li> <li>✓ System of <b>moral principles</b> and <b>values</b> applied to business activities.</li> <li>✓ Business activities should be conducted according to <b>ethics or moral standard</b>.</li> </ul>
<b>Definition</b>	<ul style="list-style-type: none"> <li>✓ Business ethics is an <b>art or science of maintaining harmonious relationship with society</b>, its various groups and institution as well as reorganizing for <b>right or wrong of business conduct</b>.</li> </ul>
<b>Features of Business Ethics</b>	<ul style="list-style-type: none"> <li>✓ Code of conduct</li> <li>✓ Provide protection to social group</li> <li>✓ Provide basic frame work</li> <li>✓ Need willing acceptance</li> <li>✓ Education and guidance</li> <li>✓ Not against for profit making</li> </ul>
<b>Principles</b>	<ul style="list-style-type: none"> <li>✓ Avoid exploitation of consumers</li> <li>✓ Avoid unfair trade practices</li> <li>✓ Fair treatment to employees. Importance</li> <li>✓ Improving consumer confidence</li> <li>✓ Business become conscious of social responsibilities</li> <li>✓ Create good image of business</li> <li>✓ Goodwill</li> <li>✓ Profitability</li> <li>✓ Survival of heated competition</li> <li>✓ Safety from legal perspectives</li> </ul>
<b>Seven principles in Business ethics</b>	<ul style="list-style-type: none"> <li>✓ Be trustful</li> <li>✓ Be keep open mind</li> <li>✓ Meet obligations</li> <li>✓ Have clear documents</li> <li>✓ Become community involved</li> <li>✓ Maintain accounting control</li> <li>✓ Be respectful</li> </ul>
<b>Areas in business ethics</b>	<ul style="list-style-type: none"> <li>✓ Corporate Social Responsibility;</li> <li>✓ Fiduciary responsibility to stake holders;</li> <li>✓ Industrial espionage.</li> </ul>

<b>Emerging Issues in Business Ethics</b>	<ul style="list-style-type: none"> <li>✓ Lack of proper directions and is struck on issues like logic, reasons etc.,</li> <li>✓ Fairness, justice and honesty are the main issues that are posing complex dilemma to the businesses.</li> <li>✓ Wrong or biased decision can have a profound impact on the goodwill of the company as well as its market position.</li> </ul>
<b>General Business Ethics</b>	<ul style="list-style-type: none"> <li>✓ Ethics of human resource management;</li> <li>✓ Ethics of sales and marketing;</li> <li>✓ Ethics of production;</li> <li>✓ Ethics of Intellectual property, knowledge and skills</li> </ul>
<b>Importance of Business Ethics</b>	<ul style="list-style-type: none"> <li>✓ Public expects business to <b>exhibit high levels of ethical performance and social responsibility</b></li> <li>✓ <b>Encouraging business firms and employees</b> to behave ethically is to prevent harm to society;</li> <li>✓ <b>Promoting ethical behavior is to protect business</b> from abuse by <b>unethical employees or unethical competitors</b></li> <li>✓ <b>High ethical performance also protects the individuals</b> who work in business.</li> </ul>
<b>Need for Business Ethics</b>	
<b>Introduction</b>	<ul style="list-style-type: none"> <li>✓ To stop business malpractice</li> <li>✓ To improve customers' confidence</li> <li>✓ For the survival of business</li> <li>✓ To safeguard consumers' rights</li> <li>✓ To protect employees and shareholders</li> <li>✓ To develop good relations</li> <li>✓ To create good image</li> <li>✓ For smooth functioning</li> <li>✓ Consumer movement</li> <li>✓ Consumer satisfaction</li> <li>✓ Importance of labour</li> <li>✓ Healthy competition</li> </ul>
<b>To Stop Business Malpractice</b>	<ul style="list-style-type: none"> <li>✓ Unscrupulous businessmen do business malpractices by indulging in <b>unfair trade practices</b></li> <li>✓ <b>Harmful to the customers</b></li> </ul>
<b>To improve Customer Confidence</b>	<ul style="list-style-type: none"> <li>✓ To improve the <b>customers' confidence about the quality, quantity, price etc., of the products</b>.</li> <li>✓ Customers have more <b>trust and confidence</b> in the businessmen who follow ethical rules.</li> </ul>
<b>For the survival of the business</b>	<ul style="list-style-type: none"> <li>✓ Business ethics are <b>mandatory for the survival of business</b>.</li> <li>✓ Businessmen <b>who do not follow it will have short term success</b>, but they will fail in the long run.</li> </ul>
<b>To safeguard consumers' right</b>	<ul style="list-style-type: none"> <li>✓ Business can survive so long it enjoys the <b>patronage of consumer</b>.</li> <li>✓ Consumer has many <b>rights such as right to health and safety, right to be informed, right to choose, right to be heard, right to redress, etc.</b></li> </ul>
<b>To protect employees and shareholders</b>	<ul style="list-style-type: none"> <li>✓ Business ethics are required to <b>protect the interest of employees, shareholders, competitors, dealers, suppliers etc.</b></li> <li>✓ It protects them from <b>exploitation through unfair trade practices</b></li> </ul>

To develop good relations	<ul style="list-style-type: none"> <li>✓ Business ethics are important to <b>develop good and friendly relations between business and society.</b></li> <li>✓ Regular <b>supply of good quality goods and services at low prices</b> to the society.</li> <li>✓ Result in <b>profits for the businesses</b> thereby resulting in growth of economy</li> </ul>
For smooth functioning	<ul style="list-style-type: none"> <li>✓ Business follows all the <b>business ethics, then the employees, shareholders, consumers, dealers and suppliers.</b></li> <li>✓ Improve <b>smooth functioning of the business.</b></li> <li>✓ Increase <b>more sales and profits</b></li> </ul>
Consumer satisfaction	<ul style="list-style-type: none"> <li>✓ Consumers will be satisfied only if the <b>business follows all the business ethics</b> and hence are highly needed.</li> <li>✓ Consumer is <b>not satisfied, then there will be no sales and thus no profits too.</b></li> </ul>
Importance of labour	<ul style="list-style-type: none"> <li>✓ Business must give them <b>proper wages and salaries</b> and better <b>working conditions.</b></li> </ul>
Healthy competition	<ul style="list-style-type: none"> <li>✓ Healthy competition brings about <b>efficiency, breaks complacency and leads to optimal utilization of scarce resources.</b></li> </ul>

#### Advantages of Business Ethics

Advantages	<ul style="list-style-type: none"> <li>✓ Offers a <b>company a competitive advantage</b></li> <li>✓ <b>Goodwill</b> of the firm</li> <li>✓ <b>Productivity</b></li> <li>✓ Increasing <b>morale and trust</b> business can increase their market share</li> <li>✓ <b>Publicity and Ethical performance</b></li> <li>✓ Acceptance of <b>products of the company by the public</b></li> </ul>
Improving Business Relationship	<ul style="list-style-type: none"> <li>✓ Behavior of business persons <b>toward customers, suppliers, and others in their workplace</b> may also generate ethical concerns.</li> <li>✓ Ethical behavior within a business involves keeping company secrets, meeting obligations and <b>responsibilities</b>.</li> <li>✓ Avoiding <b>undue pressure that may force others to act unethically.</b></li> </ul>
Improving Ethical Behaviour in Business	<ul style="list-style-type: none"> <li>✓ Understanding how people make <b>ethical choices and what prompts a person to act unethically</b> may reverse the current trend toward <b>unethical behavior in business.</b></li> </ul>

#### Emotional Intelligence

Meaning	<ul style="list-style-type: none"> <li>✓ Emotional intelligence also known as emotional quotient or EQ, is the <b>ability to understand, use, and manage own emotions</b> in positive ways to relieve <b>stress, communicate effectively, empathize with others, overcome challenges</b> and defuse conflict.</li> <li>✓ Emotional intelligence helps <b>build stronger relationships, succeed at school and work, and achieve your career and personal goals.</b></li> </ul>
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<b>Attributes of Emotional Intelligence</b>	
<b>Self-Management</b>	✓ To control impulsive feelings and behaviors, manage emotions in healthy ways, take initiative, follow through on commitments, and adapt to changing circumstances.
<b>Self-Awareness</b>	✓ Own emotions and affecting thoughts and behavior ✓ Strengths and Weaknesses, and Self-Confidence
<b>Social Awareness</b>	✓ Understand the emotions, needs, and concerns of other people, emotional cues, feel comfortable socially, and recognize the power dynamics in a group or organization.
<b>Relationship Management</b>	✓ To develop and maintain good relationships, communicate clearly, inspire and influence others, work well in a team, and manage conflict
<b>Affects of Emotional Intelligence</b>	
<b>Performance</b>	✓ High emotional intelligence can help to navigate the social complexities of the workplace, lead and motivate others, and excel in career. ✓ High emotional intelligence can help to navigate the social complexities of the workplace, lead and motivate others, and excel in career. ✓ Rate emotional intelligence as important as technical ability and employ EQ testing before hiring.
<b>Physical Health</b>	✓ Uncontrolled stress raises blood pressure, suppresses the immune system, increases the risk of heart attacks and strokes, contributes to infertility, and speeds up the aging process. ✓ To improving emotional intelligence is to learn how to manage stress.
<b>Mental Health</b>	✓ Uncontrolled emotions and Stress can also impact your mental health, making you vulnerable to anxiety and depression.
<b>Relationship</b>	✓ Communicate more effectively and forge stronger relationships, both at work and in personal life.

## REVIEW QUESTIONS

1. Define Ethics. Explain the types of Ethics
2. Difference between Ethics and Business Ethics
3. Explain the concept of Business Ethics
4. Discuss briefly the following: a) Value Chain b) Mission statement of ICAI
5. Explain the role of management accounting in ethics
6. Elaborate the nature and relevance to the business
7. Define Business Ethics. List out the features of Business Ethics
8. Describe briefly about the seven principles of public life
9. Describe the need and importance of a good business ethics programme
10. Discuss and list out the advantages and disadvantages of Business Ethics
11. Difference between Ethics and Law
12. Write short notes on Improving Ethical Behaviour in business
13. Explain the concept of Emotional Intelligence. Analyse the effect of emotional intelligence.

**RR ACADEMY**  
**CMA INTERMEDIATE**  
**PAPER 5 - BUSINESS LAW & ETHICS**

**Module**

**Section A- Commercial Laws [50% Direct & 50% Practical Questions]**

**Chapter 1- Introduction to Law & Legal System in India (Only Direct Questions)**

**Multiple Choice Question – 2**

**Theory Question-** Sources of Law, Primary and Subordinate Legislation, Lok Adalat, Fundamental Rights and Arbitration and Conciliation.

**Chapter 2-Indian Contract Act, 1872 (Theory and Practical Questions)**

**Minimum 4 marks can expect from Contract Act**

**7 Marks question (2 Questions-Theory & Practical Questions)**

**Practical Questions** - Communication of offer from one party to another, Acceptance, Wagering Agreement, Agreement made without consideration, Agreement in restraint of trade and marriage, Fraud, Misrepresentation and mistake, Bailment and mode of creation of agency)

**Theory Questions**

Revocation of offer, **No Consideration No Contract**, Privity of Contract, Essential elements of Valid Acceptance, E-Contract, **Position of Minor Agreement**, Silence amount to fraud, Quasi Contract, **Discharge of Contract, Finder of Goods, Discharge of Surety, Indemnity and Guarantee**)

**Chapter 3-Sale of Goods Act, 1930 (Theory & Practical Questions)**

**Multiple Choice Question – 1 Question**

**Practical Question- Transfer of Ownership, Implied Conditions (Very much Important)**

**Theory Question** – Essential Element of Contract of Sale, Nemo Dat Quod Non Habet & its Exceptions, Caveat Emptor & its exceptions, Types of Implied Condition, **Unpaid Seller- Right of Lien & Stoppage in Transit & Remedies, Auction Sale.**

**Chapter 4-Negotiable Instrument Act, 1881 (Theory & Practical Questions)**

**Multiple Choice Question – 2 Questions**

**Practical Question** – Bills of Exchange (Maturity Date), Accommodating, Fictitious and Inchoate, Discharge from liability,

**Theory Question**- Difference between Promissory Note and Bills of Exchange, **Holder & Holder in Due Course, Material Alteration, Dishonour of Negotiable Instrument, Payment in due Course.**

**Chapter 5-Indian Partnership Act, 1881 (Direct Question)**

**Theory Question**-Mutual Rights & Liabilities of partners, Reconstitution & **Non Registration, Dissolution of Firm.**

Practical Question-Expulsion & Dissolution of Partnership

**Chapter 6-Limited Partnership Act, 2008 (Direct Question)**

**Multiple Choice Question – 1 Question**

**Theory Question-** **LLP Agreement**, Statement of Account & Solvency, Liabilities & Disqualification of Designated Partner, Whistle blowing and **Conversion from Pvt to LLP & Conversion of Public Ltd to LLP,Modes of Winding up & Dissolution of LLP.**

**Practical Question-** Registered Office from One State to another State, Annual Return & **Audit of Accounts.**

**Section B Industrial Laws [50% Direct & 50% Practical Questions]**

**Chapter 7-Factories Act, 1948**

**Multiple Choice Question-1**

**Theory Question** – Manufacturing Process, Duties & Function of Occupier, Hazardous Process, Employment of Women, Children and Working Hours

**Practical Question-** Safety, Health and Welfare measures (One word & Practical Question)

**Chapter 8-Payment of Gratuity Act, 1972****Multiple Choice Question- 2 Question****Theory Question-** Procedure of determining the amount of gratuity, Forfeiture of Gratuity, Gratuity payable, Continuous service.**Practical Question-**Calculation of Gratuity, Forfeiture and Continuous service (**Repeated Questions**)**Chapter 9-Employees Provident Fund and Miscellaneous Provision Act, 1952****Multiple Choice Question- 1 Question****Theory Question-** Items which are not included for wages (common for all the chapters), Determination of money due from employer, Contribution under EPF, Salient features of Employee Deposit Linked Insurance Act. Protection against attachment (Common for all the chapters),**Practical Question-Transfer of Accounts (Repeated Question) and Non-Refundable under EPF****Chapter 10-Employees State Insurance Act, 1948****Multiple Choice Question- 1****Theory Question-** Purposes for which ESI fund may be expended, Benefits under ESI Act, Dependent and Medical Benefit Council, Function of Inspector.**Chapter 11-Code on Wages, 2019****Multiple Choice Question – 2****Theory Questions**-Time limit for payment of Bonus, Fixing and Revising of Minimum wages and Permissible/Authorised Deduction, Imposition of Fine (Repeated Question)**Practical Question**-Payment of Bonus – Recovery of Bonus from Employer, Disqualified Bonus and Employees not covered.**Section C Corporate Laws [Direct Questions]**  
**Companies Act, 2013****Multiple Choice Question- 2 Questions****Theory Question****Introduction** – Lifting of Corporate Veil (Judicial Interpretation) & Separate Legal Entity, **Types of Companies (Repeated Question- Small Company, One Person Company, Section 8 Co & its Conversion,****Procedure for incorporation of Company**, Types of **Prospectus** (Most Repeated Question-Red Herring & Shelf Prospectus),Shifting of Registered Office from one state to another, within the same state, Procedure for **Alteration of Memorandum**, Conversion of Private company into One Person Company, Procedure for conducting Poll meeting and sending notice through E-mode, Register of Members, Registration of Charges, Postal Ballot & E-Voting.**Types of Shares (Bonus & Employees Stock Option Scheme, Sweat Equity Shares)**, Alteration of Share Capital, Global Depository Receipt and Debenture Trustee.**Directors-** Resignation of Director, Removal and Disqualification, Procedure for obtain Director Identification Number (**Most Repeated Questions**) and Vacancy of Director, Managerial Remuneration.**Types of Director – (Most Repeated Question- Independent Director)**, Woman & Resident Director, Rotation of Directors, Alternate Director.**Internal Financial Control for Financial Reporting – Audit Committee (Repeated Questions)****Rights of Shareholders & Key Managerial Personnel**

**Section D Business Ethics [Direct Question]****Business Ethics and Emotional intelligence****Multiple Choice Question-2 Questions**

**Theory Questions-** Importance of Ethics, Seven Principles of Public Life, Advantages of Business Ethics, Value and Attitude of Professional Accounting (Cost & Management Accounting Professional). Effect of Emotional Intelligence (**Repeated Questions**).

**Important Questions for Review-** Reasons for Unethical Behaviour, Fundamental Principles of Ethical Behaviour, Ethical Conduct for practitioner fixed by ICAI, Internal Code of Ethics.

**Previous Exam Trend Analysis**

S.No	Module	Weightage	To focus as per order	Weightage as per Order
1.	Section A – Indian Contract Act	26	Indian Contract Act, Negotiable Instrument Act, Sale of Goods Act, Limited Liability Partnership Act and Partnership Act.	<b>3</b>
	Sale of Goods Act, 1930 & Negotiable Instrument Act, 1881	18		
2.	Section B-Industrial Laws	32	Code on Wages, Payment of Gratuity Act, Factories Act, Employees Provident Fund & ESI Act.	<b>2</b>
3.	Section C- Corporate Laws	34	Refer Above	<b>1</b>
4.	Section D- Business Ethics & Emotional Intelligence	18	Refer Above	<b>4</b>

S.No	Business Laws And Ethics	Marks
1.	Section – A Multiple Choice Questions	$15 \times 2 = 30$
2.	Section B Answer any five questions out of seven questions given. Each question carries 14 Marks	$14 \times 5 = 70$ (Choice Out of 98 Marks you have to attend only 70 Marks)

\*\*\*\*\*All the Best\*\*\*\*\*