All India Bar Examination 2010

Preparatory Materials

Book 1 of 2

Rainmaker
THE LEGAL PEOPLE

All India Bar Examination
Preparatory Materials

Guide to the All India Bar Examinations

Dear Advocate,

These preparatory materials are intended to assist your preparation for the first All India Bar Examination ("**the AIBE**"). These materials are divided across **two books**, **containing individual modules on each of the twenty subjects that the AIBE will comprise of**.

Before you begin reading through these modules, we recommend that you read this guide to the AIBE, so that you may plan your preparations better, and so that you are clear in setting goals leading towards your successfully passing the AIBE. The AIBE will assess capabilities at a basic level, and is intended to set the minimum standards for admission to the practice of law in India.

It would be useful to reiterate the basic methodology and structure of the AIBE here:

Methodology of the AIBE

The AIBE will have **one hundred (100) multiple-choice questions** spread across various subjects. The subjects are taken from the syllabi prescribed by the Bar Council of India for the three-year and five-year Ll.B. programmes at law schools in India (as set out under Schedule I to the Bar Council of India Rules).

These subjects are divided into **two categories**: the first comprises subjects that may be considered 'foundational' in nature, those that form the basis for large areas of law; the second comprises other subjects, which a new entrant to the legal profession must also have a basic understanding of.

The Examination paper will comprise **at least seven (7) questions from each 'Category I' subject**. The paper will also have **twenty-three (23) questions from the 'Category II' subjects as a whole**. These twenty-three questions will include questions from at least five (5) Category II subjects.

Category I subjects will be tested in Part I of the question paper, and Category II subjects will be tested in Part II of the question paper.

The Category I and Category II subjects are set out below:

Serial Number	Category / Subject	Number of Questions
	Category I (Part I of the Paper)	
1	Alternative Dispute Resolution	7
2	Civil Procedure Code and Limitation Act	7
3	Constitutional Law	7
4	Contract Law, including Specific Relief, Special Contracts, and Negotiable Instruments	7
5	Criminal Law I: The Indian Penal Code	7
6	Criminal Procedure	7
7	Drafting, Pleading, and Conveyancing	7
8	Evidence	7
9	Jurisprudence	7
10	Professional Ethics and the Professional Code of Conduct for Advocates	7
11	Property Law	7
	Category II (Part II of the Paper)	
12	Administrative Law	23 questions in all, and these questions will include questions from at least 5 subjects in Category II
13	Company Law	
14	Environmental Law	
15	Family Law	
16	Human Rights Law	
17	Labour and Industrial Law	
18	Law of Tort, including Motor Vehicle Accidents, and Consumer Protection Law	
19	Principles of Taxation Law	
20	Public International Law	

The All India Bar Examination shall be structured with **multiple-choice questions** (that is, the correct answer would have to be marked out on the Optical Mark Recognition ("**OMR**") format answer sheet provided, and no writing of an answer would be required.)

These questions will be divided into '**knowledge-based**' and '**reasoning**' questions, and you will be allowed a maximum of **three hours and thirty minutes (3 hours, 30 minutes)** to complete the AIBE.

The All India Bar Examination will be '**open-book**', which means that you may bring in any reading materials or study aids that you choose, such as these preparatory materials, textbooks and treatises, and even handwritten notes. You may not, however, bring in any electronic devices, such as laptop computers, mobile phones, or any device equipped with a radio transceiver (such as pagers) at the examination centre.

The results generated after the answer scripts are corrected will simply state whether an advocate has or has not qualified for practice (that is, whether the advocate has passed or failed the AIBE); no percentage, percentile, rankings, or absolute marks will be declared.

A Certificate of Practice shall be issued by the Bar Council of India, under the signature of the Chairman to the address of the successful advocate within 30 days of the date of declaration of results.

Points of Advice Towards Preparing for the AIBE

The emphasis throughout the AIBE structure and methodology is on assessing your understanding of an area of law, rather than on the ability to memorise large texts or rules from different areas of law. The 100 questions in the AIBE, as we have seen, are divided across two categories: 'knowledge-based' and 'reasoning' questions.

Samples of both, the 'knowledge-based' and 'reasoning' questions, are as follows:

Knowledge-Based Questions (Category 'A' Questions)

Category A questions test your knowledge of a certain area of law. For example:

Question: From amongst the following, choose the option that most correctly describes the interpretation accorded to Article 14 of the Constitution in the case of *Indra Sawhney* v. *Union of India* (AIR 1993 SC 477):

Options:

(a) The fundamental right to approach the Supreme Court in exercise of its writ jurisdiction under Article 32 cannot be suspended even during the effect of a declaration of Emergency.
(b) Only a natural person is regarded as a citizen, and therefore only natural persons are accorded fundamental rights under the Constitution.
(c) The use of methods such as narcolepsy during criminal investigations is prohibited.
(d) The meaning of 'equality' under Article 14 is that equals must be treated equally, and unequals must be treated unequally.
(e) 'Reservations' are prohibited under the Constitution of India, since they violate the principle of equality before the law enshrined in Article 14.

Correct Answer: (d)

Reasoning Questions (Category 'B' Questions)

Category B questions seek to test your logical and reasoning abilities. These also seek to test your comprehension abilities. For example:

Question: Advocate A has been approached by the officers of X Private Limited to represent the company in a matter before the court. Should X Private Limited get an unfavourable verdict in the case, it would have to pay a very big penalty to the regulator concerned, and would even lose its license to provide the services on which its business is based. X Private Limited is the wholly owned subsidiary of Y Private Limited, and Advocate A is a Director of Y Private Limited.

Principle: An Advocate should not act or plead in any matter in which he is himself pecuniarily interested.

Options:

(a) Advocate A can appear in the matter, since he does not have a pecuniary interest in X Private Limited.
(b) Advocate A cannot appear in the matter, since he may be considered as employee of X Private Limited by virtue of being a Director of Y Private Limited.
(c) Advocate A has a pecuniary interest in the matter, since an adverse verdict against X Private Limited would directly affect Y Private Limited, of which he is a Director.
(d) Advocate A can appear in the matter since he is not directly engaged as a Director of X Private Limited.
(e) Advocate A does not have a pecuniary interest in the matter, since Y Private Limited may have other business interests other than those in X Private Limited, and as such, an adverse verdict against X Private Limited would not affect Y Private Limited.

Correct Answer: (c). An adverse verdict against X Private Limited under which it may lose its license to provide the services on which its business is based would clearly affect the pecuniary interests of Y Private Limited, since it is a wholly owned subsidiary of Y Private Limited. As Advocate A is a Director of Y Private Limited, he has a pecuniary interest in the matter, and cannot appear.

What should you do to be able to answer such questions in the best possible way? A few simple rules which may help your preparation are set out here:

Rule 1: Understand; Do Not Memorise by Rote

An advocate appearing for the AIBE would be well-advised not to attempt learning the contents of these materials, or indeed, any portion of them, by heart; rather, you should attempt **a few thorough readings of these modules, highlighting and marking out important portions as you go along**. A good understanding of these modules will help you successfully attempt the questions in the AIBE with ease. Furthermore, you will be able to put to better use the limited time that you will have in the examination hall: **you should not find yourself in a situation where you are constantly flipping through your preparatory materials, trying to find the correct answer – if you follow the advice set out earlier, you should be able to go directly to the page that you need**.

Rule 2: Read the Question Thoroughly

A frequent mistake made by those answering questions like the ones in the AIBE is trying to answer the question without reading it properly. While this sounds like an obvious point to make, you must be careful not to fall into the trap of picking an answer without understanding both, the question, as well as the principle provided, thoroughly. **Very often, more than one of the options in a multiple-choice question may seem right – the option that you must choose, however, (a) must be the one that answers the question most directly, and (b) must be the one that is based most closely on the principle of law that is provided to you**.

Rule 3: Manage Your Time Properly

Bear in mind that you have only limited time to answer all the questions in the AIBE; **while answering questions correctly is important, making sure you have enough time to answer *all* the questions is equally critical!** Divide the three hours and thirty minutes that you have into clear segments; for example:

- Spend the first 5 minutes scanning the question paper as a whole; make sure your copy has all 100 questions printed on it;
- Spend the next 150 minutes (2 hours and 30 minutes) on Part I of the question paper;
- Spend the next 50 minutes on Part II of the question paper; and
- Use the remaining 5 minutes to quickly scan your answer sheet to make sure you have filled in all the necessary details clearly and accurately.

Disciplined time management is critical in any time-bound examination; this seems easy, but is difficult to achieve without practice. You would be well-advised, therefore, to **make sure that you time yourself whenever you are attempting a sample / practice paper as you get closer to the actual AIBE**. Your last three or four practices should be strictly time-bound: ask someone you trust to mark the time when you begin your attempt, and to stop you three hours and thirty minutes later – the closer your simulation is to the actual examination environment, the more comfortable and confident you will be on the day of the actual AIBE.

Rule 4: Identify – and Address – Your Weaknesses

As you prepare for the AIBE, you may find that there are certain areas where you tend to stumble. These areas of weaknesses vary from person to person. Knowing what your areas of weakness are is critical; the next vital step is addressing these weaknesses, and moving past them.

Be precise in identifying any problems you face:

- *Is it a question of speed?* Try timing your attempt at each question; if you are taking more than 2 minutes *per* question, then you might be in trouble. To address this problem, you could try working with smaller sets of questions at a time: try 'sprint' tests, answering 5 questions in 10 minutes, and then gradually building up to a full-length test.
- *Is it a problem with a particular area of law?* Try leaving that section for the last: attempt the rest of the question paper, and come back to that section at the end. This approach helps

some people, because chances are, you are much more confident after answering the questions that you are more comfortable with, and will be in a better frame of mind when approaching your 'problem' subject.

- *Are you having trouble reading the questions quickly?* Sometimes the trouble does not lie in the question paper itself, but in some other area. In such a case, you should try and use any of the common solutions to such problems: the only way to improve your reading speed, for example, is to read as much as possible – read the newspaper, these materials, novels – anything that keeps your interest, so long as you are reading.
- *Are you having trouble concentrating for three hours and thirty minutes at a stretch?* This is more common than you think. The AIBE is a fairly rigorous test, and concentrating for the entire stretch of the examination may not be easy. The obvious answer is practice – but that does not always help. A better solution may be to try and study with, or at least to attempt your practice tests with, a friend or a group of friends. Often, when you begin to tire, the sight of others working around you helps you get back to the task at hand.

These solutions do not work for everyone; the point of emphasis here is that you must try and figure out what, if anything, is holding you back, and how best you can get past that problem.

Guide to Using these Preparatory Materials

The materials are created using a simple, principle-and-illustration approach. These are not meant to be a substitute for what you have already studied and learnt while in law school; rather, these are meant to refresh your memory on the basic knowledge that you must have at hand when you join the community of Indian legal professionals, and commence the practise of law.

All the modules are published in a consistent, two-column format. Page numbers, as well as the line numbers alongside each column, are meant to aid quick reference.

A final point: do make sure that you check the website of the Bar Council of India (www.barcouncilofindia.org) regularly. Updates, model papers, as well as other critical information and resources on the AIBE will be published on that website regularly, and it is critical that you stay up-to-date with all of these.

All the best!

x-x

All India Bar Examination
Preparatory Materials

Acknowledgements and Author Credits

The publishers acknowledge the contribution of the following as authors of the modules on certain subjects in these preparatory materials:

Dr. Aman Hingorani
Subject : Alternate Dispute Resolution

Ph.D., Delhi University.
Advocate on Record, Supreme Court of India.
Adjunct Faculty : Indian Law Institute, New Delhi; Campus Law Centre, University of Delhi.
Former Faculty : School of Law, G.G.S.I.P. University, New Delhi; St. Stephens College, University of Delhi; Keble College, Oxford; South Asian Institute of Advanced Legal and Human Rights Studies, Dhaka.

Rishad Medora
Subject : Civil Procedure Code and Limitation Act

B.A.,Ll.B (Hons.), National Law School of India University, Bangalore
Advocate, High Court of Calcutta.
Formerly Associate, Amarchand & Mangaldas & Suresh A. Shroff & Co., Mumbai.

Shri Singh
Subjects : Indian Penal Code, Criminal Procedure Code, and Indian Evidence Act

B.A.,LlB (Hons.), National Law School of India University, Bangalore.
Advocate, High Court of Delhi.

Achyuth Ajithkumar
Subject : Drafting, Pleading, and Conveyancing

B.S.L.,Ll.B, I.L.S. Law College, Pune.
Advocate, High Court of Karnataka.

Professor Rahul Singh
Subject : Jurisprudence

B.A.,Ll.B (Hons.), National Law School of India University, Bangalore; Ll.M., Harvard University.
Professor and Assistant Director, Directorate of Legal Education, Bar Council of India.

Abhishek Singh
Subject : Professional Ethics and the Professional Code of Conduct for Advocates

B.A. (Hons.) (Sociology), Concord University, U.S.A.; B.S. (Hons.) (Finance and Prelegal Studies), Minor in Politics, Concord University, U.S.A.; Juris Doctor (Widener University, School of law, USA).
Admitted to the Bar, Pennysylvania.
Advocate, High Court of Delhi.

Abhishek Tripathi
Subject : Property Law

B.A., Ll.B (Hons.), National Law School of India University, Bangalore.
Advocate, New Delhi.

Samar Bansal
Subject : Administrative Law

B.A., Ll.B (Hons.), National Law School of India University, Bangalore; Gold Medallist and Best Student Advocate.
Advocate, Supreme Court of India.

Shobha Singh
Subject : Company Law

B.Sc., Ll.B, West Bengal National University of Juridical Sciences, Kolkata.
Partner, R.D.A. Legal, New Delhi.

Sudhir Mishra
Subject : Environmental Law

B.A. History (Hons.); B.A.,Ll.B, Campus Law Centre,Delhi University.
Advocate, Supreme Court of India.

Siddharth Nair
Subjects : Family Law, Labour and Industrial Law, and Public International Law
B.A.,Ll.B (Hons.), National Law School of India University, Bangalore.
Proprietor of the Offices of Siddharth Nair.

Sonal Makhija
Subject : Human Rights Law

MSc. in Law, Anthropology and Society from the London School of Economics and Political Science.
Researcher and legal consultant working on human rights, gender, and law.

Swagata Raha
Subject : Human Rights Law

B.Sc., Ll.B, West Bengal National University of Juridical Sciences, Kolkata.
Human Rights Researcher.

Abhayraj Naik
Subject : Law of Torts, including Motor Vehicle Accidents, and Consumer Protection Law.

B.A.,Ll.B (Hons.), National Law School of India University, Bangalore; Ll.M., Yale University.
Assistant Professor, and Assistant Director, Centre for Public Law and Jurisprudence, Jindal Global Law School, Sonipat.

M. V. Swaroop
Subject : Principles of Taxation Law

B.A., Ll.B (Hons.), National Law School of India University, Bangalore.
Advocate, High Court of Madras.

The modules on *Constitutional Law* and *Contract Law, including Specific Relief and Negotiable Instruments*, have been authored by Rainmaker Training & Recruitment Private Limited.

The publishers also wish to acknowledge the following for agreeing to review certain modules in the preparatory materials:

Professor (Dr.) Sudhir Krishnaswamy
Subjects Reviewed : Constitutional Law and Jurisprudence

B.A., Ll.B. (Hons.), National Law School of India University, Bangalore; Rhodes Scholar, 1998; B.C.L. and D.Phil in Law, University of Oxford.

Professor Krishnaswamy has taught at the National Law School of India University, Bangalore; Pembroke College, University of Oxford; and the West Bengal National University of Juridical Sciences, Kolkata, among other places.

Lovely Dasgupta
Subject Reviewed : Contract Law, including Specific Relief and Negotiable Instruments

Lovely Dasgupta has completed her Ll.M and M.Phil from the West Bengal National University of Juridical Sciences, Kolkata, and is presently *Assistant Professor of Law* at the West Bengal National University of Juridical Sciences, Kolkata.

M. Maithreyi
Subject Reviewed : Principles of Taxation Law

Ms. Maithreyi completed her B.A., Ll.B. (Hons.) from the National Law School of India University, and her Ll.M. in Taxation from Cambridge University. She is visiting faculty at the National Law School of India University, Bangalore.

Umakanth V.
Subject Reviewed : Company Law

Ph.D., National University of Singapore; Ll.M., New York University; B.A., Ll.B (Hons.), National Law School of India University, Bangalore.
Formerly Partner, Amarchand & Mangaldas & Suresh A. Shroff & Co., Bangalore.

Umakanth is currently *Assistant Professor of Law* at the Faculty of Law, National University of Singapore. He is also *Chairman of the Board*, Rainmaker.

x-x

All India Bar Examination: Preparatory Materials, Book 1

Table of Contents

All India Bar Examination
Preparatory Materials

Subject 1: Alternative Dispute Resolution

A.39A of the Constitution of India ("**the Constitution**") directs the State to ensure that the operation of the legal system promotes justice, on the basis of equal opportunity, and in particular, to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability.

The Supreme Court has also recognised the "right to speedy trial" as being implicit in A.21 of the Constitution. (*Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360)

To give effect to this mandate, Parliament has recognised various alternative dispute resolution ("**ADR**") mechanisms, such as arbitration, conciliation, mediation, and Lok Adalats to strengthen the judicial system.

S.89 of the Code of Civil Procedure, 1908 ("**the Code**") expressly provides for settlement of disputes through ADR.

S.89(1) of the Code provides that where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement, and give them to the parties for their observations, and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation and judicial settlement, including settlement through a Lok Adalat.

S.89 (2) of the Code provides that where a dispute has been so referred:

- To arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 ("**the 1996 Act**") shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
- To a Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of S.20 (1) of the Legal Services Authorities Act, 1987 ("**the 1987 Act**") and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
- For a judicial settlement, the Court shall refer the same to a suitable institution or person, and such institution or person shall be deemed to be a Lok Adalat, and all other provisions of the 1987 Act shall apply, as if the dispute were referred to a Lok Adalat under the provisions of that Act;
- For mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Order X, Rule 1 A of the Code further provides that after recording the admissions and denials, a Court shall direct the parties to a suit, to opt for a mode of settlement out of Court, as may be opted for by the parties. Order X, Rule 1B of the Code provides for the fixing of the date of appearance before the conciliatory forum or authority, while Order X, Rule 1C contemplates the referral of the matter back to the Court, consequent to the failure of efforts of conciliation.

The Code contemplates recourse to ADR in several other circumstances. Order XXXII-A, which pertains to suits relating to matters concerning the family, imposes a duty on the Court to assist the parties, where it is possible to do so, consistent with the nature and circumstances of the case, in arriving at a settlement in respect of their dispute, and empowers it to secure the assistance of a welfare expert for such purpose. Similarly, Order XXVII, Rule 5(B) mandates that in every suit or proceeding to which the Government, or a public officer acting in her official capacity, is a party, it shall be the duty of a Court to make, in the first instance, every endeavour, where it is possible to do so, in accordance with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit.

Model Civil Procedure Alternative Dispute Resolution Rules

The 1996 Act and the 1987 Act do not contemplate a situation where the Court asks the parties to choose any one of the ADR mechanisms, namely, arbitration, conciliation, or Lok Adalat. These Acts, thus, are applicable only from the stage after reference is made under S.89 of the Code. (*Salem Advocates Bar* Association v. *Union of India*, AIR 2005 SC 3353)

In view of the right to speedy trial being implicit in A.21 of the Constitution, and in order to provide fair, speedy and inexpensive justice to the litigating public, the Supreme Court has recommended that High Courts adopt, with or without modification, the model Civil Procedure Alternative Dispute Resolution and Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar* Association v. *Union of India*, AIR 2005 SC 3353)

The model Alternative Dispute Resolution Rules framed by the Law Commission lay down the procedure for directing parties to opt for alternative modes of settlement. Courts are directed to give such guidance as they deem fit, to the parties, by drawing their attention to the relevant factors that the parties will have to take into account, before exercising their option as to a particular mode of settlement. The Rules provide for the procedure for reference by the Court to the different modes of settlement, as also the procedure for a referral back to the Court, and appearance before the Court upon failure to settle disputes by ADR mechanisms. (*Salem Advocates Bar* Association v. *Union of India*, AIR 2005 SC 3353)

It is permissible for High Courts to frame rules under Part X of the Code, covering the manner in which the option to select one of the ADRs, can be made. The rules so framed by the High Courts are to supplement the rules framed under the Family Court Act, 1984. (*Salem Advocates Bar* Association v. *Union of India*, AIR 2005 SC 3353)

Arbitration

Arbitration is an adjudicatory process wherein parties present their dispute to a neutral third party (arbitrator) for a decision. While an arbitrator does have greater flexibility than a Judge, in terms of procedure and rules of evidence, the arbitration process is akin to the litigation process.

A valid arbitration must be preceded by an arbitration agreement, which should be valid as per the Indian Contract Act, 1872 ("**the Contract Act**"). The parties to an agreement must have the capacity to enter into a contract in terms of Ss.11 and 12 of the Contract Act.

Apart from the statutory requirement of a written agreement, existing or future disputes, and an intention to refer them to arbitration (S.7,1996 Act), other attributes that must be present for an agreement to be considered an arbitration agreement are:

- The arbitration agreement must contemplate that the decision of the arbitral tribunal will be binding on the parties to the agreement;
- The jurisdiction of the arbitral tribunal to decide the rights of the parties must derive either from the consent of the parties, or from an order of the Court, or from the statute, the terms of which make it clear that the dispute will be subject to arbitration;
- The agreement must contemplate that the substantive rights of the parties will be determined by the arbitral tribunal;
- The arbitral tribunal must determine the rights of the parties in an impartial and judicial manner, with the tribunal owing an equal obligation of fairness towards both sides;
- The agreement of the parties to refer their disputes to the decision of the arbitral tribunal should be enforceable in law;
- The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when the reference is made to the tribunal; and
- The agreement should contemplate that the

tribunal will receive evidence from both sides and hear their contentions, or at least, give the parties an opportunity to put them forward.

(*K. K. Modi* v. *K. N. Modi*, AIR 1998 SC 1297; *Bharat Bhushan Bansal* v. *Uttar Pradesh Small Industries Corporation*, AIR 1999 SC 899; *Uttar Pradesh Rajkiya Nigam Ltd.* v. *Indure (P.) Ltd*., AIR 1996 SC 1373)

It is possible to spell out an arbitration agreement in a contract by correspondence with the Government. (*P. B. Ray* v. *Union of India*, AIR 1973 SC 908) But even such contract by correspondence with the Government has to be entered into by the officer duly authorised to enter into contract on behalf of the Government under A.299 of the Constitution. A contract by a person not so authorised, is void. *(State of Punjab* v. *Om Prakash*, AIR 1988 SC 2149)

Arbitration and Expert Determination

Expert determination is the referral of a dispute to an independent third party, who uses her expertise to resolve a dispute. Such determination is helpful for determining valuation, intellectual property, or accounting disputes. The expert is not required to give reasons for her determination. An expert's determination, however, is not enforceable like an arbitral award. Nor it can be challenged in a court of law.

To hold that an agreement contemplates arbitration and not expert determination, Courts have laid emphasis on the following:

- The existence of a "formulated dispute" as against an intention to avoid future disputes.
- The tribunal or forum so chosen is intended to act judicially after taking into account the relevant evidence before it, and the submission made by the parties before it.
- The decision is intended to bind the parties.

(K. K. Modi v. *K. N. Modi*, AIR 1998 SC 1297)

The nomenclature used by the parties may not be conclusive. One has to examine the true intent and purpose of agreement. The terminology "arbitrator" or "arbitration" is persuasive, but not always conclusive.

Illustration: Two groups from a family arrived at a Memorandum of Understanding to resolve disputes and differences amongst them. The relevant clause of this memorandum purported to prevent any further disputes between the two groups, in connection with the division of assets in agreed proportions, after their valuation by a named body and under a scheme of division by another named body. It further intended to clear any other difficulties which may arise in implementation of the agreement by leaving it to the decision of the Chairman of the Financial Corporation, who was entitled to nominate another person to decide another question. The clause did not contemplate any judicial determination or recording of evidence. It was held to be a case of expert determination and not arbitration, even though the parties, in their correspondence, used the word 'arbitration'. (*K. K. Modi* v. *K. N. Modi,* AIR 1998 SC 1297)

Institutional Arbitration

A contract between parties often contains an arbitration clause, which designates an institution to administer and conduct the arbitration process under a pre-established set of rules. Examples of such institutions are the Court of Arbitration of the International Chambers of Commerce ("**the ICC**"), the London Court of International Arbitration ("**the LCIA**"), and the American Arbitration Association ("**the AAA**").

Should the administrative costs of the institution, which may be substantial, not be a major concern, the institutional approach is generally preferred. The advantages of institutional arbitration, for those who can afford it, are:

- Pre-established and well-tried rules and procedures, which ensure that an arbitration begins immediately and runs smoothly;

- Administrative and technical assistance;
- Qualified and experienced arbitrators;
- Appointment of arbitrators by the institution, should the parties request it;
- Physical facilities and support services for conduct of arbitrations;
- Assistance in encouraging reluctant parties to proceed with arbitration;
- Final review and a valid award, ensuring easier recognition and enforcement;
- Operational benefits that ensure that proper notice is always given; and
- Availability of a panel of arbitrators to fall back upon, if appointment is challenged, or an arbitrator resigns or is replaced.

The primary disadvantages of institutional arbitration are that:

- It is slow and rigid;
- Administrative fees for services and use of facilities may be high in disputes over large amounts, especially where fees are related to the amount in dispute. For lesser amounts in dispute, institutional fees may be greater than the amount in dispute; and
- The institution's bureaucracy may lead to added costs and delays.

Ad hoc *Arbitration*

Ad hoc arbitration is a proceeding administered by the parties themselves, (and not a stranger or institution) with rules created solely for that specific case. Parties make their own arrangement with respect to all aspects of the arbitration, including the law applicable, the rules under which the arbitration will be carried out, the method for selecting an arbitrator, the seat of arbitration, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration.

If parties approach an arbitration in a spirit of cooperation, *ad hoc* proceedings can be more flexible, suitable, cost effective, and faster than an institutional arbitration proceeding.

The disadvantages of *ad hoc* arbitration are:

- High level of party control, which entails the need of party co-operation, right upto the end, since there are no pre-established sets of rules;
- Parties run a risk of drafting inoperative arbitral clauses. Clauses are often drafted in great detail, are rarely workable and are susceptible to different interpretations, leading to litigation;
- The arbitral award itself may be rendered unenforceable, if incorrect procedure is agreed upon and followed;
- It lacks administrative supervision to schedule hearings, fees and engagement of translators; and
- It lacks adequate facilities and infrastructure.

Ad hoc arbitration need not be entirely divorced from institutional arbitration. Parties can choose to adopt the rules of an institution without being fully subject to that institution. Conversely, parties can designate an institution to administer the arbitration proceedings, but exclude applicability of part of its rules. Parties can simply require an institution to only appoint the arbitrator. While parties in an *ad hoc* arbitration adopt their own set of rules, it is always open to them to adopt the rules of an arbitral institution, adapted to their case or of the Model Law of the UNCITRAL.

Statutory Arbitration

There are a large number of Central and State Acts, which specifically provide for arbitration in respect of disputes arising out of matters covered by those enactments. Instances of such enactments are the Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Since such an arbitration would also be governed by the 1996 Act, the provision for statutory arbitration in such legislation is deemed to be an arbitration agreement (*Grid Corporation of Orissa* v. *Indian Change Chrome Ltd.*, AIR 1998 Ori 101)

Fast Track Arbitration / 'Documents only Arbitration'

Should the parties agree that no oral hearings shall be held, the arbitral tribunal could fast

track the arbitration process, by making the award only on the basis of documents submitted by the parties, in support of their case.

Arbitration under the 1996 Act

The 1996 Act repeals the earlier law on arbitration contained in the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961.

The 1996 Act seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules. The Model Law and Rules, however, do not become part of the 1996 Act, so as to become an aid to construe the provisions of the 1996 Act. (*Union of* India v. *East Coast Boat Builders and Engineers Ltd*., AIR 1999 Del 44)

The 1996 Act is a long leap in the direction of ADR. The decided cases under the Arbitration Act, 1940 have to be applied with caution, in determining issues arising for decision under the 1996 Act (*Firm Ashok* Traders v. *Gurumukh Das Saluja*, (2004) 3 SCC 155) Interpretation of the provisions of the 1996 Act should be independent and without reference to the principles underlying the Arbitration Act, 1940. (*Sundaram Finance Ltd.* v. *N. E. P. C. India Ltd.*, AIR 1999 SC 565)

The Arbitration Act, 1940, provided for a procedure for filing and making an award a rule of Court; that is, a decree, after the making of the award and prior to its execution. Since the object of the 1996 Act is to provide speedy and alternative solution to the dispute, the procedure does not find mention in the 1996 Act. Even for enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the Court or decree, and the other to take up execution thereafter. The Court enforcing the foreign award can deal with the entire matter in one proceeding. (*Fuerst Day Lawson Ltd*. v. *Jindal Exports Ltd*., AIR 2001 SC 2293)

Commencement of the 1996 Act

Though the 1996 Act received Presidential assent on August 16, 1996, being a continuation of the Arbitration and Conciliation Ordinance, it is deemed to have been effective from January 25, 1996, that is, the date when the Ordinance was brought in force. (*Fuerst Day Lawson Ltd*. v. *Jindal Exports Ltd*., AIR 2001 SC 2293) Therefore, the provisions of the Arbitration Act, 1940, will continue to apply to arbitral proceedings that commenced before January 25, 1996. (*Shetty's Construction Co. (P.) Ltd*. v. *Konkan Railway Construction*, (1998) 5 SCC 599)

S.85(2)(a) of the 1996 Act provides that, notwithstanding the repeal of the Arbitration Act, 1940, its provisions shall continue to apply in relation to arbitration proceedings, which commenced prior to the coming into force of the 1996 Act on January 25, 1996, unless otherwise agreed upon by the parties. S.21 provides parties with an option to fix another date for commencement of arbitral proceedings. Therefore, if the parties to the arbitration had agreed that the arbitral proceedings should commence from a day after January 25, 1996, the provisions of the 1996 Act would apply.

In cases where arbitral proceedings had commenced before the coming into force of the 1996 Act, and are pending before the arbitrator, it is open to the parties to agree that the 1996 Act will be applicable to such arbitral proceedings. (*Thyssen Stahlunion Gmbh* v. *Steel Authority of India,* (1999) SCC 334)

Domestic Arbitration

The expression "domestic arbitration" has not been defined in the 1996 Act. An arbitration held in India, the outcome of which is a domestic award under Part I of this Act, is a domestic arbitration. (Ss.2(2) - S.2(7)) Therefore, a domestic arbitration is one which takes place in India, wherein the parties are Indians, and the dispute is decided in

accordance with the substantive law of India. (S.28(1)(a))

Part I of the 1996 Act

Part I deals with the law and practice of arbitration in India, running chronologically through each stage of arbitration, from the arbitration agreement, the appointment of the arbitral tribunal, the conduct of the arbitration, the making of an arbitral award, to the recognition and enforcement of awards.

Once parties have agreed to refer a dispute to arbitration, neither of them can unilaterally withdraw from the arbitral process. The arbitral tribunal shall make an award which shall be final and binding on the parties and persons claiming under them respectively (S. 35), and such award, unless set aside by a court of competent jurisdiction (S.34), shall be enforceable under the Code, in the same manner as if it were a decree of the Court (S. 36).

Limited Judicial Intervention

Under the 1996 Act, there is no provision for reference to arbitration by intervention of the Court. S.5 of the 1996 Act limits the role of the judiciary in matters of arbitration, which is in consonance with the object of the Act, to encourage expeditious and less expensive resolution of disputes with minimum interference of the Court. (*P. Anand Gajapathi Raj* v. *P. V. G. Raju*, AIR 2000 SC 1886)

Arbitration Agreement

The existence of an arbitration agreement is a condition precedent for the exercise of power to appoint an arbitrator under S.11 of the 1996 Act. The issue of existence and validity of the "arbitration agreement" is altogether different from the substantive contract in which it is embedded. The arbitration agreement survives annulment of the main contract, since it is separable from the other clauses of the contract. The arbitration clause constitutes an agreement by itself. *(Firm Ashok Traders* v. *Gurumukh Das Saluja,* (2004) 3 SCC 155)

In cases where there is an arbitration clause, it is obligatory for a Court under the 1996 Act to refer the parties to arbitration in terms of their arbitration agreement (S.8). The Act does not, however, oust the jurisdiction of a Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated by S.8 of the Act.

Similarly, a Court is to refer the parties to arbitration under S.8 of the 1996 Act, only in respect of "a matter which is the subject matter of an arbitration agreement". Where a suit is commenced "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of S.8. The words "a matter" indicate that the entire subject matter of the suit should be subject to the arbitration agreement. (*Sukanya Holdings Pvt. Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531)

S.8 of the 1996 Act applies only to arbitrable disputes, which an arbitrator is competent or empowered to decide.

Illustration: Certain parties agreed to refer the question of winding up a company to arbitration. The power to order winding up of a company, however, is conferred upon the Company Court by the Companies Act. As the arbitrator has no jurisdiction to wind up a company, the Court cannot make a reference to arbitration under S.8. (*Haryana Telecom Ltd.* v. *Sterlite Industries (India) Ltd*., AIR 1999 SC 2354)

Illustration: Certain parties agreed to refer a question as to whether probate should be granted or not, to arbitration. Since the judgment in the probate suit under the Indian Succession Act is a judgment *in rem*, such a question cannot be referred to arbitration (*Chiranjilal Shrilal Goenka* v. *Jasjit Singh*, (1993) 2 SCC 507)

An application under S.8 of the 1996 Act can be filed in the same suit or as an independent application before the same Court.

Ordinarily, an application under S.8 of the 1996 Act has to be filed before filing the written statement in the suit concerned. But when the defendant, even after filing the written statement, applies for reference to arbitration and the plaintiff raises no objection, the Court can refer the dispute to arbitration. The arbitration agreement need not be in existence before the action is brought in Court, but can be brought into existence while the action is pending. Once the matter is referred to arbitration, proceedings in the civil suit stand disposed of. The Court to which the party shall have recourse to challenge the award would be a Court as defined in S.2(e) of the Act, and not the Court to which an application under S.8 is made. (*P. Anand Gajapathi* Raju v. *P.V.G Raju*, AIR 2000 SC 1886)

Where, during the pendency of proceedings before a Court, parties enter into an agreement to proceed for arbitration, they would have to proceed in accordance with the provisions of the 1996 Act.

Illustration: A High Court, in exercise of its writ jurisdiction, has no power to refer the matter to an arbitrator and to pass a decree thereon on the award being submitted before it. (*Tamil Nadu Electricity* Board v. *Sumathi*, AIR 2000 SC 1603)

Interim Measures by the Court

The Court is empowered under S.9 of the 1996 Act to pass interim orders, even before the commencement of arbitration proceedings. Such interim orders can precede the issuance of a notice invoking the arbitration clause. (*Sundaram Finance Ltd.* v. *N. E. P. C. India Ltd*, AIR 1999 SC 565) The Court, under S.9, merely formulates interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. (*Firm Ashok Traders* v. *Gurumukh Das Saluja*, (2004) 3 SCC 155)

If an application under S.9 of the 1996 Act for interim relief is made in Court before issuing a notice under S.21 of the Act, the Court will first have to be satisfied that there is a valid arbitration agreement, and that the applicant intends to take the dispute to arbitration. Once it is so satisfied, the Court will have jurisdiction to pass orders under S.9 giving such interim protection as the facts and circumstances of the case warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, a Court, while exercising its jurisdiction under S.9, can pass a conditional order to put the applicant to such terms as it may deem fit with a view to ensuring that effective steps are taken by the applicant in commencing arbitral proceedings. (*Sundaram Finance Ltd.* v. *N. E. P. C. India Ltd*, AIR 1999 SC 565)

Once a matter reaches arbitration, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of arbitration proceedings. The parties are permitted to approach the Court only under S.37 or under S.34 of the 1996 Act. *(SBP and Co*. v. *Patel Engineering Ltd*., 2005 (3) Arb LR 285 (SC))

Composition of Arbitral Tribunal

An arbitral tribunal, as defined in S. 2(d) of the 1996 Act, means a sole arbitrator, or a panel of arbitrators, appointed in accordance with the provisions of Ss.10 and 11 of the 1996 Act. The number of arbitrators should not be an even number; this is to ensure that there are no 'hung' decisions, with an equal number of arbitrators deciding either way in a dispute.

An arbitrator must be independent and impartial. A prospective arbitrator should disclose in writing to the parties, any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. (S.12(1), 1996 Act) The 1996 Act prescribes the procedure for challenging the arbitrator, terminating his mandate, and his replacement by a new arbitrator. (Ss.13 – 15)

Arbitration under the 1996 Act is a matter of consent, and parties are generally free to structure their agreement as they see fit. Parties are given maximum freedom not only to choose their arbitrators, but also to determine the number of arbitrators

constituting the arbitral tribunal.

There is no right to challenge an award, if the composition of the arbitral tribunal or arbitration procedure is in accordance with the agreement of the parties, even though such composition or procedure is contrary to Part I of the 1996 Act. Again, the award cannot be challenged if such composition or procedure is contrary to the agreement between the parties, but in accordance with the provisions of the 1996 Act. If there is no agreement between the parties about such composition of the arbitral tribunal or arbitration procedure, the award can be challenged on the ground that the composition, or procedure, was contrary to the provisions of the Act. (*Narayan Prasad Lohia* v. *Nikunj Kumar Lohia,* (2002)3 SCC 572)

Where the agreement between the parties provides for the appointment of two arbitrators, that by itself does not render the agreement as being invalid. Both the arbitrators so appointed, should appoint a third arbitrator to act as the presiding arbitrator (S.11(3), 1996 Act). Where the parties have participated without objection in an arbitration by an arbitral tribunal comprising two or an even number of arbitrators, however, it is not open to a party to challenge a common award by such tribunal on the ground that the number of arbitrators should not have been even. The parties are deemed to have waived such right under S.4 of the 1996 Act. (*Narayan Prasad Lohia* v. *Nikunj Kumar Lohia*, (2002) 3 SCC 572)

The determination of the number of arbitrators, and appointment of arbitrators, are two different and independent functions. The number of arbitrators in the first instance is determined by the parties, and in default, the arbitral tribunal shall consist of a sole arbitrator. The appointment of an arbitrator, however, should be in accordance with the agreement of the parties, or in default, in accordance with the mechanism provided under S.11 of the 1996 Act.

The power of the Chief Justice under S.11 of the 1996 Act to appoint an arbitral tribunal is a judicial power. Since adjudication is involved in constituting an arbitral tribunal, it is a judicial order. The Chief Justice or the person designated by her is bound to decide:

- Whether she has jurisdiction;
- Whether there is an arbitration agreement;
- Whether the applicant is a party to the arbitration agreement;
- Whether the conditions for exercise of power have been fulfilled; and
- Where an arbitrator is to be appointed, the fitness of the person to be appointed.

(*SBP and Co*. v. *Patel Engineering Ltd*., 2005 (3) Arb LR 285 (SC))

The process, being adjudicatory in nature, restricts the power of the Chief Justice to designate, by excluding non-judicial institutions or a non-judicial authority, from performing such a function. The Chief Justice of India can, therefore, delegate such power only to another Judge of the Supreme Court, while the Chief Justice of a High Court can delegate such power only to another Judge of the High Court. It is impermissible to delegate such power to the District Judge. (*SBP and Co*. v. *Patel Engineering Ltd*., 2005 (3) Arb LR 285 (SC))

Notice must be issued to the non-applicant to given her an opportunity to be heard before appointing an arbitrator under S.11 of the 1996 Act. (*SBP and Co*. v. *Patel Engineering Ltd*., 2005 (3) Arb LR 285 (SC))

No appeal lies against the decision of the Chief Justice of India or her designate while entertaining an application under S.11(6) of the 1996 Act, and such a decision is final. It is, however, open to a party to challenge the decision of the Chief Justice of a High Court or her designate by way of A.136 of the Constitution. (*SBP and Co*. v. *Patel Engineering Ltd*., 2005 (3) Arb LR 285 (SC))

Where an application for appointment of arbitrator is made under S.11(2) of the 1996 Act in an international commercial arbitration, and the opposite party takes the plea that there was no mandatory provision to refer the dispute to arbitration, the Chief Justice of

India has the power to decide on whether the agreement postulates resolution of dispute by arbitration. If the agreement uses the word 'may', and gives liberty to the party either to file a suit or to go for arbitration at its choice, the Supreme Court should not exercise jurisdiction to appoint an arbitrator under S.11 (12) of the Act. (*Wellington Associates Ltd*. v. *Kirit Mehta*, AIR 2000 SC 1379)

Where the arbitrator is to be appointed, the Supreme Court can use its discretion in making an appointment, after considering the convenience of the parties. (*Dolphin International Ltd*. v. *Ronark Enterprises Inc.*, (1998) 5 SCC 724)

Jurisdiction of Arbitral Tribunal

The arbitral tribunal is invested with the power to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. For that purpose, the arbitration clause shall be treated as an agreement independent of the other terms of the agreement, even though it is part of the said agreement. So, it is clear that even if the arbitral tribunal decides that the agreement is null and void, it shall not entail *ipso jure* the invalidity of the arbitration clause. (*Olympus Superstructures (P.) Ltd*. v. *Meena Vijay Khetan*, AIR 1999 SC 2102)

Objections as to the jurisdiction of an arbitral tribunal must be raised before the arbitral tribunal. If the arbitral tribunal accepts the plea of want of jurisdiction, it will not proceed further with the arbitration on merits, and the arbitral proceedings shall be terminated under S.32(2)(c) of the 1996 Act. Such a decision, however, is appealable. (S.37(2)(a)) If the tribunal rejects the plea of jurisdiction, it will continue with the arbitral proceedings and make an arbitral award, which can be challenged by the aggrieved party under S.34 (2) of the 1996 Act. The Court has no power to adjudicate upon the question of the want of jurisdiction of an arbitral tribunal.

S.16 of the 1996 Act does not, however, take away the power of the Chief Justice in a proceeding under S.11, to decide as to whether there is a valid arbitration agreement or not, before deciding whether the dispute should be referred to the arbitrator for arbitration. (*Wellington Associates Ltd*. v. *Kirit Mehta*, AIR 2000 SC 1379)

An arbitral tribunal, during the arbitral proceedings, can order interim measures for the protection of the subject matter of the dispute, and also provide for appropriate security, in respect of such a measure under S. 17 of the 1996 Act. Such an order for interim measures is appealable under S.37(2) of the 1996 Act.

The power to order interim measures, conferred on the arbitral tribunal under S.17 of the 1996 Act, is a limited one. A tribunal is not a court of law, and its orders are not judicial orders. A tribunal cannot issue any direction that would go beyond the scope of reference, or the arbitration agreement. An interim order may be made only in respect of a party to an arbitration. It cannot be enforced against parties who are not part of an arbitral proceeding. No power has been conferred on the arbitral tribunal under this section to enforce its order, nor does it provide for the judicial enforcement thereof. (*M. D. Army Welfare Housing Organisation* v. *Sumangal Services (P.) Ltd.*, AIR 2004 SC 1344)

Conduct of Arbitral Proceedings

Ss.18 – 27 of the 1996 Act provide various rules dealing with the arbitral procedure. S.19 establishes procedural autonomy by recognising parties' freedom to lay down rules of procedure, subject to the fundamental requirements of S.18, for the equal treatment of parties. S.20 deals with the right of the parties to an arbitration, to agree on the place of arbitration.

An arbitral tribunal is not bound by the procedure set out in the Code. It is for the parties to agree on a procedure, and if the parties are silent, then the arbitrator has to prescribe the procedure. The procedure so prescribed, however, should be in consonance with the principles of natural justice. The

doctrine of natural justice pervades the procedural law of arbitration as its observance is the pragmatic requirement of fair play in action.

Arbitral Award

The award-making process necessarily minimises the derogable provisions of the 1996 Act, and is mainly concerned with the role of the arbitrator in connection with making the award. (Ss.28 - 33)

S.28 pertains to the determination of the rules applicable to the substance of the disputes. S. 29 provides for the decision-making procedure within the tribunal. S.30 relates to the settlement of a dispute by the parties themselves, and states that, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation, and other procedures at any time during the arbitral proceedings, to encourage settlement.

S.31 of the 1996 Act refers to the form and content of an arbitral award. Unlike the 1940 Act, the 1996 Act makes it mandatory for an arbitral award to state reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an arbitral award on agreed terms under S.30.

S.32 pertains to the determination of the arbitral proceedings, while S.33 relates to the corrections and interpretation of an award, as also to the making of additional awards.

Recourse against Arbitral Award

S.34 of the 1996 Act provides for recourse against an arbitral award. The limited grounds for setting aside an arbitral award are:

- Incapacity of a party;
- Invalidity of agreement;
- Absence of proper notice to a party;
- Award beyond scope of reference;
- Illegality in the composition of an arbitral tribunal, or in the arbitral procedure;
- Dispute being non-arbitrable; and
- Award being in conflict with the public policy.

S.34 of 1996 Act is based on A.34 of the UNCITRAL Model Law. The scope for setting aside the award under the 1996 Act is far less than that under S.30 or S.33 of the 1940 Act. (*Olympus Superstructures (P.) Ltd*. v. *Meena Vijay Khetan*, AIR 1999 SC 2102)

The arbitrator is the final arbiter of a dispute between the parties, and it is not open to challenge the award on the ground that the arbitrator has drawn her own conclusions or has failed to appreciate the facts. (*Sudershan Trading Co*. v. *Government of Kerala*, AIR 1989 SC 890)

The arbitrator is the sole judge of the quality and quantity of evidence, and it will not be for the Court to re-appreciate the evidence before the arbitrator, even if there is a possibility that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the arbitrator. (*M. C. D*. v. *Jagan Nath Ashok Kumar*, (1987) 4 SCC 497) Similarly, if a question of law is referred to the arbitrator, and she arrives at a conclusion, it is not open to challenge the award on the ground than an alternative view of the law is possible. (*Alopi Parshad & Sons Ltd.* v. *Union of India*, (1960) 2 SCR 793)

The power of an arbitral tribunal to make an award is different from its power to issue procedural orders and directions in the course of the arbitration proceedings. Such orders and directions are not awards, and hence, are not open to challenge under S.34 of the 1996 Act, though they may provide a basis for setting aside or remission of an award. For instance, questions concerning the jurisdiction of an arbitral tribunal or the choice of the applicable substantive law can be determined by an arbitral tribunal, resulting in an award. On the other hand, questions relating to the admissibility of evidence, or the extent of discovery, are procedural in nature, and are determinable by making an order or giving a direction, and not by an award.

In view of the principles of acquiescence and estoppel, it is not permissible for a party to challenge an arbitration clause after

participating in an arbitration proceeding.

Illustration: Where a party consented to arbitration by the arbitral tribunal as *per* the arbitration clause, and participated in arbitral proceedings, it cannot later take the plea that there was no arbitration clause. (*Krishna Bhagya Jala Nigam Ltd*. v. *G Harish Chandra Reddy*, (2007) 2 SCC 720)

The principle of acquiescence, however, is inapplicable where an arbitrator unilaterally enlarges her power to arbitrate, and assumes jurisdiction on matters not before her.

Illustration: Certain parties, by express agreement, referred to arbitration only the claims for refund of the hire charges. The arbitrator, upon entering into the reference, enlarged its scope. Since the arbitrator continued to adjudicate on such enlarged scope, despite objections, the parties were left with no option but to participate in the proceedings. Such participation did not amount to acquiescence. Once appointed, the arbitrator has the duty to adjudicate only the matter brought before her by the parties. The award is liable to be set aside as the arbitrator had misdirected herself and committed legal misconduct. (*Union of India* v. *M/s. G. S. Atwal*, AIR 1996 SC 2965)

Finality and Enforcement of Awards

S.35 of the 1996 Act provides that subject to the provisions of Part I of the Act, an arbitral award shall become final and binding on the parties, and the persons claiming under them respectively. The word 'final' with respect to an award, as used in this section, is not to be confused with the expression 'final award'. The word 'final' means that, unless there is a successful challenge to the award, it is conclusive as to the issues with which it deals, as between the parties to the reference, and the persons claiming under them. The award can, therefore, be enforced, even if there are other issues outstanding in the reference.

S.36 of the 1996 Act renders an arbitral award enforceable in the same manner as if it were a decree, if no challenge is preferred against it within the time prescribed for making a challenge or, when upon a challenge being preferred, it has been dismissed. The fact that an arbitral award is enforceable as if it were a decree, however, does not make the arbitral proceeding a suit.

The arbitral award becomes immediately enforceable without any further act of the Court, once the time expires to challenge the award under S.34 of the 1996 Act. If there were any remaining doubts on the interpretation of the language used in S.34, the scheme of the 1996 Act would resolve the issue in favour of curtailing the court's powers by the exclusion of the operation of S. 5 of the Limitation Act. (*Union of India* v. *Popular Constructions*, (2001) 8 SCC 470)

When the arbitration proceedings commenced before the 1996 Act came into force, but the award was made after the 1996 Act came into force, the award would be enforced under the provisions of the Arbitration Act,1940. (*Thyssen Stahlunion Gmbh* v. *Steel Authority of India*, (1999) SCC 334)

International Commercial Arbitration and Foreign Awards

An "international commercial arbitration" has been defined in S.2(f) of the 1996 Act as an arbitration relating to disputes arising out of legal relationships, considered commercial under the law in force in India, and where at least one of the parties is:

- A foreign national, or an individual habitually resident outside India;
- A body corporate, incorporated outside India;
- A company, or association of individuals, whose central management and control is exercised in a country other than India; or
- The Government of a foreign country.

The law applicable may be Indian law or foreign law, depending upon the contract. (Ss. 2(1)(f) and 28(1)(b), 1996 Act)

Part I of the 1996 Act also applies to international commercial arbitrations that take

place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. The definition of international commercial arbitration in S.2(1) (f) of the 1996 Act makes no distinction between an international commercial arbitration held in India and outside India. Part II of the 1996 Act only applies to arbitrations that takes place in a convention country. An international commercial arbitration may, however, be held in a non-convention country. The 1996 Act does not provide that the provisions of Part I are not to apply to international commercial arbitrations which take place in a non-convention country. The very object of the Act is to establish a uniform legal framework for the fair and efficient settlement of disputes arising in international commercial arbitrations. (*Bhatia International* v. *Bulk Tradings*, AIR 2002 SC1432)

Illustration: Even if in terms of the arbitration agreement, the arbitration proceedings between two foreign parties were being held under ICC Rules outside India, a party to the arbitration proceedings may still seek an interim injunction under S.9 of the 1996 Act against the Oil and Natural Gas Commission, a Government Company, to restrain it from making any payment to the opposite party, till the arbitration proceedings pending between the parties were concluded. Such an injunction, since it is in respect of properties within the territory of India, is maintainable. If, however, the injunction is sought for properties outside the country, then such an application under S.9 would not be maintainable in an Indian Court. (*Olex Focas Pty. Ltd*. v. *Skodaexport Co. Ltd.*, AIR 2000 Del 161)

Part II of the 1996 Act pertains to the enforcement of certain foreign awards, and consists of two chapters. Chapter I relates to New York Convention Awards, which are supplemented by the First Schedule to the 1996 Act. Chapter II deals with Geneva Convention Awards, which is to be read with the Second and the Third Schedule of the Act.

The expression "foreign award" means an arbitral award on differences between persons arising out of a legal relationship, considered as commercial, under the law in India. An award is 'foreign' not merely because it is made on the territory of a foreign state, but because it is made in such a territory and in respect of an arbitration agreement not governed by the law of India. (*N. T. P. C*. v. *Singer Company*, AIR 1993 SC 998)

A foreign award made after the 1996 Act came into force, can be enforced only under Part II of the 1996 Act, there being no vested right to have the same enforced under the Foreign Awards (Recognition and Enforcement) Act, 1961. It is relevant that arbitral proceedings had commenced in the foreign jurisdiction before the commencement of the 1996 Act. (*Thyssen Stahlunion Gmbh* v. *Steel Authority of India*, (1999) SCC 334)

Mediation

Mediation is a voluntary, disputant-centred, non-binding, confidential, and structured process, controlled by a neutral and credible third party, who uses special communication, negotiation, and social skills to facilitate a binding negotiated settlement, by the disputants themselves. The result of the mediation process is a settlement agreement, and not a decision.

The focus in mediation is on the future, with an emphasis on building relationships, rather than fixing the blame for what has happened in the past. The purpose of mediation is not to judge guilt or innocence, but to promote understanding, get parties to focus on their interests, and encourage them to reach their own agreement.

The ground rules of mediation include:

- *Neutrality*: A mediator should be neutral, having no interest in the dispute, or in either party.
- *Self determination*: Mediation is based on the principle of the parties' self-determination, meaning that each party makes free and informed choices. The mediator is, therefore, responsible for the conduct of the process, while the parties control the

outcome.

- *Confidentiality*: This is of the essence of successful mediation, and parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them as well. Were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty-free discovery process. The mediator should endeavour:
  - That she and the parties shall keep confidential, all matters relating to the mediation proceedings, and that confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary, for the purpose of its implementation and enforcement.
  - That unless otherwise agreed to by the parties, it would be legally impermissible for her to act as an arbitrator or a witness in any arbitral or judicial proceeding in respect of the dispute that is the subject of mediation proceedings, and that the parties are not allowed to introduce such evidence – neither on facts (like the willingness of one party to accept certain proposals), nor on views, suggestions, admissions or proposals, made during the mediation.
  - That the only behaviour that might be reported, is information about whether the parties appeared at a scheduled mediation and whether or not they reached a solution.
- *Fair process*: The mediation process is just as important as the outcome. It is crucial that parties feel that they are being treated fairly, and that their concerns are being addressed.
- *Voluntary process*: Mediation is possible only with the consent of the parties involved, who are bound once they sign the settlement arrived at, during mediation.

Pre-Mediation Preparation

A mediator often asks for a pre-mediation summary from the parties, to familiarise herself with the dispute.

The participants in a mediation process need not necessarily be only the actual disputants, but all parties that could facilitate or block a settlement, can participate.

In preparing a case, it will be useful for a mediator and/or the parties to analyse a dispute. For this, a mediator must be conversant with the applicable law and practice, should acquaint herself with the perspective of both sides on the facts, and the issues that are of most concern to each party.

Demeanour of the Mediator

A mediator should endeavour to establish her neutrality and control over the process, and in doing so, should use language that is neutral, with simple words of mutuality, that apply to all parties. Her tone should be calm, moderate, business-like, and deliberative, and her posture, attentive. Importance must be given to seating arrangement, so as to ensure proximity, eye contact, and audibility.

Opening Statement

The process of mediation commences with an opening statement by the mediator, which must be simple and in a language and style adapted to the background of the parties. In her opening statement, a mediator:

- Introduces herself, her standing, training, and successful experience as a mediator;
- Expresses her hope that the proceedings terminate in a settlement;
- Requests the parties to introduce themselves;
- Enquires with the parties as to their language of choice, and the manner in which they would like to be addressed;
- Welcomes the parties' counsels;
- Enquires about the previous experience of parties and their counsels in any mediation process;
- Declares impartiality and neutrality, and describes the role of a mediator;
- Addresses confidentiality and neutrality by using appropriate eye contact, words, and body language;
- Emphasises the non-adversarial aspect of the process, like the absence of recording of

evidence, pronouncement of judgment, or award, or order;
- Emphasises the voluntary nature of the mediation process;
- Informs the parties and their counsel that she can go beyond the pleadings, and may cover other disputes;
- Explains the procedure that will be followed (that is, gives a road map) and the possibility of having private sessions;
- Explains the relevant procedures that would apply to cases with and without a settlement; and
- Informs parties that the Court fee will be refunded on settlement.

The mediator must also confirm that the parties want mediation. It is also incumbent on a mediator to manage any outbursts, handle administrative matters, such as breaks or order of presentation, and ensure that the parties are clear about the procedure to be followed. Either side can speak first, both having been given an assurance of equal opportunity.

Stages and sessions of Mediation

The introduction is followed by:

- Problem understanding stage;
- Needs and interests understanding stage;
- Problem defining stage;
- Issues identification stage;
- Options identification stage; and
- Options evaluation stage.

These stages are followed both, in a joint session, as well as a private session (caucus).

In a joint session:

- Parties and their respective counsels are present;
- Parties are advised not to say anything that will upset the other parties, and that any such information can be stated in a private session;
- Parties / counsel are allowed to speak without interruption;
- Normally the party speaks first, with the counsel supplementing the parties' submissions with legal issues;
- Any friend or relative of the parties will also be granted a hearing;
- Upon hearing each party / counsel, the mediator summarises the respective submissions of each party and seeks clarifications, if any;
- Parties / counsel may add on any information, subsequent to their submissions;
- The mediator should accede to the request of parties who would like to talk; and
- No interruptions are allowed during submissions, so as to maintain the decorum and dignity of the mediation process.

Where a party requests a private caucus, a mediator should conclude the joint session before meeting in private. A private session with one party should be followed by a private session with the other party. A mediator should explain beforehand that a private session might take more time with one party, than with the other.

A mediator may engage a private session:

- To share private matters and information that cannot be discussed in joint sessions;
- To regain control, when the conduct of a party is getting out of hand;
- Where parties to a mediation process face a deadlock or *impasse*;
- To allow parties to vent their emotions in a productive manner;
- To expose unrealistic expectations;
- To shift from discussion to problem-solving;
- To evoke options for settlement; and
- To communicate offers and counter-offers.

A mediator should avoid a private session:

- Where a party can be directly persuaded; or
- Where a party can communicate a compelling position clearly before the other party.

Mediation Techniques

Mediation is all about transforming conflicts.

A mediator should take the sting out of the hostility between the parties and endeavour to adapt the technique of neutral reframing, to rephrase an offensive or inflammatory statement of a party, in an inoffensive manner, focusing on the positive needs articulated in that statement.

Illustration: A, a party to a mediation says, "He is so dominating that he never talks to me, forcing me to keep everything bottled up."

The Mediator responds: " You would like to be heard..."

The mediator has thus, not only converted the negative statement into a positive one, she has exposed the other party to the positive need (of being heard), underlying the statement.

Other mediation techniques are:

- *Summarising*: The mediator sets out a summary, restating the essence of the statements made by parties, briefly, accurately, and completely.
- *Acknowledgement*: A mediator reflects back on the statement of a party, in a manner that recognises that party's perspective.
- *Re-directing*: A mediator shifts the focus of a party from one subject to another, in order to focus on details, or respond to a highly volatile statement by a party.
- *Deferring*: A mediator postpones a response to a question by a party, in order to follow an agenda, or gather additional information or to defuse a hostile situation.
- *Setting an agenda*: A mediator establishes the order in which issues, positions or claims are to be addressed.
- *Handling reactive devaluation*: A mediator takes ownership of information or statement of a party, in order to pre-empt the other party from reacting negatively to such information or statement, solely based on the source of the information.

A mediator should endeavour to shift from the parties' positions of interests by:

- Talking to the parties to determine their long-term interests, and in the process, discover interests common to the parties;
- Using open questions to elicit more facts;
- Inviting options from the parties for the purpose of a settlement;
- Placing every settlement option, no matter how ostensibly insignificant, on the table;
- Careful examination of each individual option, as a given option might only appeal to a party on deeper analysis; and
- Undertake a reality check, by comparing a pending offer with:

  - The best result a party can get in litigation (B. A. T. N. A., or best alternative to a negotiated agreement);
  - The worst result a party can get in litigation (W. A. T. N. A., or worst alternative to a negotiated agreement); and
  - The most likely result a party can get in litigation (M. L. A. T. N. A., or most likely alternative to a negotiated agreement).

Handling Emotions

Familiarity with ones own reaction when faced with emotions is desired. Strategies to handle emotions include:

- Accepting some venting, though preferably in a private session;
- Using active listening to verify the sincerity of the emotion;
- Identifying the source or reason for the emotion and addressing the cause, not the behaviour;
- Insisting that order be maintained;
- Moving to an easier issue on the agenda;
- Dealing with one issue at a time;
- Inviting parties to disclose the emotional impact of a given situation or express their feelings to one another; and
- Suggesting a recess.

Role of Silence in Mediation

The use of silence in mediation cannot be overemphasised. A mediator must understand the relevance of the pauses and silences of the

parties during mediation. Very often, an important piece of information is revealed after a period of silence.

Silence can be helpful to a speaker because it:

- Allows the speaker to dictate the pace of a conversation;
- Allows time to think before speaking; and
- Enables a speaker to choose whether or not to proceed with a conversation.

Silence can be useful to a listener, for its ability to:

- Demonstrate interest, respect and patience; and
- Give an opportunity to observe the speaker, and pick up non-verbal cues.

Use of Apology and 'Saving Face' Approach in Mediation

An apology is an acknowledgement and expression of regret for a fault, without defence. The emphasis is on the fact that the act done cannot be undone, but it that should not go unnoticed.

Fear of losing face is also a powerful emotion that compels parties to stick to their positions, or continue with litigation. A mediator should explore settlement options that allow an honourable "exit".

Handling an Impasse

When faced with an *impasse*, a mediator should engage in one or more of these approaches:

- By shifting gears between private and joint sessions, get parties to do a reality check on how "foolproof" their case actually is;
- Have a private session with a party's counsel, if she has given legally untenable advice to her client, who may be falsely assured of success in litigation;
- Warn the participants/ bring the parties together to acknowledge the situation;
- Solicit any last-ditch efforts to salvage the situation;
- Change the atmosphere, or use humour to relax the atmosphere;
- Revisit issues, or areas of agreement;
- Proceed, preferably with an easier issue;
- Ask parties about the cause of the *impasse*;
- Ask parties to suggest options to overcome the deadlock;
- Praise the work and accomplishments of parties;
- Try role-reversal;
- Propose hypothetical solutions;
- Suggest (or threaten) ending the mediation;
- Suggest third party / expert intervention;
- Allow emotions to emerge; and / or
- Take a temporary break from the mediation process.

Settlement Agreement

A settlement agreement should be in writing, and should:

- Comprise the statement about the parties' future relationship;
- Describe the responsibility of each party in implementing the settlement;
- Be clear, concise, complete, concrete, realistic, and workable;
- Be balanced, and reflect the gain of each party;
- Be positive, without any blame assessment; and
- Be expressed in non-judgmental language.

A settlement agreement should preferably be drafted by the mediator, though it can also be drafted by parties. A mediator drafting the agreement, should orally recite the terms of the settlement, clarify the terms, and confirm the terms before reducing them to writing.

When drafting an agreement, a mediator should be specific, and ambiguous words should be avoided. These include terms such as "reasonable", "soon", "frequent", "co-operative", or "practicable". She should state clearly "who" will do "what", "when", "where", "how", "how much", and for "how long".

The agreement should be in plain language, preferably the language of the parties, and

legal jargon should be avoided.

The parties to the agreement should sign each page, while the counsel should attest the signature of her client by signing on the last page. Once both the parties sign the settlement agreement, the mediator should sign the agreement and furnish a copy to each party.

Ending Mediation

The mediation process, being the outcome of the efforts of the parties, the mediator should ensure that the ending of the process is smooth.

If parties to the process do not come to terms, the mediator should congratulate them for the progress made, with hope for settlement in future. There is no such thing as failed mediation.

If parties do come to terms, the mediator should congratulate parties. Mediation ends on the date of the settlement agreement.

Model Civil Procedure Mediation Rules, 2003

While there is no comprehensive statute governing mediation in India, the Supreme Court has recommended that the High Courts adopt, with or without modification, the model Civil Procedure Mediation Rules framed by the Law Commission of India. (*Salem Advocates Bar Association* v. *Union of India*, AIR 2005 SC 3353)

The Rules provide the procedure for appointment of a mediator, the qualifications of a mediator, and the procedure for mediation. Rule 12 provides that the mediator is not bound by the Evidence Act, 1872 and the Code, but should be guided by principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

Rule 16 describes the role of a mediator and states that the mediator should attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and generating options in an attempt to resolve the dispute, emphasising that it is the responsibility of the parties to take a decision which affects them; a mediator should not impose any terms of settlement on the parties.

Rule 17 emphasises that the parties alone are responsible for their decisions, and that the mediator will not, and cannot, impose any settlement or give any warranty that the mediation will result in a settlement.

The Rules have strict provisions with regard to the confidentiality of the mediation process. While Rule 11 enables the mediator to meet or communicate with each of the parties separately, Rule 20 restrains the mediator from disclosing to the other party, any information given to her by a party, subject to a specific condition that it be kept confidential, and mandates the mediator and the parties maintain full confidentiality in respect of the mediation process, and stipulates that the parties do not rely on, or introduce, the said information, in any other proceedings as to:

- Views or admissions expressed by a party in the course of the mediation proceedings;
- Confidential documents, notes, drafts or information obtained during mediation;
- Proposals made or views expressed by the mediator; or
- The fact that a party had or had not indicated her willingness to accept a proposal for settlement.

Rule 21 limits the communication between a mediator and the court to informing the court about the failure of a party to attend, and with the consent of the parties, her assessment that the case is not suited for settlement through mediation, or that the parties have settled their disputes.

Rule 24 provides for the reduction of the agreement between the parties into a written settlement agreement, duly signed by the parties. The settlement agreement is to be forwarded to the court by the mediator, with a

covering letter. The court then passes a decree in terms of the settlement under Rule 25. Should the settlement dispose of only certain issues in the suit, which are severable from other issues, the court may pass a decree straightaway, in accordance with the settlement on those issues, without waiting for a decision of the court, on the other issues which are not settled. If the issues are not severable, the court must wait for the decision of the court on the issues which are not settled.

Rule 27 lays down ethical standards of a mediator, stating that she should:

- Follow and observe the Rules strictly and diligently;
- Not carry on any activity or conduct, which could reasonably be considered as conduct unbecoming of a mediator;
- Uphold the integrity and fairness of the mediation process;
- Ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;
- Satisfy herself that she is qualified to undertake and complete the mediation in a professional manner;
- Disclose any interest or relationship, likely to affect impartiality, or which might seek an appearance of partiality or bias;
- Avoid, while communicating with the parties, any impropriety or appearance of impropriety;
- Be faithful to the relationship of trust and confidentiality, imposed on the office of mediator;
- Conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;
- Recognise that the mediation is based on principles of self-determination by the parties, and that the mediation process relies upon the ability of parties to reach a voluntary agreement; and
- Maintain the reasonable expectations of the parties as to confidentiality, refrain from promises, or guarantees of results.

Conciliation

Conciliation is a term often used interchangeably with mediation; some legal experts view conciliation as a pro-active form of mediation, where a neutral third party takes a more active role in exploring and making suggestions to the disputants on how to resolve their disputes. (*Salem Advocates Bar Association* v. *Union of India,* AIR 2005 SC 3353)

The manner of conducting conciliation, the ground rules and ethical standards are similar to that of mediation.

The 1996 Act is the first comprehensive statute on conciliation in India. Part III of the 1996 Act adopts, with minor contextual variations, the UNCITRAL Conciliation Rules, 1980.

The 1996 Act provides the procedure for commencement of conciliation proceedings, upon the invitation of one of the disputants (S. 62), and the submission of statements to a conciliator, describing the general nature of the dispute and the points at issue. (S.65) A conciliator is not bound by the Code or the Indian Evidence Act, 1872. (S.66)

Role of Conciliator

S.67 of the 1996 Act describes the role of a conciliator as under:

- A conciliator shall assist the parties in an independent and impartial manner, in their attempt to reach an amicable settlement of their dispute;
- A conciliator shall be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous business practices between the parties;
- A conciliator may conduct conciliation proceedings in such a manner as she considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear

oral statements, and the need for a speedy settlement of the dispute; and

- A conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing, and need not be accompanied by a statement of the reasons thereof.

Confidentiality is integral to the conciliation process. While S.69 of the 1996 Act enables the conciliator to meet or communicate with each of the parties separately, S.70 restrains the conciliator from disclosing to the other party, any information given to her by a party, subject to a specific condition that it be kept confidential. S.75 mandates that notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Unless otherwise agreed upon by the parties, a conciliator is barred by the 1996 Act from acting as an arbitrator or as a representative or counsel of a party, in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings, as also from being presented by the parties as a witness in any arbitral or judicial proceedings. (S.80)

S.81 of the 1996 Act provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute, that is the subject of the conciliation proceedings:

- Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- Admissions made by the other party in the course of the conciliation proceedings;
- Proposals made by the conciliator; or
- The fact that the other party had indicated her willingness to accept a proposal for settlement made by the conciliator.

S.73 of the 1996 Act mandates that the settlement agreement signed by the parties will be final and binding on the parties, and persons claiming under them respectively. The settlement agreement must be authenticated by the conciliator. S.74 confers on a settlement agreement the same status and effect, as if it is an arbitral award on agreed terms, on the substance of the dispute, rendered by an arbitral tribunal under S.30, that is, the status of a decree of a court.

A successful conciliation proceeding comes to an end only when the settlement agreement signed by the parties comes into existence. It is such an agreement, which has the status and effect of legal sanctity of an arbitral award under S.74 of the 1996 Act. (*Haresh Dayaram Thakur* v. *State of Maharashtra,* AIR 2000 SC 2281)

Conciliation under other Statutes

Several statutes contain provisions for settlement of disputes by conciliation, such as the Industrial Disputes Act, 1947, the Hindu Marriage Act, 1948, the Family Courts Act, 1984, and the Gram Nyayalayas Act, 2008. S. 20 of the 1987 Act deals with cognizance of cases by Lok Adalats, and mandates that every Lok Adalat shall, while determining any reference before it under that Act, act with utmost expedition to arrive at a compromise or settlement between the parties, and must be guided by the principles of justice, equity, fair play, and other legal principles. The 1987 Act also provides for pre-litigation conciliation and settlement, and lays down the procedure for reference of the matter to conciliation before the permanent Lok Adalat. The permanent Lok Adalat must assist the parties in their attempt to reach an amicable settlement of a dispute in an independent and impartial manner.

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 2: The Civil Procedure Code, 1908, and The Limitation Act, 1963

Introduction

Broadly speaking, laws are of two types: (a) Substantive law; and (b) Procedural law. While substantive law specifies the rights and liabilities of parties, procedural law sets out the practice, procedure, and machinery for the enforcement of such rights and liabilities. The Code of Civil Procedure, 1908 ("**the Code**"), deals with the procedural law to be followed by civil courts. There have been several amendments to the same, the noteworthy ones being the amendments of 1976, 1999, and 2002. The Code extends to the whole of India except the State of Jammu and Kashmir, and the State of Nagaland, and the tribal areas.

The Code can be divided into two parts: (a) the body of the Code, containing 158 Sections; and (b) the Schedule containing 51 Orders, and Rules therein. The Sections deal with the general principles of jurisdiction, and the Schedule lays down the method and manner in which such jurisdiction may be exercised. The Sections can be amended only by the Legislature, while the Orders and Rules can be amended by the High Courts. The Sections and the Rules must be read together and harmoniously constructed, and in the event there is any inconsistency, the Sections will prevail.

Jurisdiction and Limitation

Any person, who has a civil dispute with another person, has a right to institute a civil suit in a competent civil court, unless its cognizance is either expressly or impliedly barred by any law. (S.9 of the Code) (*See Vankamamidi Venkata Subba Rao* v. *Chatlapalli Seetharamaratna Ranganayakamma*, (1997) 5 SCC 460; *Dhruv Green Filed Ltd.* v. *Hukam Singh*, (2002) 6 SCC 416)

The person who files a case / commences a legal action against someone in a court is called a "plaintiff". Such action is commenced against a "defendant".

In order to commence a legal action, the plaintiff must have a "cause of action" against the defendant, which is the foundation of a suit and is essentially a bundle of essential facts, which is necessary for the plaintiff to prove before he can succeed. (*See Sadanandan Bhadran* v. *Madhavan Sunil Kumar*, (1998) 6 SCC 514; *Rajasthan High Court Advocates' Association* v. *Union of India*, (2001) 2 SCC 294; *Navinchandra N. Majithia* v. *State of Maharashtra*, (2000) 7 SCC 640)

The plaintiff must commence legal action against the defendant within a particular period of time, depending on the nature of the dispute. This is known as the "period of limitation". The Limitation Act, 1963 ("**the Limitation Act**"), lays down the law in respect of limitation of suits and other proceedings, and also specifies the periods of limitation for different types of proceedings that may be instituted in a court, including suits and appeals. (The Schedule of the Limitation Act) In respect of suits relating to accounts, contracts, movable property, declarations, decrees, and instruments, the period of limitation is usually three years. In respect of suits relating to immovable property, the period of limitation is usually twelve years. In the case of a suit being filed by a mortgagor: (a) to redeem or recover possession of immovable property that has been mortgaged, the period of limitation is thirty years; and (b) to recover surplus collection received by the mortgagee after the mortgage has been satisfied, the period of limitation is three years. In case of a suit being filed by a mortgagee for foreclosure, the period of limitation is thirty years. In respect of suits relating to tort, the period of limitation is usually one year or three years, depending on the tort committed. The period of limitation for any suit or application for which no period of limitation is provided in the Limitation Act, 1963, the period of limitation is three years from the date when the right to sue or apply accrues. (A.113 and A.137 of the Schedule to the Limitation Act; *State of Punjab* v. *Gurdev Singh*, (1991) 4 SCC 1)

If a legal proceeding is not instituted within the time period prescribed by the Limitation Act, or any other law, a court has the power to dismiss such proceeding on this ground alone even though the defendant may not have taken the plea of limitation as a defence. (S.3 of the Limitation Act, 1963; *V. M. Salgaocar and Bros.* v. *Board of Trustees of Port of Mormugao*, (2005) 4 SCC 613) However, a court has the power to condone the delay in the filing of a proceeding by a litigant if the litigant is able to satisfy the court that he had sufficient cause for not filing such proceeding within the time period fixed for filing the same. (S.5 of the Limitation Act, 1963; *Vedabai* v. *Shantaram Baburao Patil*, (2001) 9 SCC 106) In the case of a continuing breach of contract or in the case of a continuing tort, such as nuisance, a fresh period of limitation begins to run at every moment of time during which the breach or the tort, as the case may be, continues. (S.22 of the Limitation Act)

Before the plaintiff commences legal action in respect of a civil dispute, the plaintiff must determine which civil court in the country has the "jurisdiction", that is the authority / power to hear and decide, in respect of such dispute. (*See Official Trustee* v. *Sachindra Nath Chatterjee*, AIR 1969 SC 823) Broadly speaking, jurisdiction is of two types:

- *Territorial jurisdiction*: Every court has its own geographical territorial limit beyond which it cannot exercise its jurisdiction. Thus, a District Judge has to exercise jurisdiction within his district, and not outside it. The High Court in a particular State has jurisdiction over the territory of the said State, and not beyond it.
- *Pecuniary jurisdiction*: In terms of the Code, a court will have jurisdiction only over those matters, the amount or value of the subject-matter of which does not exceed the pecuniary limits of its jurisdiction. Thus, pecuniary jurisdiction means that different courts can entertain matters depending on the monetary value of such matters.

The following rules / principles regarding jurisdiction must be kept in mind:

- S.15 of the Code states that every suit shall be instituted in the court of the lowest grade competent to try it. Thus, the plaintiff must value his claim in the suit and accordingly, file it before the court having the pecuniary jurisdiction to try the same.
- S.16 of the Code, dealing with immovable property, states that subject to pecuniary jurisdiction, suits for: (a) the recovery of immovable property with or without rent or profits; (b) the partition of immovable property; (c) foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property; (d) the determination of any other right to interest in immovable property; (e) compensation for wrong to immovable property; and (f) the recovery of movable property actually under distraint or attachment must be filed in the court within the local limits of whose jurisdiction the property is located. The provisions of S.16 of the Code are not applicable to a High Court in the exercise of its original civil jurisdiction, that is, when suits can be instituted directly before a High Court. (S.120 of the Code)
- A suit regarding immovable property situated within the territorial jurisdiction of different courts may be instituted in any of such courts. (S.17 of the Code) The provisions of S.17 of the Code are not applicable to a High Court in the exercise of its original civil jurisdiction. (S.120 of the Code)
- A suit for compensation for wrongs done to the person or to movable property may be filed either in the court having territorial jurisdiction over the area where the wrong was committed or where the defendant resides or carries on business or personally works for gain. (S.19 of the Code)
  Illustration: X, residing in Chennai, beats Y in Jabalpur. Y may sue X either in Chennai or in Jabalpur.

  Illustration: X, residing in Chennai, publishes in Jabalpur statements defamatory of Y. Y may sue X either in Chennai or in Jabalpur.

- All other suits (not covered under the

aforesaid rules) may be filed in any of the following courts: (a) where the cause of action, wholly or partly arises; or (b) where the defendant resides, or carries on business or personally works for gain; or (c) where there are two or more defendants, where any of them resides or carries on business or personally works for gain, provided that either the leave of the court is obtained or the defendants who do not reside or carry on business or personally work for gain at that place acquiesce to such filing. (S.20 of the Code)

Illustration: A is a merchant in Bangalore. B carries on business in Chennai. B, through his agent in Bangalore, buys goods from A and requests A to deliver them to East Indian Railway Company. A may sue B for the price of goods either in Bangalore, where the cause of action has arisen, or in Chennai, where B carries on business.

Illustration: A resides at Darjeeling, B at Calcutta, and C at Mumbai. A, B and C being together at Allahabad, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Allahabad, where the cause of action arose. A may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court. It must be kept in mind that the provisions of S.20 of the Code are not applicable to a High Court in the exercise of its original civil jurisdiction. (S.120 of the Code)

- As a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try a suit. (*See Bahrein Petroleum Co. Ltd.* v. *P. J. Pappu*, AIR 1966 SC 634) However, the same may be subject to the terms of a valid contract between the parties. Where two or more courts have jurisdiction consequent upon a part of the cause of action arising therewith, if the parties stipulate in the contract to vest jurisdiction in one such court to try the disputes arising between themselves and if the contract is unambiguous, explicit and clear, and is not void or opposed to S.23 of the Indian Contract Act, 1872, then a suit would lie only in the court agreed to by the parties and the other court/s will have no jurisdiction even though the cause of action arose partly within the jurisdiction of the other court/s. (*See Angile Insulations* v. *Davy Ashmore India Ltd.*, (1995) 4 SCC 153)

The Code precludes a plaintiff from filing a suit in the following cases:

- Where a proposed suit is barred by *res judicata* (S.11 of the Code);
- Where a decree is sought to be challenged in a proposed suit on an objection as to territorial jurisdiction of the court which passed the decree (S.21-A of the Code);
- Where questions in the proposed suit relate to execution, discharge, or satisfaction of a decree (S. 47(1) of the Code; *Umasankar* v. *Sarbajeet*, (1996) 2 SCC 371);
- Where an order is made determining an application for compensation for arrest, attachment, or temporary injunction, a suit for compensation cannot be filed (S.95(2) of the Code);
- Where restitution or other relief can be claimed by filing an application under S. 144(1), a separate suit cannot be instituted for obtaining restitution or such other relief (S.144(2) of the Code);
- Where there has been an omission to sue or there has been relinquishment in respect of part of a claim by a plaintiff without the leave of the court, a separate suit cannot be instituted for such part of the claim (Order II, Rule 2 of the Code);
- Where a suit is wholly or partly dismissed because of the plaintiff's non-appearance, the plaintiff cannot institute a new suit later on the same cause of action (Order IX, Rule 9 of the Code);
- Where a suit is dismissed for non-compliance with an order of discovery, the plaintiff cannot institute a new suit on the same cause of action (Order XI, Rule 21(2) of the Code);
- Where a suit has abated, no fresh suit can be filed on the same cause of action (Order XXII, Rule 9 of the Code);

- Where a suit or part of a claim has been abandoned by a plaintiff, he cannot institute a fresh suit in respect of such subject-matter or such part of the claim (Order XXIII, Rule 1(1) and (4) of the Code);
- Where a suit or part of a claim has been withdrawn by a plaintiff without the leave of the court (Order XXIII, Rule 1(3) of the Code); and
- Where a compromise decree is sought to be challenged on the ground that the compromise was not lawful (Order XXIII, Rule 3-A of the Code).

Objections regarding the jurisdiction of a court must typically be taken by the defendant before the court of the first instance and at the earliest possible opportunity, and in cases where issues are settled, at or before the settlement of the issues. (S.21 of the Code)

Res Sub Judice *and* Res Judicata

The principles of "*res sub judice*" and "*res judicata*" must be borne in mind before one institutes a civil suit. S.10 of the Code, which deals with the principle of *res sub judice*, provides that no court shall proceed with the trial of a suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties before another court of competent jurisdiction. The object of this provision is to prevent courts of concurrent jurisdiction (in some cases where more than one court may have the jurisdiction to entertain a dispute) from simultaneously entertaining two parallel litigations in respect of the same dispute. S.11 of the Code, which deals with the principle of *res judicata*, provides that once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh. (*See National Institute of Mental Health & Neuro Sciences* v. *C. Parameshwara*, (2005) 2 SCC 256) The aim of this principle is to give finality to judicial decisions and a person should not be vexed twice in respect of the same matter. (*See Sri Bhavanarayanaswamivari Temple* v. *Vadapalli Venkata Bhavanarayanacharyulu*, (1970) 1 SCC 673)

Illustration: A sues B seeking compensation for breach of contract. The suit is dismissed. A cannot file a new suit against B claiming compensation in respect of breach of the same contract, which was the subject-matter of the earlier suit. The following conditions must be satisfied to apply the principles of *res sub judice*:

- There must be two suits, one previously instituted and the other subsequently instituted;
- The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit;
- Both the suits must be between the same parties or their representatives;
- The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in India or in any court beyond the limits of India established or continued by the Central Government or before the Supreme Court;
- The court in which the previous suit was instituted must have had the jurisdiction to entertain the same; and
- The parties to the dispute must be litigating under the same title in both the suits.

The following conditions must be satisfied to apply the principles of *res judicata*:

- The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit;
- The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
- The parties must have been litigating under the same title in the former suit;
- The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and
- The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court

in the former suit.

Foreign Judgments

Ss.13 and 14 of the Code constitute the principle of *res judicata* in respect of foreign judgments, that is, adjudication by a foreign court in respect of a dispute before it. Thus, a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as *res judicata* between the parties thereto except where:

- It has not been pronounced by a court of competent jurisdiction;
- It has not been given on the merits of the case;
- It appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- The proceedings in which the judgment was obtained are opposed to natural justice;
- It has been obtained by fraud; and
- It sustains a claim founded on a breach of any law in force in India.

Suits

"Suit" means a civil proceeding instituted by the presentation of a plaint in duplicate to the court. (S.26 and Order IV, Rule 1 of the Code) A "plaint" is a statement of claim or a document, by the presentation of which a suit is instituted. In every plaint, facts shall be proved by "affidavit", which is essentially a declaration of facts drawn up in the first person, reduced to writing, and affirmed or sworn before an officer having the authority to administer oaths. Swearing of a false affidavit is an offence of perjury punishable under S. 191 of the Indian Penal Code, 1860. A litigant may represent himself before a court or be represented by a recognised agent or pleader. (Order IX, Rule 1 of the Code) No pleader shall act for any person in court unless he has been appointed for such purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment. Every such appointment must be filed in court.

Some Special Suits

- *Suits by or against the Government or public officers in their official capacity*: S.80 of the Code states that no suit can be instituted against the Government or against public officers in their official capacity unless two months has expired from the date of serving a notice on the Government or such public officer, stating the cause of action, the name, description and place of residence of the plaintiff, and the relief which he claims. S.81 of the Code states that in a suit instituted against a public officer in respect of any act purportedly done by him in his official capacity, such officer shall not be liable to be arrested nor shall his property be attached otherwise than in execution of the decree, and where the court is satisfied that such officer cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person. Order XXVII of the Code sets out the procedure to be followed in respect of suits by or against the Government or public officers in their official capacity.
- *Suits by alien enemies*: Every person residing in a country, which is at war with India and carrying on business in that country without a licence on that behalf granted by the Central Government, shall be deemed to be an "alien enemy". Alien enemies residing in India, with the Central Government's permission, and alien friends, may sue in a competent court, as if they were citizens of India. However, alien enemies residing in India without such permission cannot sue in any such court. (S.83 of the Code)
- *Suit by a foreign State*: A foreign State may sue in any court provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer in such State in his public capacity. (S.84 of the Code)
- *Suits against foreign rulers, Ambassadors, and Envoys*: S.86 of the Code states that no suit shall be instituted against a foreign State, a

Ruler of a foreign State, or an Ambassador or Envoy of a foreign State without the consent of the Central Government. Such consent will be given provided the conditions laid down are satisfied. Similarly, no decree can be executed against the property of any foreign State, or an Ambassador or Envoy of a foreign State, without the consent of the Central Government. Similarly, a Ruler of a foreign State, an Ambassador, an Envoy, a High Commissioner of a Commonwealth country, or any other member of his staff, as the Central Government may specify, cannot be arrested under the Code.

- *Suits by or against minors and persons of unsound mind*: A suit by a minor, that is, a person who has not attained the age of 18 years and for whose person or property a guardian or next friend has been appointed by a court, or whose property is under the superintendence of a Court of Wards (the age of majority is 21 years in terms of S.3 of the Majority Act, 1875), must be instituted in his name through his guardian or next friend. (Order XXXII, Rule 1 of the Code) In a suit instituted by a minor through his next friend, a court may order such next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant. (Order XXXII, Rule 2A of the Code) When a suit is instituted against a minor, the court must appoint a guardian *ad litem* to defend the suit. (Order XXXII, Rule 3 of the Code) Any person who is of sound mind and has attained majority may act as a next friend of a minor or as his guardian for the suit provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff. (Order XXXII, Rule 4 of the Code) When a minor plaintiff attains majority, he may adopt any of the courses specified in Order XXXII, Rules 12 and 13 of the Code. The provisions of Order XXXII of the Code (except Rule 2A) also apply to persons of unsound mind. (Order XXXII, Rule 15 of the Code)
- *Interpleader suit*: Where two or more persons claim adversely to one another the same debt, sum of money, or other property, movable or immovable, from another person, who claims no interest therein other than for charges and costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit or interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and for obtaining indemnity for himself. (S.88) Order XXXV of the Code sets out the procedure to be followed for interpleader suits. In addition to other statements in the plaint, the plaint must also state that: (a) the plaintiff claims no interest in the subject-matter in dispute other than the charges and costs; (b) the claims have been made by the defendants severally; and (c) there is no collusion between the plaintiff and any of the defendants. (Order XXXV, Rule 1 of the Code) Order XXXV, Rule 5 of the Code states that nothing in Order XXXV of the Code shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustration: A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader suit against A and C.

Illustration: A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A later alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader suit against A and C.

- *Suits by indigent persons*: A person is an indigent person: (a) if he is not possessed of sufficient means to enable him to pay the prescribed fees for filing a suit; or (b) where no such fee is prescribed, when he is not entitled to property worth one thousand rupees. (Order XXXII, Rule 1 of the Code)

Order XXXIII of the Code entitles indigent persons to file suits with the permission of the court without paying the prescribed court fees.

- *Mortgage suits*: Order XXXIV of the Code sets out the procedure with respect to suits relating to mortgages of immovable property. Order XXXIV, Rule 1 of the Code, *inter alia*, states that all persons having an interest either in the mortgage-security or in the right of redemption, must be joined as parties to any suit relating to the mortgage.
- *Summary suits*: If the plaintiff is of the opinion that a defendant has no defence in a suit to be filed by him, he may file a suit under Order XXXVII of the Code for summary disposal of the suit. The word "summary" implies a short and quick procedure instead of, or, as an alternative to, the more elaborate procedure ordinarily adopted or prescribed for deciding a case. The proceedings before a court, tribunal, or an authority are called summary proceedings if it is not required to follow the regular formal procedure but is authorised to follow a short and quick procedure for expeditious disposal. Order XXXVII of the Code applies to the following classes of suits: (a) suits upon bills of exchange, *hundies*, and promissory notes; and (b) suits in which the plaintiff seeks to recover only a debt or liquidated demand in money payable by the defendant, with or without interest, arising: (i) on a written contract; or (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (iii) on a guarantee, where the claim against the principal is in respect of a debt or of liquidated demand only. (Order XXXVII, Rule 1 of the Code) The provisions of Order XXXVII of the Code do not alter the nature of the suit or jurisdiction of courts. In a summary suit, a defendant is not entitled to defend the suit, as a matter of right. The defendant must apply to the court for leave to defend within a period of ten days, and such leave will be granted by the court only if the defendant discloses such facts as to satisfy the court that he has a substantial defence, that is the defendant raises a triable issue to the plaintiff's suit, and such defence is not frivolous or vexatious. (A.118 of the Schedule to the Limitation Act, 1963; Order XXXVII, Rule 3 of the Code; *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corporation*, (1976) 4 SCC 687)
- *Public trusts*: S.92 of the Code, *inter alia*, provides that a suit may be filed in respect of breach of trust created for public purposes of a charitable or religious nature and the same may be filed by the Advocate General or two or more persons having an interest in the trust with the leave of the court. The reliefs, which may be claimed in such a suit, are also set out. (*See Sugra Bibi* v. *Haji Kummu*, AIR 1969 SC 884; *Vidyodaya Trust* v. *Mohan Prasad R*, (2008) 4 SCC 115)
- *Special case*: Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of a court provided that, upon a finding of the court with respect to such question: (a) a sum of money fixed by the parties or to be determined by the court shall be paid by one of the parties to the other; (b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other; or (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement. (S.90 and Order XXXVI of the Code)

*Return of plain*t: Where at any stage of the suit, the court finds that it has no jurisdiction, either territorial or pecuniary, or with regard to the subject-matter of the suit, it will return the plaint to be presented to the proper court in which the suit ought to have been filed. (Order VII, Rule 10 of the Code)

When a plaintiff files a suit, the defendant must be informed about it. Such intimation is called a "summons". (Order V, Rule 1 of the Code) It is a document issued from an office of a court, calling upon the person to whom it is directed, to attend before a judge or an officer of the court for a certain purpose. A "*caveat*" is an official request that a court should not take a particular action without

issuing notice to the party lodging the *caveat* and without giving an opportunity of hearing to such party. *Caveats* are typically filed by persons when they are expecting some other person to institute some legal proceeding against her in court. A notice of the *caveat* must be served by the person filing the caveat, that is, the *caveator,* on the person who the *caveator* expects will take some legal action against the *caveator*. If a proceeding is instituted after the filing of the *caveat*, the court must inform and serve a notice of such proceeding on the *caveator*. A *caveat* is valid for 90 days. (S.148A of the Code)

A "written statement" is a reply of the defendant to the plaint filed by a plaintiff. (Order VIII, Rule 1 of the Code) It is the pleading of a defendant dealing with every material fact of a plaint. It may also contain new facts in favour of the defendant or legal objections against the plaintiff's claim. The same must be filed within thirty days from the date of service of summons (to be accompanied by a copy of the plaint) (Order V, Rule 2 of the Code) on that defendant. The time to file the written statement may be extended by the court but the same shall not be more than ninety days from the date of service of summons. (Order V, Rule 1 of the Code and Order VIII, Rule 1 of the Code)

Joinder of Plaintiffs and Defendants

Order I of the Code deals with parties to a suit. All persons may be joined in one suit as plaintiffs provided that the right to relief alleged to exist in each plaintiff arises out of the same act or transaction and the case is of such a character that, if such person filed separate suits, common questions of law or fact would arise. (Order I, Rule 1 of the Code)

Illustration: X enters into an agreement with Y and Z to supply ball-bearings within a specified date. Subsequently, X fails to supply the ball-bearings. Consequently, Y and Z suffer huge losses in their businesses. Y and Z have a right to claim compensation from X. This right arises from the same agreement, and common questions of law and fact would arise. Thus, Y and Z may file a suit against X jointly for claiming compensation.) Similarly, all persons may be joined in one suit as defendants provided that the right to relief alleged to exist against them arises out of the same act or transaction and the case is of such a character that, if separate suits were filed against such persons, common questions of law or fact would arise. (Order I, Rule 3 of the Code)

Illustration: Z, a passenger in a train is severely injured when a truck collides with it at a level crossing at a very high speed. Z may join, *inter alia*, the train driver and the truck driver, as defendants in one suit for damages for the injuries suffered by him on account of their negligence, since common questions of law and fact would arise if separate suits were filed against them by Z.

Necessary and Proper Parties

A suit must be filed against all "necessary parties", that is, those whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom, no effective decree can be passed. Another frequently-used term is "proper party", that is a party in whose absence an effective order can be passed, but whose presence is required for a complete and final decision on the questions involved in the suit. (*See* *Ramesh Hirachand Kundanmal* v. *Municipal Corporation of Greater Bombay*, (1992) 2 SCC 524) Where a person, who is a necessary or a proper party to a suit, has not been joined as a party to the suit, it is a case of non-joinder. If a person, who is not a necessary or a proper party, has been made a party to the suit, it is a case of misjoinder. (Order I, Rule 9 of the Code) A suit cannot be dismissed only on the ground of non-joinder or misjoinder of parties, but this rule is not applicable in case of non-joinder of a necessary party. All objections on the ground of non-joinder or misjoinder of parties must be taken at the earliest opportunity, otherwise such objection will be deemed to have been waived. (Order I, Rule 13 of the Code) If the defendant takes such an objection at the earliest stage and the plaintiff chooses not to add the necessary party, the plaintiff cannot be subsequently

allowed to cure such defect in appeal.

Representative Suit

Order I, Rule 8 of the Code states that when there are a number of persons similarly interested in a suit, one or more of them can, with the permission of the court or upon a direction from the court, sue or be sued on behalf of themselves and others. The plaintiff, in a representative suit, need not obtain the advance consent of the persons whom he seeks to represent.

Framing of Suit

Order II, Rule 2 of the Code provides that every suit must include the whole of the claim, which the plaintiff is entitled to make in respect of his cause of action against the defendant. If the plaintiff omits to sue for or intentionally relinquishes any part of his claim, she shall subsequently not be allowed to sue in respect of the part so omitted or relinquished unless she had prayed for the leave of the court to do so at the time of filing the suit.

Joinder of Causes of Action

Order II, Rules 3 and 6 of the Code provide that a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit. However, if it appears to the court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the court may order separate trials.

Pleadings

"Pleading" means plaint or written statement. (Order VI, Rule 1 of the Code) Every pleading must contain only a statement in a concise form of the material facts on which the party pleading relies on for his claim or defence, but not the evidence by which they are to be proved. (Order VI, Rule 2 of the Code) The Code contains various forms of pleadings in Appendix A, which must be used by litigants. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which further particulars may be necessary, particulars (with dates and items, if necessary) must be stated in the pleading. (Order VI, Rule 4 of the Code) No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleading of the party pleading the same. Every pleading must be signed by the party and his pleader, if any. (Order VI, Rule 14 of the Code)

Verification (Order VI, Rule 15 of the Code): Every pleading must be verified at the foot by the parties or one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts and circumstances of the case. The person verifying must specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. The verification must be signed by the person making it and must state the date on which and the place at which it was verified. The person verifying the pleading must also furnish an affidavit in support of his pleading.

Amendment of pleadings (Order VI, Rules 17 and 18 of the Code): The court may at any stage of the proceedings allow the plaintiff or the defendant to alter or amend their pleadings in such manner and on such terms as may be just, and all such amendments must be made as may be necessary for the purpose of determining the real questions in controversy between the parties. However, no application for amendment will be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. (*See Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91) If a party, who has obtained an order for leave to amend, does not amend accordingly

within the time limited for the purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time or of such fourteen days, as the case may be, unless the time is extended by the court. It is settled law that the grant of application for amendment shall be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing a new cause of action and intends to prejudice the other party; and (iii) when allowing the amendment application defeats the law of limitation. (*See Rajkumar Gurawara* v. *S. K. Sarwagi and Co. (P.) Ltd.*, (2008) 14 SCC 364)

Plaint

Order VII, Rule 1 of the Code provides that a plaint shall contain the following particulars:

- The name of the court in which the suit is brought;
- The name, description, and place of residence of the plaintiff;
- The name, description, and place of residence of the defendant, so far as they can be ascertained;
- Where the plaintiff or the defendant is a minor or person of unsound mind, a statement to that effect;
- The facts constituting the cause of action and when it arose;
- The facts showing that the court has jurisdiction;
- The interest and liability of the defendant in the subject-matter of the suit;
- The relief which the plaintiff claims;
- Where the plaintiff seeks the recovery of money, the plaint must state the precise amount claimed (Order VII, Rule 2 of the Code);
- Where the plaintiff sues for *mesne* profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value cannot, after the exercise of reasonable diligence, estimate, the plaint must state the approximate amount or value sued for (Order VII, Rule 2 of the Code);
- Where the subject-matter of the suit is immovable property, the plaint must contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint must specify such boundaries or numbers (Order VII, Rule 3 of the Code);
- Where the plaintiff files a suit in a representative capacity, the facts showing that the plaintiff has an actual existing interest in the subject-matter and that he has taken steps that may be necessary to enable him to file such suit (Order VII, Rule 4 of the Code);
- Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished;
- A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits; and
- Where the suit is time-barred, the ground upon which the exemption from the law of limitation is claimed. (Order VII, Rule 6 of the Code)

Rejection of plaint (Order VII, Rule 11 of the Code): A plaint may be rejected in the following cases:

- Where it does not disclose a cause of action;
- Where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time period to be fixed by the court, fails to do so;
- Where the relief claimed is properly valued but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so;
- Where the suit appears from the statements in the plaint to be barred by any law;
- Where it is not filed in duplicate; and
- Where the plaintiff, despite an order of the court, fails to present copies of the plaint

on plain paper to all the defendants along with the requisite fee for service of summons on the defendants within seven days from the passing of such an order.

Written Statement

The defendant must raise by his pleading, all matters which show the suit not to be maintainable, or that the transaction in question is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality. The defendant must also specifically deal with allegation of fact which he does not admit to be the truth, except damages. (Order VIII, Rule 2 of the Code)

Set-off: In a suit for recovery of money, where there are ascertainable mutual debts between the plaintiff and the defendant, one debt may be settled against the other. The particulars of set-off must be stated in the written statement. (Order VIII, Rule 6 of the Code) *Illustration*: A sues B on a bill of exchange for Rs.500/-. B holds a judgment against A for Rs. 1,000. The two claims, both being definite, pecuniary demands, may be set-off. *Illustration*: A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount, not being ascertained, cannot be set-off.

Illustration: A and B sue C for Rs.1,000/-. C cannot set-off a debt due to him alone by A.

Illustration: A sues B and C for Rs.1,000/-. B cannot set-off a debt due to him alone by A.

Counter-claim (Order VIII, Rule 6A of the Code): This is a claim made by a defendant in a suit against the plaintiff. It is a claim independent of, and separable from, the plaintiff's claim, which can be enforced by a cross-action. It is a cause of action in favour of the defendant against the plaintiff. The counter-claim must not exceed the pecuniary limits of the jurisdiction of the court. The same can be set up in a written statement filed by a defendant. The counter-claim shall be treated as a plaint and will be governed by the rules applicable to plaints. The plaintiff shall have the liberty to file a written statement in answer to the counter-claim of the defendant within such time period as may be fixed by the court.

Documents relied on by the plaintiff or the defendant (Order VII, Rule 14 and Order VIII, Rule 1-A of the Code): Where a plaintiff / defendant sues / bases his defence upon a document or relies upon a document in his possession or power, in support of his claim or defence or claim for set-off or counter-claim, the plaintiff / defendant must enter such document in a list, and must produce it in court when the plaint / written statement is presented and must, at the same time, deliver the document and a copy thereof, to be filed with the plaint / written statement. Where any such document is not in the possession or power of the plaintiff / defendant, the plaintiff / defendant must, wherever possible, state in whose possession or power it is. A document which ought to be produced in court when the plaint / written statement is presented, or to be entered in the list to be added or annexed to the plaint / written statement but is not produced or entered accordingly, will not, without the leave of the court, be received in evidence on the plaintiff's / defendant's behalf at the hearing of the suit. However, the foregoing will not apply to documents produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.

Appearance of Parties (Order IX of the Code)

After a suit has been filed by a plaintiff and the summons in respect of the same has been served on the defendant, the next stage in the court proceedings is that of the appearance of the parties before the court. The following procedural rules / principles must be kept in mind:

- The parties to the suit must attend the

court in person or through their pleaders on the date fixed in the summons for the defendant to appear (Order IX, Rule 1 of the Code);

- If a plaintiff or a defendant, who has been ordered to appear in person, does not appear in person or show sufficient cause for non-appearance, the court may dismiss the suit, if he is the plaintiff, or proceed *ex parte* if he is the defendant;
- If an *ex parte* decree is passed against the defendant, the defendant can: (a) apply to the court for setting aside the same, within thirty days from the date of such ex parte decree, by showing sufficient cause as to why he was absent (Order IX, Rule 13 of the Code); (b) file an appeal against the same; (c) apply for review; and (d) file a suit on the ground of fraud.
- At the first hearing of the suit, the court must ascertain whether the allegations in the pleadings are admitted or denied, and record the same. (Order X, Rule 1 of the Code)
- Thereafter, the court must frame and record the issues, either of fact or of law (Order XIV, Rule 1 of the Code), arising in the suit in respect of propositions of law or fact alleged by one party and denied by the other
- Where issues of both law and fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the court or relates to a bar to the suit created by any law.

Discovery, Inspection, and Production of Documents (Orders XI and XIII of the Code)

After the pleadings have been filed by the parties to the suit, it may appear to any party that the nature of his opponent's case is not sufficiently disclosed in his pleadings. All the parties to a suit are entitled to know, prior to the trial, all material facts constituting his opponent's case and all documents in his possession, which may have a bearing on the case. "Discovery" is to require the opposite party to disclose what facts and documents he has in his possession or power. This may be done by putting questions called "interrogatories" to the concerned party. A party may object to answer an interrogatory if the same is irrelevant, immaterial, scandalous, *mala fide*, or privileged. Discovery may also be done through discovery of documents. Upon an application for discovery by a party, the court may pass an order for discovery making the opposite party liable to make an affidavit of documents, and he may be required to produce the same for inspection by his opponent. Where any party fails to comply with any order to answer interrogatories or for discovery or production of documents, the suit may be dismissed if such party is the plaintiff, and if he is the defendant, his defence will be struck off.

Judgment on Admission

Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on a party's application or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions, and a decree shall be drawn up in accordance with the judgment. (Order XII, Rule 6 of the Code)

Interim Orders

After a suit has been filed and before it is finally disposed of, a court may pass interim or interlocutory orders as may seem just and convenient in order, *inter alia*, to protect the rights of the parties till the final disposal of the suit. An "order" is basically an adjudication of a court, which is not a "decree" (explained later). An order may be passed in a suit, in a petition, or in an application. All orders are not appealable.

Interim orders may be passed in the following manner and/or in the following circumstances:

- *Security for costs* (Order XXV of the Code): The court may, at any stage of the suit, order the plaintiff to give security for the

payment of the costs of the defendant. It may be noted that the court must pass such an order where the plaintiff resides outside India and such plaintiff does not have sufficient immovable property within India other than the property in the suit.

- *Commissions* (Ss.75 – 78, and Order XXVI of the Code): The court has the power to issue commissions, either on an application by a party to the suit or of its own motion, for the following purposes: (a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; (d) to make a partition; (e) to hold a scientific, technical or expert investigation; (f) to conduct sale of property which is subject to speedy and natural decay, and which is in the custody of the court pending the determination of the suit; or (g) to perform any ministerial act. A commission for the examination of any person may be issued to any court (not being a High Court) situated in a State other than the State in which the court of issue is situated and having jurisdiction in the place in which the person to be examined resides. The Commissioner may: (a) summon and procure the attendance of parties and their witnesses, and examine them; (b) call for and examine documents; (c) enter into land or any building mentioned in the court order; and (d) proceed *ex parte* (in the absence of any party), if the party does not appear before him in spite of the court order.
- *Arrest before judgment* (Order XXXVIII of the Code): Where at any stage of the suit, other than a suit of the nature referred to in S.16 of the Code (being a suit for land or immovable property), the court is satisfied, either by affidavit or otherwise: (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him, has absconded or left, or is about to abscond or leave, the local limits of the jurisdiction of the court; or (b) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance. However, the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant, any sum specified in the warrant as sufficient to satisfy the plaintiff's claim.
- *Attachment before judgment* (Order XXXVIII of the Code): Where at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him: (a) is about to dispose of the whole or any part of his property; or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, of such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause as to why he should not furnish security. The plaintiff must, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof. If the defendant fails to show cause as to why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached. The court cannot order attachment or production of any agricultural produce in the possession of an agriculturist. The object of order XXXVIII, Rule 5 of the Code is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. However, before exercising the power under the said Rule, the court should be satisfied that there is a

reasonable chance of a decree being passed in the suit against the defendant. Further, the plaintiff needs to establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. The power of the court under Order XXXVIII, Rule 5 of the Code is a drastic and extraordinary power. Such power should not be used mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order XXXVIII, Rule 5 of the Code is not to convert an unsecured debt into a secured debt. (*See Raman Tech. & Process Engg. Co.* v. *Solanki Traders*, (2008) 2 SCC 302)

- *Temporary injunctions* (Order XXXIX of the Code): An order of injunction is an order of court whereby a party (plaintiff or defendant) is directed to do (mandatory injunction), or prohibited to do (prohibitory injunction), any particular act. Injunctions are either temporary or permanent. An order of temporary injunction may be passed by a court: (a) where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; (b) where a defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors; (c) where a defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit; (d) where a defendant is about to commit a breach of contract, or injury of any other kind; or (e) where a court is of the opinion that the interest of justice so requires. (Order XXXIX, Rules 1 and 2 of the Code) Before passing an order of injunction against a party, the court must be satisfied of the following: (a) that the party claiming such an order has a *prima facie* case in his favour, that is, there is a *bona fide* dispute; (b) that there is a strong case for trial which needs investigation and a decision on merits, and the facts placed before the court demonstrate that there is a probability that such party is entitled to the relief claimed by him; (c) that irreparable injury will be caused to the party claiming such an order if such order is not passed; and (d) lastly, the balance of convenience must be in favour of the person claiming such an order, that is, the court must be satisfied that the contrasting difficulty or inconvenience that is likely to be caused to the person claiming such an order by refusing to pass an order of injunction will be more than that which is likely to be caused to the opposite party by granting it. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. In order to protect the defendant, the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial. (*See Gujarat Bottling Co. Ltd. v. Coca Cola Co.*, (1995) 5 SCC 545; *Kashi Math Samsthan v. Shrimad Sudhindra Thirtha Swamy*, (2010) 1 SCC 689) Before granting an injunction, a court must give notice to the opposite party unless it is satisfied that the object of granting the injunction would be defeated by the delay in giving notice. (Order XXXIX, Rule 3 of the Code) In the case of disobedience of an injunction granted by a court under Order XXXIX, Rule 1 or 2 of the Code, the court may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in a civil prison for a term not exceeding three months. (Order XXXIX, Rule 2A of the Code)
- *Interlocutory orders* (Order XXXIX of the Code): An interlocutory order is also a temporary order. A court has the power to order sale of any movable property, which is the subject-matter of the suit or attached before judgment in such suit, which is perishable, or for any just and sufficient

cause, desirable to be sold immediately. A court can also order for detention, preservation, or inspection of any property, which is the subject-matter of such suit, or as to which any question may arise therein.

- *Receiver* (Order XL of the Code): A receiver is basically an independent person appointed by a court to receive and preserve the property or fund in litigation pendent elite, that is, during the pendency of the case, or for any other purpose as deemed to be just and convenient by a court, when it does not seem reasonable to the court that either party should hold it. A court may confer on a receiver any of the following powers: (a) to institute and defend suits; (b) to realise, manage, protect, preserve, and improve the property in question; (c) to collect, apply, and dispose of the rents and profits; (d) to execute documents; and (e) such other powers as it thinks fit.

Trial

After the pleadings have been filed by the parties and issues have been framed and recorded, the parties to a suit are in a position to ascertain what facts and documents are required to be proved by them. For this purpose, any party to the suit may apply to the court for summons to persons whom he proposes to call as his witnesses. Ss.30 to 32 and Orders XVI to XVIII of the Code deal with the summoning, attendance, and examination of witnesses. The provisions of the Code in respect of issue of a summons to give evidence apply to a summons to produce documents or other material objects.

Usually, the evidence of witnesses of the parties is recorded orally in an open court in the presence of and under the personal direction and superintendence of the judge. The court may record such remarks as it thinks material in respect of the demeanour of any witness, while under examination. (Order XVIII, Rule 12 of the Code) The court may, however, direct that the witnesses' statements be recorded on commission under Order XXVI, Rule 4A of the Code. (Order XVIII, Rule 19 of the Code)

The right to begin emanates from the rules of evidence. Thus, the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either on point of law (for instance, lack of the court's jurisdiction, limitation, or res judicata), or on some additional facts alleged by him, the plaintiff is not entitled to any relief. In such a situation, the defendant has the right to begin. (Order XVIII, Rule 1 of the Code) Therefore, on the day fixed for hearing of the suit, the party having the right to begin must state his case and produce his evidence in support of the issues which he is bound to prove. Thereafter, the other party must state his case and produce his evidence (if any) and may then address the court generally on the whole case. The party beginning may then reply generally on the whole case. Parties may also file written arguments in support of their case before the court, and such written arguments must be furnished to the other side. (Order XVIII, Rule 2 of the Code)

Adjournments (Order XVII of the Code)

The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a party during hearing of the suit. (Order XVII, Rule 1 of the Code)

Where any party to a suit to whom time has been granted fails to produce his evidence or perform any other act necessary for the further progress of the suit, for which time had been allowed, a court may, in spite of such default: (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties are, or if any of them is, absent, fix a date for further hearing of the suit and order costs to be paid by the errant party, as it deems fit. (Order XVII, Rule 3 of the Code)

Abatement

- *Death of a party*: The death of a plaintiff or defendant shall not cause the suit to abate,

that is, come to an end, if the right to sue survives. (Order XXII, Rule 1 of the Code) The detailed procedure to be followed when any party to the suit dies is laid down in Order XXII of the Code. If an application is not made within the time prescribed under the law to substitute the legal representatives of the plaintiff or defendant, the suit shall abate so far as the deceased plaintiff is concerned or as against the deceased defendant. Where a suit abates under Order XXII of the Code, no fresh suit can be filed on the same cause of action. (Order XXII, Rule 9 of the Code) Wherever a pleader appearing for a party to the suit comes to know of the death of that party, she must inform the court about it, and the court shall consequently give notice of such death to the other party. (Order XXII, Rule 10A of the Code)

- *Marriage of a party*: The marriage of a female plaintiff or defendant will not cause the suit to abate. (Order XXII, Rule 7 of the Code)
- *Insolvency of a party*: The insolvency of a plaintiff shall not cause the suit, and can be continued by his Assignee or Receiver for the benefit of his creditors. But, if the Assignee or Receiver declines to continue the suit, or to give security for costs, as ordered by the court, the court may, on an application filed by the defendant, dismiss the suit on the ground of the plaintiff's insolvency. (Order XXII, Rule 8 of the Code) The defendant's insolvency may result in a court staying the suit or proceeding pending against her.

Conclusion of Suit

A suit typically concludes in any of the following manners:

- *Withdrawal of the suit* (Order XXIII, Rule 1 of the Code): At any time after the institution of a suit, the plaintiff may abandon his suit or abandon part of his claim against all or any of the defendants without the court's leave / permission, and the plaintiff will thereafter be precluded from filing a fresh suit in respect of the same subject-matter. If a court is satisfied that a suit must fail by reason of some formal defect (for example, misjoinder of parties, non-payment of proper court fees, failure to disclose a cause of action, or absence of territorial jurisdiction of the court), or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit in respect of the subject-matter of the said suit or part of the claim in the said suit, the court may grant the plaintiff permission to withdraw from the suit or part of the claim with the liberty to institute a fresh suit in respect of the subject-matter of the said suit or part of the claim.
- *Compromise of the suit* (Order XXIII, Rule 3 of the Code): If it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or if the defendant satisfied the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall record such agreement, compromise, or satisfaction, and accordingly pass a decree (explained later).
- *A judgment*: It is the statement given by a judge of the grounds of a decree or order. After the hearing has been completed, a court must pronounce the judgment in open court, either at once or on some future day, after giving due notice to the parties or their pleaders. (S.33 and Order XX, Rule 1 of the Code) Typically, a judgment should contain a concise statement of the case, the points for determination, the decision in respect thereof, and the reasons for such decision. (Order XX, Rule 4 of the Code) A court must pronounce its judgment in respect of all the issues that had been framed by it.
- *A decree*: A formal expression of adjudication conclusively determines the rights of the parties to the suit with regard to all / any of the matters in dispute in the suit. A decree must be passed in the suit itself after the hearing is concluded and every decree is appealable, unless otherwise expressly provided. A decree should be drawn up within 15 days from the date of the judgment, and it must agree with the same. If the decree is not drawn up, an appeal can be filed without filing a

copy of the decree. (Order XX, Rule 6A of the Code)

Types of decrees: A decree may be preliminary or final. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. A decree is final when the adjudication completely disposes of the suit. A decree could also be partly preliminary and partly final. For example in a suit for possession of immovable property with *mesne* profits, that is, those profits which a person in wrongful possession of property received or might have received had he exercised due diligence, together with interest on such profits, a court may decree possession of the property and direct an enquiry into the *mesne* profits. The former part of the decree is final, while the latter part is preliminary because the final decree for *mesne* profits can be drawn only after the enquiry, and the amount due is ascertained.

Contents of a decree: The decree shall, *inter alia*, contain the number of the suit, the names and descriptions of the parties, their registered addresses, the particulars of the claim, the relief granted or other determination of the suit, and the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid. (Order XX, Rule 6 of the Code) Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree must specify such boundaries or numbers. (Order XX, Rule 9 of the Code) Where the suit is for movable property and the decree is for the delivery of such property, the decree must also state the amount of money to be paid as an alternative if delivery cannot be had. (Order XX, Rule 10 of the Code)

- *Correction of a judgment / decree / order*: S.152 of the Code provides that clerical or arithmetical mistakes in judgments, decrees, or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.
- *Settlement of disputes outside the court*: S.89 of the Code states that where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations. After receiving the observations of the parties, the court may reformulate the terms of a possible settlement and may refer the same for arbitration, conciliation, mediation, or judicial settlement, including settlement through Lok Adalats.
- *Inherent powers of a court*: S.151 of the Code gives a court the power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, and the Code shall not limit such power in any manner whatsoever.
- *Certified copies of the judgment and decree*: Must be furnished to the parties on applying for the same to the court, and at their expense. (Order XX, Rule 20 of the Code)
- *Interest*: Where the decree is for payment of money, the court may award interest at such rate as it thinks reasonable on the principal sum, as adjudged. (S.34 of the Code) The interest so awarded could fall under any or all of the following three categories: (a) Interest prior to the filing of the suit; (b) Interest *pendent lite*, that is, from the date of institution of the suit till the date of the decree; and (c) Interest from the date of decree till payment in respect thereof.
- *Costs*: The court has the discretionary power to award costs in a legal proceeding, and the court has the complete power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the same. S.35 of the Code deals with general costs, S.35A deals with compensatory costs for false and vexatious claims or defences, S.35B deals with costs for causing delay, and Order XXA deals with miscellaneous costs in respect of costs

incurred by the parties in giving notices, typing charges, inspection of records of the court for the purposes of the suit, obtaining copies of judgment and decrees, and producing witnesses.

Execution

Execution is the enforcement of a decree passed by a court. A person in whose favour a decree is passed is called the "decree-holder" or "judgment-creditor" and a person against whom a decree has been passed is called the "judgment-debtor". Ss.36 to 74 and Order XXI of the Code set out the provisions of the Code in respect of execution. S.38 of the Code states that a decree may be executed by either the court which passed it, or by the court to which it is sent for execution. An executing court cannot go behind the decree, that is, it does not have the power to modify the terms of the decree and must take it as it stands. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. (S.47 of the Code)

The period of limitation for the execution of a decree (other than a decree granting a mandatory injunction) is twelve years from the date of the decree. (A.136 of the Limitation Act) The period of limitation for the execution of a decree for mandatory injunction is three years from the date of the decree. (A.136 of the Limitation Act)

Subject to the conditions specified in Order XXI, Rule 11 of the Code, an application for execution may be in the oral form or in the written form.

The following persons may file an application for execution:

- The decree-holder (Order XXI, Rule 10 of the Code);
- A legal representative of the decree-holder, if the decree-holder is dead (S.146 of the Code);
- A representative of the decree-holder (S.146 of the Code);
- Any person claiming under the decree-holder (S.146 of the Code);
- Transferee of the decree-holder, only if: (a) the decree has been transferred by an assignment in writing or by operation of law; (b) the application for execution must have been made to the court which passed the decree sought to be executed; and (c) notice and opportunity of hearing must have been given to the transferor and the judgment-debtor (S.49 and Order XXI, Rule 16 of the Code);
- One or more of the joint decree-holders provided: (a) the decree should not have imposed any condition to the contrary; (b) the application must have been made for the execution of the entire decree; and (c) the application must have been made for the benefit of all the joint decree-holders (Order XXI, Rule 10 of the Code); and
- Any person having special interest.

An execution application may be filed against:

- A judgment debtor (S.50 and Order XXI, Rule 15 of the Code);
- If the judgment debtor is dead, the legal representatives of the judgment debtor, who shall be liable only to the extent of the property of the judgment debtor which has devolved on them, and they shall not be personally liable otherwise (Ss.50, 52, and 53 of the Code);
- Representatives of or the person claiming under the judgment debtor (S.146 of the Code); and
- Surety of the judgment debtor. (S.150 of the Code)

Every written application for the execution of a decree must be signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain, in a tabular form, the following particulars, as stipulated in Order XXI, Rule 11 of the Code:

- The number of the suit;
- The names of the parties;
- The date of the decree;

- Whether any appeal has been preferred from the decree;
- Whether any, and (if any) what, payment or adjustment of the matter in controversy has been made between the parties subsequent to the decree;
- Whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- The amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- The amount of the costs (if any) awarded;
- The name of the person against whom execution of the decree is sought; and
- The mode in which the assistance of the court is required, whether: (a) by the delivery of any property specifically decreed; (b) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property; (c) by the arrest and detention in prison of any person; (d) by the appointment of a receiver; and (e) otherwise, as the nature of the relief granted may require. (Order XXI of the Code)

Execution of Cross-Decrees

Order XXI, Rule 18 of the Code, *inter alia*, states that where applications are made to a court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then: (a) if the two sums are equal, satisfaction shall be entered upon both decrees; and (b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum but only for such sum after deducting the smaller sum. The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustration: A holds a decree against B for Rs. 1,000/-. B holds a decree against A for the payment of Rs.1,000/- in case A fails to deliver certain goods on a future date. B cannot treat his decree as a cross-decree under Order XXI, Rule 18 of the Code.

Illustration: A and B, being co-plaintiffs, obtain a decree for Rs.1,000/- against C, and C obtains a decree for Rs.1,000/- against B. C cannot treat his decree as a cross-decree under Order XXI, Rule 18 of the Code.

Illustration: A, B, C, D, and E are jointly and severally liable for Rs.1,000/- under a decree obtained by F. A obtains a decree for Rs. 1,000/- against F singly and applies for execution to the court in which the joint decree is being executed. F may treat his joint decree as a cross-decree under Order XXI, Rule 18 of the Code.

Order XXI, Rule 26 of the Code, *inter alia*, states that the executing court shall, on sufficient cause being shown and on the judgment debtor furnishing security or fulfilling such conditions as may be imposed on him, stay the execution of a decree for a reasonable time to enable the judgment debtor to apply to the court which has passed the decree or to the appellate court for an order to stay execution.

Garnishee Proceeding

Order XXI, Rules 46-A to 46-I of the Code sets out the procedure to be followed in a garnishee proceeding, that is, a proceeding by which the decree holder seeks to receive money or property of the judgment debtor in the hands of a third party, that is, a debtor of a judgment debtor, namely, the garnishee. Vis-à-vis this process, an executing court may order a third party to pay the decree holder the debt from him to the judgment debtor.

Foreign Judgments

A foreign judgment, which is conclusive and does not fall within the exceptions mentioned in S.13 of the Code may be enforced in India by: (a) instituting a suit on such foreign judgment; or (b) by taking out execution proceedings in certain specified cases

mentioned in S.44-A of the Code. An award passed by a foreign arbitrator and enforceable in a country where it was made, can be enforced in India.

Appeals, Reference, Review, and Revision

If a person is aggrieved by any order or decree passed by a court, he may file an appeal in a superior court if an appeal is provided against that decree or order, or may file an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court.

Appeals from Original Decrees

An appeal is basically the judicial examination of a decision by a higher court of the decision of an inferior court. It is a continuation of the suit. A first appeal lies against a decree passed by a court exercising original jurisdiction while a second appeal lies against a decree passed by a first appellate court. A first appeal can be filed in a superior court, which may or may not be a High Court, but a second appeal can only be filed in a High Court. A first appeal is maintainable on a question of fact, or on a question of law, or on a mixed question of fact and law. No appeal shall lie from a decree passed by a court with the consent of the parties. (S.96 of the Code) A second appeal can be filed only on a substantial question of law, and where the subject matter of the original suit is for recovery of money, the recovery must be for a sum exceeding twenty-five thousand rupees. (S.102 of the Code)

Form of Appeal

Every appeal must be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in this behalf. The memorandum must be accompanied by a copy of the judgment. The memorandum must set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and such grounds must be numbered consecutively. Where the appeal is against a decree for payment of money, the appellant must, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. (Order XLI, Rule 1 of the Code)

Limitation

An appeal against a decree or order can be filed in a High Court within ninety (90) days and in any other court, within thirty (30) days from the date of the decree or order appealed against. (A.116 of the Schedule to the Limitation Act)

Application for Condonation of Delay

When an appeal is presented after the expiry of the period of limitation specified therefor, it must be accompanied by an application supported by an affidavit setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such specified period. (Order XLI, Rule 3A of the Code)

Stay of Proceedings

An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree. However, the Appellate Court may order a stay of execution of such decree, if sufficient cause is shown by the appellant. Execution may be stayed if the court is satisfied that: (a) substantial loss may result to the party applying for a stay of execution unless such order is passed; (b) the application for stay has been made without unreasonable delay; and (c) security has been given by the appellant for the due performance of the decree or order as may ultimately be binding on him. (Order XLI, Rule 5 of the Code)

Production of Additional Evidence in Appellate Court

The parties to an appeal shall ordinarily not be entitled to produce additional evidence,

whether oral or documentary, in the Appellate Court. However, if: (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; (b) the party seeking to produce additional evidence, establishes that despite the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed; or (c) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined. (Order XLI, Rule 27 of the Code)

Filing of Cross-Objections

Order XLI, Rule 22 of the Code, *inter alia*, states that a respondent who has not filed an appeal against the decree can object to the same by filing cross-objections in the appeal filed by the appellant. Cross-objections shall be in the form of a memorandum of appeal, and must be filed within one month from the date of service on the respondent or his pleader of the notice of the date fixed for hearing of the appeal. (Order XLI, Rule 22 of the Code)

Power of Court of Appeal

An Appellate Court has the power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal was only in respect of part of the decree and may be exercised in favour of all or any of the parties, although such party may not have filed an appeal or objection. (Order XLI, Rule 33 of the Code)

Appeals from Orders

S.104 of the Code *inter alia* states that an appeal may be filed against the following orders:

- An order under S.35A of the Code (dealing with compensatory costs in respect of false or vexatious claims or defences);
- An order under S.91 of the Code (dealing with institution of suits in respect of public nuisances and other wrongful acts affecting the public) or S.92 of the Code (dealing with institution of suits in respect of public charities) refusing leave to institute a suit of the nature referred to in S.91 or S.92 of the Code, as the case may be;
- An order under S.95 of the Code (dealing with compensation for obtaining arrest, attachment or injunction on insufficient grounds);
- An order under any of the provisions of the Code imposing a fine or directing the arrest or detention in civil prison of any person except where such arrest or detention is in execution of a decree; and
- Any order made under the rules from which an appeal is expressly allowed by the rules.

Order XLIII, Rule 1 of the Code states that an appeal lies from the following orders:

- An order under Order VII, Rule 10 of the Code returning a plaint to be presented to a proper court (except where the procedure specified in Order VII, Rule 10A of the Code has been followed;
- An order under Order IX, Rule 9 of the Code rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- An order under Order IX, Rule 13 of the Code rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;
- An order under Order XI, Rule 21 of the Code;
- An order under Order XXI, Rule 34 of the Code on an objection to the draft of a document or of an endorsement;
- An order under Order XXI, Rule 72 or 92 of the Code setting aside or refusing to set aside a sale;
- An order rejecting an application made under Order XXI, Rule 106(1) of the Code, provided that an order under the

application referred to in Order XXI, Rule 105(1) of the Code is appealable;

- An order under Order XXII, Rule 9 of the Code refusing to set aside the abatement or dismissal of a suit;
- An order under Order XXII, Rule 10 of the Code giving or refusing to give leave;
- An order under Order XXV, Rule 2 of the Code rejecting an application (in case open to appeal) for an order to set aside the dismissal of a suit;
- An order under Order XXXIII, Rule 5 or Rule 7 of the Code rejecting an application for permission to sue as an indigent person;
- Orders in interpleader suits under Order XXXV, Rule 3, Rule 4, or Rule 6 of the Code;
- An order under Order XLVIII, Rule 2, Rule 3, or Rule 6 of the Code;
- An order under Order XXXIX, Rule 1, Rule 2, Rule 2A, Rule 4, or Rule 10 of the Code;
- An order under Order XL, Rule 1 or Rule 4 of the Code;
- An order of refusal under Order XLI, Rule 19 of the Code to re-admit or under Order XLI, Rule 21 of the Code to re-hear, an appeal;
- An order under Order XLI, Rule 23 or Rule 23A of the Code remanding a case, where an appeal would lie from the decree of the appellate court; and
- An order under Order XLVII, Rule 4 of the Code granting an application for review.

The rules of Order XLI of the Code are applicable in respect of the procedure to be followed in appeals from orders. (Order XLIII, Rule 2 of the Code)

Letters Patent Appeal

The Code does not provide for any appeal being filed within a High Court. Whether an appeal would lie against an order passed by a Single Judge Bench of a High Court to a Division Bench of the same High Court depends on the provisions of the Letters Patent of the concerned Chartered High Court. Such an appeal must be filed within thirty days from the date of the order being appealed against. (A.117 of the Limitation Act)

Appeals to the Supreme Court under the Code

An appeal can be filed before the Hon'ble Supreme Court of India from any judgment, decree, or final order in a civil proceeding of a High Court if the High Court certifies that: (a) the case involves a substantial question of law or general importance; and (b) in the opinion of the High Court, the said question needs to be decided by the Hon'ble Supreme Court of India. (Order XLV of the Code)

Reference to High Court

Any court may state a case and refer the same for the opinion of a High Court in respect of a question of law, and the High Court may make such order thereon as it thinks fit. (S.113 of the Code) A court may refer a case either on an application of a party or suo motu. The conditions prescribed by Order XLVI, Rule 1 of the Code must be satisfied before a reference can be made.

Review

S.114 of the Code gives a litigant a substantive right of review in certain circumstances and Order XLVII of the Code prescribes the procedure in respect thereof. A review is basically a judicial re-examination of a case by the same court and by the same judge. A person aggrieved by a decree or order may apply for review of a judgment. A review petition can be filed in: (a) cases in which no appeal lies; and (b) cases in which appeal lies, but has not been preferred. The Code also permits a review of a judgment on a reference from a Court of Small Causes. An application for review of a judgment may be made on any of the following grounds: (a) discovery of new and important matter or evidence; (b) mistake or error apparent on the face of the record; and (c) any other sufficient reason. An application for review of judgment delivered by a court other than a Supreme Court must be filed within thirty days from the date of the decree or order. (A.124 of the Limitation Act)

Revision

S.115 of the Code states that a High Court may call for the record of any case which has been

decided by any court subordinate to it and in which no appeal lies thereto, provided such subordinate court has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested, or has acted illegally or with material irregularity in the exercise of its jurisdiction. This is known as the revisional jurisdiction of a High Court. A person aggrieved by an order of a subordinate court may file an application for revision before a High Court or a High Court may *suo motu* (on its own motion) exercise revisional jurisdiction over any order passed by a court subordinate to it.

The limitation period for filing an application for revision under S.115 of the Code is ninety days from the date of the concerned decree or order.

The revisional powers of a High Court under S.115 of the Code and the power of superintendence of a High Court under A.227 of the Constitution of India contemplate two separate and distinct proceedings. The primary difference between the two powers is that the revisional powers of a High Court can be exercised under S.115 of the Code only if all the conditions mentioned therein are satisfied, while none of those conditions are required to be satisfied for the purposes of enabling a High Court to exercise its power of superintendence under A.227 of the Constitution of India.

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 3:
Constitutional Law

Preamble

The Preamble to the Constitution of India ("**the Constitution**") sets out the ideals and goals that the makers of the Constitution sought to achieve. A court may look into the terms of the Preamble when a doubt arises in interpreting the language used in a provision of the Constitution. This occurs when the language is capable of more than one meaning. Where the language of the other provisions of the Constitution is clear and unambiguous, the terms of the preamble cannot be used to qualify or cut down that enactment. The objectives specified in the Preamble are part of the basic structure of the Constitution, and may not be amended in exercise of the power in the Constitution in violation of the basic structure. (*Keshavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461)

Illustration: The basic feature of secularism as envisaged in the Preamble is to mean that the state will have no religion of its own and all persons will be equally entitled to the freedom of conscience and the right freely to profess, practice and propagate the religion of their choice. (*S R Bommai and others* v. *Union of India*, AIR 1994 SC 1918)

Part I: The Union and its Territory

The Constitution provides that India is a union of states (A.1), and as such, one must keep in mind that the essential structure of the Constitution is federal or quasi-federal in nature. (*Automobile Transport (Rajasthan) Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406)

Parliament has the authority to form new states (A.2), to alter the territory or names of the states without their consent or concurrence, and to alter the area, boundaries, or names of existing states by a law passed by a simple majority. (A.3)

Part II: Citizenship

Part II of the Constitution relates to citizenship, and lays down the modes of acquiring citizenship of India at the time of commencement of the Constitution. A.11 vests Parliament with the power to regulate, by legislation, the right to citizenship. In exercise of this power, Parliament enacted the Citizenship Act, 1955.

The Constitution clearly distinguishes between a 'person' and a 'citizen'. Some fundamental rights are available only to citizens, whereas others are available to all persons, regardless of whether they are citizens. (*Jaipur Udyog* v. *Union of India*, AIR 1969 Raj 281)

In 1995, the Supreme Court held that the Union of India could not restrain the appellant private company from publishing a listing of paid advertisements, as "commercial speech" could not be denied the protection of A. 19(1)(a).

Part III: Fundamental Rights

A.12 defines 'State' for the purposes of Part III of the Constitution as including the Government and Parliament of India and the government and legislature of each of the states, as well as all local or other authorities within the territory of India or under the control of the Government of India.

Whether or not a body is 'state' will have to be considered in each case, on the basis of the facts available, and considering whether the body is financially, functionally, and administratively dominated by or under the control of the government. Mere regulatory control, whether under statue or otherwise, would not make a body 'state'. (*Zee Telefilms Ltd.* v. *Union of India*, AIR 2005 SC 2677)

Illustration: A files a writ petition, arguing that the Board for Control of Cricket in India is 'state' within the meaning of A.12. The Board was not created under a statute; no part of the share capital of the Board was held by the government; practically no financial

assistance was given by the government to meet the whole or entire expenditure of the Board; the Board's monopoly on cricket in the country was not state-conferred or state-protected. The control of the government, if any, was only regulatory, and not administrative in nature. The Board is not 'state' under A.12. (*Zee Telefilms Ltd.* v. *Union of India*, AIR 2005 SC 2677)

Laws in force in the territory of India before the coming into force of the Constitution, in so far as they are inconsistent with the provisions of Part II, are void to the extent of such inconsistency; furthermore, the State is barred from making any laws that take away or abridge the rights conferred in Part III - any law made in contravention of this rule are, to the extent of such inconsistency, void. 'Law' for this purpose would include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having within the territory of India the force of law. This rule, under A.13, would not apply to any amendment of the Constitution made under A.368.

Right to Equality

A.14 provides that the state will not deny to any person equality before the law and the equal protection of the laws in the territory of India. 'Equality' here means legal equality, and not natural equality; equality before the law means that among equals the law must be equal and must be equally administered, that like must be treated alike. Courts have upheld legislation containing apparently discriminatory provisions where the discrimination is based on a reasonable basis.

The test that has been used by the judiciary is whether the classification of persons has been based on some intelligible differentia, and whether these differentia had any nexus with the object of the legislation. (*Indra Sawhney* v. *Union of India*, AIR 1993 SC 477)

Illustration: The policy of the Government was to appoint only women as principals in a women's college. A male teacher working in the college challenges the college's policy and argues that such a rule is discriminatory on the ground of sex. The court held that the appointment of only lady principals or lady teachers in a women's college would not be violative of Art 14 or Art 16 on the ground of reasonable classification and having a nexus with the object sought to be achieved. (Based on *Vijay Lakshmi* v. *Punjab University*, (2003) 8 SCC 440)

A.15 prevents the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them. The State may, however, make special provisions for:

- Women and children (A.15(3));
- The advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes (A.15(4)); or
- For the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes insofar as such provisions relate to their admission to educational institutions, including private educational institutions, whether aided by the State or not, other than minority educational institutions. (A. 15(5))

Illustration: The Rules of a Medical College provided that non-residents of the state where the college was located would have to pay a capitation fee for admission, whereas residents would not. The court held that the discrimination was based on place of residence, and not on place of birth, and therefore, it did not violate A.15(1). (*D. P. Joshi* v. *State of Madhya Bharat*, AIR 1960 SC 1208)

A.16 provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Sub-clause (4), however, provides that this would not prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Judicial review of any such reservations made would be available only in cases of a demonstrably perverse

identification of backward classes, and in cases of an unreasonable percentage of reservations made for them. (*Indra Sawhney* v. *Union of India*, AIR 1993 SC 477)

Illustration: The Government of a state notifies vacancies for clerical posts in different law colleges located within the state. A, who has secured 70% of marks in the qualifying exams is an applicant along with others. When the final selection list is announced A finds that she has not been selected for employment. B, a person securing less than 50% marks, is selected. The state argues that B is selected on the ground that she belongs to the OBC category, and the post was reserved for such categories. The court upholds the decision of the state on the ground that reservation is permissible under the state for certain categories of persons.

Right to Freedom

A.19(1) provides all citizens with the following rights:

- Freedom of speech and expression (A.19(1)(a));
- To assemble peaceably and without arms (A.19(1)(b);
- To form associations or unions (A.19(1)(c));
- To move freely throughout the territory of India (A.19(1)(d));
- To reside and settle in any part of the territory of India (A.19(1)(e)); and
- To practise any profession, or to carry on any occupation, trade or business (A.19(1)(g)).

Note that these rights are available only to citizens, and not to all persons. Furthermore, these rights are not absolute: they are subject to reasonable restrictions being imposed by the State in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, contempt of court, defamation, incitement to an offence, the general public, or of any Scheduled Tribe. (A. 19(2)-A.19(6)).

There is no exact standard or measure of 'reasonableness'; each case must be judged on its own merit. The standard of reasonableness varies with the nature of factors such as the infringed right, the underlying purpose of imposing restrictions, the urgency and extent of the evil sought to be remedied, and the prevailing conditions at the time. The reasonableness of a restriction must be determined by objective standards rather than subjective ones. (*State of Madras* v. *V. G. Row*, AIR 1952 SC 196) If it is to be judged reasonable, a restriction must have a rational relation with the object which the legislature seeks to achieve, and must not be in excess of that object. (*Arunachala Nadar* v. *State of Madras*, AIR 1959 SC 300)

Illustration: A files a writ petition, claiming that his right under A.19(1)(a) is violated if he is not permitted to fly the National Flag freely. The Court held that the right to fly the national flag freely with respect and dignity is included in A.19(1)(a); however, this does not mean to say that one can burn the flag as a manner of free speech or expression. (*Union of India* v. *Naveen Jindal*, (2004) 2 SCC 510)

Illustration: A makes a speech at a public assembly, and makes some statements with a deliberate intention to hurt the religious feelings of another community. A law punishing such behaviour is valid, because it imposes a restriction on the right to free speech in the interest of public order, since such speech or writing has the tendency to create public disorder even if in some cases those activities may not actually lead to a breach of the peace. (*Ramji Lal Modi* v. *State of Uttar Pradesh*, AIR 1957 SC 620)

Illustration: The State passed a law requiring all two-wheeler riders to compulsorily wear a helmet. The law imposes a reasonable restriction on the freedom of movement. (*Ajay Canu* v. *Union of India*, (1988) 4 SCC 156)

Illustration: A state government passes a law prohibiting all persons residing in certain areas, and engaged in agricultural labour, from engaging in the manufacture of *bidis*. The object of the law was to keep sufficient labour supply for agricultural purposes. The

court held that this object could have been achieved by restraining the employment of agricultural labour in *bidi* manufacturing during the agricultural season. The law as it stood imposed an absolute, unreasonable restriction on the freedom of trade, profession, occupation and business, and was struck down. (*Chintaman Rao* v. *State of Madhya Pradesh*, AIR 1951 SC 118)

A.20 provides for protection in respect of conviction of offences. It provides for protection against conviction under *ex-post facto* laws (A.20(1)), protection against double jeopardy (A.20(2)), and protection against self-incrimination (A.20(3)).

Illustration: An Act passed in 1957 provided that employers who were closing their undertakings had a liability to pay compensation to their employees. The law made this rule effective from November 1956 onwards. A person could be imprisoned under the Act for a failure to pay the compensation. The court held that the liability under the Act was a civil liability, and since a failure to discharge a civil liability is not an offence, A. 20(1) would not apply. (*Hathising Manufacturing Co.* v. *Union of India*, AIR 1960 SC 923)

Illustration: A was found guilty of an offence under S.107(8) of The Sea Customs Act, 1878 and punished as provided thereunder. Later, the authorities sought to prosecute A under S. 120B of The Indian Penal Code. The court held that the second prosecution was not barred since it was not for the same offence. (*Leo Roy Frey* v. *Superintendent, District Jail*, AIR 1958 SC 119)

Illustration: A, an accused, was made to provide thumb-impressions and specimens of handwriting by the police during the course of their investigation into an offence. The court held that 'Self-incrimination must mean conveying information based on the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in the controversy…' The court held that giving thumb-impressions or impressions of foot or palm or fingers, or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness' in A.20(3). (*State of Bombay* v. *Kathi Kalu Oghad*, AIR 1961 SC 1808).

The compulsory administration of narcoanalysis and polygraph examination techniques during the investigative stage in criminal cases violates the 'right against self-incrimination'. However, the Supreme Court has permitted the voluntary administration of these techniques subject to certain safeguards. (*Selvi and others* v. *State of Karnataka*, AIR 2010 SC 1974)

A. 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The right to 'live' is not merely confined to physical existence, but it includes within its ambit the right to live with human dignity. (*Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi*, AIR 1981 SC 746) The Supreme Court has also recognised a fundamental right to education in the right to life under A.21. (*Unni Krishnan* v. *State of Andhra Pradesh*, (1993) 1 SCC 645) The scope of A.21 has been expansively interpreted by the Supreme Court; for example, the right to 'know' was recognised as a part of the right under A.21, since it is a necessary ingredient of participatory democracy. (*Reliance Petrochemicals Ltd.* v. *Proprietors, Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592)

Illustration: Workers employed in various Asian games projects being carried out in Delhi were not paid minimum wages. This was held to be a denial to them of their right to live with basic human dignity, and therefore, violative of A.21. (*Peoples Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473)

A.22 provides for protection from arrest and detention in certain cases. It provides for certain rights that apply in case of arrest and detention. For instance, an arrested person must be produced before the nearest

magistrate within twenty-four hours of being arrested, and must be told the grounds for the arrest as soon as possible. No person may be detained beyond the period of twenty-four hours without the authority of the court. Any such person would also have the right to consult and be represented by a lawyer of his choice. It also provides for certain rights in the case of persons detained in pursuance of a law providing for preventive detention. The Supreme Court has also laid down detailed guidelines that must be followed by the authorities concerned for arrest and detention in police custody. (*D. K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416)

Illustration: A was arrested on a complaint of criminal trespass. The arrest was effected under the provisions of the Criminal Procedure Code and the trial was held in the *nyaya panchayat*, functioning under the Panchayat Act of the state. That Act provided that no lawyer could please a case before the *nyaya panchayat*. The court held that this provision was *ultra vires*, since it was violative of A.22(1). (*State of Madhya Pradesh* v. *Shobharam*, AIR 1966 SC 1910)

Right Against Exploitation

A.23 prohibits traffic in human beings and *begar* and other similar forms of forced labour. Child labour is prohibited under A.24.

Illustration: An Act provided that no person 'shall refuse to render to any person merely on the ground that he belongs to a scheduled caste, any service which such person already render to other Hindus on the terms on which such service is rendered in the ordinary course of business.' The court held that this Act was not violative of A.23, because when a person is prohibited from refusing to render service merely on the ground that the person asking for it belongs to a scheduled caste, that person is not being subjected to forced labour. (*State* v. *Banwari*, AIR 1951 All 615)

Right to Freedom of Religion

The Constitution guarantees to every person the right to freedom of conscience and the right freely to profess, practise, and propagate religion, subject to public order, morality, and health. (A.25) The right to propagate religion, however, does not include the *right* to convert another to one's own religion; a law prohibiting the conversion of a person by force, fraud, or inducement would not be violative of this Article. (*Rev. Stanislaus* v. *State of Madhya Pradesh*, (1971) 1 SCC 677)

Certain freedoms relating to the management of religious affairs are provided in A.26. Furthermore, A.28 prohibits the imparting of religious instruction in any educational institution wholly maintained out of State funds; and provides that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution without their, or their guardian's consent.

Illustration: S.4 of the Guru Nanak University Act enjoined the State to make provisions for the study and research on the life and teachings of Guru Nanak. This provision was challenged on the grounds that since the University was maintained wholly out of State funds, it violated A.28. The court dismissed this argument, holding that S.4 was to encourage an academic study of the life and teachings of Guru Nanak, which need not necessarily amount to religious instruction or the promotion of any particular religion. (*D. A. V. College* v. *State of Punjab*, (1971) 2 SCC 269)

Cultural and Educational Rights

A.29 provides any group of citizens residing in the territory of India or any part thereof, having a distinct language, script, or culture of its own the right to conserve the same. It also provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, or language.

In *English Medium Students' Parents' Association*

v. *State of Karnataka and Others*, AIR 1994 2 SC 1702, the Supreme Court held that a Karnataka Government order, directing that the mother tongue should be the medium of instruction up to the Sixth standard, did not violate A.29 or A.30 of the Constitution. In *St. Stephen's College* v. *University of Delhi* ((1992) 1 SCC 558), the Supreme Court held that a minority community may reserve up to 50% seats for members of its own community in an educational institution established and administered by it even if the institution receives aid from the State. In a later judgment (*T. M. A. Pai Foundatoin* v. *State of Karnataka*, (2002) 8 SCC 481), the Supreme Court, while agreeing with the *St. Stephen's College case*, has relaxed the 50% limit, and held that a reasonable percentage could be fixed by the State having regard to the type of the institution, population, and educational needs of the minorities.

A.30 gives all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. Furthermore, the State may not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. Although written in this manner, the rights conferred under this Article are not absolute. (See *Sidhrajbhai Sabbai* v. *State of Gujarat*, AIR 1963 SC 540; *T. M. A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481)

Illustration: The petitioners, the Society of Jesus, were running the St. Xavier's College at Ahmedabad. The object was to provide higher education to Christian students; however, children of all classes and creed were admitted to the college. The state government passed an Act which provided for, among other things, university nominees in the governing and selection bodies of all colleges, conversion of affiliated colleges to constituent colleges, approval of the Vice-Chancellor for disciplinary action against members of the teaching staff, and reference of disputes between the staff and management to arbitration in which the umpire had to be the Vice-Chancellor's nominee. The court held that these provisions could not be applied to minority colleges, as they were violative of the minority's right under A.31 to administer an educational institution. (*Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717)

Illustration: The state government passed an Act providing for such matters as a code of conduct for the employees of schools, procedure for disciplinary proceedings, and scales of pay and allowances. The Act provided that these provisions would not extend to unaided minority institutions. The petitioners, employees of a minority unaided institution, who were demanding parity of pay scales and allowances, approached the court. The court declared that provision of the Act violative of the right to equality under A. 14, and struck it down. This case also illustrates that the rights of minorities under A.30 are not absolute. (*Frank Anthony Public School Employees' Association* v. *Union of India*, (1986) 4 SCC 707)

Validation of Certain Acts and Regulations

Certain acts and regulations are specified in the Ninth Schedule to the Constitution, and A. 31-B provides that these shall not be deemed to be void, or ever to have become void, notwithstanding that such act or regulation is inconsistent with, or takes away or abridges, any of the rights under Part III, and notwithstanding any judgment, decree, or order of any court or tribunal to the contrary, each of these acts and regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.

If the legislature amends any of the provisions of an act or regulation contained in the Ninth Schedule, the amended provision would not receive the protection of A.31-B, and its validity could be examined on merits. The amendment may, however, be saved if the parent act was included in the Ninth Schedule after the amendment had already been made. (*Venkata Rao* v. *State of Bombay*, (1969) 2 SCC 81)

A nine-judge bench of the Supreme Court has clarified that while the laws included in the Ninth Schedule before the *Keshavananda Bharati case* ((1973) 4 SCC 225), that is, before April 2, 1973, are immune from challenge on grounds of violation of the fundamental rights or the basic structure of the Constitution, laws included after that date would be open to challenge on the ground that they are against, or destructive of, the basic structure of the Constitution. (*I. R. Coelho* v. *State of Tamil Nadu*, (1999) 7 SCC 580)

Saving of Laws Giving Effect to Certain Directive Principles

A.31-C provides that no law giving effect to any of the directive principles of state policy would be void on the grounds that it is inconsistent with, or takes away, or abridges any of the rights under A.14 or A.19. Furthermore, such a law cannot be challenged on the ground that it does not give effect to such a policy. If a state government passes such a law, the law would not receive the immunity under A.31-C unless the law has been reserved for the President's consideration, and has received the President's assent. However, if on consideration of the true nature and character of the legislation, the court considers that it does not have a nexus with the principles contained in A. 39 (b) or (c), it will not be saved under A. 31C. (*Keshavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225)

Right to Constitutional Remedies

A.32 guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred in Part III; that is, the fundamental rights. The Supreme Court has the power to issue directions or order or write, including the writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto*, and *certiorari*, as appropriate, for this purpose. The right under A.32 may not be suspended except as otherwise provided by the Constitution.

The words 'appropriate proceedings' in A.32 do not refer to any particular form, but rather, to the purpose of the proceeding; as long as the purpose of the proceeding is the enforcement of a fundamental right, it is appropriate, and when it relates to the enforcement of the fundamental rights of the poor, disabled, or ignorant by a public-spirited person, "even a letter addressed by him to the Court can legitimately be regarded as an 'appropriate proceeding'." The Supreme Court has opened a Public Interest Litigation cell to facilitate such proceedings, and it is to this cell that all letters to the Court or to individual judges are forwarded. These letters are then placed before the Chief Justice after scrutiny by the staff of the cell. Appropriate proceedings need not be adversarial; they can also be inquisitorial in nature. (*Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161)

The Supreme Court would not enter into questions of fact ordinarily in proceedings under A.32, but it may do so if it finds it necessary in appropriate cases. (*Laxmi Shankar Pandey* v. *Union of India*, (1991) 2 SCC 488)

The Supreme Court has wide discretion in the matter of framing writs to suit the needs of a particular case, and the application of a petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for. (*Charanjit Lal Chowdhury* v. *Union of India*, AIR 1951 SC 41)

The Court's power under A.32 is not confined only to the issuance of writs. The Court may also issue any directions or orders appropriate for the enforcement of any of the fundamental rights. The Court's power is not only injunctive, that is, preventing the violation of a fundamental right; it can also provide relief against a breach of a fundamental right already committed. (*M. C. Mehta* v. *Union of India*, (1987) 1 SCC 395)

If a fundamental right is also available against a private individual, such as under Aa.17, 23, and 24, the Supreme Court can also be approached for an appropriate remedy against the violation of such a right by private individuals. (*People's Union for Democratic Rights* v. *Union of India*, (1982) 3 SCC 235)

Such jurisdiction is conferred on the Supreme Court (under A. 32) and on the High Courts (under A. 226) but it is not necessary for a petitioner to first approach a High Court before approaching the Supreme Court for a remedy under A.32.

Illustration: A approached the Supreme Court directly for the enforcement of a fundamental right. The Attorney-General contended that as a matter of orderly procedure, A should first approach the High Court under A.226. Rejecting this contention, the Supreme Court stated that unlike A.226, which confers powers on the High Court, A.32 confers a fundamental right on the individual, and an obligation on the Supreme Court, which it must discharge when an individual complains of an infringement of his fundamental right. (*Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124)

Petitions made to the Supreme Court are subject to the rule of *res judicata*.

Illustration: The respondents objected against the maintainability of six writ petitions under A.32 on the ground that in each one of them, the petitioners had moved the High Court for similar writs on the same facts, and the High Court had rejected them. The Supreme Court held that the writs were barred by the rule of *res judicata*, and could not be entertained. (*Daryao* v. *State of Uttar Pradesh*, AIR 1961 SC 1457) The doctrine of res judicata under A.32 also applies against matters decided under A. 136. (*P. S. R. Sadhanathan* v. *Arunachalam*, (1980) 3 SCC 141)

The writ of *habeas corpus* is an exception to the rule of *res judicata*, and, therefore, if a High Court has refused a writ of *habeas corpus*, the petitioner may file an independent writ under A.32. (*Ghulam Sarwar* v. *Union of India*, AIR 1967 SC 1335) Furthermore, repeated petitions may be filed under A.32 itself; this means that A.32 is an exception to the rule of *res judicata*. (*Sunil Dutt* v. *Union of India*, (1982) 3 SCC 405) If, however, an appeal under A.136 against a decision refusing the writ of *habeas corpus* under A.226 has been refused, a fresh petition under A.32 can be filed only if (i) the circumstances have changed, or (ii) grounds which were not available when the earlier petition was decided, have become available. (*T. P. Moideen Koya* v. *Government of Kerala*, (2004) 8 SCC 106)

The traditional position was that a petition under A.32 could only be filed by a person who had suffered an infraction of his rights, and was an 'aggrieved person'. This rule has, however, been widened with the emergence of *pro bono publico* litigation, or, as it is more commonly known, public interest litigation. The position now is that any member of the public who has sufficient interest may maintain an action for judicial redress for a public injury that arises from a breach of public duty, or from a violation of a Constitutional provision. (*S. P. Gupta* v. *Union of India*, 1981 Supp SC 87) Note, however, that although anybody can move the Supreme Court for the enforcement of a fundamental right under A.32, it would not "intervene at the instance of meddlesome interloper or busybody and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activise the Court." (*Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161)

Illustration: A filed a petition under A.32 before the Supreme Court, challenging the conviction of B in a criminal matter by a High Court. B did not file an appeal against the conviction, nor a petition under A.32, because B's personal philosophy forbade B from taking recourse to legal remedies. The Supreme Court rejected A's petition for want of *locus standi*, stating that a mere obsession based on religious belief or personal philosophy could not be treated as a legal disability, and that B should have approached the Supreme Court directly. (Based on *Karamjeet Singh* v. *Union of India*, (1992) 4 SCC 666)

Habeas Corpus

A writ of *habeas corpus* is used to compel a person who has detained another to produce such another before the court, so that the court

can know the grounds on which the person has been confined, and to release the person if there is no legal justification for that person's confinement. A writ for *habeas corpus* would become infructuous if the detenu is produced before the magistrate.

Illustration: The police arrested A from his home, and no information about A's condition, or place of confinement, was available for days on end. A's brother, B, files a petition before the Supreme Court under A.32. The Supreme Court can issue a writ of *habeas corpus* against the police authorities, directing them to produce A before the court.

Mandamus

The word '*mandamus*' translates literally into 'command'. This writ is issued to provide for remedies for the enforcement of rights where a fundamental right is infringed by a statute, statutory order, or a 'non-statutory' executive order. (*Prabodh* v. *State of Uttar Pradesh*, AIR 1985 SC 167)

Illustration: A, a District Collector, issues an order, directing the jail authorities not to permit inmates at a prison to vote during the upcoming general elections. B, an inmate, causes a petition under A.32 to be filed before the Supreme Court. The Supreme Court can issue a writ of mandamus, quashing the District Collector's order, and directing the jail authorities to ensure that the inmates' right to vote is not violated.

Prohibition

This is a writ issued by the Supreme Court or a High Court to an inferior court, forbidding the inferior court from continuing any proceedings which are in excess the inferior court's jurisdiction, or over which the inferior court does not have any jurisdiction at all. The writ of *prohibition* is only available against judicial or quasi-judicial authorities.

Illustration: A challenges the order of a judicial authority under A.32 on the grounds that it cites the wrong provision of law, and prays for a writ of *prohibition* to be issued. This petition would be dismissed; merely citing the wrong provision would not be sufficient for the issue of a writ of *prohibition*; the petitioner must show an absence or excess of jurisdiction. (Based on *Isha Beevi* v. *Tax Recovery Officer*, (1976) 1 SCC 70)

Quo Warranto

The Supreme Court may use this writ to inquire into the legality of a claim which a person asserts to a public office, and to remove such a person from the public office if the claim is not well-founded.

Illustration: The Governor of a state appoints a person who is not qualified to be a member of the state legislature, as the Chief Minister of the state. A, a member of the state legislature, approaches the Supreme Court under A.32, challenging the appointment. The Supreme Court can issue a writ of *quo warranto*, and if it finds that the Chief Minister's appointment was not legal, direct that person to vacate the office of Chief Minister. (Based on *B. R. Kapur* v. *State of Tamil Nadu*, (2001) 7 SCC 231)

Certiorari

The writ of *certiorari* is similar to the writ of *prohibition*, in that it is issued to a judicial or quasi-judicial authority acting in excess of, or without, jurisdiction. The difference, however, is that the writ of *certiorai* is used to quash an order of such an authority that is in excess of, or without, jurisdiction, whereas *prohibition* is used to prevent the authority from issuing such an order or decision. This writ may not, however, be issued by a bench of the Supreme Court to quash a judicial order passed by another bench of the Supreme Court, or a High Court. (*A. R. Antulay* v. *R. S. Nayak*, AIR 1988 SC 1531)

Modification of Fundamental Rights; Legislation

Parliament has authority, under A.33, to determine by law the extent to which the fundamental rights may be restricted or abrogated in their application to members of the armed forces or the forces charged with the maintenance of public order, for the

purpose of ensuring the proper discharge of their duties and maintaining discipline among them. Furthermore, under A.34, Parliament may by law indemnify any person in the service of the Union or a State or any other person in respect of any act done in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force; it may also validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done under martial law in such area.

Under A.35, Parliament has authority to make laws wherever the Constitution prescribes that a law should be made for giving effect to any fundamental right, or where a law is to be made to make any action interferes with the fundamental rights punishable, notwithstanding that the legislative power to make such a law falls under the legislative competence of a state, as provided in the three lists in Schedule VII of the Constitution.

Part IV: Directive Principles of State Policy

While the directive principles of state policy are not specifically enforceable in a court, A.37 provides that these are fundamental in the governance of the country, and provides that it shall be the duty of the state to apply these principles in making laws.

The Directive Principles of State Policy exhort the State to strive to promote the welfare of the people by securing and protecting a social order in which justice - social, economic and political, shall inform all the institutions of the national life. Some other principles of policy to be followed by the State include the securing of a right to an adequate means of livelihood, the distribution of ownership of material resources to subserve the common good and to aspire towards an economic system which does not result in the concentration of wealth.

The Supreme Court has held that "harmony and balance between the fundamental rights and directive principles is an essential feature of the basic structure of the Constitution." (*Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625) Further to this principle, the Court has relied upon the directive principles to determine, in some cases, whether a restriction placed on a fundamental right is 'reasonable'.

Illustration: A petitioner challenges the order of a state government. The order bans the sale and possession of liquor in the state. In determining whether such a restriction is reasonable, the court may refer to the provisions of A.47, a directive principle of state policy. (*State of Bombay* v. *F. N. Balsara*, AIR 1951 SC 318)

Part IV-A: Fundamental Duties

The fundamental duties are not specifically enforceable in court unless a law is passed to give effect to any of them. If there is a conflict between such a law and a fundamental right, then the court would make an effort to reconcile them, unless such a difference is irreconcilable. For example, the duty "to renounce practices derogatory to the dignity of women" (A.51-A(e)) implies a right in every woman not to be subjected to such practices. This applies equally for the other duties as well. (*See Union of India* v. *Naveen Jindal*, (2004) 2 SCC 510)

Where there is no law to give effect to a fundamental duty, *mandamus* cannot be sought against an individual who is not observing that duty. (*Surya Narain* v. *Union of India*, AIR 1982 Raj 1) In some cases, however, if the non-observance of a duty by one citizen can be established as a violation of the right of another, the courts may provide an appropriate remedy. (*See Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241)

The Executive

Union (Part V, Chapter I)

A.52 provides that there shall be a President of India, and A.53 sets out the executive power of the President. The executive power of the Union vests in the President, as does the supreme command of the Defence Forces of the Union, subject to any applicable law. Note

that the President may only exercise the Union's executive power in accordance with the Constitution. (A.53)

The President is elected by the members of an electoral college, and the constituents of the electoral college (A.54) as well as the manner of election of the President (A.55) are set out in the Constitution, as are the term of office (A. 56), conditions of office (A.59), procedure for impeachment of the President (A.61), and other relevant details.

The Constitution provides for a Vice-President of India (A.63), who is also the *ex-officio* Chairman of the Council of States (A.64), and is required to act as the President or to discharge the functions of the President during casual vacancies in the office, or during the absence, of the President (A.65).

The Supreme Court has the exclusive and final jurisdiction to inquire into and decide on all doubts and disputes arising out of or in connection with the election of a President or Vice-President. (A.71)

The executive power of the Union extends to all matters set out in the First (Union) List in Seventh Schedule of the Constitution, as well as such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. (A.73)

The Constitution provides for a Council of Ministers with the Prime Minister at their head to aid and advise the President, who is required to act in accordance with their advice in the exercise of the presidential functions. The President may, however, require the Council of Ministers to reconsider such advice, either generally or otherwise; once the Council of Ministers have reconsidered their advice and tendered it to the President, the President is bound to act in accordance with it. (A.74)

The President has the authority to appoint the Prime Minister, and the other Ministers on the advice of the Prime Minister. The Council of Ministers is collectively responsible to the House of the People. (A.75)

The office of the Attorney-General of India is provided for under A.76 of the Constitution. The Attorney-General is required to advise the Government of India upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to the Attorney-General by the President, and to discharge the functions conferred on the Attorney-General by the Constitution, or any other law for the time being in force. (A.76)

States (Part VI, Chapter II)

Each State has a Governor (A.153), who is appointed by the President (A.155), and in whom the executive power of the State vests (A.154).

The powers and functions of a Governor of a State are comparable to that of the President in relation to the Union.

Except in spheres where the Governor is to act in his own discretion under the Constitution, the Governor acts on the advice of the Council of Ministers of the State (*Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831), which is provided for under A.163 to aid and advise the Governor. Note, however, that the Governor's discretion as to whether or not she may act in her own discretion, or only upon the advice of the Council of Ministers in a particular matter, is final. (A.164(2)) The executive power of a State extends to those matters in respect of which the Legislature of a State has the authority to make laws. In respect of matters in the Concurrent List, however, this power is subject to the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union. (A.162)

The Chief Minister of a State is appointed by the Governor, and the other Ministers are appointed by the Governor on the advice of the Chief Minister. The Chief Minister and the other Ministers hold office during the pleasure of the Governor, and the Council of Ministers of a State is collectively responsible to the Legislative Assembly of the State. (A. 164)

The Constitution provides that there shall be an Advocate-General for each State. (A.165) The functions of an Advocate-General in relation to the Governor and the State are analogous to those of the Attorney-General in relation to the President and the Union.

The Legislature

Parliament (Part V, Chapter II)

The Parliament of India consists of the President, and two Houses, known as the Council of States, and the House of the People. (A.79)

The Council of States has 250 members, of whom 12 are nominated by the President, and 238 are elected representatives of the States and Union Territories. The representatives of the States are elected by the elected members of the Legislative Assembly of the State through the system of proportional representation, using a single transferable vote. (A.80) The House of the People consists of not more than 530 members elected directly by the voters in the States, not more than 20 members to represent the Union Territories, chosen in the manner provided under law, and not more than two members belonging to the Anglo-Indian community, appointed by the President under A.331. (A.81) This allocation of seats in the House of the People is re-adjusted after each census. (A.82)

The Council of States is a permanent body, with one-third of its members retiring and being replaced by new members every second year, whereas the House of the People continues for five years from the date appointed for its first meeting. (A.84) The President summons each House of Parliament from time to time, and may prorogue (discontinue a session of) each or both the Houses, and may dissolve the House of the People. There should not be an interval of more than six months between the sessions of the Houses of Parliament. (A.85) The Constitution also provides for the appointment of various officers of Parliament, such as the Deputy Chairman of the Council of States, and the Speaker and the Deputy Speaker of the House of the People. (Aa.89, 93)

Any person who holds an office of profit under the Government of India or the Government of any State is disqualified from being chosen as, and for being a member of either House of Parliament. (A.102)

Illustration: A, a member of the Council of States, was also the Chairperson of the U. P. Film Development Council, with entitlements to an honorarium and several allowances and perquisites. Although A had not received any of these, A was disqualified from being a Member of Parliament. (Based on *Jaya Bachchan* v. *Union of India*, (2006) 5 SCC 266)

Illustration: A held an office under the State Government, and the terms of office provided that A was entitled to receive only compensatory allowances, intended to meet out-of-pocket expenses. A was not disqualified from being a Member of Parliament, as this is not an "office of profit". (Based on *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanappa*, (1971) 3 SCC 870)

There is freedom of speech in Parliament, subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament. No member of Parliament is liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament, and no person would be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes, or proceedings. (A.105)

Illustration: A, a member of Parliament, makes a statement against a public figure. The statement may be considered defamatory. A cannot be prosecuted in any court of law for the statement made in Parliament. If, however, A publishes the speech outside Parliament, A may be prosecuted. (Based on *Jatish Chandra Ghose* v. *Harisadhan Mukherjee*, AIR 1956 Cal 433)

Aside from Money Bills, a Bill may be

introduced in either House of Parliament. A Bill is deemed to be passed only when both Houses of Parliament have passed it. (A.107) The President may call for a joint sitting of both Houses if a Bill is passed in one House but rejected in the other; if the Houses have finally disagreed as to the amendments to be made in the Bill; or if more than six months have elapsed from the date that a Bill, having been passed by one House, has been received in the other House without its passing the Bill. (A.108) Money Bills may only be introduced in the House of the People, and once it passes a Money Bill, it is sent to the Council of States, which must return it to the House of the People with its recommendations or proposed amendments, if any. The House of the People, however, is not bound to accept any such recommendations or proposed amendments, and if it does not accept them, the Money Bill is deemed to have been passed in the original form in which the House of the People passed it. (A.109) Once a Bill is passed by the Houses of Parliament, it is presented to the President, who may either assent to it or withhold assent. If the President withholds assent, she must return the Bill to Parliament with her recommendations or proposed amendments. Parliament may or may not accept such recommendations or amendments, and send the Bill again to the President, who cannot now withhold assent. (A.111)

Aa.112 to 116 provide the procedure that Parliament must follow in matters relating to the supply or grant of public money; A.117 provides the procedure to be followed in respect of financial bills.

Legislative Powers of the President

The President can issue Ordinances having the effect of an Act of Parliament if she is satisfied that circumstances exist which make it necessary for her to do so, and if neither House of Parliament is in session. Such an Ordinance, however, must be placed before both Houses of Parliament, and would cease to operate six weeks after the reassembly of Parliament, or if both Houses pass resolutions disapproving the Ordinance before the six week period is over, when the second of those resolutions is passed. The President may also withdraw the Ordinance at any time. The President's power to issue Ordinances is subject to the extent of Parliament's authority to make laws under the Constitution. (A.123) Note that the President has power to promulgate Ordinances only on the advice of the Council of Ministers. Although an Ordinance is promulgated in the President's name, and on the President's satisfaction, it is in truth promulgated on the advice of the Council of Ministers, and on their satisfaction. (*R. C. Cooper* v. *Union of* India, (1970) 1 SCC 564)

The State Legislature (Part VI, Chapter III)

Each State has a Legislature, comprising the Governor and a Legislative Assembly, and, in some States, a Legislative Council. (A.168) Members of the Legislative Assembly are directly elected (A.170), and the members of the Legislative Councils are appointed through a combination of indirect election, and nomination by the Governor (A.171).

The Legislative Assembly of a State, unless sooner dissolved, continues for five years from the date appointed for its first meeting. (A.172) The Governor summons the House or Houses of the Legislature of a State to meet from time to time, provided that not more than six months should intervene between meetings of the Houses. The Governor also has the authority to prorogue either or both Houses, and to dissolve the Legislative Assembly. (A.174)

Aa.178-186 provide for the offices of a Speaker and Deputy Speaker of the Legislative Assembly, and a Chairman and Deputy Chairman of the Legislative Council in each State, their manner of appointment, duties and functions.

A.191 provides certain situations in which a person may be disqualified for being chosen as, and for being, a member of the Legislature of a State.

Subject to the provisions of the Constitution and to the rules and standing orders

regulating the procedure of the Legislature, there is freedom of speech in the Legislature of each State, and no member of the Legislature of a State may be liable to any proceedings in any court in respect of anything said or any vote given by that person in the Legislature or any of its committees, and no person is so liable in respect of the publication by or under the authority of a House of such Legislature of any report, paper, votes, or proceedings. (A. 194)

Aside from Money Bills, a Bill may be introduced in either House of the Legislature in a State that has a bicameral Legislature, and both Houses must agree on a Bill before it is deemed to have been passed. (A.196) A.197 provides for the procedure in the event that any Bill other than a Money Bill is passed by the Legislative Assembly, but is not approved by the Legislative Council, or if the Legislative Council passes it with amendments that the Legislative Assembly does not pass. The special procedure relating to a Money Bill in States having a bicameral Legislature is provided in A.198.

When the Legislature of a State passes a Bill, it is sent to the Governor for assent. The Governor may either assent to the Bill, withhold assent, or reserve the Bill for the consideration of the President. If the Governor withholds assent, the Governor must, as soon as possible, return the Bill if it is not a Money Bill, to the Legislature, and ask that the Legislature reconsider the Bill, along with any suggested amendments. If the Legislature sends the Bill back to the Governor with or without the suggested amendments, the Governor may not withhold assent any further. The Governor must reserve for the consideration of the President any Bill which, in the Governor's opinion, would, if it became law, derogate from the powers of the High Court and endanger its Constitutional position. (A.200)

Where a Bill other than a Money Bill is reserved for the consideration of the President, the President may either assent to the Bill, or send it back to the Legislature of the State concerned for reconsideration, along with any suggested amendments. The Legislature of the State may then reconsider it accordingly within a period of six months, and, if it passes the Bill again, with or without the suggested amendments, it is again presented for the President's consideration. (A.201)

Aa.202-212 relate to further rules of procedure that the Legislatures of the States must follow.

Legislative Power of the Governor

At any time except when the Legislature of a State is in session, if the Governor is satisfied that circumstances exist that make it necessary for her to take immediate action, the Governor may promulgate such Ordinances as the circumstances appear to him to require. The Governor is required to take the assent of the President before promulgating an Ordinance in certain cases. Any Ordinance promulgated by the Governor must be presented before the Legislature as soon as it is in session, and expires six weeks from the reassembly of the Legislature, or earlier, if the Legislature passes a resolution disapproving it. (A.213)

The Governor's power to promulgate Ordinances under A.123 is an exceptional power, and cannot be used as a substitute for the law-making power of the Legislature of a State. An Ordinance can only be re-promulgated in very rare cases where, for shortage of time, the Legislature cannot convert an Ordinance into an Act, and the continuance of the Ordinance is necessary in the public interest. (*D. C. Wadhwa* v. *State of Bihar*, (1987) 1 SCC 378)

The Judiciary

The Union Judiciary (Part V, Chapter IV)

A.124 provides that there shall be a Supreme Court of India, consisting of a Chief Justice and such number of other judges as the Parliament may by law prescribe. All judges of the Supreme Court are appointed by the President upon consultation with such judges of the Supreme Court and the High Courts as the President deems necessary. Judges of the Supreme Court hold office until the age of

sixty-five years. Judges of the Supreme Court may resign from office; otherwise, they may only be removed by an order of the President, passed after an address by each House of Parliament, supported by a majority of the total membership of each House, and by a majority of not less than two-thirds of the members of each House present and voting has been presented to the President in the same session for the removal of the judge, on the ground of 'proved misbehaviour or incapacity'.

The Supreme Court is a court of record. (A. 129) This means that its acts and judicial proceedings are recorded for perpetual memory and testimony, and that it has the authority to fine and imprison for contempt of itself. (*Aswini Kumar Ghose* v. *Arabinda Bose*, AIR 1953 SC 75) The Supreme Court has held that its power to punish for contempt is not limited to its own contempt, but also extends to all courts and tribunals subordinate to it in the country. (*Delhi Judicial Service Association* v. *State of Gujarat*, (1991) 4 SCC 406)

While the Supreme Court can punish a lawyer for contempt as much as any other person, it cannot, in exercise of that power, suspend or cancel a lawyer's licence. (*Supreme Court Bar Association* v. *Union of India*, (1998) 4 SCC 409). However, in *R. K. Anand* v. *Registrar, Delhi High Court*, 2009 (10) SCALE 164, the Supreme Court held that it was open to a High Court to prohibit the appellants from appearing before that High Court and the courts sub-ordinate to it for a specified period as punishment for criminal contempt of court.

Illustration: A, a journalist and a writer, wrote an article, in which A said that the Supreme Court "*displays a disturbing willingness to issue notice on an absurd, despicable, entirely unsubstantiated petition,*" and that the Court's notice "*was intended to silence criticism and muzzle dissent.*" The Supreme Court held that such statements amounted to contempt of itself. (Based on *In re, Arundhati Roy*, (2002) 3 SCC 343)

The Supreme Court's Jurisdiction

The Supreme Court has exclusive and original jurisdiction over any disputes between:

- the Government of India and one or more States, or
- the Government of India and any State or States on one side, and one or more States on the other side, or
- Two or more States,

If, and so far as, the dispute involves any question on which the existence or extent of a legal right depends. (A.131) The Supreme Court has held that the word 'State' in A.131 includes within its purview 'State Government.' (*State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592)

Illustration: A dispute arose between the State of Bihar and the Hindustan Steel Ltd., a registered company under the Indian Companies Act. The Supreme Court held that the dispute did not fall within its original jurisdiction, because a body like the Hindustan Steel Ltd. was not a 'State' for the purposes of A.131. (*State of Bihar* v. *Union of India*, (1970) 1 SCC 67)

Illustration: Two States were parties to proceedings before the Inter-State Water Disputes Tribunal. One of the States refused to honour the award of the Tribunal. The other State approached the Supreme Court under A. 131. The Court held that such a suit was maintainable under A.131. (*State of Karnataka* v. *State of Andhra Pradesh*, (2000) 9 SCC 572)

In normal cases, suits before ordinary courts must be filed for complete adjudication of disputes, or the passing of a decree capable of execution; in the case of A.131, however, it is open to an aggrieved party to present a petition to the Supreme Court containing a full statement of the relevant facts, and praying for the declaration of its rights as against other disputants only. Once this is done, the Supreme Court's function under A. 131 is over. (*State of Bihar* v. *Union of India*, (1970) 1 SCC 67)

An appeal will lie to the Supreme Court from any judgment, decree, or final order of a High Court, whether in a civil, criminal, or other proceeding, if the High Court certifies under A.134-A that the case involves a substantial question of law as to the interpretation of the Constitution. If such a certificate is given, any party to the case may appeal to the Supreme Court, on the ground that such a question has been wrongly decided. (A.132)

A 'substantial' question of law would mean a question over which there is divergence of opinion. When the law on the subject has been finally and effectively decided by the Supreme Court, a question would not be 'substantial'. For example, when the parties agree on the interpretation of A.14, but disagree on its application to the facts, there is no 'substantial question' within the meaning of A.131. (*State of Jammu and Kashmir* v. *Thakur Ganga Singh*, AIR 1960 SC 356)

An appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies under A.134-A that:

- The case involves a substantial question of law of general importance; and
- That in the High Court's opinion, that question needs to be decided by the Supreme Court.

Notwithstanding the provisions of A.132, a party appealing under this provision may urge as one of the grounds in the appeal that a substantial question of law as to the interpretation of the Constitution has been wrongly decided. An appeal to the Supreme Court under this provision cannot lie from a judgment, decree or final order of one Judge of a High Court. (A.133)

Note that the words 'judgment, decree or final order' in A.133 mean that only such orders of a High Court are appealable which finally determine the rights or liabilities of the parties in dispute. An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding.

Illustration: A appealed to a High Court from the order of a Tribunal, asking that the Tribunal's award be set aside. The High Court remanded the case for a *de novo* trial under S. 151 of the Code of Civil Procedure. A wished to appeal to the Supreme Court under A.133, and applied for a certificate from the High Court under A.134-A, which was denied. The Supreme Court held that the order of the High Court remanding the matter was not a final order, and no certificate under A.134-A to appeal to the Supreme Court under A.133 could be awarded in such a case. (Based on *Jethanand & Sons* v. *State of Uttar Pradesh*, AIR 1961 SC 794)

An appeal to the Supreme Court lies from any judgment, final order, or sentence of a High Court in a criminal proceeding, if the High Court:

- Has, on appeal, reversed an order of acquittal of an accused person, and sentenced that person to death; or
- Has withdrawn for trial before itself any case from any court subordinate to its authority, and has, in such a trial, convicted the accused person and sentenced that person to death; or
- Certifies under A.134-A that the case is fit for appeal to the Supreme Court, subject to any provisions that may be made in that behalf under A.145(1) and to any conditions that the High Court may have established or requires. (A.134)

Illustration: A was charged under S.302 of the Indian Penal Code for murder, and was convicted by the trial court under S.304. The High Court reversed that order, and convicted the accused of murder under S.302, and sentenced the accused to death. The Supreme Court rejected the State's argument that the word 'acquittal' in A.134 meant 'complete acquittal', and held that the accused was entitled to a certificate under A.134(1)(a). (*Tara Chand Damu Sutar* v. *State of Maharashtra*, AIR 1962 SC 130)

A High Court may issue the certificate

mentioned in Aa.132(1), 133(1), or 134(1)(c):

- On its own motion, or
- If an oral application is made by or on behalf of the aggrieved party,

immediately after the passing or making of such judgment, decree, final order or sentence, determine as soon as may be after such passing or making, whether such a certificate should be given in that case. (A.134-A)

Notwithstanding any other provisions in Part V of the Constitution (*The Union*), the Supreme Court has the discretion to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal. This discretion, however, does not extend to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces. (A.136)

Illustration: A Conciliation Officer passed an order, against which a party applied for special leave to appeal under A.136. The Supreme Court denied the plea, since the Conciliation Officer could not be considered a 'tribunal' for the purposes of A.136. This was because the Conciliation Officer was not required to sit in public, no formal proceedings were required to be tendered before the Officer, and the Officer was not empowered to compel the attendance of witnesses. (Based on *Jaswant Sugar Mills* v. *Lakshmi Chand*, AIR 1963 SC 677)

A.136 confers a wide discretionary power on the Supreme Court to grant special leave to appeal; it does not, as such, confer a *right* of appeal on a party. Although it is a wide power, decided cases have established that the Supreme Court will grant special leave to appeal only in exceptional cases, where grave and substantial injustice has been done, for example, by disregard to the forms of legal process or violation of the principles of natural justice. (*Narpat Singh* v. *Jaipur Development Authority*, (2002) 4 SCC 666)

That being said, the Court does have wide discretion under A.136. For example, the Supreme Court can also invoke its power under A.136 on its own motion. (*Pawan Kumar* v. *State of Haryana*, (2003) 11 SCC 241)

Illustration: In a criminal case where special leave to appeal was granted under A.136, one of the co-accused, A, did not prefer an appeal. In the appeal before the Supreme Court, all the other co-accused were acquitted. The Supreme Court, in exercise of its jurisdiction, also acquitted A, even though A was not one of the appellants. (*Gurucharan Kumar* v. *State of Rajasthan*, (2003) 2 SCC 698)

The Supreme Court would be reluctant to go into questions of fact where two courts of fact have appreciated and assessed the evidence with regard to questions of fact; it may, however, go into the correctness of findings of fact where "*the concurrent decision of two or more courts or tribunals is manifestly unjust.*" (*Raghunath G. Panhale* v. *Chaganlal Sundarji & Co.*, (1999) 8 SCC 1)

Typically, the Supreme Court would not interfere with the interim orders of a High Court in an appeal under A.136. This has been done in some cases, though, for example, where the interim order of the trial judge was held not justified on account of the important principles of international trade being involved in the case. (*Tarapore & Co.* v. *V. O. Tractors Export*, (1969) 1 SCC 233)

The Supreme Court has the authority to review its own judgments, subject to any law in force, or any rules made under A.145. (A. 137) The Rules under A.145 permit such a review on the grounds mentioned in Order 47, Rule 1 of the Code of Civil Procedure. A review, therefore, would lie on the following grounds:

- Discovery of new and important matters or evidence;
- Mistake or error apparent on the face of the record; or
- Any other sufficient reason.

The remedy of 'curative petitions' has been read into the scope of its powers under A.137

by the Supreme Court. For example, in a case where the Supreme Court denied the claim of questioning the validity of a final order or judgment of the court under A.32, it suggested that a curative petition could be filed against any final order or judgment of the Court if it is vitiated by the non-observance of the principles of natural justice or on account of abuse of process of the Court. (*Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388)

The scope of the Supreme Court's power may be extended by Parliament under A.138 in respect of any of the matters in the Union List, and in respect of any matter as the Government of India and the Government of any State may by special agreement confer. (A. 138) Similarly, Parliament may also extend the Supreme Court's power to issue writs for any purposes other than those mentioned in A.32 (2). (A.139)

Under A.139-A, if there are several cases involving the same or substantially the same questions of law pending before the Supreme Court and one or more High Courts, or before two or more High Courts, and the Supreme Court is satisfied on its own motion or on an application by the Attorney-General, or any party to such a case, that there are substantial questions of general importance involved in such cases, the Supreme Court may withdraw the pending case or cases before the High Courts, and dispose of all the cases itself. The Supreme Court can also, if it deems it necessary to do so for the ends of justice, transfer any case, appeal, or other proceedings pending before any High Court to any other High Court.

The law declared by the Supreme Court is binding on all courts within the territory of India. (A.141) High Courts are bound by a decision of the Supreme Court, and they cannot ignore it on the ground that relevant provisions were not brought to the notice of the Supreme Court, or that the Supreme Court laid down the legal position without considering all the points, and therefore its decision is not binding. (*Ballabhdas Mathurdas Lakhan* v. *Municipal Committee*, (1970) 2 SCC 267)

The Supreme Court, however, is not bound by its own decisions, and may overrule its previous decisions. (*Dwarka Das Shrinivas* v. *Sholapur Spinning and Weaving Co. Ltd.*, AIR 1954 SC 119) Generally, a decision of a larger bench binds a smaller or equal bench. If there is a doubt, the smaller or equal bench can invite the attention of the Chief Justice to the matter, and request that the matter be placed before a larger bench. (*Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*, (2005) 2 SCC 673)

The Supreme Court has the power, in the exercise of its jurisdiction, to pass such order as may be necessary to do complete justice in the matter pending before it. It may exercise this power only when the Court is otherwise exercising its jurisdiction, and when it is necessary to do complete justice in the matter pending before it. (A.142)

Illustration: The Supreme Court was hearing contempt proceedings against some police officials for assaulting, handcuffing, and maliciously prosecuting a Chief Judicial Magistrate. The Supreme Court not only sentenced the police officers and their accomplices, but, in exercise of its authority under A.142, also quashed the criminal proceedings against the Magistrate. The Supreme Court held that this was necessary to do complete justice in the matter. (*Delhi Judicial Service Association* v. *State of Gujarat*, (1991) 4 SCC 406)

The President may refer a question to the Supreme Court for consideration if it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is necessary to obtain the Supreme Court's opinion upon it. Upon receiving such a question from the President, the Supreme Court may, after hearing as it thinks fit, report its opinion on such a question to the President. This consultative jurisdiction of the Supreme Court even extends to matters that it otherwise does not have the jurisdiction to hear under the proviso to A.131. (A.143)

While the language of A.143 is quite wide, it cannot be used to refer a question of law to the Supreme Court which it has already decided in the exercise of its judicial powers. The Court cannot sit in appeal against its earlier decisions in the exercise of its advisory jurisdiction under A.143. (*In the matter of Cauvery Water Disputes Tribunal*, 1993 Supp (1) SCC 96) Although the opinion of the Supreme Court in a reference under A.143 is not, strictly speaking, binding upon the President, it is normally honoured by the President, and, in some cases, the Court may also take an undertaking through the Attorney-General that the President will honour it. (*Special Reference No. 1 of 1998, Re*, (1998) 7 SCC 739) Furthermore, the Supreme Court has discretion in this matter, and may, in a proper case and for good reasons, decline to express any opinion on the questions submitted to it. (*Kerala Education Bill, 1957, Re*, AIR 1958 SC 956)

Illustration: The President referred a question to the Supreme Court under A.143, relating to the constitutionality of a Bill pending before Parliament. An argument was raised that it would be futile for the Supreme Court to consider the question because whatever view the Supreme Court took, it would still be open to Parliament to discuss the Bill and to pass it or not pass it as it pleased. The Supreme Court rejected this argument, holding that while it was true that nothing the Supreme Court opined could deter Parliament from proceeding with the Bill in any manner, but since the constitutionality of the Bill was a matter which fell within the exclusive domain of the judiciary, the Supreme Court would proceed on the trust that Parliament would not fail to take notice of the Court's opinion. (*Special Courts Bill, 1978, Re*, (1979) 1 SCC 380)

A.145(1) provides for the rule-making authority of the Supreme Court. A.145(3) fixes the minimum number of judges that are required to sit for the purpose of deciding a any case involving a substantial question of law as to the interpretation of the Constitution at five. A.145(5) provides that all decisions of the Supreme Court are to be delivered with the concurrence of a majority of the Judges hearing a case; however, Judges who do not agree with the majority opinion have the right to deliver a dissenting judgment or opinion.

The High Courts in the States (Part VI, Chapter V)

A.214 provides that there shall be a High Court for each State. A High Court is a court of record, and has all the powers of such a court, including the power to punish for contempt of itself. (A.215)

The Chief Justice and the other Judges of a High Court are appointed by the President, and hold office until the age of sixty-two years. (A.217) The provisions of A.124 clauses (4) and (5), relating to the procedure for the removal of the judges of the Supreme Court apply in relation to the High Courts, with the substitution of reference to the High Court for references to the Supreme Court. (A.218) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to another. (A.222)

A.226 confers a power on the High Courts to issue to any person or authority, including, in appropriate cases, any government, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto*, and *certiorari*, for the enforcement of any of the Fundamental Rights, and for any other purpose - that is, for the enforcement of any legal right.

Under clause (1) of A.226, a High Court's power under A.226 cannot run beyond the territories subject to its jurisdiction, and, secondly the person or authority to whom a High Court issues such a writ must be 'within those territories.' This clearly implies that they must be amenable to the High Court's jurisdiction either by residence or location within those territories. (*Kusum Ingots and Alloys Ltd.* v. *Union of India*, AIR 2004 SC 2321) Since this might cause hardship to petitioners who are located elsewhere than Delhi, and who seek a remedy against the Central Government, clause (2) of A.226 allows a High Court to issue directions, orders, or writs to any Government, authority or person if the

cause of action, wholly or in part, arises within the territorial jurisdiction of that High Court, notwithstanding that the seat of such Government or authority or residence of that person is not within the territorial jurisdiction of that High Court.

The remedy under A.226 is a discretionary remedy; as such, the High Court has the discretion to refuse the grant of any writ if it is satisfied that the aggrieved party can have an adequate remedy elsewhere. (*Rashid Ahmed* v. *Municipal Board*, AIR 1950 SC 163) Note that this is within the discretion of the High Court, and that the High Court may choose to exercise jurisdiction under A.226 if it thinks fit, regardless of whether an alternate remedy exists. This may happen, for example, in a situation where the *vires* of the Act itself is challenged. The High Court may also consider other factors when determining whether to exercise its jurisdiction under A.226, such as, for example, whether the petitioner has inordinately delayed in applying for the remedy. (*P. S. Sadasivaswamy* v. *State of Tamil Nadu*, (1975) 1 SCC 152)

Illustration: A challenged a decision of the Election Tribunal in a petition under A.226 before the High Court. The relevant statute, however, allowed for a process of appeal from the decisions of the Election Tribunal to a High Court. The High Court refused to exercise its jurisdiction under A.226 in this case since an alternate remedy was available to A. (*N. T. Veluswami* v. *G. Raja Nainar*, AIR 1959 SC 422)

Illustration: A challenged an order levying an additional duty under the Sea Customs Act. The Act provided a procedure for appeal, but also required that the entire amount demanded as additional duty be deposited as a condition precedent for filing an appeal against the order. The High Court decided to exercise jurisdiction in this case, since the remedy under the Act could not be considered an adequate alternative remedy. (*Calcutta Chemical Co.* v. *Assistant Collector of Customs*, AIR 1958 Cal 694)

The Supreme Court has held that a High Court should grant interim relief in exercise of its jurisdiction under A.226 only in exceptional cases. (*C. C. E.* v. *Dunlop India Ltd.*, (1985) 1 SCC 260) Accordingly, a High Court would only grant interim relief under A.226 if it is satisfied that withholding it would 'prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice.' (*Deoraj* v. *State of Maharashtra*, (2004) 4 SCC 697)

A.227 confers on all High Courts the power of superintendence over all courts and tribunals throughout its territorial jurisdiction. This power is of an administrative as well as a judicial nature. (*Ram Roop* v. *Bishwa Nath*, AIR 1958 All 456) This power would not, however, be exercised where an alternate remedy is available, even though pursuing that remedy may involve some inconvenience or delay. (*Manek Gustedji Burjarji* v. *S. N. Mirza*, (1977) 1 SCC 227) Grounds for interference may include want or excess of jurisdiction (*Gulab Singh* v. *Collector of Farrukhabad*, AIR 1953 All 585), and an error apparent on the face of the record (*Surya Devi Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675)

Illustration: A approached the High Court under A.227 in relation to the decision of the tribunal relating to the alleged unfair dismissal of an employee. The Supreme Court held that the High Court could not interfere with the tribunal's decision if it was a mere wrong decision with nothing more. Furthermore, where the two lower courts had reached the same conclusion on the questions of facts, the High Court could not reassess the evidence under A.227. (*D. N. Banerji* v. *P. R. Mukherjee*, AIR 1953 SC 58; *Visalakshmi* v. *Anjanuyalu Chetti*, AIR 1958 Mad 242; *M. M. Amonkar* v. *S. A. Johari*, (1984) 2 SCC 354)

The law declared by a High Court is binding on its subordinate courts as well as on administrative tribunals in the State. (*East India Commercial Co. Ltd.* v. *Collector of Customs*, AIR 1962 SC 1893)

As concerns the difference between the

powers under A.226 and A.227, the Supreme Court has explained that "*While in a* certiorari *under A.226 the High Court can only annul the decision of the tribunal, it can, under A.227, do that, and also issue further directions in the matter.*" (*Hari Vishnu Kamath* v. *S. Ahmad Ishaque*, AIR 1955 SC 233)

If the High Court is satisfied that a case that is pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution, it may withdraw the case, and either dispose of the case itself, or determine the question of law and return the case to the subordinate court, which is then required to dispose of the case in conformity with the High Court's judgment on that question of law. (A.228)

Appointments, postings, and promotions of district judges in a State are made by the Governor in consultation with the High Court. (A.233)

Illustration: A challenged the appointment of certain persons as district judges. The Governor had constituted a Selection Committee to select candidates on the basis of qualifications indicated by the Governor. The Supreme Court held that the object of consultation with the High Court under A.233 was to know better about the suitability of candidates, and that the mandatory provision (A.233) was violated by constituting an authority that had no place in the constitutional provision at all. (Based on *Chandra Mohan* v. *State of Uttar Pradesh*, AIR 1966 SC 1987)

Part VIII: The Union Territories

Other than as may be provided by any Central law, every Union Territory is administered by the President, acting, to the extent that the President thinks fit, through an administrator appointed by the President with such designation as the President may specify. If the President appoints a Governor as the administrator of a Union Territory, the Governor acts independently of the Council of Ministers in respect of the administration of the Union Territory. (A.239)

Though the Union Territories are centrally administered, they do not become merged with the Central Government by virtue of A. 239. They maintain their distinct constitutional identity. (*Satya Dev Bushare* v. *Padam Dev*, AIR 1954 SC 587)

Part IX: The Panchayats

Part IX of the Constitution (Aa.243 - 243-O) set out the system of *panchayats* at the lowest level of the States in furtherance of the objective of local self-government.

Part IX-A: The Municipalities

Part IX-A of the Constitution (Aa.243-P - 243-ZG) provides for the setting up of municipalities in all metropolitan areas and municipal areas in the country.

Part X: The Scheduled and Tribal Areas

Part X of the Constitution (Aa.244 - 244-A) provide for the scheme of administration of the Scheduled Areas and Scheduled Tribes, in accordance with the provisions of the Fifth and Sixth Schedules of the Constitution.

Part XI: Relations between the Union and the States

Legislative Relations

Parliament has the authority to make laws o the subject matter enumerated in the appropriate list for the whole or any part of the territory of India, and a State Legislature has the authority to make laws for the whole or any part of the State. No law made by Parliament can be deemed invalid on the ground that it has extra-territorial operation. (A.245)

Illustration: Parliament passes an Act providing that if a person domiciled in the territory of India marries wheresoever while his wife is alive and has not been divorced by a competent court, shall be guilty of the offence of bigamy. An Indian citizen goes to France and marries a French woman while his

first wife is alive. He can be prosecuted in India for the offence of bigamy committed in France. (M. P. Singh (Ed.), *V. N. Shukla's Constitution of India*, 11th ed., 2008, at p.715)

Although a State Legislature cannot make a law having extra-territorial operation, a law made by a State Legislature would be valid if there is sufficient nexus or connection between the State and the subject-matter of the law.

Illustration: The newspaper *Sporting Star* was printed and published in Bangalore, but had a wide circulation in Bombay as well. The publishers used the newspaper to conduct prize competitions, for which entry forms and fees were received from the State of Bombay through agents and depots established throughout Bombay. The Court held that the standing invitations, the filling up of the forms, and the payment of money took place within the State of Bombay. It was therefore held that there was sufficient nexus to enable the Bombay Legislature to tax the publishers, who were residing outside the State. (*State of Bombay* v. *R. M. D. Chamarbaugwala*, AIR 1957 SC 699)

Although A.245 recognises only the law-making power of only Parliament and the State Legislatures, it is not always possible for the legislature to think of and provide for every eventuality that may arise. The legislature may, therefore, allow for delegated legislation, wherein the executive is permitted to make rules or regulations under the authority of a law passed by the legislature. Care must be taken, however, to avoid excessive delegation. Essential powers of legislation cannot be delegated. The essential legislative power consists of the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. (*Delhi Laws Act, 1912, Re*, AIR 1951 SC 332)

Illustration: An Act empowered the administrator so far as it appeared necessary to him to be necessary or expedient for carrying out the provisions of the Act, by order, to regulate by licenses, permit, or otherwise, the manufacture, distribution, transport, acquisition, possession, transfer, disposal, use, or consumption of gold. The Act was declared invalid on the ground of excessive delegation as the power conferred on the administrator was legislative in character. No guidance was indicated in the Act for having any control over the exercise of power, and neither was there any stipulation for legislative supervision. (*Harakchand R. Banthia* v. *Union of India*, (1969) 2 SCC 166)

Illustration: The object set out in the preamble of an Act, "*to maintain supplies and services essential to the life of the community*" was held to offer sufficient guidance for the exercise of control by delegated legislation over the trade of export and import. (*Bhatnagars & Co. Ltd.* v. *Union of India*, AIR 1957 SC 478)

Parliament has exclusive power to make laws with respect to the matters set out in List I (the Union List) in the Seventh Schedule of the Constitution; Parliament and (subject to Parliament's exclusive power to make laws in respect of the matters set out in the Union List) the Legislature of any State have power to make laws with respect to the matters set out in List III (the Concurrent List) in the Seventh Schedule. Subject to the foregoing (Parliament's powers of legislation), the Legislature of any State has the exclusive power to make laws in respect of the matters set out in List II (the State List) of the Seventh Schedule. Parliament has the power to make laws on any subject for any part of the territory of India, if it not located within a State. (A.246)

The law-making power of a legislature under A.246 is *plenary* (absolute; unqualified) unless the Constitution prohibits legislation, or places any restriction on the law making power, either absolutely or conditionally.

The Supreme Court has held that in matters of interpreting the limits of jurisdiction of the Union and the States, entries in the Union and the State Lists must be read together, and the language of one interpreted, and where necessary, modified by that of the other. (*Calcutta Gas Co.* v. *State of West Bengal*, AIR 1962 SC 1044) This is known as the doctrine of

harmonious construction.

Illustration: Parliament passed the Advocates Act, 1961, which allows for, among other things, the qualifications, enrolment, right to practice and discipline of advocates. Entries 77 and 78 of the Union List concerning persons entitled to practise before the Supreme Court and the High Courts were the relevant entries. Entry 26 of List III relates to 'legal, medical and other professions'. The constitutionality of the Advocates Act was challenged. The Supreme Court applied the rule of harmonious construction and held that Parliament was exclusively empowered to legislate in respect of persons entitled to practise in the Supreme Court or High Court, and power to legislate in respect of the rest of the practitioners fell under Entry 26 of List III. (*O. N. Mahindroo* v. *Bar Council*, AIR 1968 SC 888)

If a law deals with a subject in one List, but also touches upon a subject in another List, over which it does not have legislative competence, the true character and nature of the legislation has to be ascertained. If, upon examination, it is found that the legislation is in substance on a matter assigned to the legislature enacting the statute, then it must be held valid in its entirety even though it may incidentally tread upon matters beyond its competence. This is known as the doctrine of *pith and substance*.

Illustration: The State Legislature passed an Act restricting the use of sound amplifiers under Entry 6, List II: "Public health and sanitation". A, who had been prosecuted under the Act, challenged its constitutionality on the ground that the subject matter fell under Entry 31, List I: "Posts and Telegraphs, Telephones, Wireless, Broadcasting and other like forms of communication", and therefore, was outside the legislative competence of the State Legislature. The Supreme Court held that the impugned legislation, in its pith and substance, fell under Entry 6 of List II, and was therefore valid. (*State of Rajasthan* v. *G. Chawla*, AIR 1959 SC 544)

Parliament has exclusive power to make laws on any subject not included in List II or List III of the Seventh Schedule. (A.248)

Illustration: Parliament enacted a law imposing an expenditure tax. This subject was not included in any of the Lists in the Seventh Schedule. The Supreme Court upheld the validity of the tax as it was within the legislative competence of Parliament under A. 248. (*H. H. Prince Azam Jha Bahadur* v. *Expenditure Tax Officer*, (1971) 3 SCC 621)

Parliament may be empowered to pass laws on subjects in the State List in certain circumstances, for example, when a proclamation of Emergency is in operation (A. 250), or in respect of two or more States, if those States pass a resolution to that effect (A. 252). Furthermore, there is no restriction on the law-making power of Parliament on the ground that a matter is listed in the State List if Parliament passes a law to give effect to international agreements. (A.253)

If a provision of any law made by a State Legislature is repugnant to any law made by Parliament that Parliament is competent to enact, then the law made by the State Legislature would be invalid to the extent of the repugnancy. If, however, the law made by the State Legislature relates to a subject in the Concurrent List, and that law has been reserved for the President's consideration and received the President's assent, then the law would prevail over the Central law in that State. In the latter situation, however, Parliament may pass a law at any time, adding to, amending, varying, or repealing the State law. (A.254)

Illustration: The State Legislature of Assam passed a law in 1962, prescribing that the Presiding Officer of the Industrial Tribunal should be appointed in consultation with the High Court. Parliament passed a law on the same topic in 1964, and the Central law did not have the requirement of consultation with the High Court. The Supreme Court held that the Central Act occupied the field, and accordingly, the Assam Act on the subject was held repugnant to the Central Act and struck down. (*State of Assam* v. *Horizon Union*, AIR

1967 SC 442)

'Repugnancy' under A.254 does not mean that there has to be a direct conflict between the Central and the State laws. The doctrine of *occupied field* provides that there may be repugnancy because both cover the same field.

Illustration: A State legislation on a subject in the Concurrent List provided a punishment of seven years' imprisonment for a certain offence. A subsequent Central legislation provided a punishment of three years for the same offence. It was held that the State law was repugnant to the Central law, and, therefore, invalid. (*Zaverbhai* v. *State of Bombay*, AIR 1954 SC 752)

Administrative Relations

Every State must exercise its executive power in such a manner as to ensure compliance with Central laws, and the executive powers of the Union extend to the giving of such directions to a State as the Government of India may think fit for this purpose. (A.256) Furthermore, the Union may also give directions to a State in certain cases, such as, for example, in matters of national or military importance. (A.257) Furthermore, the Union may also provide for the adjudication of disputes relating to the use, distribution, or control of the waters of, or in, any inter-State river or river valley (A.262), and provide for the setting up of an Inter-State Council to inquire into or advise upon inter-State disputes (A.263)

Part XII: Finance, Property, Contracts and Suits

No tax can be levied or collected except by authority of law. (A.265)

A.265 makes it clear that a tax may only be imposed under statutory law, enacted by a legislature that has the competence to pass a law on the subject concerned; no tax, therefore, can be imposed by executive action. (*Ramjilal* v. *I. T. O.*, AIR 1951 SC 97)

All revenues raised by the Government of India, as well as all moneys received, are to be formed into the Consolidated Fund of India; similarly, all revenues raised and moneys received by a State Government are to be formed into the Consolidated Fund of that State. No moneys may be appropriated from the Consolidated Fund of India or from the Consolidated Fund of a State except in accordance with law, and for the purposes and manner provided in the Constitution. (A. 266)

Aa.268 - 281 provide for the manner of distribution of revenues between the Central and the States.

A State may not impose, or authorise the imposition of, a tax on the sale or purchase of goods if such sale or purchase takes place outside the State, or in the course of the import of the goods into India, or the export of the goods out of India. (A.286)

Illustration: A company made various sales of cement which were supplied from factories outside the State of Mysore to purchasers within the State. The State of Mysore levied a tax on these sales. The Court held that it was the goods were brought into the State as the result of a covenant or incident of the contract of sale; this was because the contract of sale was deemed to have contained a covenant that the goods would be supplied in Mysore from a place situated outside Mysore. The sales were, therefore, inter-State sales, and the State of Mysore could not levy a sales tax on them. (*State Trading Corporation of India Ltd.* v. *State of Mysore*, AIR 1963 SC 548)

Property, Contracts, Rights, Liabilities, Obligations and Suits

All contracts and assurances of property made in the exercise of the executive power of the Union and the State are made in the name of the President and the Governor of the State, respectively; however, neither the President nor any Governor is personally liable in respect of such contracts or assurances of property, nor are any persons who execute such contracts or assurances of property on behalf of the President or the Governor. (A.

299) Non-compliance with the provisions of this Article would render a contract void. (*Bhikraj* v. *Union of India*, AIR 1962 SC 113)

Illustration: A contract entered into with the Government of India was found to be void because of non-compliance with A.299; however, goods had been delivered by the contractor to the Government. The Supreme Court held that though the contract was void, there was an obligation on the Government under S.70 of the Indian Contract Act to make payment for the goods received. (*New Marine Coal Co. Ltd.* v. *Union of India*, AIR 1964 SC 152)

The Government of India may sue or be sued by the name of the Union of India; the Government of a State may sue or be sued by the name of the State. (A.300) For example, any suit against the Government of India would name the 'Union of India' as a party.

While A.300 makes it clear that the Government may be sued, the extent of tortious liability of the Government for the acts of its servants remains unclear. The earlier position that the Government cannot be held liable under tort for acts committed by its servants in the exercise of the sovereign functions of the state (*See Kasturi Lal* v. *State of Uttar Pradesh*, AIR 1965 SC 1039), does not seem to find much acceptance in recent judgments (*See Common Cause, A Registered Society* v. *Union of India*, (1999) 6 SCC 2979)

Illustration: A suffered serious injuries as the result of the negligent driving of a military truck by a military *jawan*. The Supreme Court held the Union of India liable for the *jawan's* actions, and granted a compensation of Rs. 1,00,000/- to A. (*Pushpa Thakur* v. *Union of India*, AIR 1986 SC 1199)

As concerns contractual liability, the generally accepted view is that the Government's liability is the same as a private person's. Note, however, that there is no liability of the Government for what are known as 'acts of State'.

Right to Property

No person can be deprived of property except by authority of law. (A.300-A)

The position after the removal of Aa.19(1)(f) and 31, which provided a fundamental right to property, and the addition of A.300-A is that the executive cannot deprive a person of his property without the authority of law, and 'law' in this context would mean an Act of Parliament or a State Legislature, a rule, or a statutory order, having the force of law. (*Bishambhar Dayal Chandra Mohan* v. *State of Uttar Pradesh*, (1982) 1 SCC 39)

Part XIII: Trade, Commerce and Intercourse within the Territory of India

Trade, commerce and intercourse throughout the territory of India is free, subject to the provisions of Part XIII of the Constitution. (A. 301)

Illustration: A carried on the business of growing tea, and sending it to Calcutta *via* Assam. The Legislature of Assam passed a law, which provided for the imposition of a tax on goods carried by road or inland waterways in the State of Assam. The Supreme Court held that the tax imposed on the goods directly restricted their transport or movement, and was, therefore, violative of A. 301. The law was held void and the State restrained from imposing the tax for this reason. (*Atiabari Tea Co.* v. *State of Assam*, AIR 1961 SC 232)

Illustration: The State of Rajasthan passed a law providing that no one could use or keep a motor vehicle for use in the State of Rajasthan without paying an appropriate tax for it. The Supreme Court held that the tax was a compensatory tax for the use of trading facilities, and, therefore, was not violative of A.301. (*Automobile Transport Ltd.* v. *State of Rajasthan*, AIR 1962 SC 1406)

'Trade and commerce' protected under A.301 only refers to those activities that are lawful trading activities, and are not against public policy. Gambling is not a trade, and the

Supreme Court has held that gambling could not be regarded as 'trade or commerce', and as such, was not protected under A.19(1)(g) or A. 301. (*State of Bombay* v. *R. M. D. Chamarbaughwala*, AIR 1957 SC 699)

Parliament may impose such restrictions on the freedom of trade, commerce or intercourse within the territory of India as may be necessary in the public interest. (A.302) Parliament may not, however, discriminate between States through such restrictions, unless it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. (A.303) A State Legislature may by law impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subject. (A.304) This power, however is restricted to the imposition of a non-discriminatory tax. (*See State of Karnataka* v. *Hansa Corporation*, (1980) 4 SCC 697)

Illustration: A State Legislature imposed a sales tax on tanned hides and skins imported from outside the State that was higher than the sales tax imposed on the same goods produced or manufactured within the State. The Court invalidated this tax as it was discriminatory and therefore unconstitutional under A.304(a). (*Firm A. T. B. Mehtab Majid & Co.* v. *State of Madras*, AIR 1963 SC 928)

Part XIV: Services under the Union and the States

The appropriate Legislature may, through legislation, regulate the recruitment, and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union and the States. Until provision is made by the appropriate Legislature in this manner, rules on these matters may be made by the executive. This power is subject to the other provisions of the Constitution. (A.309)

The rules providing for the terms of service can be unilaterally altered by the Government; this is because once appointed to a post or office, a government servant acquires status, and the government servant's rights and obligations are no longer determined by the consent of both parties, but by statute or statutory rules, which may be framed and altered unilaterally by the Government. The legal position of a government servant is more of status than of contract. (*Roshan Lal* v. *Union of India*, AIR 1967 SC 1889)

Illustration: The Government issues an order raising the retirement age of teachers in government and government-aided schools from 55 to 58 years after the teachers submitted a memorandum in this regard. The rules under the relevant legislation were suitably altered in this regard. Later, in supersession of its earlier order, the Government reduced the retirement age to 55 years, and made the necessary amendments to the rules once again. It was argued that the raising of the retirement age to 58 years was done as a result of an understanding which could be considered a binding contract, which could not be unilaterally altered by the Government. The Supreme Court rejected this argument, and held that the powers of the Government under A.309 to regulate the conditions of conditions of service cannot be fettered by an agreement or contract. (*C. Sankaranarayanan* v. *State of Kerala*, (1971) 2 SCC 361)

Except as expressly provided in the Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State. (A.310)

The importance of the 'doctrine of pleasure' recognised in A.310 is that firstly, the Government has the right to regulate or determine the tenure of its employees at pleasure, without being restricted by any terms in their contract to the contrary; and secondly, that the Government has no power to restrict or give up its prerogative of

terminating the services of its employees at pleasure under any contract with the employee; both these, of course, are subject to the other provisions of the Constitution, including A.310(2). A.310(2) empowers the Government to enter in special contracts with new employees, under which the application of the rule of dismissal at pleasure may be qualified or limited. If there is no stipulation in the contract for the payment of compensation on premature termination of employment, no compensation can be claimed under A.310(2). (*J. P. Bansal* v. *State of Rajasthan*, (2003) 5 SCC 134)

The 'pleasure' of the President or Governor under A.310 is exercised not in any personal capacity but as head of the Government, acting on the aid and advice of the Council of Ministers. (*Union of India* v. *Tulsiram Patel*, (1985) 3 SCC 252)

A person who is a member of a civil service of the Union or an all-India service or a civil service of a State, or a person holding a civil post under the Union or a State cannot be dismissed or removed by an authority subordinate to that by which that person was appointed. (A.311(1)) Furthermore, no such person can be dismissed or removed or reduced in rank, unless an inquiry has been conducted, in which that person has been informed of the charges against that person, and given a reasonable opportunity of being heard in respect of those charges. A penalty may be imposed on the basis of the evidence adduced during such an inquiry, and it is not necessary to give such person any opportunity of making a representation on the penalty proposed. This inquiry is not necessary if:

- The person is dismissed or removed or reduced in rank on the ground of conduct which has led to that person's conviction on a criminal charge;
- The authority empowered to dismiss or remove the person or to reduce that person in rank is satisfied for some reason, to be recorded in writing, that it is not reasonably practicable to hold such an inquiry; or
- Where the President or Governor, as applicable, is satisfied that it is not expedient to hold such an inquiry in the interest of the security of the State. (A.311 (2))

Illustration: A government servant was appointed by the Secretary, but dismissed by the Deputy Secretary; the dismissal was set aside under A.311. (*Satish* v. *State of West Bengal*, AIR 1960 Cal 278)

The protection under A.311 would not extend to an employee of a company incorporated under the Companies Act, such as the Hindustan Steel Ltd., because the company is not a department of the Government. (*S. L. Agarwal* v. *General Manager, Hindustan Steel Ltd.*, (1970) 1 SCC 177) Employees of an institution such as the Council of Scientific and Industrial Research, which is sponsored and controlled by the Government, would also not be covered by A.311, because the Council is registered under the Societies Registration Act, and is not a department of the Government. (*Sabhajit Tewary* v. *Union of India*, (1975) 1 SCC 485)

A.311 is applicable both to permanent and temporary servants. (*Parshotam Lal Dhingra* v. *Union of India*, AIR 1958 SC 36)

Although A.311 provides that an inquiry must be conducted in accordance with the principles of natural justice, what principle of natural justice should be applied depends on the facts and circumstances of each case. The courts are only required to see whether the non-observance of any of those principles in a given case is likely to have resulted in deflecting the course of justice. (*State of Uttar Pradesh* v. *O. P. Gupta*, (1969) 3 SCC 775) While the technicalities of criminal law cannot be invoked, the charges framed against the public servant must be held to be proved before any punishment can be imposed. (*State of Madras* v. *A. R. Srinivasan*, AIR 1966 SC 1827)

The protection of A.311(2) is available only where dismissal, removal, or reduction in rank is sought to be inflicted by way of punishment and not otherwise. (*Sukhbans Singh* v. *State of Punjab*, AIR 1962 SC 1711) A

person, therefore, who is compulsorily retired in accordance with the service rules cannot claim any right under A.311 because the retirement is not by way of punishment. (*Satish Chandra Anand* v. *Union of India*, AIR 1953 SC 250) Similarly, the discharge of a civil servant on account of the abolition of the post held by the civil servant is not a personal penalty, but an action concerning the policy of the State on whether a post should continue or not. As such, the termination of service brought about by the abolition of a post effected in good faith does not attract A.311(2). (*K. Rajendran* v. *State of Tamil Nadu*, (1982) 2 SCC 273)

The power of Parliament to create an all-India service is set out in A.312. Parliament may create such a service if the Council of States declares by a resolution supported by not less that two-thirds of the members present and voting that it is necessary or expedient to do so in the national interest.

Public Service Commissions

The Union Public Service Commission and the various State Public Commissions are provided for in A.315. Aa.315 - 323 relate to the appointment and term of office of member of the Public Service Commissions, their removal, and the manner of functioning of Public Service Commissions.

Part XIV-A: Tribunals

A.323-A provides Parliament the authority to create administrative tribunals for the adjudication or trial of disputes or complaints relating to the recruitment and conditions of service of any persons appointed to public services and posts in connection with the affairs of the Union or of any State, or of any local or other authority within the territory of India, or under the control of the Government of India, or of any corporation owned or controlled by the Government.

A.323-B sets out the authority of the appropriate Legislature to provide for the adjudication or trail by tribunals of any disputes, complaints or offences with respect to all or any of the matters specified in A.323-B(2) with respect to which that Legislature has power to make laws. Some of the matters set out in A.323-B(2) are: the levy, assessment, collection, and enforcement of any tax; industrial and labour relations; and ceiling on urban property.

A.323-A(2)(d) and A.323-B(3)(d) provide that Parliament or the appropriate Legislature, as the case may be, may provide for the exclusion of the jurisdiction of all courts other than that of the Supreme Court under A.136 when setting up such tribunals, in respect of the matters for the adjudication or trial of which the tribunals have been set up; the Supreme Court has held, however, that since judicial review is part of the basic structure of the Constitution, Aa.323A-(2)(d) and 323-B(3)(d) are unconstitutional to the extent that they exclude the jurisdiction of the High Courts under Aa.226 and 227, and that of the Supreme Court under A.32. Therefore, the judicial remedies under Aa.32, 226, and 227 are now available against the decisions of all tribunals constituted under Aa.323-A and 323-B. (*L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261)

Part XV: Elections

The Election Commission is vested with the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and the to the Legislature of every State and of elections to the offices of the President and Vice-President. (A.324)

Illustration: The Election Commission cancelled the entire poll as a result of mob violence at the time of counting of votes, and ordered a repoll for the entire constituency. Under A.324, a hearing may have to be given to all the candidates to meet the ends of natural justice, since their interests were immediately affected; however, it is not necessary that notice should be given to all the members of the general public if the Election Commission is satisfied that the procedure adopted has gone astray on a wholesale basis. (*Mohinder Singh Gill* v. *Chief*

Election Commissioner, (1978) 1 SCC 405)

Illustration: The Election Commission directed that electronic machines be used for casting of votes in an Assembly election; at that time, this was in contravention of the existing provisions of the Representation of People Act, 1951, which contemplated only manual voting. The Court held that the use of electronic machines vitiated the election, and a defeated candidate could challenge the election on the ground of illegality. The Court clarified that the words 'superintendence, direction and control' in A.324 are meant to supplement and not supplant the law, and therefore cannot be availed of against a valid law made by Parliament or a State Legislature concerning election matters. (*A. C. Jose* v. *Sivan Pillai*, (1984) 2 SCC 656)

A.325 provides that there shall be one general electoral roll for every territorial constituency for election to either House of Parliament or any House of Legislature of a State; no discrimination is permitted, neither is it permitted to create a special electoral roll, on grounds only of religion, race, caste, sex, or any of them.

Every person who is a citizen of India and who is not less than eighteen years of age, and is not otherwise disqualified under the Constitution or any other law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any election to the House of the People and to the Legislative Assembly of a State. (A.326) This Article expressly recognises the principle of adult suffrage for elections.

Part XVI: Special Provisions Relating to Certain Classes

A.330 provides for the reservation of seats in the House of the People for the Scheduled Castes and the Scheduled Tribes. Similar provisions exist for the reservation of seats in the Legislative Assemblies of the States. (A. 332) Furthermore, there is provision for the representation of the Anglo-Indian community in the House of the People (A.331) and in the Legislative Assemblies of the States. (A.333) Currently, the Constitution provides that these provisions shall expire sixty years after the commencement of the Constitution. (A.334)

Further special provisions relating to the Scheduled Castes and Scheduled Tribes exist in the form of consideration of their claims in the making of appointments to services and posts in connection with the affairs of the Union or of a State, in consistency with the maintenance of efficiency of administration (A.335); and making provisions in their favour for relaxation in qualifying marks in any examination or lowering the standards of evaluation, and for reservation in matters of promotion (proviso to A.335).

The President may, with respect to any Union Territory, and with respect to any State, in consultation with the Governor, specify the castes, races, or tribes or parts or groups within castes, races, or tribes which are recognised as Scheduled Castes under the Constitution for that State or Union Territory. (A.341) Similarly, the President may specify the tribes or tribal communities or parts of or groups within tribes or tribunal communities that are recognised as Scheduled Tribes under the Constitution in respect of any State or Union Territory. (A.342)

Illustration: A's father belonged to a Scheduled Tribe in Andhra Pradesh, and availing the benefit of that status, had joined the employ of the Central Government, and later moved to Maharashtra. A grew up and studied in Maharashtra for about ten years; upon completing high school, A applied for admission to medical colleges in Maharashtra as a member of a Scheduled Tribe. The Court held that A could not be treated as a member of a Scheduled Tribe in Maharashtra because the tribe to which A belonged was not included in the list of Scheduled Tribes in Maharashtra. Scheduled Tribes are specified in relation to each State and Union Territory, and therefore a member of a Scheduled Tribe in one State or Union Territory does not carry that status in another State or Union Territory. (*Marri Chandra* v. *Dean, Seth G. S. Medical*

College, (1990) 3 SCC 130; upheld in *Action Committee on Issue of Caste Certificate to SCs/STs* v. *Union of India*, (1994) 5 SCC 244)

Part XVII: Official Language

Hindi in the Devanagari script is the official language of the Union. (A.343) State Legislatures may by law adopt any one or more of the languages in use in the State, or Hindi, as the language or languages to be used for all or any of the official purposes of that State. (A.345)

The Constitution provides that English must be used in:

- All proceedings of the Supreme Court and in every High Court;
- The authoritative texts of all Bills or amendments to Bills to be introduced in either House of Parliament or in any House of Legislature of a State;
- The authoritative texts of all Acts passed by Parliament of the Legislature of a State, and of all Ordinances promulgated by the President or a Governor; and
- The authoritative texts of all orders, rules, regulations, and bye-laws issued under the Constitution or under any Union or State law. (A.348)

A.348(2) provides that the Governor of a State may, after prior consultation with the President, authorise the use of Hindi or any other language used for any official purpose in that State, in proceedings in the High Court having its principal seat in that State; this does not, however, apply to any judgment, decree, or order passed by that High Court.

Illustration: A, an intervener in a *habeas corpus* petition before the Supreme Court, insisted on arguing in Hindi. The Supreme Court suggested that A (i) argue in English; (ii) allow counsel to present A's case; or (iii) give written arguments in English. A did not accept any of these suggestions. Since the language of the Court is English, and A was not agreeable to the suggestions made by the Court, the Court cancelled A's intervention. (*Madhu Limaye* v. *Ved Murti*, (1970) 3 SCC 738)

Part XVII: Emergency Provisions

If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, the President may, by proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory of India as may be specified in the Proclamation. (A.352(1)) Such a Proclamation of Emergency may be varied or revoked by a subsequent Proclamation (A.352 (2)); such a Proclamation, or a Proclamation varying such a Proclamation, can be only be issued if the decision of the Union Cabinet that such a Proclamation may be issued has been issued to the President in writing. (A.353 (3)). Such a Proclamation must be approved by both the Houses of Parliament (A.352(4)), and, unless revoked, ceases to operate on the expiry of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation. (A.352(5)) Such a resolution approving a Proclamation of Emergency must be passed by a majority of not less than two-thirds of the members of the House present and voting. (A.353(6)) The President must revoke such a Proclamation or a Proclamation varying such a Proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such a Proclamation. (A.352(7))

The provisions relating to financial emergency are set out in A.360.

While a Proclamation of Emergency is in operation:

- The power of the Union extends to the giving of directions to any State as to the manner in which the State should exercise its executive power; and
- Parliament may make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union and the officers and authorities of the Union, on any matter, even if it is not part of the Union List in the Seventh Schedule.

(A.353)

The 'satisfaction' of the President when making a Proclamation of Emergency under A.352 is not altogether beyond judicial review, and may be brought within it, perhaps on grounds of mala fides or that the satisfaction is based on wholly extraneous and irrelevant grounds or is absurd or perverse. (*See Minerva Mills* v. *Union of India*, (1980) 3 SCC 625)

When a Proclamation of Emergency declaring that the security of India or any part of the territory of India is threatened by war or external aggression is in operation, nothing in A.19 can restrict the power of the State as defined in Part III of the Constitution to make any law or take any executive action which the State would be competent to make or take but for the provisions of Part III of the Constitution. Any such law shall, to the extent of such incompetency, shall cease to have effect as soon as the Proclamation ceases to operate, except in relation to things done or omitted to be done before the law so ceases to have effect. (A.358)

Illustration: The Newsprint Policy of 1972-73 was a continuation of an old policy made before a Proclamation of Emergency came into effect. This Policy was challenged as being violative of A.19. The defence was raised that under A.358, the Policy could not be challenged on this ground when a Proclamation of Emergency was in effect. The Supreme Court held that the policy was not protected from attack under A.19. It held that executive action which is unconstitutional at the time of its being taken is not immune from challenge in a court of law during the Proclamation of Emergency, which came into effect later. The Proclamation of Emergency would not authorise the taking of any executive action in exercise of a power conferred under a pre-emergency law. (*Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788)

The President may, when a Proclamation of Emergency is in operation, by order declare that the right to move any court for the enforcement of any of the rights conferred by Part III of the Constitution - except Aa.20 and 21 - as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. (A.359(1)) When such an order is in operation, nothing in Part III of the Constitution can restrict the power of the State as defined in Part III to make any law or to take any executive action which the State, but for the provisions of Part III, would be incompetent to make or to take. Any such law shall, to the extent of such incompetency, cease to have effect as soon as the order ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect. (A.359(1-A))

A law that is inconsistent with the fundamental rights and is made during an Emergency would not be validated - only its invalidation is suspended. (*Madan Mohan Pathak* v. *Union of India*, (1978) 2 SCC 381)

In *A. D. M., Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521, the Supreme Court, with the dissent of Justice Hans Raj Khanna, held that the writ of habeas corpus could be suspended under A.359 during an Emergency on the basis of higher claims to national security. The Forty Fourth Amendment of the Constitution has invalidated this provision. The enforcement of Aa.20 and 21 cannot now be suspended in any situation, and A.21 binds not only the executive but also the legislature. (*See Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248)

If, on receipt of a report from the Governor of a State or otherwise, the President is satisfied that a situation has arisen in which the government of the State cannot be carried out in accordance with the provisions of the Constitution, the President may by Proclamation:

- Assume all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the

State, other than the Legislature of the State;
- Declare that the powers of the Legislature of the State would be exercisable by, or under the authority of, Parliament; and
- Make such incidental or consequential provisions as the President thinks fit to give effect to the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any body or authority in the State.

The President is not authorised, however, to assume any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of the Constitution relating to High Courts. (A.356(1)) A Proclamation under A.356 has to be approved by both Houses of Parliament (A.356(3)), and may be continued for six months at a time on such approval, subject to a maximum of three years. (A.356 (4), *see also* A.356(5))

Where, by a Proclamation under A.356(1), it has been declared that the powers of the Legislature of a State would be exercisable by or under the authority of Parliament, it is competent:

- For Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate this power to any other authority that the President may specify;
- For Parliament, or the President, or the other authority that the President may have specified, as aforesaid, to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union, or the officer and authorities of the Union; and
- When the House of the People is not in session, for the President to authorise expenditure from the Consolidated Fund of the State, pending the sanction of such expenditure by Parliament. (A.357)

Any law that is made in exercise of the power of the Legislature of the State by Parliament, the President, or the other authority as aforesaid, which Parliament, the President or such other authority would not, but for the issue of a Proclamation under A.356, have been competent to make, would, after the Proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority. (A.357(2))

The exercise of the President's power under A. 356 is subject to judicial review. Though the President's 'satisfaction' is subjective, it has to be based on objective facts. If the power is exercised in a *mala fide* manner, it can be struck down. The President is obliged to produce the material on which the action under A.356(1) is based. While the Court cannot go into the correctness of the material or its adequacy, it can see whether it was relevant to the action. If the Court comes to the conclusion that the President's action was unconstitutional, it can restore the dismissed government to office, and revive and reactivate the Legislative Assembly, whether it was dissolved or kept under suspension. (*See S. R. Bommai v. Union of India*, (1994) 3 SCC 1)

Illustration: The Presidential Proclamation of December 15, 1992 under A.356 removed the State Government of Madhya Pradesh and dissolved the Legislative Assembly. Upon review, the High Court took the view that the President's satisfaction was based on two letters of the Governor. These letters mentioned some incidents of riot, arson, and killings that occurred in the aftermath of the demolition of the Babri Mosque on December 6, 1992. The High Court held that in that present case, these incidents did not satisfy the requirement that an 'internal disturbance' in a State, to justify a Proclamation under A. 356, must be of such a magnitude that it would be impossible for the State Government to carry on in accordance with the Constitution. (*Sunderlal Patwa* v. *Union of India*, 1993 Jab LJ 387 (FB))

Part XIX: Miscellaneous

The President or the Governor of a State are not answerable to any court for the exercise and performance of the powers and duties of their office, or for any act done or purporting

to be done by the President or the Governor in the exercise and performance of those powers and duties. This does not, however, affect the operation of A.61, relating to the impeachment of the President. This also does not restrict the right of any person to bring appropriate proceedings against the Government of India or the Government of any State. (A.361(1)) No criminal proceedings can be instituted or continued against the President or the Governor of a State during their term of office (A.361(2)), nor can any process for their arrest or imprisonment be issued during their term of office. (A.361(3)) A civil proceeding may be brought against the President or the Governor of a State in respect of their personal liability; however, two months' notice before the institution of the suit must be given, specifying the cause of action, and the name, description, and place of resident of the party who seeks to initiate such proceedings. (A.361 (4))

A.361-A provides protection in respect of the publication of proceedings of Parliament and of the State Legislatures. Aa.361-B - 365 relate to certain miscellaneous provisions; A.366 provides certain definitions, and A.367 makes the General Clauses Act, 1897 applicable for the interpretation of the Constitution.

Part XX: Amendment of the Constitution

A.368(1) provides that Parliament may, in the exercise of its constituent power, amend any provision of the Constitution by addition, variation, or repeal. An amendment of the Constitution can only be carried out through a Bill introduced for that purpose in either House of Parliament. Such a Bill must be passed by a majority of the total membership of each House, and by a majority of not less that two-thirds of the members of each House present and voting. It is then presented to the President, and upon the President's assent, the Constitution stands amended in accordance with the terms of the Bill. (A.368(2))

Certain provisions of the Constitution, listed in the proviso to A.368(2) may only be amended if the amendment is also ratified by the Legislature of not less that half of the States before the Bill providing for the amendment is presented for the President's assent.

Nothing in A.13 applies to any amendment made under A.368. (A.368(3))

Clauses (4) and (5) of A.368 have been held unconstitutional in *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625)

Illustration: Para 7 of the Tenth Schedule to the Constitution placed a bar on the jurisdiction of the courts in respect of any matter connected with the disqualification of a member of a House under that Schedule. This was struck down as unconstitutional and severed from the rest of the Tenth Schedule on the ground that it had the effect of amending the powers of the Supreme Court and the High Courts without following the procedure required in A.368(2). (*Kihoto Hollohan* v. *Zachillu*, 1992 Supp (2) SCC 651)

In *Keshavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, a writ petition was filed challenging the validity of certain amendments to the Constitution, as well as the Kerala Land Reforms Act, 1963 as amended in 1969. It was urged that if the Parliament's amending power were to be construed as empowering Parliament to exercise the full constituent power of the people, and authorising it to destroy or abrogate the essential features, basic elements, and fundamental provisions of the Constitution, such a construction must be held unconstitutional. The bench of thirteen judges was divided in its opinion; however, nine judges signed a 'summary' holding that A.368 did not enable Parliament to alter the basic structure or framework of the Constitution.

The 'basic structure' doctrine enunciated in the *Keshavananda Bharati case* has been interpreted over time to include a number of features as part of the basic structure of the Constitution, and as such, not subject to the amending power of Parliament, including:

- Judicial review (*L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261);

- Democracy (*Kihoto Hollohan* v. *Zachillu*, 1992 Supp (2) SCC 651);
- Free and fair elections based on adult franchise and a multi-party system as a part of democracy (*People's Union for Civil Liberties* v. *Union of India*, (2003) 4 SCC 399);
- The rule of law (*S. P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124);
- Harmony and balance between fundamental rights and directive principles (*Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625);
- Independence of the judiciary (*Minerva Mills Ltd.* v. *Union of India*, (1980) 2 SCC 591, *Kumar Padma Prasad* v. *Union of India*, (1992) 2 SCC 428); and
- Equality (*Indra Sawhney II* v. *Union of India*, (2000) 1 SCC 168).

While the scope of the basic structure doctrine remains the subject of judicial interpretation, the Court has identified the 'width' and 'identity' test to try and determine whether an impugned amendment violates the basic structure of the Constitution. Furthermore, the Court has clarified that it is not an amendment of a particular article, but rather, an amendment that adversely affects or destroys the wider principles of the Constitution, such as democracy, secularism, equality, or republicanism, or the one that changes the identity of the Constitution that is impermissible under this doctrine. (*M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212) These tests have also been discussed in later judgments, and the Court has emphasised that the 'rights' test, or the 'impact' test, rather than the 'essence of right' test may be more appropriate in the context of determining whether a particular amendment violates against the basic structure of the Constitution. (*I. R. Coelho* v. *State of Tamil Nadu*, (2007) 2 SCC 1)

Part XXI: Temporary, Transitional and Special Provisions

Aa.369 - 392 set out certain temporary, transitional, and special provisions, such as:

- Power to Parliament for a period of five years after the commencement of the Constitution to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List (A. 369); and
- Special provisions with respect to various States (Aa.371 - 371-I);

Part XXII: Short Title, Commencement, Authoritative Text in Hindi and Repeals

The Constitution may be called the 'Constitution of India'. (A.393) The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the Government of India Act, 1935, other than the Abolition of Privy Council Jurisdiction Act, 1949, stand repealed. (A.395)

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 4:
Contract Law, including Specific Relief, Special Contracts, and Negotiable Instruments

The Indian Contract Act, 1872 ("**the Contract Act**") is not an exhaustive code. Its function is "...to define and amend certain parts of the law relating to contracts..." (Preamble).

Where the Contract Act deals with an issue specifically, it is exhaustive on the subject. Where it does not, and no other authorities in Indian law are available, the courts may refer to the judgments of English Courts. (*Bhagwandas Goverdhandas Kedia* v. *Girdharilal Parshottamdas and Co.*, [1966] 1 SCR 656)

Definition of a contract (S. 2(h)):

"*an agreement enforceable by law is a contract.*"

The definition implies that all agreements are not contracts; an agreement must meet certain criteria in order to be enforceable by law and qualify as a contract. These are set out in Section 10 of the Contract Act:

- Free consent of parties;
- Competence of parties to contract;
- Lawful consideration;
- Lawful object; and
- Not expressly declared void by law.

A contract may be bilateral or unilateral. In a bilateral contract, two parties exchange promises, each promise forming the consideration for the other. In the case of a unilateral contract, a promise by one is exchanged for an act of forbearance on the part of the other.

Illustration: A offers to give a reward of Rs. 10,000/- to anyone who finds her missing mobile phone. B finds the phone and returns it to A. A is bound to give B the reward money. This is a unilateral contract, where A makes a promise in exchange for an act of forbearance by the finder of the missing phone.

Intention to Create Legal Obligation:

Though not expressly set out in the Contract Act, it is accepted by the courts that the parties to an agreement must have the intention to create legal obligations in order to give rise to a contract:

"*There are agreements between parties that do not result in a contract within the meaning of that term in our law.*" (*Balfour* v. *Balfour*, [1919] 2 K.B. 571)

Illustration: In the course of a casual conversation, A stated that he was willing to give £100 to anyone marrying his daughter with his consent. B married A's daughter with his consent, and asked for the money. The court observed that it was not reasonable that the defendant should be bound by such general words, and that there existed no intention to create a legal obligation. (*Weeks* v. *Tybald*, (1605) Noy 11)

Formation of a Contract: Offer and Acceptance

Two parties may enter into an agreement by the communication of a proposal and its acceptance. Such a proposal is called an '*offer*', and once it is accepted, it becomes a promise. An assent to an offer is called an '*acceptance*'.

An offer must be distinguished from an *invitation to treat*, or an *invitation to make offers*. Such a statement does not constitute a valid offer.

Illustration: Goods were displayed in a shop, with the prices attached. This was held to be an invitation to treat, and not an offer. It was not capable of conversion into a contract by acceptance. (*Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.*, [1952] 2 Q.B. 795)

In an *auction*, each bid constitutes an offer, which may or may not be accepted. An auction, therefore, is merely an invitation to treat.

An offer may be made to a particular individual ('*specific offer*'), or to the world at large ('*general offer*').

Illustration: A company stated in an advertisement that it would pay £100 to anyone who caught influenza after using its smoke balls thrice daily for two weeks. The company deposited the money in a bank account to show its sincerity. A lady, relying on the advertisement, used the smoke balls for the prescribed period. She caught influenza and sued for the reward. The company was held liable to pay, because there was an intention to create a legally binding obligation, and this was made clear to all persons in general (general offer). (*Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256)

An offer (and acceptance) must be definite and *certain*. If the offer or acceptance are not clear enough to permit the conclusion of the contract, they are not considered valid. S.29 of the Contract Act states:

"*Agreements, the meaning of which is not certain, or capable of being made certain, are void.*"

Illustration: The managing director of a company entered into an agreement with one of the company's employees, to pay a certain amount of remuneration when the company was in a position to do so. The agreement was held to be void due to uncertainty. (*Pushpabala Ray* v. *L.I.C. of India*, AIR 1978 Cal. 221)

An offer must be *communicated* to the other person in order for it to be valid. If one does not know of an offer, one cannot possibly accept it.

Illustration: A and B are negotiating the sale of A's property to B over the telephone. After all the other terms have been negotiated and settled, A says "My final offer is Rs.40 lakhs. Will you buy the property for this price?" At the same time, though, the telephone disconnects, and B does not hear this statement. There is no offer, since A's statement was not communicated to B.

If a particular mode or time limit is specified for the acceptance of an offer, the acceptance will only be valid if made in that mode and within that time. If no such mode or time is specified, the acceptance must be made in a reasonable mode, and within a reasonable time.

Illustration: A offers to buy B's computer for Rs.30,000/-, and tells B to respond in writing to the offer. B tells A on the telephone that she would sell him the computer. A is not bound by B's statement, since the 'acceptance' was not communicated in the prescribed mode.

If the offeror accepts in a manner other than that prescribed, and does not protest against the manner within a reasonable time, the offeror is bound by the acceptance.

Illustration: In the above illustration, if A tells B on the same telephone conversation that she agrees to buy the computer, and that she would send B the money immediately, A is bound by the acceptance, and cannot walk out of the bargain.

If, in a unilateral contract, the offer demands an action, the other party only has to perform the action, and does not have to communicate an acceptance otherwise.

Illustration: Where A offers a reward to the finder of some lost property, and B finds the lost property, B need not communicate the acceptance to A; merely returning the lost property to A is enough to constitute a valid contract.

Communication of offer or acceptance must be made to the party directly, or the person authorised to receive communication by the party; communication to a third party or stranger will not suffice.

In case of communication by a non-instantaneous mode of communication, such as post or email, (a) an offer is complete as against the acceptor when the offeror puts it in a mode of transmission outside the control of the offeror, and (b) an acceptance is complete as against the offeror when the acceptor puts it in a mode of transmission

outside the control of the acceptor.

Illustration: A offered, by post, to sell B some iron at a particular price. The letter reached B two days later, and B posted a letter of acceptance on the same day. Due to some delay, the letter reached A after over a fortnight, by which time the price of iron had risen. A refused to sell the iron to B at the original price. It was held that there was a binding contract. (*Dunlop* v. *Higgins*, (1848) 1 H.L. Cas. 381)

An offer lapses if a counter offer is made. A counter offer is considered a fresh offer, which must be accepted in order to give rise to a contract.

Illustration: A offered to sell her estate for £1,000. B offered to pay £950. A refused. B replied immediately, accepting the original offer of £1,000. A now refuses. It was held that A was no longer bound by the terms of her original offer, because it had lapsed when B made the counter offer to the original offer. (*Hyde* v. *Wrench*, (1840) 3 Beav. 334)

An offer lapses by *revocation*; an offer may be revoked at any time before the acceptance is completed as against the offeror. An acceptance may be revoked at any time before it is complete as against the acceptor, that is, until it reaches the offeror.

Requirements of a Valid Contract: Free Consent

"*Two or more persons are said to consent when they agree upon the same thing in the same sense.*" (S.13, Contract Act)

Section 13 of the Contract Act lays down the doctrine of '*consensus ad idem*', that is, both parties must accept each other's promises on the terms that they are made; that there must be a meeting of minds. If not, there is, in fact, no agreement between them at all. Lack of *consensus ad idem* renders the contract *void ab initio*.

Illustration: A signs a document which is written in a language that A does not understand. Unless it is shown that the contents of the document were explained to A, the contract is void. (*Chimanram Motilal* v. *Divanchand Govindram*, AIR 1932 Bom 151)

If *both parties* to an agreement are under a mistake as to *a matter of fact essential to the agreement*, there is no meeting of minds, and the contract is void.

Note that a mistake as to a law in force in India does not render a contract voidable; however, a law *not* in force in India is treated as a fact, and a mistake as to such a law not in force in India would render the contract void. (S.21, Contract Act)

Both parties to the agreement must be under the mistake as to the essential fact; if only one party to the agreement is under a mistake as to a matter of fact, the agreement is not voidable. (S.22, Contract Act)

Illustration: A agrees to buy B's land. Both of them are mistaken as to the actual size of the plot of land: they think the plot is 10 acres in size, whereas it is actually 15 acres in size. The contract is void. (*Tarsem Singh* v. *Sukhminder Singh*, AIR 1998 SC 1400)

Illustration: A wishes to sell certain goods to B, and they enter into an agreement of sale. Unknown to both of them, the goods have already been stolen from A's warehouse, where she had kept them. The contract is void. (Based on *Governor-General-in-Council* v. *Kabir Ram*, AIR 1948 Pat 345)

Free Consent

A contract is voidable if one of the parties has entered into the agreement without free consent.

S.14 of the Contract Act provides that consent is said to be free when it is not caused by:

- Coercion;
- Undue Influence;
- Misrepresentation;
- Fraud; or
- Mistake (subject to the provisions of Ss.20,

21, and 22 of the Contract Act.)

Coercion

Coercion is the committing of, or threatening to commit, any act forbidden by the Indian Penal Code, 1860, or the unlawful detaining of, or threat to detain, any property with the intention of compelling any person to enter into a contract. (S.15, Contract Act) Mere economic duress, however, would not amount to coercion.

Illustration: A threatens to commit suicide if his wife and son do not agree to sell their property to him. The wife and son sign the agreement. The contract is voidable at the instance of the wife and son for coercion. (Based on *Chikkam Amiraju* v. *Chikkam Seshamma*, AIR 1918 Mad 414)

Undue Influence

A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other party. (S.16(1), Contract Act)

S.16(2) of the Contract Act provides that a person is in a position to dominate the will of another where:

- A person holds a real or apparent authority over the other, or is in a fiduciary relation with the other person; or
- A person makes a contract with a person whose mental capacity is temporarily or permanently affected because of age, illness, or mental or bodily distress.

Illustration: A, the office-bearer of a temple trust, pressurises B, a devotee, to make some donations to the trust. The contract is voidable at B's instance for undue influence. (Based on *Chinnamma* v. *Devangha Sangha*, AIR 1973 Mys 338)

Illustration: A, a moneylender, lends some money to B, at a very high rate of interest. At that time, the interest rates prevailing in the money market were generally very high. There is no undue influence in this case. (Based on illustration (d), S.16, Contract Act)

Fraud

Fraud means and includes any of the following acts committed by a party to a contract, or with her connivance, or by her agent, with intent to deceive the other party or her agent, or to induce him to enter into a contract:

- stating facts which are not true with knowledge of their falsity;
- actively concealing a fact by a person having knowledge or belief of that fact;
- making a promise without any intention of performing it;
- doing any act fitted to deceive; or
- doing any act which the law specially declares to be fraudulent.

Mere silence as to facts likely to affect the willingness of a party to enter into a contract is not fraud unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silent to speak, or unless the silence, by itself, is equivalent to speech. (S.17, Contract Act)

A contract is voidable for fraud only if it was the fraud which caused the other party to enter into the agreement.

Illustration: A wants to sell her property to B, and in order to get a high price, shows B fictitious letters from fake buyers, offering a very high price for the property. B, believing the letters to be genuine, enters into an agreement to buy A's property for a high price. The contract is voidable at B's instance, for fraud. (Based on *John Minas Apcar* v. *Louis Caird Malchus*, AIR 1939 Cal 473)

Mere silence does not amount to fraud. Where, however, silence as to the facts is likely to influence the other party's decision to enter into the contract, or if the silence is equivalent to speech, silence would amount to fraud. Please see the illustrations to S.17 of the

Contract Act for an explanation of this principle.

In some cases, such as insurance contracts, there must be full disclosure of all material facts. This is because such contracts are considered *uberrimae fidei*, meaning, of utmost good faith.

Illustration: The application form for an insurance policy contains a section, asking the applicant to tick the box if the applicant had consulted a doctor in the previous five years. A, an applicant, had consulted a doctor in the previous five years, but does not tick the box. This would amount to fraud. (Based on *Mithoolal Nayak* v. *Life Insurance Corporation of India*, AIR 1962 SC 814)

Misrepresentation

Misrepresentation means and includes:

- the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true although the person making the statement believes it to be true;
- any breach of duty done without an intent to deceive which gives an advantage to the person making it, or to persons claiming under her, by misleading another person to her prejudice or to the prejudice of any persons claiming under her; or
- causing, however innocently, a party to an agreement to make a mistake as to the substance of the subject matter of the agreement. (S.18, Contract Act)

A contract is voidable only if the misrepresentation was such as to cause the other party to enter into the contract. Although misrepresentation and fraud are similar in that both are based on a false representation, the difference between the two is that in the case of misrepresentation, the person making the statement believes it to be true, whereas in the case of fraud, the person making the representation does not believe it to be true.

Illustration: A, a landlord, represents to B, a lessee, that a house has four bedrooms, whereas one of the rooms is not fit for use as a bedroom. A, however, does not know that one of the rooms is not fit for use as a bedroom. This would amount to misrepresentation, and the contract is voidable at B's instance. (Based on *Allah Baksh Khan* v. *R. E. Barrow*, AIR 1917 Lah 173)

Requirements of a Valid Contract: Competence of Parties

The following persons are not competent to enter into a contract (S.11, Contract Act):

- Minors;
- Persons of unsound mind; and
- Persons disqualified from contracting by any law to which they are subject.

Minors

An agreement entered into with a minor is *void ab initio*.

Illustration: A, a minor, executed a mortgage in favour of B, a moneylender. Before the mortgage was executed, a notice was issued to B on behalf of A's mother, intimating B of A's minority. Despite this notice, B got A to sign a declaration stating that A was an adult, and then advanced part of the money to A, and executed the mortgage deed. A filed for cancellation of the mortgage deed. B contended that (a) A was an adult; (b) that A was estopped from pleading minority because of the declaration; (c) that if A were a minor, the contract is voidable, and not void; and lastly, (d) if the court cancelled the mortgage deed, it should order repayment of moneys advanced. The court held that a contract made with a minor was void, and that the moneylender was not entitled to repayment of the moneys advanced.

Minors can enforce contracts made in their favour for valuable consideration, because although they cannot incur liability, they are not debarred from acquiring title to anything valuable. (*Firm Bhola Ram Harbans Lal* v. *Bhagat Ram*, AIR 1927 Lah 24)

Legal guardians of minors can enter into contracts on their behalf and for their benefit.

S.68 of the Contract Act is important here:

"*If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by any person with the necessities 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*."

Note that what is a 'necessary' is a relative fact, to be determined with reference to the facts and circumstance of a particular infant.

Illustration: A, an infant and a professional boxer, applied for and was granted a license from the Board of Control. The license provided that A would have to adhere strictly to the rules of the Board, and to any further rules or alterations to the rules. The Board withheld a purse of £3,000 from A, in accordance with its rules, on the ground that A had been disqualified in a contest for hitting below the belt. It was held that the contract was binding against A, even though A was a minor, because the license was practically essential in order to enable A to become proficient in A's profession. (*Doyle* v. *White City Stadium Ltd.*, [1935] 1 K.B. 110)

Persons of Unsound Mind

Contracts with persons of unsound mind are absolutely void. S.12 of the Contract Act defines 'sound mind' for the purposes of entering into a contract: if, at the time of entering into a contract, a person is capable of understanding it, and of forming a rational judgement as to its effect upon that person's interests, the person is of sound mind for the purposes of contracting.

S.68 of the Contract Act, relating to the provision of necessaries supplied to a person incapable of contracting, applies in the case of contracts with persons of unsound mind as well.

Persons Disqualified from Contracting by any Law to which they are Subject

In certain cases, some persons are specifically barred from entering into contracts of some kinds by the law that governs them. In such cases, any such contract would be void. For example, corporations derive their power from Charters, Statutes, or Acts which create them. If a corporate enters into a contract beyond the scope permitted in such Charter, Statute, or Act, the contract would be void.

Requirements of a Valid Contract: Lawful Consideration

Consideration is defined in S.2(d) of the Contract Act. The definition provides that in the first place, the act or abstinence which is to be a consideration for the promise should be done at the desire of the promisor; secondly, that it should be done by the promisee or any other person; and lastly, that the act or abstinence may have been already executed or is in the place of being done or may be still executory (to be performed in the future.)

Consideration need not be adequate, or equal in value to the promise; all that is required is that it have some value in the eyes of the law, and cause some incremental change in the position of the receiver.

Illustration: One coin depicting a World Cup footballer was offered to every customer who purchased four gallons of petrol. This was held to be an offer of consideration to the customer to enter into a contract of sale of petrol, and not a gift. (*Esso Petroleum Co. Ltd.* v. *Customs and Excise Commissioners*, [1976] 1 All ER 117)

Illustration: A owed a sum of money as a promissory note to his father. He kept complaining of unequal treatment in the division of property, till his father told him that if he stopped complaining, he would waive A's debt. A stopped complaining and then refused to repay the debt when the father asked him to do so. It was held that A's stopping complaining did not amount to a valid consideration. (Based on *White* v. *Bluett*,

(1853) 23 LJ Ex 36)

Performance of a public duty, such as appearing at a trial as a witness in response to a subpoena (similar to a summons in the Indian system) would not amount to valid consideration. An act performed in discharge of a pre-existing duty to another party or society in general cannot be consideration for another agreement.

Something not done at the desire of the promisor, but voluntarily, will not amount to valid consideration.

The Doctrine of Privity

A contract cannot confer rights or impose obligations under it on any person except the parties to it. A third person cannot be entitled to demand performance of the contract.

Illustration: A borrowed Rs.40,000/- by executing a mortgage in favour of B. Later, A sold the property to C for Rs.44,000/- and allowed C to retain Rs.40,000/- of the price in order to redeem the mortgage. B, the mortgagee, sued C for the recovery of the mortgage. It was held that B could not succeed because B was not a party to the contract between A and C. (*Jamna Das* v. *Ram Autar Pande*, (1911) 30 I.A. 7)

There are certain exceptions to the rule of privity, such as:

- *Covenants running with land*: A person who purchases land with notice that the owner of the land is bound by certain duties created by an agreement or covenant affecting the land shall be bound by them, although such purchaser was not a party to the agreement.
- *Trust of charge*: A person in whose favour a charge or other interest in some specific property has been created may enforce it, even though such person was not a party to the contract.
- *Acknowledgement of estoppel*: Where, by the terms of a contract, a party is required to make a payment to a third person, and the party acknowledges it to that third person, a binding obligation is incurred towards that third person.

The doctrine of *privity of contract* must not be confused with the concept of *privity of consideration*. While parties to a contract cannot confer rights or impose obligations under it on any third person, S.2(d) implies that as long as there is consideration for a promise, it is immaterial if a third party has provided it.

Illustration: In order to provide a marriage portion for his daughter, A intended to sell a piece of wood. A's son, B, promised A that if A forbore from selling the wood, he, B, would pay the daughter £1,000. A accordingly forbore from selling the wood, but B did not pay. The daughter and her husband sued B for the amount. It was held that, though the daughter had not provided any consideration herself, she could still recover because there was a consideration, provided by the father. (*Dutton* v. *Poole*, 1 Ventris 318)

Promissory Estoppel

The requirement in the normal course is that there must be an exchange of promises. The law also recognises unilateral promises. In such cases, the promisee is not bound to act, but if the promisee carries out the act desired by the promisor, the promisee can hold the promisor to her promise. The promisor is now estopped from claiming that there is no consideration. This is the doctrine of *promissory estoppel*.

Illustration: The Commissioners of Howrah Municipality invited subscriptions from the general public for the construction of a town hall. A subscribed to the fund for Rs.100/-. Once sufficient subscriptions were made, and relying upon the faith of the promised subscriptions, the Municipality entered into a contract for the construction of the town hall. A then refused to pay the amount of Rs.100/-. It was held that A was bound to pay. The promise was: 'In consideration of your agreeing to enter into a contract to erect the town hall, I undertake to supply the specified money for it.' (*Kedarnath Bhattacharji* v. *Gorie*

Mahomed, (1887) ILR 14 Cal 64)

A unilateral promise is revocable at any time before the promisor has taken any action based on the faith that the promise would be honoured, but at no time after.

Requirements of a Valid Contract: Lawful Object

S.23 defines what consideration and objects are lawful, and what are not:

"*The consideration or object of an agreement is lawful, unless-*

> *It is forbidden by law; or*
> *is of such a nature that, if permitted, would defeat the provisions of any law, or is fraudulent; or*
> *involves or implies any injury to the person or property of another; or*
> *the court regards it as immoral, or opposed to public policy.*"

The illustrations to this section are very helpful in understanding its meaning, and one would be well advised to read them.

An illegal contract is totally unenforceable. The maxim '*ex turpi causa non oritur actio*', means 'out of a base cause, no action arises.' The principle of public policy is: '*ex dolo malo non oritur actio*' (No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.)

Locus poenitentiae means a place for repentance, an opportunity for changing one's mind, an opportunity to undo what one has done, a chance to withdraw from a contemplated bargain or contract, before it results in a definite contractual liability, a right to withdraw from an incomplete transaction (*Morris* v. *Johnson*, 219 Ga. 81). Where the contract is still executory, a party to an illegal contract is allowed to exercise a *locus poenitentiae* and is permitted to recover money or property delivered to the other party, provided that such party takes proceedings before the illegal purpose has been substantially performed. The party seeking the aid of the court must repent of the transaction before the illegal purpose is substantially carried out. If, however, the party waits till the illegal purpose is carried out, or seeks to enforce the illegal transaction, in neither case can the action be maintained.

Illustration: A, a debtor,made a fictitious assignment of her goods to B, to defraud creditors. Two meetings of the creditors were called, but no composition was reached. In the meantime, B had parted with the goods to C, one of the creditors who knew about the original transaction, without A's consent. A sued for the recovery of the goods. It was held that A was entitled to recover the goods as the illegal purpose had been only partially effected, since the creditors, realising that the greater part of A's visible wealth had disappeared without the removal of A's goods, and would probably abandon any attempt to exact payment by process of law. The judges opined that nothing had been done to carry out the illegal purpose beyond the removal of the stock and this was insufficient to defeat the creditors. (*Taylor* v. *Bowers*, (1875-76) L.R. 1 Q.B.D. 291)

Agreements Opposed to Public Policy

An agreement that tends to be injurious to the public or against the public good is void as being contrary to public policy.

"*What constitutes an injury to public interest or welfare would depend upon the times and the climes. The social milieu in which the contract is sought to be enforced would decide the* factum, *the nature and the degree of injury. The concept of public policy is not immutable, since it must vary with the changing needs of the society.*" (*Bhagwant Genuji Girme* v. *Gangabisan Ramgopal*, AIR 1940 Bom 369)

Some examples of agreements opposed to public policy are:

- Trading with an alien enemy;
- Sale of public offices (*Illustration*: An agreement to pay money to a public servant to induce the public servant to retire and thus make way for the

appointment of the promisor is virtually trafficking with reference to an office, and is void. (*Hoode Venkataramanayya* v. *J.M. Lobo*, AIR 1953 Mad 506);

- Agreements which tend to abuse the legal process, such as agreeing to pay money to a person to give evidence in a civil suit on the promisor's behalf (*Shahabuddin Sahib* v. *Tota Venkatachalam Chettiar*, AIR 1938 Mad 911);
- Maintenance and champerty: A person who, without any just cause, supports litigation in which she has no legitimate interest, is guilty of maintenance. This is not, *per se*, opposed to public policy, unless the object of the agreement is an improper one, such as abetting unrighteous suits or gambling in litigation. Champerty is an aggravated form of maintenance, and is *per se* opposed to public policy; here, the maintainer stipulates for a share of the proceeds of the action or suit or other proceedings where property is in dispute (*Giles* v. *Thompson*, [1993] 3 All ER 321);
- Unconscionable agreements, or transactions caused by economic duress, but falling short of undue influence or coercion.

Illustration: Company A entered into a scheme of arrangement with Corporation B, a government company; the scheme provided that the officers of Company A could either accept employment in Corporation B, or leave and receive a meagre sum by way of compensation. The rules of Corporation B provided for termination of the services of officers by giving three months' notice. The petitioners challenged this rule as arbitrary and alleged that a term in a contract of employment entered into by a private employer, which was unfair, unreasonable, and unconscionable, was bad in law. The contract was held to be opposed to public policy, and thus, void. (*Central Inland Water Transport Corporation Ltd.* v. *Brojo Nath Ganguly*, AIR 1986 SC 1571.)

Requirements of a Valid Contract: Not Expressly Declared Void

Certain agreements are specifically or expressly declared void by the Contract Act. These are:

- Agreements of which the consideration or object is unlawful (Ss.23 and 24);
- Agreements without consideration (S.25);
- Agreements in restraint of marriage (S.26);
- Agreements in restraint of trade (S.27);
- Agreements in restraint of legal proceedings (S.28);
- Agreements which are uncertain and ambiguous (S.29);
- Agreements by way of wager (S.30);
- Agreements to do impossible acts (S.56).

Every agreement in restraint of the marriage of any person, other than a minor, is void. The restraint may be general or partial, but in either case, the agreement is void.

An agreement in restraint of trade, whether the restraint is general or partial, qualified or not, is void.

Illustration: A and B were rival shopkeepers in a locality, and A agreed to pay B a sum of money in exchange for B closing B's shop. B closed the shop and demanded the money. The agreement was held to be void. (*Madhub Chunder* v. *Rajcoomar Doss*, (1874) XIV Bengal Law Reports 767)

Certain exceptions to this rule are recognised:

- *Sale of goodwill*: An agreement by a person who sells the goodwill of a business, not to carry on a similar business within specified local limits so long as the buyer carries on a similar business, is valid provided that the restrictions are reasonable.

Illustration: A, an inventor and manufacturer of guns and ammunition made a sale of goodwill, and agreed with the buyer (a) not to practice the same trade for twenty-five years, and (b) not to engage in any business competing or liable to compete in any way with the business for the time being carried on by the buyer. The first part of the agreement was held to be valid, but the second part was considered to be unreasonable and void. (*Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co. Ltd.*, (1894) AC 535)

- *Partnership Act*: The Partnership Act provides certain exceptions to the general rule that agreements in restraint of trade are void. For example, Section 11 enables partners during the continuance of the firm to restrict their mutual liberty by agreeing that none of them shall carry on any business other than the business of the firm.
- *Judicially recognised exceptions*: Certain exceptions to this rule have also been recognised in judicial decisions. For example, trade agreements, and exclusive dealing agreements are recognised as valid under certain circumstances. An agreement of service by which an employee agrees not to serve anybody else for a certain duration, is a valid agreement; however, an agreement to restrain a servant from competing with the employer after the termination of employment may not be allowed, unless the restraint is necessary for protecting the employer's goodwill.

An agreement absolutely restraining a party from enforcing rights through a court of law, or an agreement which places a limit as to the time within which a right may be enforced, is void.

Illustration: A clause in an agreement provided that the Bombay court alone would have the jurisdiction to adjudicate. The plaintiff filed a suit in Varanasi, but it was dismissed in view of the agreement. In this case, both, the Varanasi and Bombay courts had jurisdiction, and since the restraint was not absolute, it was held to be valid. (*Hakam Singh* v. *Gammon (India) Ltd.*, AIR 1971 SC 740).

An agreement by way of a wager is void, subject to certain exceptions. The word 'wager' means 'a bet'. It is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event. Though a wagering agreement is void and unenforceable, it is not forbidden by law, and therefore transactions collateral to the main transaction are enforceable.

Illustration: A lends money to B, to enable B to pay off a gambling debt. A can recover the money from B.

Distinction between Illegal and Void Agreements

An illegal transaction is one which is actually forbidden by law. A void agreement may not be forbidden; all that is said is that if it is made, the courts will not enforce it. Every illegal contract is also void, but a void contract is not necessarily illegal. In both cases, however, the main or primary agreement is unenforceable. A collateral transaction to the main agreement is, however, enforceable if the main agreement is void but not illegal (*see the previous illustration*.)

Doctrine of Severability

Sometimes, certain parts of a contract may be lawful in themselves, whereas other parts are not. In such cases, the general rule is that:

"*...where you cannot sever the illegal from the legal part of a convenance, the contract is altogether void; but where you can sever them, whether the illegality be caused by statute or the common law, you may reject the bad part and retain the good.*" (*Pickering* v. *Ilfracombe Railway Co.*, (1868) LR 3 CP 235.)

Illustration: A contract of bailment was with regard to gold and gems; the former being illegal and the latter legal, since the two were severable, the latter was enforced. (*Thomas Brown & Sons Ltd.* v. *Fazal Deen*, (1962) 108 CLR 391.)

***Quasi* Contracts**

Certain situations in law as well as justice require that a person be required to conform to an obligation, without having violated any contractual term or committing a tort. Such obligations are called *quasi*-contractual obligations, because they do not arise out of any actual agreement. They are not based on the consent of the party, and their classification as *quasi*-contractual emphasises their remoteness from the genuine conception of a contract.

Quasi-contractual obligations are based upon the principle that law as well as justice should try and prevent unjust enrichment, or to prevent a person from retaining the money of, or some benefit derived from, another, which it is unconscionable for that person to keep.

The following essentials have to be proved in an action for unjust enrichment:

- The defendant has been 'enriched' by the receipt of a 'benefit';
- That this enrichment is 'at the expense of the plaintiff'; and
- That the retention of the enrichment is unjust. (*Mahabir Kishore* v. *State of M.P.*, AIR 1990 SC 313)

The Contract Act recognises some forms of *quasi*-contractual obligations in Ss.68-72. For example, S.71 provides:

"*A person, who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.*"

To avoid liability for criminal misappropriation of property, the finder must try to find out the real owner of the goods and must not appropriate the property to her own use.

Illustration: A bank wrongly credits B's account with a sum of Rs.1,00,000/-. B withdraws the money. The amount has to be paid back to the bank (*S. Ketrabarsappa* v. *Indian Bank*, AIR 1987 Kant 236.)

Performance of Contracts

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the Contract Act, or of any other law. Unless a contrary intention appears from the contract, the representatives of a party are bound by the party's promises in case of death. A contract to perform personal services, however, such as an agreement with an artist to paint one's portrait, would not bind the representatives of the promisor. (S.37, Contract Act)

A party may assign any benefits under a contract to another person, unless the contract is of a personal nature, or unless the contract prohibits such an assignment. A party may assign duties under a contract to another person with the consent of the other party to the contract, but this would amount to a novation, that is, the substitution of the existing contract with a new one. (*Khardah Co. Ltd.* v. *Raymon & Co. (India) (Pvt.) Ltd.*, AIR 1962 SC 1810)

Performance by a third party is acceptable if the promisee has accepted such performance. In the case of joint promisors, all the joint promisors are jointly and severally liable for performance, and the promisee can take an action against any or all of the joint promisors for performance. If one promisor has discharged the obligation under the contract, the promisor can ask for contribution from the other joint promisors. (Ss.40-43, Contract Act)

Offer to Perform (Tender)

If a party offers to perform the contract, and the offer of performance (tender) has not been accepted, the party is not responsible for non-performance, and the party's rights under the contract are not lost, provided:

- the offer is unconditional;
- the offer is made at the proper time and place; and
- the offer is made in such a manner that the person to whom it is being made has a reasonable opportunity of ascertaining that the person making it is able and willing there and then to do the whole of what that person is bound by her promise to do. (S. 38, Contract Act)

Illustration: A agreed to sell some goods to B. The contract provided that A would deliver the goods to B's factory, within normal business hours. A offers to deliver the goods to the railway station nearest to B's office, at midnight. This is not a valid tender, and would not discharge A of responsibilities under the contract. (Based on *Re Andrew Yule & Co.*, AIR 1932 Cal 879)

A tender is not necessary if the other party has already indicated that they would refuse to accept it. (*International Contractors Ltd. v. Prasant Kumar Sur (decd)*, AIR 1962 SC 77)

Anticipatory Breach

When a party refuses to perform, or has disabled himself from performing her promise in its entirety, the other party may put an end to the contract unless she has, by words or conduct, signified acquiescence to the continuation of the contract. (S.39, Contract Act)

Illustration: A enters into an agreement with B to chop timber from B's property and deliver it to the nearest railway station on A's carts. A sells the carts before performance is complete. This would amount to anticipatory breach, and B can either acquiesce to the continuation of the contract, or rescind it. (Based on *John Usher Jones* v. *Edward Scott Grogan*, AIR 1919 PC 190)

Time, Place, and Mode of Performance

If no time for performance is specified, a contract must be performed within a reasonable time. (S.46, Contract Act) If the parties intended that time should be of the essence of the contract, a failure to perform at the specified time would give the promisee the right to rescind the contract. (S.18, Contract Act) Generally speaking, time is presumed to be of the essence in the case of commercial contracts. Parties may, however, indicate clearly whether or not time is of the essence in any contract, and this intention would determine whether time is of the essence.

Illustration: A agrees to supply sweets for B's daughter's wedding. B has told A specifically that the sweets are for the guests at the wedding, which has been fixed for a particular date. A does not supply the sweets on the date of the wedding. Here, time is of the essence of the contract, and therefore B can rescind.

The promisor must call upon the promisee to appoint a reasonable place for performance. Where the contract does not specify a place, the proper place has to be inferred from the terms of the contract.

Illustration: A buys some goods from B, who is in another city. A then asks B to come to A's office and take payment. This is unreasonable: the payment should be made to B at B's usual place of business, unless B indicates otherwise. (Based on *Gopiram Kashiram v. Shankar Rao*, AIR 1950 MB 72)

Performance may be made in any manner or at any time which the promisee prescribes or sanctions. (S.50, Contract Act)

Illustration: A, a tenant, sends the amount of rent to B, the landlord, by money order. A, however, deducts the money order charges from the amount due. This would not be valid performance, unless B has agreed specifically to the money order charges being deducted. (Based on *Narayanrao Jageshwar Rao* v. *Tanbaji Damaji*, AIR 1954 Nag 270)

Impossibility and Frustration

An agreement to do an act impossible in itself is void. (S.56, Contract Act) Where, however, one person has promised to do something which she knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the contract.

If the performance of a promise becomes impossible for any reason which the promisor could not prevent, or unlawful, after the contract is made, the contract becomes void when the act becomes impossible or unlawful. This is the doctrine of *frustration*. (S.56, Contract Act)

Illustration: A enters into a contract with B, who is in another country, to deliver some linseed oil to B in B's country. Subsequently, the export of linseed oil is banned. A is not bound to perform the promise under the

contract, as the contract has been rendered void under the doctrine of frustration. (*Durga Devi Bhagat* v. *J. B. Advani & Co. Ltd.*, (1970) 76 Cal WN 528)

The performance of a contract must become impossible or unlawful for the doctrine of frustration. A contract cannot be regarded as impossible merely because it is more difficult to perform than anticipated, or less remunerative. (*Alopi Parshad & Sons Ltd.* v. *Union of India*, AIR 1960 SC 588)

Illustration: A, a manufacturer, agrees to sell some machines to B for a certain price. After the contract is made, the government raises the manufacturing tax on the machines by 20%. A now finds that there is no profit in selling the machines to B at the price fixed. This would not amount to impossibility; the contract is still valid, and A must perform the promise.

Parties may insert a '*force majeure*' clause in the contract, specifying events over which neither party may have any control, and the occurrence of which would excuse performance. Such clauses may include events which are not normally considered as leading to impossibility under the law, such as strikes, floods, or riots.

Novation

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. There cannot, however, be a novation unless all the parties to the original contract assent to it. (S. 62, Contract Act)

Release, Waiver, Accord and Satisfaction

A promisee may dispense with or remit, either wholly or in part, the performance of the promise made to him, or extend the time for its performance, or may accept instead of the original promise, any satisfaction she thinks fit. (S.63, Contract Act)

Illustration: A owes a sum of Rs.10,000/- to B. A pays B Rs.5,000/-, and B agrees to waive the remaining debt, and to release A from the obligation to pay the same. This amounts to accord and satisfaction, and A is no longer obliged to pay the remaining debt. (Based on *Kapurchand Godha* v. *Himayatalikhan Azamjah*, AIR 1963 SC 250)

Consequences of Rescission, and of a Contract Becoming Void

When a voidable contract is rescinded, the other party need not perform any promise contained in the contract, and the party rescinding the contract must return to the other party any benefit received under it. (S.64, Contract Act)

If an agreement is discovered to be void, or if it becomes void, for example, due to frustration, any person who has received some advantage under the agreement must return it or compensate the person from whom the advantage was received. (S.65, Contract Act)

Illustration: A, a landlord, recovers a rent from B, the tenant, that is higher than that permitted under the rent control legislation. A must return the excess rent to B. (*Somraj* v. *Jethmal*, AIR 1957 Raj 392)

Consequences of Breach: Specific Performance

In certain situations, a party takes an action against the party who has breached a contract, to compel the breaching party to perform its obligations under the contract. This is called 'Specific Relief', and the law relating to such remedies is to be found in The Specific Relief Act, 1963 ("**the Specific Relief Act**").

The specific performance of any contract may, at the discretion of the court, be enforced:

- when there is no standard to ascertain the actual damage caused by the non-performance of the act agreed to be done; or
- when the act agreed to be done is such that monetary compensation for its non-performance would not be adequate relief.

(S.10, Specific Relief Act)

Unless otherwise proved, it is assumed:

- that the breach of a contract to transfer immovable property cannot be adequately relieved by monetary compensation; and
- that the breach of a contract to transfer movable property can be relieved by monetary compensation, except where:
  - the property is not an ordinary article of commerce, or is of special value of interest to the plaintiff, or consists of goods that are not easily obtainable in the market; and
  - the property is held by the defendant as the agent or trustee of the plaintiff. (Explanation to S. 10, Specific Relief Act)

Illustration: A agrees to supply a certain amount of steel to B. At that time, there is a strike at the steel mills, and procuring steel is not easy. If A refuses to perform the promise under the contract, a decree of specific performance can be awarded to B, because steel is not 'easily obtainable in the market' at that time. (*Howard E. Perry & Co. Ltd.* v. *British Railway Board*, [1980] 2 All ER 579.)

Illustration: A agreed to sell some rare and beautiful antique furniture to B, but later, refused to give B the furniture. B could not claim specific performance in this case; B being a dealer who only wanted the antique furniture for resale. (*Cohen* v. *Roche*, [1927] 1 KB 169)

A contract made by a trustee cannot be enforced if it is in excess of the trustee's powers, or is made in breach of trust. (S.11, Specific Relief Act)

Illustration: A, a trustee, is empowered to lease a land for seven years. A enters into a lease with B to lease the land for seven years, with a covenant to renew the lease at the end of the term of seven years. The contract cannot be specifically enforced. (Illustration to S.21(e) of the (repealed) Specific Relief Act, 1877)

Specific Performance of part of a Contract

As a general rule, a court will not compel specific performance of a contract, unless:

- A party to a contract is unable to perform the whole of her part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and can be compensated by way of money; in such a case, the court may, at the suit of either party, order the specific performance of that part of the contract which can be so performed, and order monetary compensation for the remaining part;
- A party to a contract is unable to perform the whole of her part of it, and the part which must be left unperformed:
  - forms a considerable part of the whole, in which case, the court may order specific performance if the other party pays or has paid the agreed consideration for the whole of the contract, reduced by the consideration for the part which must be left unperformed;
  - cannot be compensated by way of money, in which case the court may order specific performance if the other party pays or had paid the consideration for the whole of the contract without any abatement;

  but in either case, the other party must relinquish all claims to the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained through the default of the defendant.
- A part of a contract, taken by itself, can and ought to be specifically performed, and that part stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, in which case, the court will order specific performance of the part which can and ought to be specifically performed. (S.12, Specific Relief Act)

Illustration: A agrees to sell B 100 acres of land. It turns out that A only owns 98 acres, and the remaining two acres belong to a stranger, who refuses to sell them. The 2 acres are not necessary for the use or enjoyment of the other 98 acres, nor are they so important that

the loss of their use may not be compensated in money. In such a case, on B's suit, A may be directed to convey 98 acres to B and to compensate B for not conveying the remaining acres, or, on A's suit, B may be directed to pay, on receiving the conveyance of the 98 acres, the decided purchase money, less a sum towards the 2 acres that were not conveyed. (Based on illustration (a) to S.14 of the (repealed) Specific Relief Act, 1877)

Contracts which cannot be Specifically Enforced

The following contracts cannot be specifically enforced:

- Where monetary compensation is adequate relief for non-performance;
- A contract which runs into such numerous details or which is so dependant on the personal qualifications or will of the parties, or is otherwise from its nature such that the court cannot enforce the specific performance of its material terms; and
- A contract which is in its nature determinable.

Illustration: A and B enter into a contract which allows B to terminate the contract without notice and without giving any reason. A cannot specifically enforce the contract. (*Dharam Veer* v. *Union of India*, AIR 1989 Del 227)

- A contract whose performance involves the performance of a continuous duty which the court cannot supervise.

Illustration: A and B enter into a contract under which A gives B the right to use such part of a certain railway line for twenty-one years as is upon B's land. The railway line has been made by A. The contract also provides that B would have a right to run carriages over the whole line on certain terms, that A would provide engine power for this, and that A would keep the whole line in good repair. B cannot specifically enforce this contact. (Illustration to clause (g) of S.21 of the (repealed) Specific Relief Act, 1877))

Except as provided in the Arbitration Act, 1996, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the Arbitration Act, 1996 applies), and has refused to perform it, sues in respect of any subject which she has contracted to refer, the existence of such a contract would bar the suit.

Notwithstanding sub-clauses (a), (b), and (c) set out above, the court may specifically enforce contracts in the following cases:

- where the suit is for the enforcement of a contract:
  - to execute a mortgage or provide any other security to secure the repayment of any loan which the borrower is not willing to repay at once, provided that if only a part of the loan has been advanced, and the vendor is willing to advance the remaining part of the loan in terms of the contract; or
  - to take up and pay for any debentures of a company.
- Where the suit is for:
  - the execution of a formal deed of partnership, and the parties have started carrying out the business of the partnership; or
  - the purchase of a partner's share in a firm
- Where the suit is for the enforcement of a contract for the construction of a building or the execution of any work on land, provided:
  - the building or other work is described in the contract in sufficiently precise terms to enable the court to determine the exact nature of the building or work;
  - the plaintiff has a substantial interest in the performance of the contract, and the interest is such that monetary compensation would not be adequate relief for non-performance; and
  - the defendant has, in pursuance of the

contract, obtained possession of the whole or part of the land on which the building is to be constructed or other work is to be executed. (S.14, Specific Relief Act)

Illustration: A agrees to sell B the shares of a company which are not readily available in the contract. If A refuses, B may obtain a decree for specific performance, since the shares are not readily available, and monetary compensation would not be adequate relief. (Based on *Langen and Wind Ltd.* v. *Bell*, [1972] 1 All ER 296)

Contracts which depend on the will of the parties are usually contracts of service ('Employment Contracts'), where a particular quality or ability, possessed by a person for which the contract is entered into, depends upon that person's willingness or state of mind. If such contracts are specifically enforced, they may not obtain the results originally intended. (*Robert D'Silva* v. *Rohini Enterprises*, AIR 1987 Kant 57)

Illustration: A, being an author, contracts with B, a publisher, to complete a literary work. B cannot enforce specific performance. (Based on illustration to clause (b) of S.21 of the (repealed) Specific Relief Act, 1877)

Illustration: A appoints B to cut and remove timber from a plot of land. A can specifically enforce this contract, since this contract is not dependant on the volition of the parties. (*Robert D'Silva* v. *Rohini Enterprises*, AIR 1987 Kant 57)

Specific performance of a contract cannot be enforced in favour of a person who would not be entitled to recover compensation for its breach, or who has become incapable of performing, or violates any essential term of the contract that on her part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation that the contract intends to establish. Specific performance would also not be enforced in favour of a person who fails to aver and prove that she has performed or has always been ready and willing to perform the essential terms of the contract that she is required to perform, other than those terms that the defendant has waived or prevented from being performed. (S.16, Specific Relief Act)

Illustration: A agrees to sell some goods to B. After some of the goods are supplied, however, A is unable to supply the remaining goods to B. This shows a lack of readiness and willingness to perform the obligations under the contract, and A cannot ask for specific performance. (Based on *Sun Permanent Benefit Building Society* v. *Western Suburban and Harrow Road Permanent Building Society*, [1921] All ER Rep 690)

A court is not bound to grant specific performance merely because it is lawful to do so; this jurisdiction is discretionary. A court may not, for example, decree specific performance where:

- The terms of the contract, or the conduct of the parties, or the circumstances under which the parties entered into the contract, though not voidable, were such that they gave the plaintiff an unfair advantage over the defendant; or
- The performance of the contract would involve some hardship on the defendant which the defendant did not foresee, but which would not involve any such hardship on the plaintiff; or
- The defendant has entered into the contract under circumstances, which though not voidable, would make it inequitable to enforce specific performance. (S.20, Specific Relief Act)

Illustration: A agrees to sell a land to B. At the time the parties entered into the contract, a canal was being dug, which had increased the value of the land tremendously. B knew this, but A did not. Specific performance was refused. (*Ramakrishna Naidu* v. *Palaniappa Chettiar*, AIR 1963 Mad 17)

A plaintiff in a suit for specific performance may also claim compensation in addition to, or in substitution of, specific performance. Such compensation could be ordered if the court feels that specific performance cannot be

enforced, but that some compensation should be paid to the plaintiff, or if the court decides that compensation is necessary in addition to specific performance. When determining the amount of such compensation, the court would have to be guided by the principles laid down in S.73 of the Contract Act. (S.21, Specific Relief Act)

Illustration: A agrees to sell B a house for Rs. 10,00,000/-; B pays the amount, but A does not hand over possession of the property. A suit for specific performance is finally decreed in B's favour three years after the date set for performance; in such a case, the court could also award B compensation for the period during which B did not have use of the property. (Based on illustration to the third paragraph of S.19 of the (repealed) Specific Relief Act, 1877)

A contract which names a sum as the amount to be paid in the event of breach may also be specifically enforced, if the court is satisfied that the sum was named only for the purpose of securing performance of the contract, and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance. In such a case, however, the court shall not also order payment of the sum named. (S.23, Specific Relief Act)

Illustration: A is a tenant on B's property. A contracts to grant C a sub-lease on the property, and to obtain permission from B to grant the sub-lease. The contract also provides that A would pay C Rs.10,000/- if the permission is not granted. Thereafter, A refuses to apply for permission for the sub-lease, and offers to pay C the Rs.10,000/-. C is entitled to have the contract specifically enforced if B consents to the sub-lease. (Based on illustration to S.20 of the (repealed) Specific Relief Act, 1877)

Consequences of Breach: Damages

A party to a contract who breaches the contract must compensate the other party for any loss or damage that arises naturally from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of the contract. (S.73, Contract Act) (Please see the illustrations to this section.)

Illustration: A purchased a leasehold property with a workshop on it; access to the property was narrow from the front, and in order to run the workshop, it was critical that access be available from the rear. A relied upon their solicitors, who informed them that there was a right of way over the land from the rear of the property. The owner of the plot of land at the rear, however, asserted that there was no right of way, and blocked access after A took the property. As a result, A could not run a workshop on the property, and had to dispose of the workshop at a lower price. In an action against the solicitors, A was awarded damages on the basis of the capital expenditure wasted in the purchase of the business, and the expenses incurred, including bank interest up to the time of the sale of the property. (*Hayes* v. *James and Charles Dodd*, [1990] 2 All ER 815)

The Supreme Court held that there are two principles on which damages are calculated in the case of breach of contract of sale of goods. It stated:

"*The first is that he who has proved a breach of a bargain to supply what he has contracted to get, is to be placed so far as money can do it in as good a situation as if the contract had been performed; but this principal is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.*" (*Murlidhar Chiranjilal* v. *Harishchandra Dwarkadas*, AIR 1962 SC 366)

Illustration: A, the highest bidder at an auction, defaults on commitment to pay the bid price. B, the auctioneer, must accept the next highest bid, if it is still alive, to mitigate the damage. (*A. R. Krishnamurthy* v. *Arni Municipality*, (1955) 1 Mad LJ 437)

While the general principles relating to the measure of damages are laid down in S.73 of the Contract Act, special measures relating to

different types of contracts have been evolved by the courts over the years. For example:

Illustration: Bailment: A leaves a horse with B, a bailee. If the horse suffers a permanent injury while in B's possession, the measure of damages is the difference between the original value of the horse and its value after injury. (*Hastmal* v. *Raffi Uddin*, AIR 1953 Bhopal 5)

Illustration: Construction contracts: A, a contractor, abandons the work of constructing a building. The measure of damages is the cost of getting the work completed. (*Dhulipudi Namayya* v. *Union of India*, AIR 1958 AP 533)

Illustration: Sale of goods: A, the seller, and B, the buyer, enter into a contract of sale of goods, which provides that A is empowered to resell the goods if there is a default by B. If B defaults, the measure of damages is the difference between the contract price and the price realised on resale, if the resale takes place within a reasonable time; if the resale does not take place within a reasonable time, the measure of damages is the difference between the contract price and the market price at the date of the breach. (*Bismi Abdullah & Sons, Merchants and Commission Agents* v. *Regional Manager, Food Corporation of India, Trivandrum*, AIR 1987 Ker 56)

The second part of S.73 of the Contract Act relates to damage that both parties knew, at the time they entered into the contract, as likely to be resulting from a breach. This is called the rule of '*special damages*'.

Illustration: A, the owners of a mill, engaged B to deliver a broken crankshaft to the manufacturer for repair. B delayed the delivery; unknown to B, this was the only crankshaft that A owned, and as a result, there was a delay in restarting the mill. A sought to recover profits they would have made, had the mill started without delay. The court rejected the claim on the ground that the facts known to the defendant were insufficient to 'show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers' to the manufacturer. If, on the other hand, B knew that such a loss would result from a delay in delivering the crankshaft, B may be liable to pay the damages resulting from the delay in restarting the mill. (*Hadley* v. *Baxendale*, [1843-60] All ER Rep 461)

Illustration: A tailor, expecting to make large profits on the occasion of a festival that was to be held at a certain place, gave a railway company a sewing machine and a bundle of cloth, and asked them to deliver them to the place of the festival. The tailor did not tell the railway company about the festival, or the expectation of profits. The railway company delayed the delivery, and the machine and cloth only reached the location after the festival was over. The tailor is not entitled to damages for loss of profits, nor for expenses incidental to the journey to the place of the festival and back, as such damages could not have been in the contemplation of both parties when they made the contract, nor could they have been said to have arisen naturally as a result of the breach. (*Madras Railway Co.* v. *Govinda Rau*, (1897-98) ILR 20-21 Mad 478)

Penalty and Liquidated Damages

If a contract stipulates a sum to be paid if there is a breach, or contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage is proved to have been caused by the breach, to receive reasonable compensation not exceeding the amount named or as the case may be, the stipulated penalty. However, even in a case where the losses resulting from the breach are more than the liquidated damages, the plaintiff cannot recover an amount higher than the liquidated damages. (S.74, Contract Act)

Illustration: A sold beer in bottles and crates. The deposit paid by dealers for the bottles and the crates was refunded to them upon return of the bottles and crates. A required from its dealers that bottles were not sold to the customers, and bottles were to be returned in order to ensure that the bottling process could continue smoothly. It was held that the deposit represented the liquidated damages for the loss of the bottle if it was not returned.

(*United Breweries Ltd.* v. *State of Andhra Pradesh*, (1997) 3 SCC 530)

Illustration: Under the terms of a contract, a purchaser was to deposit 25% of the purchase price as earnest money, which was liable to forfeiture if the purchaser committed default in paying the purchase price. It was held that the amount of earnest money was correctly liable to be forfeited as it was a guarantee for the proper fulfilment of the contract. (*Shree Hanuman Cotton Mills* v. *Tata Air Craft Ltd.*, AIR 1970 SC 1986)

Special Contracts: Indemnity

A contract by which a party promises to save another from loss caused by the conduct of the promisor, or by the conduct of another person, is called a 'contract of indemnity'. (S.124, Contract Act)

A contract of insurance is a contract of indemnity, which covers every kind of loss envisaged by the policy, and not just loss caused by the party to the contract. (*State of Orissa* v. *United India Insurance Co. Ltd.*, AIR 1997 SC 2671)

The rights of the indemnity-holder are set out in S.125 of the Contract Act, and include the right to recover from the promisor, all damages which the indemnity-holder may be compelled to pay in any suit in respect of any matter to which the promise of indemnity applies.

Illustration: A, an agent, contracted with B, a carrier company, to hire their vans. Under the rules of the Carriers' Association, agents were required to keep the carriers indemnified against the negligence of their drivers. A used the vans to transport some watches for C, another company. The watches were damaged as a result of the negligence of the driver, and C recovered compensation from B. It was held that A was bound to indemnify B, the carrier, in such a situation. (*Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Co. Ltd.*, [1973] QB 400)

Special Contracts: Guarantee

A 'contract of guarantee' is an oral or written contract to perform the promise, or discharge the liability of a third person in case of her default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal-debtor,' and the person to whom the guarantee is given is called the 'creditor.' (S.126, Contract Act)

Indemnity and Guarantee

While there are only two parties in a contract of indemnity (the indemnifier and the indemnified), there are three parties in a contract of guarantee (the surety, the principal-debtor, and the creditor). In a contract of indemnity, there is no privity of contract between the indemnifier and the debtor, and the indemnifier cannot compel the debtor to pay. (*K. V. Periyamianna Marakkayar & Sons* v. *Banians & Co.*, AIR 1926 Mad 544)

As in any other contract, a contract of guarantee not supported by consideration would be void. Anything done, or any promise made, for the benefit of the principal-debtor may be sufficient consideration for giving the guarantee. (S.127, Contract Act)

Illustration: A wrote to B: "Please lend Rs.1,200/- to C; there will be no trouble in the payment of your money. Be assured, if there is any trouble, I hold myself responsible." This was held to be a guarantee, and A, a surety for C's debt. (*Jagannath Baksh Singh* v. *Chandra Bhukhan Singh*, AIR 1937 Oudh 79)

The liability of a surety is co-extensive with that of a principal-debtor, unless the contract of guarantee provides otherwise. (S.128, Contract Act) Where two persons undertake a liability to a third person and agree between themselves that one of them will be liable only on the default of the other, the third person not being a party to the contract, their liability to the third person is that of a principal-debtor even if the third person is aware of the contract between them. (S.132, Contract Act)

The surety's liability arises only when the principal-debtor has defaulted. Upon the defaulting of the principal-debtor, the surety is immediately liable, and the creditor is not required to first proceed against the principal-debtor before calling upon the surety to make payment. (*Re Brown's Estate, Brown* v. *Brown*, [1893] 2 Ch 300) The creditor may file a suit against both, the principal-debtor and the surety, or against either one of them, or against any one of the co-sureties. (*Chokalinga Chettiar* v. *Dandayuthapani Chettiar*, AIR 1928 Mad 1262; *Gurdit Singh* v. *Gujjar Singh*, AIR 1919 Lah 355; *Muslim Bank of India Ltd.* v. *Mahommad Ateeq*, AIR 1943 All 289; *State Bank of India* v. *G. J. Herman*, AIR 1998 Ker 161)

A guarantee that extends to a series of contracts is called a continuing guarantee. (S. 129, Contract Act)

Illustration: A agrees to act as surety for any default by B in respect of an overdraft account with a bank, C. This is a continuing guarantee. (Based on *Margaret Lalita Samuel* v. *Indo-Commercial Bank Ltd.*, AIR 1979 SC 102)

If any variance is made in the terms of the contract between the principal-debtor and the creditor without the surety's consent, the surety is discharged as to transactions subsequent to the variance. (S.133, Contract Act) The surety would also be discharged by any contract between the creditor and the principal-debtor under which the principal-debtor is released, or if, by any act or omission of the creditor, the principal-debtor is discharged. (S.134, Contract Act) The surety would be discharged if the creditor does any act that is prejudicial to the surety's rights, or does not do any act which the surety requires the creditor to do, and because of which the eventual remedy of the surety against the principal-debtor is impaired. (S.139, Contract Act)

Illustration: A stands surety for a loan given by bank B to the principal-debtor, C. C pledges some goods with the bank as security against the loan. B negligently loses the goods. A is discharged. (*State Bank of Saurashtra* v. *Chitranjan Rangnath Raja*, AIR 1980 SC 1528)

If the guaranteed debt has become due, or the principal-debtor has defaulted in the performance of a guaranteed duty, the surety, upon payment or performance of all that she is liable for, has all the rights which the creditor had against the principal-debtor. (S. 140, Contract Act)

Illustration: A was surety for B for a liquor shop licence, and deposited a cash security with the Government. B took C as a partner in the business, and when they both failed to pay the license fee, the Government recovered it from the security deposit. A could recover the amount from both B and C. (*Pheku Ram Mali* v. *Ganga Prasad*, AIR 1938 All 206)

Special Contracts: Bailment

Bailment is the delivery of goods by one person ("the bailor") to another person ("the bailee") for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the bailor's instructions. (S.148, Contract Act)

Illustration: A stays at Hotel B, and leaves some luggage with the Hotel for safekeeping. The Hotel is a bailee in respect of the luggage, and A is a bailor. (Based on *Jan & Sons* v. *A. Cameron*, AIR 1922 All 471)

Where the contract of bailment does not provide for any remuneration to be paid to the bailee for the purpose for which the goods are to be kept or carried, the bailor must repay to the bailee the necessary expenses incurred by the bailee for the purposes of the bailment. (S.158, Contract Act)

A bailee is bound to take as much care of the goods bailed as a person of ordinary prudence would, under similar circumstances, take of that person's own goods of the same bulk, quality, and value as the goods bailed. (S.151, Contract Act)

Illustration: A gave B some bales of jute, to be transported by ship to another port. B shipped the jute to the other port, but failed to unload

the bales of jute from the boat, which was also leaky, for 30 hours when a cyclone hit the area. B has not performed the duty expected of a bailee, and would be liable to compensate A for the damage caused. (Based on *Lakshmi Narain Baijnath* v. *Secretary of State for India*, AIR 1924 Cal 92)

The bailee must return, or deliver according to the bailor's instructions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. (S.160, Contract Act) If, because of the bailee's fault, the goods are not returned, or the delivery not made at the proper time, the bailee is responsible to the bailor for any loss, destruction, or damage. (S. 161, Contract Act) If the bailee, in accordance with the purpose of the bailment, renders any service involving the exercise of skill or labour in respect of the bailed goods, the bailee has, in the absence of a contract to the contrary, a right to retain the bailed goods until the bailee receives due remuneration for the services rendered in respect of the goods. (S.170, Contract Act)

Illustration: A gave some goods to B, and asked B to store them in a godown for a period of time. A would pay B a fee for the storage and use of the godown. B does not have a right to retain the goods after the period is over, if A does not pay the fee, because merely making arrangements for storage of goods in a godown would not involve any labour or skill exercised in respect of the goods. (Based on *Kalloomal Tapeshwari Prasad & Co.* v. *Rashtriya Chemicals & Fertilizers Ltd.*, AIR 1990 All 214)

When goods are bailed as security for the payment of a debt, or performance of a promise, the bailment is a 'pledge'. (S.172, Contract Act) There must be a delivery, actual or constructive, of the goods to the pawnee to constitute a pledge. (*Co-op Hindushtan Bank Ltd.* v. *Surendra Nath Dey*, AIR 1932 Cal 524)

Special Contracts: Agency

An 'agent' is a person employed to do any act on behalf of another ('the principal'), or to represent a principal in dealings with third persons. (S.182, Contract Act)

The underlying doctrine of agency is that a person who does an act through another is deemed to do it himself. (*Municipal Corporation of Delhi* v. *Jagdish Lal*, AIR 1970 SC 7)

The distinction between an agent and a servant or employee is that while in the case of an agent the principal merely directs what must be done, in the case of employees, the employer also directs how it is to be done. (*Gaya Sugar Mills Ltd.* v. *Nand Kishore Bijoria*, AIR 1955 SC 441)

Illustration: A, a common carrier, engaged B, another common carrier, to carry C's goods from one place to another. C's servants loaded the goods from C's premises. A was held to be C's agent. (*Sukul Bros.* v. *H. K. Kavarana*, AIR 1958 Cal 730)

Illustration: Some millers were licensed to buy paddy at a fixed price from the Government, and to sell it to others at a fixed price. The millers were given a commission for this labour; they invested their own moneys, and the goods were stored at their own risk. The millers were held not to be agents; importantly, the difference between the purchase price and the sale price, from which the millers received a commission, was payable to the Government under the law, and in terms of the licence. (Based on *State of Madras* v. *Jayalakshmi Rice Mill Contractors Co.*, AIR 1959 AP 352)

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 effects, as if the contracts had been entered into, and the acts done, by the principal in person. (S.226, Contract Act)

Illustration: A appoints B as an agent. B borrows some money from C on A's behalf. A is bound to repay the loan to C. (Based on *Romesh Chandra Mondal* v. *Bhuyan Bhaskar Mahapatra*, AIR 1916 Pat 57)

An agency is terminated when:

- the principal revokes the agent's authority;
- the agent renounces the business of the agency;
- the business of the agency is completed;
- either the principal or the agent dies or becomes of unsound mind; or
- the principal is adjudicated an insolvent under any law for the time being in force for the relief of insolvent debtors. (S.201, Contract Act)

Illustration: A is an agent appointed to collect bills and to remit the realised amount by drafts. The agency is terminated when the drafts are dispatched. (Based on *Alliance Bank of Simla Ltd.* v. *Amritsar Bank*, AIR 1915 Lah 214)

Agent's Authority

An agent's authority may be express or implied. (S.186, Contract Act)

Illustration: A, a life insurance company, had a Salary Saving Scheme, which covered a large number of employees of B. Under the agreement between A and B, B accepted the sole responsibility to collect premium from its employees and remit it by means of one cheque to A. No individual employee was required to send the premium to A. B failed to pay the premium, and A disclaimed its liability to pay the assured amount. It was held that B had implied authority to act as an agent of A. It was held that if the employees had reason to believe that their employee was acting on behalf of A, a contract of agency might be inferred. (*Chairman, Life Insurance Corporation* v. *Rajiv Kumar Bhasker*, AIR 2005 SC 3087)

An agent who has the authority to do an act also has the authority to do every lawful thing necessary in order to do such an act. (S.188, Contract Act)

Illustration: A appointed B as an agent to manage a business. B would also have the authority to borrow money for the business. (*Dhanpat Rae Chaturvedi* v. *Allahabad Bank Ltd., Lucknow*, AIR 1927 Oudh 44)

In an emergency, an agent has authority to do all such acts for the purposes of protecting the principal from loss as would be done by a person of ordinary prudence, in her own case, under similar circumstances. (S.189, Contract Act) This is called the *doctrine of necessity*. It is essential, however, that the agent communicates with and obtains instructions from the principal wherever possible; otherwise, the act of the agent in the emergency will not bind the principal. (*Dayton Price & Co. Ltd.* v. *S. Rohomotollah & Co.*, AIR 1925 Cal 609)

Illustration: A sends some goods to another port on a ship. B is the master of the ship, and when the ship reaches the other port, B tries to contact A to get directions for the disposal of the goods. A, however, is unreachable, and the goods would perish if left on the ship for more time. B sells the goods. B had the authority to do this because this was an emergency. (Based on *Australasian Steam Navigation Co.* v. *Morse*, (1872) LR 4 PC 222)

If a person does certain acts on behalf of another, but without that other person's knowledge or authority, the other person may ratify or disown such acts. If such acts are ratified, the same effects will follow as if they had been performed by that other person's authority. (S.196, Contract Act)

Illustration: A, without B's consent, lends B's money to C. Afterwards, B accepts interest on the loan, and gives instructions about collecting the amount. B's actions amount to a ratification of A's acts. (*Ramaswamy Chetty. S. R. M. A. R.* v. *A. L. K. R. Algappa Chetty*, AIR 1915 Mad 859)

Ostensible Authority of an Agent

If an agent has done acts or incurred obligations to third persons on behalf of the principal without authority, and if the principal has, by words or conduct, induced such third persons to believe that the acts or obligations were within the agent's authority,

the principal is bound by such acts or obligations. (S.237, Contract Act)

Illustration: A's agent, B, is authorised to borrow up to Rs.1,00,000/- on A's behalf. B borrows Rs.1,50,000/- from C, who does not know of the limit on B's borrowing powers by A. A must repay the entire amount to C. (Based on *Jagrup Singh* v. *Ram Kishan Das*, AIR 1920 Oudh 105)

Duties of an Agent

An agent must conduct the principal's business according to the principal's instructions, or, if there are no such instructions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts business. If the agent acts otherwise, the agent must make good to the principal any loss that is sustained, and if there is profit, the agent must account for it. (S.211, Contract Act)

Illustration: A, the principal, instructs B, the agent, to buy some wheat and dispatch it by rail. B buys the wheat, but dispatches it in an open truck. The wheat is destroyed in a fire. B must make good the loss suffered to A. (*Suraj Mal-Chandan Mal* v. *Fateh Chand-Jaimal Rai*, AIR 1930 Lah 280)

An agent must also conduct the business of the agency with such skill as is generally possessed by a person engaged in a similar business, unless the principal had notice of the agent's lack of skill. An agent must act with reasonable diligence, and use all the skill that the agent possesses, and must compensate the principal for direct consequences of the agent's neglect, want of skill, or misconduct. (S.212, Contract Act)

Illustration: A bank was asked to collect money on behalf of a customer, and remit it to the customer. The bank sent the money, about Rs. 34,000/- by draft, by ordinary post. The draft was lost. As an agent, the bank was held to be negligent in sending such a large amount through ordinary post. (*Bank of Bihar Ltd.* v. *Tata Scob Dealers*, AIR 1960 Cal 475)

An agent must render proper accounts to the principal on demand. (S.213, Contract Act)

If an agent, without informing the principal of all material circumstances, and without obtaining the principal's consent, deals on her own account in the business of the agency, the principal can repudiate the transaction and recover any benefit the agent may have received from the transaction. (Ss.215, 216, Contract Act)

Illustration: A, an agent, sells some goods belonging to B, the principal, to C. A receives a commission from B for this, but also gets a return commission from C. A must pay to B the amount of the return commission, because it is a profit made by A as an agent. (Based on *Mayen* v. *Alston*, (1893) ILR 16 Mad 238)

An Agent's Rights

Out of any moneys received on account of the principal in the agency business, an agent may retain all moneys due to the agent in respect of advances made or expenses properly incurred by the agent, and any remuneration payable to the agent for acting as an agent. (s.217, Contract Act) Where there is no contract to the contrary, an agent is entitled to retain goods, papers, and other property, movable or immovable, of the principal received by the agent, until the amount due to the agent for commission, disbursements and services in respect of the same has been paid or accounted for to the agent. (S.221, Contract Act)

Illustration: A engages B as an agent to collect rent on A's behalf. B can retain the rent collected until B's remuneration is paid. (*Roshan Lal* v. *Emperor*, AIR 1935 All 922)

A principal is bound to indemnify the agent against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon the agent. (S.222, Contract Act)

Illustration: A, an agent, buys some goods on behalf of B, the principal. The goods were bought with A's own money; B did not

reimburse A. A can sell the goods and recover the balance from B. (Based on *Babasa Bakale* v. *Hombanna Rayappa Hombannavar*, AIR 1932 Bom 593)

Special Contracts: Partnership

The law relating to partnership was contained in Chapter XI of the Contracts Act prior to 1932. Chapter XI, however, was not exhaustive of the law of partnership, and so, Chapter XI was repealed and The Indian Partnership Act, 1932 ("**the Partnership Act**") was promulgated. The other provisions of the Contract Act, however, are generally still applicable. (S.3, Partnership Act)

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 is called a 'partnership'. The persons who have entered into partnership with one another are individually called 'partners', and collectively, a 'firm'. The name under which their business is carried on is called the 'firm name'. (S.4, Partnership Act)

An agreement to share profits is an essential element in the constitution of a partnership, but not an agreement to share loss. (*Sk Kabir* v. *Narayandas Lachman Das Ltd.*, AIR 1955 Ori 24; *Mirza Mal Bhagwan Das* v. *Rameshwar*, AIR 1929 All 536)

Illustration: A, a designer, and B, a business man, decide to form a partnership business to sell any goods that A designs. Under the terms of their agreement, A and B would each receive a share of any profits, but only B would have to bear any losses. This is a valid partnership arrangement.

There is mutual agency between the partners in a partnership. The business is carried on on behalf of all the partners; as such, each partner is an agent of all the other partners, and equally, each of the partners is a principal to all the other partners to the extent that each partner is bound by the acts of the other partners done in the furtherance of the partnership business. Liabilities of the firm can be enforced against each of the partners personally. (Ss.18-30, Partnership Act) A partner is an agent of the firm for the purposes of the business of the firm, and cannot be an employee of the firm. A firm is not presumed to be an agent of a partner. (S. 18, Partnership Act; *Keshavji Ravji & Co.* v. *Commissioner of Income Tax*, AIR 1991 SC 1806; *Powell* v. *Broadhurst*, (1901) 2 Ch 160)

Illustration: A and B are partners in a firm. B borrows some money from C for the partnership business. When the loan becomes due, C calls upon A for repayment. A must repay the loan.

A firm is not a juristic person, or a person in law, but is merely an association of individuals. As such, where a suit is filed against the name of a firm, it is a suit against all the partners of a firm; similarly, where a suit is filed in the name of a firm, it is a suit filed by all the partners of the firm. (*Dulichand Lakshminarayan* v. *Commissioner of Income Tax, Nagpur*, AIR 1956 SC 354; *Ashok Transport Agency* v. *Awadesh Kumar*, AIR 1998 SC 352)

The mutual rights and duties of the partners of a firm may be determined by contract between the partners and such contract may be expressed or implied by a course of dealing. (S.11, Partnership Act)

Where a person enters into a transaction in her own name and does not profess to act for and on behalf of the firm of which she is a partner, and where there is nothing to show that she had acted in any manner expressing or implying an interest to bind the firm, the transaction will not be binding on the firm simply because she was in fact a partner and the transaction could have been entered into by her on behalf of the firm in exercise of her implied authority. (*Devji* v. *Maganlal*, AIR 1965 SC 139)

Illustration: A, a partner in a firm, takes a sublease on a colliery. The sublease is taken in A's own name, and not the name of the firm. A was not acting on behalf of the firm. A's act will not bind the firm, or the other partners. (Based on *Devji* v. *Maganlal*, AIR 1965 SC 139)

Negotiable Instruments

The law relating to negotiable instruments in India may be found enacted in the Negotiable Instruments Act, 1881 ("**the Negotiable Instruments Act**").

A 'negotiable instrument' means a promissory note, bill of exchange or cheque payable either to order or to bearer. A promissory note, bill of exchange or cheque is payable to order if it is expressed to be so payable or is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the last or only indorsement is an indorsement in blank. Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to her or her order, it is nevertheless payable to her or her order at her option. (S.13, Negotiable Instruments Act)

'Negotiation' of an instrument means the transfer of a promissory note, bill of exchange, or cheque to any person so as to make that person the holder of the instrument. (Ss.46-60, Negotiable Instruments Act) When the maker or holder of a negotiable instrument signs it, otherwise than as a maker, for the purposes of negotiation, on its back, or signs a slip of paper annexed to the instrument, or signs a stamped paper intended to be completed as a negotiable instrument for this purpose, the person is said to 'indorse' it, and the person is called the 'indorser'. (Ss.14-16, Negotiable Instruments Act)

Promissory Notes, Bills of Exchange, and Cheques

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 only to, or to the order of, a certain person, or to the bearer of the instrument. (S.4, Negotiable Instruments Act)

Illustration: A deposits some money with B. B issues A a deposit receipt, which also contains a promise to pay the deposit money back on demand by A. This is not a promissory note, since it is not negotiable, and is merely a receipt. (Based on *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh*, AIR 1936 PC 171)

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. (S.5, Negotiable Instruments Act)

The maker promises to pay in a promissory note, whereas in the case of a bill of exchange, the maker directs another person to pay. It may be said that the maker of a promissory note is the principal-debtor, whereas the drawer of a bill of exchange is a surety. (*Radha Kisan* v. *Hiralal*, AIR 1919 Nag 39; *(Firm) Wallibhoy-Suleman* v. *(Firm) Jagjiwandas Tulsidas*, AIR 1936 Nag 260)

A *cheque* is a bill of exchange drawn on a specified banker, payable only on demand. (S.6, Negotiable Instruments Act)

A bill of exchange, cheque, or promissory note must be for the payment of money only. (Ss.4 - 6, Negotiable Instruments Act)

Illustration: A writes a note, promising to deliver 500 kilograms of rice to B. This is not a promissory note, since it is not for the delivery of money.

Every negotiable instrument is presumed to be made or drawn for consideration, and every such instrument when it has been accepted, indorsed, negotiated, or transferred, is presumed to be so accepted, indorsed, negotiated, or transferred for consideration. *Prima facie*, every party to a bill is deemed to have become a party for value, and every holder is deemed to be a holder in due course. (S.118, Negotiable Instruments Act)

A holder is deemed to be a holder for value in relation to the acceptor and all the parties

prior to the time when value has been given for the instrument. A holder, to be a holder in due course, should have:

- acquired the bill, note or cheque which is complete on the face of it;
- for value before it becomes overdue; or
- without notice that it had been previously dishonoured; and
- must be a transferee in good faith without having sufficient cause to believe that any defect existed in the title of the person from whom the instrument was received. (S.9, Negotiable Instruments Act)

Illustration: A received a cheque from B. A was fully aware, however, that the cheque had been dishonoured and the indorsement in A's favour was only after the cheque had been returned by the bank. It was held that the essential characteristics of a holder in due course were not met. (Based on *Sukhanraj Khimraja, a firm of merchants, Bombay* v. *N. Rajagopalan*, (!989) 1 LW 401)

Every prior party to a negotiable instrument is liable to a holder in due course until the instrument is duly satisfied. (S.36, Negotiable Instruments Act)

Dishonour of Cheques

To enhance the acceptability of cheques, and for the settlement of liabilities, the drawer is made liable to penalties, including criminal penalties, for the dishonour of cheques in certain circumstances. (Ss.138-142, Negotiable Instruments Act)

A drawer is strictly liable for the offence of dishonour of a cheque regardless of any intention to pay the amount stated in the cheque. The drawer is deemed to have committed an offence if the amount on the cheque remains unpaid. A person convicted of the offence of dishonour of a cheque is liable to be punished with imprisonment for a term of one year or with a fine of twice the amount of the cheque, or both. (Ss.138, 140, Negotiable Instruments Act)

The pendency of a criminal prosecution for the dishonour of a cheque is not an impediment to proceeding with a civil suit relating to the recovery of the cheque amount. Similarly, a civil suit instituted to recover the amount of a dishonoured cheque would not debar the filing of a criminal complaint against the drawer. (*State of Rajasthan* v. *Kalyan Sundaram Cement Industries Ltd.*, (1996) 3 SCC 87; *Mathew* v. *Sony Cyriac*, (196) 1 BC 71)

Illustration: A draws a cheque for Rs.1,00,000/- in favour of B. B presents the cheque at A's bank, but the cheque is returned for lack of sufficient funds in A's account. B institutes a civil suit against A to recover Rs.1,00,000/-. B can simultaneously initiate criminal proceedings against A for the offence of the cheque being dishonoured.

A person would be deemed to have committed the offence of dishonour of a cheque where (i) any cheque drawn by that person on an account maintained by that person with a banker, (ii) for the payment of any amount of money to another person from out of that account for the discharge in whole or in part of any liability, (iii)is returned by the bank, either:

- Because the amount of money standing to the credit of that account is insufficient to honour the cheque; or
- Because it exceeds the amount arranged to be paid from that account by an agreement made with the bank. (S.138, Negotiable Instruments Act)

There are three conditions precedent to the commission of the offence:

- The cheque should have been presented within six months of its issue, or within the period of its validity, whichever is earlier;
- The payee or holder in due course should have made a demand for the payment of the amount for which the cheque is drawn by the issue of a notice in writing to the drawer within 30 days of the receipt of information by the payee or drawer from the bank regarding the return of the cheque as unpaid; and
- The drawer should have failed to pay the

cheque amount within 15 days of receipt of such a notice. (S.138, Negotiable Instruments Act)

Illustration: A draws a cheque for Rs.2,00,000/- in B's favour. The cheque is returned as unpaid from A's bank. B issues a notice in this regard to A. A makes the payment of Rs. 2,00,000/- to B within 15 days of the receipt of notice from B. The offence of dishonour of a cheque under S.138 of the Negotiable Instruments Act is not made out in this case. (Based on *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, (1999) 7 SCC 510)

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 5: Criminal Law I - IPC

Elements of Crime

The fundamental reason for having a system of criminal law is to provide a framework for the punishment of wrongdoers by the state and thereby to preserve an acceptable degree of social order. A functional system of criminal law and prosecution would also deter others in society from committing crimes, and hence, maintain social order.

For an act to attract liability, the fundamental principle is that there must be a wrongful act (*actus reus*) combined with a wrongful intention (*mens rea*). This principle is reflected in the Latin maxim *actus non facit reum nisi mens sit rea*. The maxim translates to mean an act does not make one guilty unless the mind is also legally blameworthy.

In other words, for an act to be termed a crime it must be accompanied with the necessary mental element, which would give a criminal hue to the act. Unless this mental element is present, no act is usually criminal in nature.

However, it must be noted that there are certain offences that bear 'strict liability'. These offences are also termed vicarious or deemed liability offences. Examples of such offences can be found in Special Acts such as the Negotiable Instruments Act, 1881, the Customs Act, 1962, and the Information Technology Act, 2000, which provide for deemed offences by directors / responsible officers of a company, if a company has committed a contravention / offence. Such deemed liability disregards whether there was actually any mens rea or not on the part of the person concerned.

Note that certain forms of negligence have also been made offences under the Code. Provisions such as S.279 and S.304-A IPC render rash and negligent acts as offences. Though, generally acts must be of a voluntary nature for them to constitute offences, the IPC also recognizes that negligence of a high order can result in grave harm and the IPC has criminalized that order of negligence and has rendered it punishable in law. Note further that all negligence does not come under the purview of the IPC. Different courts have held that only "gross negligence" or acts of "recklessness", would cross the threshold of being criminal acts.

Mens rea or the mental element of an offence has earlier been seen as an essential element of any offence. Offences under the IPC are qualified with the terms that indicate they require a mental element or a state of mind to be determined before a person can be said to have committed that offence. These words include "dishonestly", "fraudulently", "reason to believe", "voluntarily", "maliciously".

In *State of Maharashtra* v. *Mayor Hans George*, AIR 1965 SC 722, the Supreme Court held that, "Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law." Further, in *Kartar Singh* v. *State of Punjab*, 1994 (3) SCC 569, the Supreme Court held that the element of *mens rea* must be read into a statutory penal provision unless a statute either expressly or by necessary implication rules it out.

Extra territoriality of the Code and General Explanations

Ss.3 and 4 IPC: Extra Territorial Operation of the Code

Ss.3 and 4 IPC relate to the extra territorial operation of the Code. These provisions relate to substantive law and not to procedural law. S.3 IPC provides that an act constituting an offence in India shall also be an offence when committed outside India.

S.4 IPC makes all offences under the IPC, without exception, extra territorial and S.188 Cr.P.C. confers jurisdiction on the court within

whose locality the accused is found.

Illustration: A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.

Therefore, an Indian citizen who committed an offence outside India which was not an offence according to the laws of that country would still be liable to be tried in India if it was an offence under Indian law. (*Pheroze* v. *State*, 1964 (2) Cr. L. J. 533)

Chapter II of the IPC contains definitions and interpretative provisions. S.7 states that any Section which is explained in any part of the IPC, is used in every part of the IPC in conformity with that explanation. Some provisions under this Chapter are noted below:

Public Servant

S.21 lists various descriptions of persons who fall within the definition of "public servant". The term "public servant" is expansively defined and is not limited merely to covering government servants. Explanation 1 clarifies that persons falling in any of the descriptions given under S.21 are public servants, whether appointed by the Government or not.

Movable Property

'Movable property' includes corporeal property of every description, except land and things attached to the earth or permanently fastened to anything, which is attached to the earth.

Dishonestly

Whoever does anything with the intention of causing wrongful gain to one person and causing wrongful loss to the another person, is said to do that thing dishonestly. The terms 'wrongful gain' and 'wrongful loss' have been further defined in S.23. The term dishonestly gains importance since various provisions under the IPC use this term to indicate *mens rea*. Since 'dishonestly' has been clearly defined, its use within the provision must be viewed within that definition.

Fraudulently

A person is said to do a thing fraudulently if he does that thing with the intent to defraud but not otherwise. The term 'defraud' has not been defined anywhere, however, in a recent decision, *Mohd. Ibrahim & Others* v. *State of Bihar*, JT (2009) 11 SC 533, the Supreme Court relied upon the understanding of 'fraud' as found in *Dr. Vimla* v. *Delhi Administration*, AIR 1963 SC 1572. In the *Dr. Vimla case*, the Supreme Court held that the expression '"defraud" involves two elements, namely, deceit and injury to the person deceived where injury is something other than economic loss.

Document

A document has been defined as any matter expressed or described on any substance by means of letters, figures or marks, or by more than one of those means, intended to be used or which may be used, as evidence of that matter. The definition of 'document' is also expansive. The term is also defined in S.3(18) of the General Clauses Act, 1897, and in S.3 of the Evidence Act.

S.29-A of the IPC was inserted by way of amendment in the year 2000 and adopts the meaning assigned to the term 'electronic records' given in S.2(1)(t) of the Information Technology Act, 2000.

Valuable Security

The term 'valuable security' has been defined in S.30 of the IPC as a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration: A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill

to any person who may become the lawful holder of it, the endorsement is a 'valuable security'.

Illustration: A passport gives a person valuable rights to enter and leave a country and hence would be a valuable security. (*Daniel* v. *State*, AIR 1968 Mad 349)

Illustration: A title page of an account book of a firm containing the names of partners and showing the capital contributed by each if signed by the partners may be valuable security under S.30 of the IPC. (*Hari Charan* v. *Girish Chandra Sadhukhan*, 11 Cr. L. J. 525)

Acts include illegal omission

S. 32 provides that except where a contrary intention appears from the context, words referring to acts done also extend to illegal omission, therefore, every omission would not constitute an offence under the Code. The omission, unless otherwise defined, must contain some 'illegality'.

Punishments

The Code under S.53 lists five forms of punishments for offenders under the IPC. These are: (a) death; (b) imprisonment for life; (c) imprisonment, either rigorous or simple; (d) forfeiture of property; and (e) fine.

The death penalty is awarded only in the 'rarest of rare' cases. While considering sentencing of the convict, the Supreme Court has held that awarding of the death sentence is the exception, while life imprisonment is the rule. (*Asgar* v. *State of Uttar Pradesh*, AIR 1977 SC 1812)

Imprisonment for life under the IPC means 'rigorous imprisonment for life' and not 'simple imprisonment for life'. (*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 898)

In the case of rigorous imprisonment, the convict is put to hard labour and in the case of simple imprisonment, the offender is confined to the jail and is not subject to any kind of work.

Group / Joint Liability

The IPC contains several provisions that lay out basic rules of criminal liability of individuals who commit a crime in a group and share with others in the commission of a crime. These include Ss.34 - 38, 149, 120-A and 120-B of the IPC.

Common Intention

S.34 of the IPC provides that when an act done by several persons in furtherance of common intention of all, each of such persons is liable for that act in the same manner as if it is done by him alone.

S.34 of the IPC is invoked in cases where it may be difficult to distinguish between the act of individual members of a party or to prove as to what part was played by each of them. In *Mahboob Shah*, the Privy Council stated that to invoke S.34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all and that if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. (*Mahboob Shah* v. *Emperor*, AIR 1945 (PC) 118)

The term 'in furtherance of' used in S. 34 has been elucidated in *Shankarlal Kachrabhai* v. *State of Gujarat,* AIR 1965 SC 1260, where the Supreme Court observed:

"The dictionary meaning of the word 'furtherance' is 'advancement or promotion'. If four persons have a common intention to kill A, they will have to do many acts in promotion or prosecution of that design in order to fulfil it. Some illustrations will clarify the point. Four persons intend to kill A in his house. All of them participate in different ways. One of them attempts to enter the house, but he is stopped by the sentry and he shoots the sentry. Though the common intention was to kill A, the shooting of the sentry is in furtherance of the said common intention. So Section 34 applies. Take another illustration. One of the said accused enters the room where the intended victim usually

sleeps, but somebody other than the intended victim is sleeping in the room, and on a mistaken impression, he shoots him. The shooting of the wrong man is in furtherance of the said common intention, and so Section 34 applies."

Illustration: The facts proved before a Court are that A and C suddenly emerge out of the darkness and gives axe blows to B, who dies as a result of those injuries. It is further in evidence that A gave a blow to the arm of B, while C gave a blow to the abdomen of B. By virtue of S. 34, the Court can hold both A and C liable for the murder of B.

Criminal Conspiracy

A conspiracy has been defined as when two or more persons agree to do, or cause to be done; an illegal act; or an act which is not illegal, by illegal means. It is further provided in S.120-A of the IPC that for a conspiracy to exist some act besides the agreement between the parties must be done in pursuance of the agreement. The law on conspiracy has been extensively discussed in *State* v. *Nalini*, (1999) 5 SCC 60, and in *State* v. *Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600. In *State* v. *Nalini*, it was pointed out that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is a *sine qua non* of the criminal conspiracy. (*State* v. *Nalini*, (1999) 5 SCC 60)

The Supreme Court has held that each of the conspirators need not have taken active part in the commission of each and every one of the conspiratorial acts for the offence of conspiracy to be made out. Since a conspiracy is usually 'hatched in secrecy', the prosecution need not necessarily prove what the accused persons expressly agreed to do. S.120-B punishes the offence of criminal conspiracy defined under S.120-A.

S.120-B of the IPC divides conspiracies into two categories. S.120-B(1) provides punishment for a person who is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment of life or rigorous imprisonment for a term of two years or upwards in the same manner as if such person has abated such offence. S.120-B (2) provides that in any other case the accused shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or both.

Unlawful Assembly

S.149 of the IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person who at the time of committing of that offence is the member of the same assembly is guilty of that offence.

Ss.141 of the IPC defines the term 'unlawful assembly'. Ss.34 and 149 differ from each other. S.34 is only a rule of evidence whereas S. 149 creates a substantive offence. Further, while S.34 uses a test of common intention to attribute liability, S.149 utilises the test of common object. Common object unlike common intention does not require prior concept and a common meeting of minds before the commission of the offence and unlawful object can develop at the spot. S.34 requires 'two or more persons involved in the commission of the offence' whereas S.49 mandates that for an offence to be committed within its purview five or more persons must part of an unlawful assembly.

General Exceptions

Certain acts, or acts in particular circumstances have been removed from the ambit of being treated as offences under the IPC by virtue of Chapter IV of the IPC. The provisions of the IPC must be read in such manner so as to be subject to the exceptions contained in Chapter IV.

Burden of Proving Exception

The onus of proving that an act lies within an exception is on the accused. Under S. 105 of the Indian Evidence Act, 1872, the burden of proving the existence of circumstances bringing the case within exceptions lies on the accused, and the **c**ourt shall presume the absence of such circumstances.

In *Nanavati*, the Court said that it shall regard the non-existence of such circumstances as proved, until they are disproved. (*K. M. Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605)

Standard of Proof for Proving Exception

The Supreme Court has held that the standard of proof required for an accused to discharge his burden of proving that his acts come within a general exception is that of preponderance of probabilities. (*Vijayee Singh and others* v. *State of Uttar Pradesh*, (1990) 3 SCC 190)

The test is not whether the accused has proved beyond all reasonable doubt that he comes within an exception, but whether in setting up the defence, he has established a reasonable doubt in the case of the prosecution and thereby earned his right of acquittal. (*Kanali Barui* v. *Subhas Das*, 1983 Cri. L. J. 1474)

Although an exception must normally be proved in trial by the accused, the Supreme Court in *Vadilal Panchal* v. *Dattatraya Dulaji Ghadigaonker and Another*, AIR 1960 SC 1113, has recognized that where an act falls within one of the exceptions provided in the IPC, and this is apparent on the complaint itself, the Magistrate is within her powers to decline to issue process. The Supreme Court held:

"*The short question before us is - was the High Court right in its view that when a Magistrate directs an enquiry under S.202 of the Code of Criminal Procedure for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it is not open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer?* Must he, as a matter of law, issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial? *It may be pointed out here that the High Court itself recognised that it would not be correct to lay down a proposition in absolute terms that whenever a defence under any of the exceptions in the Indian Penal Code is pleaded by the person complained against, the Magistrate would not be justified in dismissing the complaint and must issue process. Said the High Court: "As we have already observed, if there is a complaint, which itself discloses a complete defence under any of the exceptions, it might be a case where a Magistrate would be justified in dismissing such a complaint finding that there was no sufficient ground to proceed with the case.*"

(*Emphasis supplied*)

Exceptions Provided under Chapter IV: General Categories

Mistake of Fact

S.76 of the IPC excuses a person who has done what by law is an offence under a mistake of facts (and not under a mistake of law), that lead her to believe in good faith that she was bound by law to do such an act.

Illustration: A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

Illustration: A, an officer of a court, being ordered by that court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

S.79 of the IPC

S.79 of the IPC excuses a person who has done what by law is an offence under a mistake of fact (and not under a mistake of law) that lead her to believe in good faith that she was justified in law to do such an act.

Illustration: A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all person of apprehending murderers in the act, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

Ss.76 and of the 79 of the IPC are based on the principle that ignorance of a fact may be excused, but ignorance of the law cannot be excused. The distinction between Ss.76 and 79 of the IPC is that in the former, a person is assumed to be *bound*, and in the latter to be *justified*, by law.

Judicial Acts

S.77 of the IPC protects acts done by a Judge while acting judicially and in exercise of the powers given to him by law.

S.78 of the IPC protects acts done in pursuance of, or in consequence of the judgment of order of a Court.

Accident

S.80 of the IPC exempts the commission of any innocent or lawful act, done in an innocent or lawful manner, which has led to an unforeseen result that may have ensued from an accident or misfortune. For the accused to avail of this exception, it must be shown that due care and caution were exercised at the time of commission of the act. (*See Bhupendrasinh A. Chudasama* v. *State of Gujarat*, AIR 1997 SC 3790; and *Sukhdev Singh* v. *State*, (2003) 7 SCC 441)

Absence of Criminal Intent

These exceptions, including for unsoundness of mind and intoxication, are based on the premise that the accused, while committing the acts in question had no criminal/*malafide* intent. For instance, under S.82 of the IPC, acts done by a child under the age of seven are not offences.

Unsound Mind

S.84 of the IPC lays down the test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' under the IPC. However, courts have treated this term as being equivalent to insanity.

Insanity itself, however, has no precise definition and is a term used to describe varying degrees of mental disorder. Therefore, every person suffering from some sort of a mental ailment is not ipso facto exempted from criminal responsibility and thereby come within the ambit of the protection provided by S.84 of the IPC. (*Bapu and Gajraj Singh* v. *State of Rajasthan*, (2007) 8 SCC 66)

A person is exonerated from liability or doing an act on the ground of unsoundness of mind, if she, at the time of doing the act, is either incapable of knowing the nature of the act, or that she is doing what is either wrong or contrary to law.

In *Nanney Khan* v. *State (Delhi Administration)*, (1986) 2 Crimes 328 (Del), since no questions were put to witnesses regarding the alleged insanity of the accused at the time of the commission of the crime, and since the accused didn't set up any defence of insanity, the Court held that a plea of insanity before the appellate court taken for the first time cannot prevail, and the accused is not entitled to the benefit of S.84 of the IPC.

In *Jagdish* v. *State of M.P.*, JT 2009 (12) SC 300, the Supreme Court rejected a plea of insanity under S. 84 of the IPC that was taken by the accused/convict for the first time before the Supreme Court.

Intoxication

Under S.85 of the IPC, a person will be exonerated from liability for doing an act while in a state of intoxication, if at the time of the act, the person (due to intoxication) was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law.

Consent

S.87 of the IPC provides that nothing is an offence if the person to whom harm is caused is above eighteen years of age and has given consent to suffer such harm. The provision however, provides that the act for which consent is offered should not be intended to cause death or grievous hurt.

Illustration: A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Trifling Acts

S.95 of the IPC provides that if the harm caused by an act is so slight that a person of ordinary sense and temper would not complain of such harm, the act would not be an offence. This defence is often known as the 'defence of triviality'.

The High Court in revision came to the conclusion that the injuries were trivial and the case was one in which the injury intended to be caused was so slight that a person of ordinary sense and temper would not complain of the harm caused thereby and accordingly set aside the conviction and acquitted the accused.

While upholding the decision of the High Court, the Supreme Court held:

"*The next question is whether, having regard to the circumstances, the harm caused to the appellant ... was so slight that no person of ordinary sense and temper would complain of such harm. S.95 is intended to prevent penalisation of negligible wrongs or of offences of trivial character. Whether an act which amounts to an offence is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or interation with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes ... An assault by one child or another, or even by a grown-up person on another, which causes injury may still be regarded as so slight, having regard to the way and station of life of the parties, relation between them, situation in which the parties are placed, and other circumstances in which harm is caused, that the victim ordinarily may not complain of the harm*."

See also Neelam Mahajan Singh v. *Commissioner of Police & Others*, 1994 (2) Crimes 75; and *Keki Hormusji Gharda* v. *Mehervan Rustom Irani*, (2009) 6 SCC 475, in this regard.

Private Defence

Ss.96 to 106 of the IPC deal with the right of private defence and are a recognition of the right of a person to protect his or her life and property against the unlawful aggression of others.

S.96 of the IPC states that nothing is an offence which is done in the exercise of the right of private defence. S.97 of the IPC defines the right of private defence of the body and property. Every person has a right to defend his own body and the body of any other person against any offence affecting the human body, subject to the restrictions contained in S. 99 of the IPC.

Among the restrictions stated in S.99 of the IPC, the provision stipulated the extent to which the right of private defence may be exercised, namely that it in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Further, S. 100 details instances in which the right of private defence of the body extends to causing death.

For the plea of right to defence to succeed in totality, it must be proved by the accused that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the Court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all. (*Bhanwar Singh* v. *State of MP,* (2008) 16 SCC 657)

Offences Affecting the Human Body

Chapter XVI of the IPC deals with offences affecting the human body and is further divided into various categories. Some important provisions are dealt with hereinunder.

Offences Affecting Life (Ss. 299 – 311 of the IPC)

Ss.299 – 304 of the IPC: Culpable Homicide and Murder

Cases of homicide (killing of a human being, by another human being) punishable under the IPC are, culpable homicide not amounting to murder (S.299 of the IPC), murder (S.300 of the IPC), rash or negligent homicide (S.304A of the IPC), and suicide (S.305 - 306 of the IPC).

Culpable homicide under S.299 of the IPC is the causing of death by the doing of:

- An act with the intention of causing death;
- An act with the intention of causing such bodily injury as is likely to cause death; and
- An act with the knowledge that it was likely to cause death.

In the absence of any of the above, an act resulting in the death of a person would not constitute culpable homicide. The provision further provides three explanations wherein the presence or absence of factors in causing death nevertheless constitutes culpable homicide.

Illustration: A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

Illustration: A knows Z to be behind a bush. B does not know that A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire and kill Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

To invoke this provision, death must be said to have been caused. It is immaterial if the person whom the accused intended to kill was not killed and that some other person was killed. The offence is complete as soon as a person is killed. The death must be a proximate and not a remote consequence of an act of violence. Culpable homicide not amounting to murder under S.299 of the IPC is punishable under S.304 of the IPC.

S.300 of the IPC classifies culpable homicide as 'murder', where:

- Firstly, if the act by which the death is caused is done with the intention of causing death;
- Secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- Thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- Fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.

Therefore, every murder is culpable homicide, but every culpable homicide is not murder.

Illustration: A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

Illustration: A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Determination of whether Facts Constitute S.299 or S.300 of the IPC

In *Raj Kumar* v. *State of Maharashtra*, (2009) 15 SCC 292, the Supreme Court held that whenever a court is confronted with the question of whether the offence is murder or culpable homicide not amounting to murder on the facts of a case, it will be convenient for it to approach the problem in three stages.

The question to be considered at the *first stage* would be whether the accused has done an act, by doing which he has caused the death of another. Proof of such causal connection (*causa causans)* between the act of the accused and the death leads to the *second stage* for considering whether that act of the accused amounts to culpable homicide as defined in S. 299 of the IPC.

If the answer to this question is *prima facie* found in the affirmative, the *third stage* for considering the operation of S.300 of the IPC is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of murder contained in S.300 of the IPC. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder punishable under Part I or Part II of S.304 of the IPC, depending, respectively, on whether second or third clause of S.299 of the IPC is applicable.

If this question is found in the positive, but the case comes within any of the exceptions enumerated in S.300 of the IPC, the offence would still be culpable homicide not amounting to murder punishable under Part I of S.304 of the IPC.

Exceptions in S.300 of the IPC

- Grave and sudden provocation (See *K. M. Nanavati* v. *State of Maharashtra,* AIR 1962 SC 605);
- Private defence;
- Acts of public servants;
- Sudden fight; or
- Consent.

Distinction between S.299 and S.300 of the IPC

The distinction between S.299 and S.300 of the IPC was discussed by Melville, J., in *Reg.* v. *Govinda*, (1876) ILR 1 Bom 342. This decision has now attained the status of being *locus classicus* for the understanding of culpable homicide. The tabular comparison used in the said judgment has been quoted with approval by the Supreme Court.

Distinction between S.299(b) of the IPC and S.300 (2) of the IPC

The distinguishing feature of the mens rea requisite under S.300(2) of the IPC is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to her is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause the death of a person in normal health or condition.

The 'intention to cause death' is not an essential requirement of S.300(2) of the IPC. Only the intention of causing the bodily injury coupled with the knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to satisfy S.300 (2) of the IPC. (*See* Illustration (b) appended to S.300 of the IPC)

S.299(b) of the IPC does not postulate any such knowledge on the part of the offender. Instances of cases under S.299(b) of the IPC are where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from a diseased heart and such blow is likely to cause death of that particular person as a result of the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury was intentionally given.

Distinction between S.299(b) of the IPC and S.300 (3) of the IPC

Instead of the words 'likely to cause death' occurring in S.299(b) of the IPC, the words 'sufficient in the ordinary course of nature to cause death' have been used in S.300(3) of the IPC. The distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death that determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in S.299(b) of the IPC conveys the sense of the probable as distinguished from a mere possibility. The words 'bodily injury...sufficient in the ordinary course of nature to cause death' mean that death will be the 'most probable' result of the injury, having regard to the ordinary course of nature.

For cases to fall within S.300(3) of the IPC, it is not necessary that the offender intended to cause death, as long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.

(See *State of Andhra Pradesh* v. *Rayavarapu Punnayya and Another*, 1977 Cri.L.J. 1; *Augustine Saldanha* v. *State of Karnataka*, 2003 Cri L J 4458; *Shri Harendra Nath Borah* v. *State of Assam*, JT 2007 (2) SC 404)

In *Virsa Singh* v. *State of Punjab*, 1958 Cri.L.J 818, the Supreme Court explained the scope of S.300(3) of the IPC. The Court observed that the prosecution must prove the following facts before it can bring a case under S.300(3) of the IPC:

- First, it must establish quite objectively, that a bodily injury is present;
- Secondly the nature of the injury must be proved. These are purely objective investigations.
- Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further; and
- Fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Thus, according to the rule laid down in *Virsa Singh's case*, even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. See Illustration (c) to S.300 of the IPC.

Distinction between S.299(c) of the IPC and S.300 (4) of the IPC

Both provisions require knowledge of the probability of the act causing death. S.300(4) of the IPC would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons - being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury. (See *Thangiya* v. *State of Tamil Nadu*, 2005 Cri.L.J. 684)

S.302 of the IPC

S.302 of the IPC provides for the punishment for murder, as defined under S.300 IPC. S.302 IPC provides two punishments, death sentence or imprisonment for life, and there is a further provision that imposes a fine.

Death Penalty

In *Bachan Singh* v. *State of Punjab*, AIR 1980 SC

898, a Constitution Bench of the Supreme Court upheld the validity of the death penalty provision, which had been challenged under Aa.19 and 21 of the Constitution.

The Court laid down the following propositions:

- The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- Before opting for the death penalty, the circumstances of the 'offender' must be taken into consideration along with the circumstances of the 'crime';
- Life imprisonment is the rule and death sentence is an exception. In other words, the death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided that the option to impose a sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances; and
- A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

This decision has been followed subsequently in *Machi Singh* v. *State of Punjab*, (1983) 3 SCC 470.

S.304 of the IPC

As mentioned earlier, S.304 of the IPC provides the punishment for culpable homicide not amounting to murder. There are two parts to S. 304 of the IPC:

- Where the act is done with the intention of causing death or such bodily injury as is likely to cause death (Part I); and
- Where the act is done with the knowledge that it is likely to cause death without any intention of causing death (Part II).

S.304A of the IPC: Death by Negligence

S.304A of the IPC deals with cases where death is caused by a rash or negligent act.

The term 'rash' conveys the idea of recklessness or the doing of an act without due consideration, and 'negligence' denotes the lack of adequate /proper care.

Every rash or negligent act leading to the death of any person would not come within the purview of this provision. S.304A of the IPC excludes the ingredients of Ss.299 and 300 of the IPC.

In *Mohammed Aynuddin and Miyam* v. *State of Andhra Pradesh*, (2000) 7 SCC 72, the facts that were established were that the appellant was driving a bus and a passenger boarded the bus. When the bus moved forward, she fell out of the vehicle and the rear wheel of the bus ran over her and she died of the injuries sustained in that accident. The Supreme Court held that in the case, S.304A IPC would have no applicability since negligence of the driver could not be presumed. The Court further held that a rash act is primarily an over hasty act and is different from a deliberate act.

Illustration: A speeding truck, while taking a turn in an open field, hit a cot causing the death of a person who was resting on it. The case falls under S.304A of the IPC and not under S.304, Part II of the IPC, as the driver obviously did not wilfully drive the car on the cot. (*See State of Gujarat* v. *Haider Ali*, (1976) 1 SCC 889)

Professional Negligence and S.304A of the IPC

S.304A of the IPC is often invoked against medical professionals in cases alleging professional negligence. The Supreme Court in *Jacob Mathew* v. *State of Punjab and Another*, (2005) 6 SCC 1, reiterated the earlier view of the Supreme Court in *Dr. Suresh Gupta* v. *Government of NCT of Delhi*, (2004) 6 SCC 422.

The Court *inter alia* observed that the concept

of negligence differs in civil and criminal law and what may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist and for an act to amount to criminal negligence, the degree of negligence should be much higher, that is, gross or of a very high degree. Negligence that is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

The Court further held that though the word 'gross' has not been used in S.304A of the IPC, yet it is settled that the expression 'rash or negligent act' as occurring in S.304A of the IPC has to be read as qualified by the word 'grossly'.

The test laid down by the Court was that to prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury that resulted was most likely imminent.

See also, *Martin F. D'Souza* v. *Mohd. Ishfaq*, (2009) 3 SCC 1.

Ss.306 and 309 of the IPC: Abetment and Attempt to Commit Suicide

S.306 IPC makes a person liable for punishment for abetting the commission of suicide. Abetment is described in the IPC in Chapter V. Abetment has been defined in S.107 of the IPC as comprising:

- Instigation to commit an offence;
- Engaging in a conspiracy to commit an offence; and
- Aiding the commission of an offence.

For an act to come within the ambit of S.306 of the IPC, the act must fall within the purview of S.107 of the IPC.

S.306 IPC and S.113A of the Indian Evidence Act, 1872

S.113A of the Indian Evidence Act, 1872 ("**the Evidence Act**"), provides that when the question is whether the commission of suicide by a woman had been abetted by her husband or by any relative of her husband, and it is shown that:

- She had committed suicide within a period of seven years from the date of her marriage; and
- That her husband or such relative of her husband had subjected her to cruelty;

The Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

This provision was introduced by way of an amendment in 1983 to meet a social demand to resolve difficulty of proof where helpless married women were forced to commit suicide by the husband or the in-laws and where incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to any one outside the occupants of the house.

Note that firstly, the presumption is not mandatory, it is only permissive since the phrase used is 'may presume'. Secondly, before the presumption may be drawn, the court must have regard to 'all the other circumstances of the case'. The consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. Thirdly, the presumption under S.113A of the Evidence Act is a rebuttable one.

See *Ramesh Kumar* v. *State of Chhattisgarh*, (2001) 9 SCC 618; and *Rajbabu and Another* v. *State of Madhya Pradesh*, AIR 2008 SC 3212.

S.309 of the IPC punishes any person who attempts to commit suicide and does any act

towards the commission of such an offence.

Offences of Hurt (Ss.319 – 338 of the IPC)

Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt under S.319 of the IPC.

S.320 of the IPC defines '*grievous hurt*' as:

- Emasculation;
- Permanent privation of the sight of either eye;
- Permanent privation of the hearing of either ear;
- Privation of any member or joint;
- Destruction or permanent impairing of the powers of any member or joint;
- Permanent disfiguration of the head or face;
- Fracture or dislocation of a bone or tooth; or
- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

For either hurt or grievous hurt to be punishable under the IPC, the same must have been caused voluntarily, as provided under S. 321 of the IPC (Voluntarily causing Hurt) and S.322 of the IPC (Voluntarily Causing Grievous Hurt).

Illustration: A is fighting with B and attempts to hit B with a lathi. C intervenes and attempts to stop the fight. In the scuffle, A hits C with a lathi, though A was trying to hit B. A commits an offence under S.323 of the IPC.

In *State of Karnataka* v. *Shivlingaiah*, AIR 1988 SC 115, it was held that where the accused had squeezed the testicles of the deceased, which resulted in his almost instant death and where the incident took place all of a sudden, it could not be said that the accused had any intention of causing the death of the deceased, nor could he have been attributed any knowledge that his act was likely to cause a cardiac arrest and hence death. It was therefore held that the act fell within S.325 of the IPC.

Offences of Kidnapping, Abduction, and such other Offences (Ss.359 – 374 of the IPC)

S.359 of the IPC provides that kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.

S.360 of the IPC defines kidnapping from India as conveying any person beyond the limits of India without the consent of that person (or a person legally authorised to give consent).

S.361 of the IPC defines kidnapping from lawful guardianship as the act of taking or enticing any minor (under 16 years for a male; and under 18 years for a female) or any person of unsound mind, out of the keeping of, and without the consent of a lawful guardian.

In *Thakorlal D. Vadgame* v. *State of Gujarat*, (1973) 2 SCC 413, the Supreme Court held that the word 'takes' in S.361 IPC does not necessarily connote taking by force and it is not confined to the use of force, whether actual or constructive.

Illustration: A (unrelated to G) offers G (a minor) a chocolate to enter her car. G enters her car. A has kidnapped G under S.361 of the IPC.

S.362 of the IPC defines abduction as compelling by force or inducing by any deceitful means any person to go from any place.

S.364A of the IPC was introduced by way of an amendment in 1993. The provision was introduced to provide severe punishment in cases where the offence of abduction or kidnapping is complete or the person is kept continuously under detention, and the accused threatens to cause death or hurt to such a person detailed or creates a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to compel the government or any foreign state or international governmental organisation to do or abstain from doing an act or to pay a ransom as demanded by the accused.

Sexual and Unnatural Offences (Ss.375 – 377 of the IPC)

Ss.375 and 376 of the IPC: Rape

A man is said to commit 'rape' when he has sexual intercourse with a woman under circumstances falling within any of the following descriptions:

- Against her will;
- Without her consent;
- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt;
- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent; or
- With or without her consent, when she is under sixteen years of age.

S.375 of the IPC contains an explanation that penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape. Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.

Consent of a girl below the age of sixteen is immaterial. (*Bishnu Dayal* v. *State of Bihar*, AIR 1981 SC 39) In *State of Uttar Pradesh* v. *Manoj Kumar Pandey*, AIR 2009 SC 711, the Supreme Court held that merely because the victim was more than 16 years of age cannot be a ground to hold that she was a consenting party.

The Supreme Court, in *State of Uttar Pradesh.* v. *Om*, 1999 Cr.L.J. 5030, held that the mere fact that a victim / prosecutrix was of loose moral character and was used to sexual intercourse, cannot be used to disbelieve her statement in a case under S.375 of the IPC.

A conviction on a charge of rape on the uncorroborated testimony of the victim / prosecutrix has been held to be legal in *Madho Ram* v. *State of Uttar Pradesh*, AIR 1973 SC 469.

S.376 of the IPC: Punishment of Rape

The minimum punishment for rape is imprisonment for seven years and fine.

When a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of such persons is deemed to have committed gang rape. In *Promod Mehto* v. *State of Bihar*, AIR 1989 SC 1475, it was held that where four persons raped a woman and the medical evidence supported the fact of rape, the conviction of all of them was upheld without it being necessary to show whether all of them or which of them participated in the crime.

Section 114A of the Evidence Act: Consent

S.114-A of the Indian Evidence Act, 1872, provides that in all cases of prosecution for rape under S.376(2) of the IPC (except S.376(2)(f) of the IPC), where:

- Sexual intercourse by the accused is proved; and
- The question is whether it was without the consent of the woman alleged to have been raped; and
- She states in her evidence before the Court that she did not consent;

The Court shall presume that she did not consent.

S.377 of the IPC

In *Naz Foundation* v. *Government of NCT and Others*, 2010 Cri.L.J. 94, the Delhi High Court declared that:

- S.377 of the IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Aa.21, 14, and 15 of the

Constitution;

- The provisions of S.377 of the IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors; and
- A person below 18 would be presumed not to be able to consent to a sexual act.

Offences against Property

Section 378 and 379 of the IPC: Theft

A person commits theft under S.378 of the IPC when such person, to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to perform such taking.

The commission of theft, therefore, consists in:

- The moving of a movable property of a person out of his possession without his consent; and
- The moving being in order to perform the taking of the property with a dishonest intention.

Thus, the absence of the person's consent at the time of moving, and the presence of dishonest intention in so taking and at the time of the taking, are the essential ingredients of the offence of theft.

A person can be said to have dishonest intention, if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of the property to which a person so losing is legally entitled.

It is further clear from the definition that the gain or loss contemplated need not be a total acquisition or total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary 'keeping out' of property from the person legally entitled.

Illustration: A puts a bait for dogs in his pocket, and thus induces Z's dog to follow her. Here, if A's intention is to dishonestly take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

Illustration: A sees a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

Illustration: Z, going on a journey, entrusts his plate to A, the keeper of the warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

Illustration: A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and when A dishonestly removes it, A commits theft.

In *K. N. Mehra* v. *State of Rajasthan*, AIR 1957 SC 369, a cadet took an aircraft of the Indian Air Force and unauthorisedly flew it to Pakistan. It was held by the Supreme Court, that this act constituted theft.

S.383 of the IPC: Extortion

Under S.383 of the IPC, whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustration: A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

Illustration: A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z signs and delivers the note. A has committed

extortion.

Illustration: A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

In *Chander Kala* v. *Ram Kishan*, AIR 1985 SC 1268, the Supreme Court held that where a head master of a school called a lady teacher and induced her to sign three blank papers by threatening an attack on her modesty, the same amounted to extortion.

S.390 of the IPC: Robbery

S.390 of the IPC states that in all robbery cases, there is either extortion or theft.

Theft is 'robbery' if, in order to commit the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

Extortion is 'robbery' if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Illustration: A holds Z down and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. Here, A has committed theft, and in order to commit that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

Illustration: A obtains property from Z by saying, "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such. It is not robbery, unless Z is put in fear of the instant death of his child.

S.403 of the IPC: Dishonest Misappropriation of Property

There is no definition of misappropriation in the IPC though S.403 of the IPC provides for the offence of dishonest misappropriation of property. Misappropriation forms an ingredient of offences such as criminal breach of trust. (S.405 to 409 of the IPC)

Illustration: A takes property belonging to Z out of Z's possession, in good faith, believing, at the time when he takes it, that the property belongs to herself. A is not guilty of theft, but if A, after discovering his mistake, dishonestly appropriates the property to her own use, she is guilty of an offence under this section.

Illustration: A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

S.403 of the IPC bears two explanations. The first explanation provides that a dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration: A finds a government promissory note belonging to Z, bearing a blank endorsement. A knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

The second explanation to S.403 of the IPC is that a person who finds property not in the possession of any other person, and takes such property for the purpose of protecting if for, or of restoring it to, the owner does not take or misappropriate it dishonestly, and is not guilty of an offence. However, he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable

means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

Illustration: A finds a rupee on the road, not knowing to whom the rupee belongs. A picks up the rupee. Here, A has not committed the offence defined in this section.

Illustration: A finds a letter on the road, containing a bank note. From the address and contents of the letter, she learns to whom the note belongs. She appropriates the note. He is guilty of an offence under this section.

Illustration: A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to her own use. A has committed an offence under this section.

Ss.405 – 409 of the IPC: Criminal Breach of Trust

The offence of criminal breach of trust is committed when a person who is entrusted in any manner with property or with dominion over it, dishonestly misappropriates it, or converts it to his own use, or dishonestly uses it or disposes it of, in violation of any direction of law, prescribing the mode in which the trust is to be discharged, or of any lawful contract, express or implied, made by him touching such discharge, or willfully suffers any other person so to do. (*Som Nath Puri* v. *State of Rajasthan,* (1972) 1 SCC 630)

In *Krishan Kumar* v. *Union of India*, (1960) 1 SCR 452, the Supreme Court held that it is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or appropriated the goods of his master. The question considered by the Court was one of intention and not of direct proof. However, giving of a false account of what has been done with the goods received by an accused person, can be treated as a strong circumstance against the accused person.

Where amounts said to have been embezzled were received by a person and if he failed to account for the same, the elements constituting the offence of Ss. 406 - 409 of the IPC stand established. The burden is initially placed on the prosecution and where the accused / prosecution succeeds in proving the receipt by the accused of the several amounts, it was for the accused / petitioner to show that he had not converted them to his own use. Once entrustment is proved, it is for the accused to prove how the property entrusted was dealt with. (*See N. Bhargavan Pillai* v. *State of Kerala*, AIR 2004 SC 2317; *Mustafikhan* v. *State of Maharashtra*, (2007) 1 SCC 623)

Ss.415 – 420 of the IPC: Cheating

S.415 of the IPC provides that to hold a person guilty of cheating as defined, it is necessary to show that she had a fraudulent or dishonest intention at the time of making the promise to retain the property.

In other words, S.415 of the IPC requires the deception of any person by:

- Inducing that person to:
  - Deliver any property to any person; or
  - Consent that any person shall retain any property.

OR

- Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person, anybody's mind, reputation, or property. (See *Hira Lal Hari Lal Bhagwati* v. *C.B.I.*, (2003) 5 SCC 257.)

Illustration: A, by exhibiting to Z, a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby, dishonestly induces Z to buy and pay for the article. A cheats.

Illustration: A tenders to Z a bill of exchange as payment for an article. A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A

cheats.

Illustration: A, by pledging diamonds which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

S.415 of the IPC is made punishable by S.417 of the IPC. There exists a distinction between pure contractual dispute of a civil nature and an offence of cheating. Although breach of contract *per se* would not come in the way of initiation of a criminal proceeding, a mere breach of contract is not sufficient to make a person liable under S.415 or S.420 of the IPC. (*See V.Y. Jose and Another* v. *State of Gujarat and Another*, (2009) 3 SCC 78; *All Cargo Movers (I) Pvt. Ltd.* v. *Dhanesh Badarmal Jain and Another*, 2007 (12) SCALE 391)

To constitute an offence under S.420 of the IPC, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived to:

- Deliver any property to any person; or
- Make, alter, or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

For an offence under this provision, it must be proved that the Complainant parted with his property acting on representation which was false to the knowledge of the accused and that the accused had a dishonest intention from the outset. (*Mobarik Ali Ahmed* v. *The State of Bombay*, AIR 1957 SC 857)

Offences Relating to Documents

Ss.463 – 477A of the IPC: Forgery, Making False Documents, and Related Offences

In *Md. Ibrahim and Others* v. *State of Bihar and Another,* (2009) 8 SCC 751, the Supreme Court extensively dealt with the provisions of the IPC relating the forgery of documents.

Ss.463-465 of the IPC: Forgery

A person is said to commit forgery under S. 463 of the IPC, if she makes any false documents with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into express or implied contract, or with intent to commit fraud or that the fraud may be committed. S.470 defines a forged document as a false document made by forgery.

Forgery is punishable under S.465 of the IPC.

The term 'making a false document' is further defined in S.464 of the IPC. An analysis of S. 464 of the IPC (as per *Md. Ibrahim's* case) shows that the provision divides false documents into three categories:

- The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed;
- The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself or any other person; and
- The third is where a person dishonestly or fraudulently causes any person to sign, execute or alter a document knowing that such person could not by reason of:

  - Unsoundness of mind;
  - Intoxication; or
  - Deception practised upon him;

Know the contents of the document or the nature of the alteration.

Therefore, a person is said to have made a `false document' under S.464 of the IPC if: (i) he made or executed a document claiming to be someone else or authorised by someone else; (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of

his senses.

Illustration: A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable and authorises B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum or twenty thousand rupees. B commits forgery.

Illustration: A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order", and by signing the endorsement. B dishonestly erases the words "Pay to Z or his order", and thereby converts the special endorsement into a blank endorsement. B commits forgery.

Illustration: A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and is in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

The IPC has provided for further and aggravated forms of offences under this Chapter to punish the creation, possession, and the use of false documents.

Ss.467 – 468 of the IPC: Forgery of Valuable Security / for Cheating

S.467 of the IPC provides that whoever forges a document which purports to be a valuable security (*See* S.30 of the IPC). S.468 of the IPC punishes the commission of forgery for the purpose of cheating.

S.471 of the IPC: Use of Forged Document as Genuine

S.471 of the IPC provides that whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

S.474 of the IPC provides that whoever has in her possession, a document described in S.466 of the IPC or S.467 of the IPC, knowing the same as being forged, with the intention to use the same as genuine, is liable for punishment.

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 6: Criminal Law II - Criminal Procedure Code

Introduction

The Code of Criminal Procedure, 1973 ("**the Code**" or **"the Cr.P.C."**), replaced the Code of Criminal Procedure, 1898. The Code provides the procedure for the implementation of the criminal justice system. It provides the mechanism for the investigation into and trial of offences.

The Indian Penal Code, 1860 (and other special acts containing penal provisions), provide the substantive criminal law, whereas the Code is the 'adjective law' or procedural law to put into force the provisions of the substantive criminal law. The Code represents a balance between the rights of an accused person enshrined and protected under the Constitution of India, and the need for society to protect itself from crime and its perpetrators.

The Code also puts into effect the constitutional mandate of the separation of powers between the legislature, the executive, and the judiciary. As can be seen, each limb of the State has its own set of responsibilities and duties, and the Code ensures that this principle of separation of powers is not breached. In *King Emperor* v. *Nazir Ahmed*, AIR 1963 SC 447, the Privy Council held that the functions of the judiciary and of the police are complementary, not overlapping.

Though the Code was passed by Parliament, the subject 'Criminal Procedure' comes under the Concurrent List of the Seventh Schedule. Hence, it is open to State Legislatures, in accordance with the Constitution, to modify the Code to suit its own requirements.

Preliminary / Definitions

S.2 of the Code contains definitions that are used throughout the Code. Since the Code is the principal procedural law in the criminal justice delivery system, unless otherwise stated/intended, the definitions used in this section are often used to interpret the same terms/phrases used in other legislation.

S.2(d): Classification Of Offences

S.2(A) - Bailable/Non Bailable Offences

The First Schedule of the Code contains a list of offences under the Indian Penal Code, 1860 ("**the IPC**"), and provides procedural information regarding the same. Offences that are marked 'bailable' and 'non-bailable' in the Schedule are defined as such in S.2(a) of the Code. However, other laws may also define an offence to be bailable or non bailable.

For instance, as *per* the First Schedule, an offence under S.323 of the IPC (voluntary hurt) is bailable, whereas an offence under S. 326 (voluntarily causing grievous hurt with dangerous weapons or means) is non bailable. S.77B of the Information Technology Act, 2000, provides that all offences under the Information Technology Act, 2000, that are punishable with imprisonment of three years, shall be bailable.

In a bailable offence, a person has a right to be released on bail upon arrest; non bailable offences do not imply that bail will never be granted; in such cases, the release of a person is dependant on the exercise of judicial discretion.

Ss.2(c), 2(l): Cognizable / Non Cognizable

A cognizable offence/case is an offence/case where a police officer may arrest without warrant. Such specification is provided either in the First Schedule, or any other special law. There is no fixed basis for this categorisation. It may, however, be said that generally, all serious offences are considered cognizable.

Illustration: A is arrested on allegations of kidnapping under S.363 of the IPC. The offence is congizable, and hence the police can arrest A without a warrant. However, the offence is bailable, and hence A ought to be

released on bail immediately in terms of S.436 of the Cr.P.C.

A is arrested on allegations of kidnapping under S. 365 IPC. The offence is non- bailable, and hence the release of A is subject to the discretion of the Court.

Ss.2(w), 2(x): Summons Case / Warrant Case

S.2(x) defines a warrant case as being a case relating to an offence punishable with death, imprisonment for life, or imprisonment for a term exceeding two years. S.2(w) defines a summons case as being any case relating to an offence, not being a warrant case.

Note that the classification of summons and warrant cases is the basis on which trial in each case will proceed. Chapters XVIII and XIX of the Code deal with trial of warrant cases, while Chapter XX deals with the trial of a summons case.

S.2(d): Complaint

A complaint has been defined as any allegation made orally or in writing to a Magistrate, with a view to her taking action under the Code, that some (known or unknown) person has committed an offence.

A complaint does not include a police report. A police report (under S.173, Cr.P.C.) is colloquially referred to in some states as a 'chargesheet'.

S.2(e): Inquiry

An inquiry has been defined as every inquiry, other than a trial, conducted by a Magistrate or Court under the Code. An example of an inquiry would be inquest proceedings under S.174 of the Cr.P.C.

S.2(n): Offence

An offence has been defined as any act or omission made punishable by any law for the time being in force. Hence, subject to Ss.4 and 5 of the Code, the trial for all offences is governed by the Code.

S.2(r): Police report

A police report refers to a report forwarded by a police officer to a Magistrate under S.173(2) of the Cr.P.C.

Constitution of Criminal Courts

Ss.6 to 23 of the Code provide for the constitution of Criminal Courts. S.6 provides that besides High Courts, each State shall have Courts of Session, Judicial Magistrates of the first class (or Metropolitan Magistrates), Judicial Magistrates of the second class, and Executive Magistrates.

The remainder of the provisions give details of each Court and of the *inter se* hierarchy of the Courts.

Powers of Criminal Courts

Ss.28 and 29: Sentences that may be Passed

S.28 provides that a High Court can pass any sentence authorised by law. A Sessions Court (or Additional Sessions Judge) may pass any sentence authorised by law, but if the sentence of death is passed by any such court or judge, respectively, such sentence is subject to confirmation by the High Court.

Illustration: After consideration of material in a trial for the offence of S.302 of the IPC, the Sessions Court convicts an accused and sentences him to death. This sentence must now be confirmed by the High Court.

S.29 provides that a Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death, imprisonment for life, or imprisonment for a term exceeding seven years. The Court of a Magistrate of first class (or a Metropolitan Magistrate) may pass a sentence of imprisonment for a term not exceeding three years, or a fine not exceeding Rs.10,000/-.

Arrest

Arrest means deprivation of the personal

liberty of a person by a person having legal authority to do so. S.60A of the Cr.P.C. (added by way of amendment in 2009) now provides that no arrest shall be made except in accordance with the provisions of the Code or any other law, for the time being in force, that provides for arrest.

The police exercise its powers of arrest in two cases, either with the use of a warrant, or without such warrant. S.87 of the Cr.P.C. also empowers a Magistrate to issue warrants, regardless of whether the case is a summons case or a warrants case. S.204 of the Cr.P.C. provides that after taking cognizance of a warrant case, a Magistrate may issue warrants of arrest.

It is important to remember that the words 'arrest' and 'custody' are not synonymous. (*Niranjan Singh* v. *Prabhakar Raja Ram Kharote*, (1980) 2 SCC 559) A person can be in custody not merely when the police arrests him/her, but also when the police produces him/her before a Magistrate and gets a remand to judicial or other custody.

A person can be stated to be in the custody of the Court (judicial custody) when s/he surrenders before Court and submits to its directions. Arrest is therefore a form of custody.

Illustration: A is accused of a cognizable offence and surrenders before the Court. A is now in judicial custody.

A is accused of a cognizable offence and is arrested by the police. A is now in police custody.

S.41: Power to Arrest Without a Warrant

S.41 deals with cases where the police is empowered to arrest without a warrant. The police have no powers to arrest a person without a warrant in a non-cognizable case, expect in certain specified circumstances.

A person can also be arrested by a police officer under S.42 of the Cr.P.C. if she has committed a non-cognizable offence in the presence of such police officer, and has failed to give the police officer her name and residence.

S.43 provides that in certain limited circumstances, a private person may arrest a person or cause such person to be arrested. S. 44 provides for powers of a Magistrate to effect arrest.

S.46: Arrest how made

S.46 provides that in making an arrest, a police officer must actually touch or confine the body of a person arrested, unless the person to be arrested submits to custody by words or by action.

S.46 empowers a police officer to use all means necessary to effect arrest, barring causing the death of a person who is not accused of an offence punishable with death or imprisonment for life.

Rights of an Accused / Arrested Person

S.49: No Unnecessary Restraint

S.49 provides that a person arrested shall not be subjected to more restraint than is necessary to prevent her escape.

S.50(1): Right to know grounds of arrest

Under S.50(1) of the Cr.P.C., the police/arresting authority is under an obligation to inform the arrested person as to the grounds of his/her arrest. *See also* A.22(1) of the Constitution in this regard.

S.50A: Obligation to Inform Friend / Relatives of Arrested Person

S.50A provides that upon the arrest of a person, information regarding such arrest, including the place where the person is being held must be given to friends, relatives, or other persons nominated by the arrested person.

The arrested person must be informed of these rights by a police officer as soon as he is

brought to the police station. S.50A was added as an amendment in 2005 (with effect from 2006).

Prior to this provision, basic rights of an accused person had been recognised by the Supreme Court in *Joginder Singh* v. *State of UP*, (1994) 4 SCC 260, and *D. K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416. These rights have been recognised as being part of the fundamental rights as protected by the Constitution and are hence, inviolable.

Ss.53, 53A, 54, 55A: Right to be Examined by a Registered Medical Practitioner / Health and Safety of Arrested Person

Under Ss.53 and 53A of the Cr.P.C., the police have the power to have an arrested person examined by a registered medical practitioner for purpose of affording evidence or collection of facts that may afford such evidence. S.53A is specific to the examination of a person accused of rape.

S.54 of the Cr.P.C. provides that a person arrested must be examined by a medical officer in the service of either the Central or State Government (or if such medical officer is unavailable, then by a registered medical officer) soon after the arrest is made.

S.55A provides that it is the duty of the person having custody of the accused to take reasonable care of the health and safety of the accused. This is a new provision, and was added in 2009.

It may be noted that S.164(A) of the Cr.P.C. deals with the medical examination of a victim of rape. This provision provides a detailed procedure and requirement of information to be recorded during the course of such an examination.

Ss.56, 57: Right to be Produced Before a Magistrate

A person who has been arrested by the police must be produced before a Magistrate within 24 hours of the arrest of such person.

Illustration: B is arrested at 11am on a Saturday, the 12th of June 2010. B must be produced before the Magistrate before 11am on Sunday, the 13th of June 2010.

Right to Consult a Lawyer / Legal Advice

An accused person has the right to consult a lawyer, which is recognised under A.22(1) of the Constitution and under S.303 of the Cr.P.C. An accused person has a constitutionally guaranteed right against self incrimination under A.20(3) of the Constitution.

An accused person also has a right to legal advice while being interrogated, with the general rule being that lawyers can remain within sight of the accused during interrogation, but out of hearing distance.

Right Against Custodial Violence

The Supreme Court has held in several cases, for example, *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746, that wrongful detention gives rise to a claim for compensation by the victim. The Supreme Court has deprecated the practice of custodial violence and extraction of information/confessions by use of illegal/'third degree' methods.

The right of an accused not to be tortured or to be subjected to custodial violence has been read into A.21 of the Constitution. (*Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535

Furthermore, provisions such as Ss.24 – 27 of the Indian Evidence Act, 1872, which *inter alia* place a bar on the admissibility of statements made to police officers, ensure that the interrogation by police is kept humane and within legal parameters.

Illustration: A is accused of an offence and is arrested by the police and kept in police lockup. A is beaten and her statement is forcibly taken by the police. Such a statement is not valid in the eyes of law.

Bail

Once an accused is arrested, she has a right to be considered for release on bail. Bail connotes the process of procuring the release of an accused charged with certain offences by ensuring her future attendance in the court for trial, and to compel her to remain within the jurisdiction of the court.

During the course of trial, an accused has a right to be presumed to be innocent until proven guilty. Pre-trial detention is the anti-thesis to this proposition. While balancing the rights of the accused and the right of society to protect itself from crime, however, it becomes necessary at times to continue pre-trial detention of the accused person. This pre-trial detention is open to challenge by the accused, who can seek bail under various provisions of the Code. Bail seeks to restore liberty to the arrested person without compromising the objective of his arrest. Release on bail, apart from release where conditions under S.167(2) of the Cr.P.C. are satisfied, is a matter of discretion of a court and varies in each fact situation.

Chapter XXXIII contains provisions as to bails and bail bonds. Apart from Chapter XXXIII, bail can also be granted under various provisions of the Code, including Ss.81(1), 167 (2), and 389 of the Cr.P.C.

Illustration: T is arrested on a charge of theft. On the 59th day of her custody, the police express their inability to file a chargesheet against her within 60 days. T is now entitled to be released on bail under S.167 of the Cr.P.C.

S.436 of the Cr.P.C.

Under S.436 of the Cr.P.C., when any person, other than a person accused of a non bailable offence, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before the court and is prepared to give bail, such person shall be released on bail. It has been held in *Rasik Lal* v. *Kishore Khan Chand Wadhwani*, AIR 2009 SC 1349, that the right to claim bail under S.436 of the Cr.P.C. in a bailable offence is an absolute and indefeasible right. The Supreme Court further held that in a bailable offence, there can be no question of discretion in granting bail since the words of S.436 of the Cr.P.C. are imperative in nature.

Illustration: P is arrested for a charge under S. 471 of the IPC. The offence is cognizable but bailable. P ought to be granted bail under S. 436 of the Cr.P.C. at the time of her arrest, subject to P being willing to comply with the bail conditions.

S.436(A) of the Cr.P.C.: Maximum Period for Which an Under-trial can be Detained

This provision was inserted by way of an amendment in 2005 (with effect from March 26, 2006). This provision provides that when a person has, during the period of investigation, inquiry, or trial of an offence under any law, undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law, she shall be released on her personal bond. This provision will not apply to cases where a person is undergoing detention for an offence for which the punishment of death has been specified as one of the punishments of that law.

Ss.437 and 439 of the Cr.P.C.: Bail in Non-Bailable Offences

S.437 of the Cr.P.C. gives a court (other than a High Court or a Court of Sessions) or a police officer the power to release the accused on bail in a non-bailable case, unless there appear reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life.

S.439 of the Cr.P.C. grants special powers to the High Court or Court of Sessions to direct the release of a person on bail. The power to grant bail under S.437 of the Cr.P.C. is granted to Courts other than the High Court or the Court of Session, and the powers under S.437 of the Cr.P.C. cannot be treated at par with the powers of the Sessions Court and High Court under S.439 of the Cr.P.C.

In *State of Rajasthan* v. *Balchand*, AIR 1977 SC 2447, the Supreme Court held that the basic rule is bail not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating utter troubles in the shape of repeating offences or intimidating witnesses. Grant of bail is the rule and its refusal is the exception. (See also *Moti Ram* v. *State of Madhya Pradesh*, (1978) 4 SCC 47)

In *Jayendra Saraswati Swamigal* v. *State of Tamil Nadu*, AIR 2005 SC 716, the considerations, which normally the Court weighs while granting bail in non-bailable offences, were set out as the following:

- The nature and seriousness of offence;
- The character of the evidence;
- Circumstances which are peculiar to the accused;
- A reasonable possibility of the presence of the accused not being secured at the trial;
- Reasonable apprehension of witnesses being tampered with; and
- The larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case

These considerations are not exhaustive, and bail ought to be considered on the basis of the facts of each case and the circumstances in which bail is being sought by the accused.

Illustration: A is arrested in a cognizable offence after having evaded summons and non bailable warrants in the case and having absconded for many years. The fact that A had absconded will be looked into by the Court while considering A's fresh application for bail.

Decisions of the Supreme Court in relation to grant/refusal of bail include *Ram Govind Upadhyay* v. *Sudarshan Singh*, (2002) 3 SCC 598, *Puran* v. *Ram Bilas*, (2001) 6 SCC 338, *Kalyan Chandra Sarkar* v. *Rajesh Ranjan & Pappu Yadav*, (2004) 7 SCC 528.

Bail granted under S.437 of the Cr.P.C. can also be cancelled under S.437(5) of the Cr.P.C. Any Court may direct that a person granted bail under S.437(1) or (2) of the Cr.P.C. be arrested and committed to custody. Bail granted under S.439 of the Cr.P.C. can be cancelled by the Court granting bail under S. 439(2) of the Cr.P.C.

The Supreme Court has held that once bail has been granted, it can only be cancelled based on cogent and overwhelming circumstances. Proceedings for the cancellation of bail are not in the nature of an appeal from the grant of bail, and therefore, a court must look for circumstances that warrant cancellation of bail such as interference or attempt to interfere with the due course of justice, or abuse of concession of bail granted to the accused in any manner. (*Dolat Ram* v. *State of Haryana*, (1995) 1 SCC 349)

An accused has the right to file successive bail applications; however, after the bail application has been dismissed, a second application must be filed only upon a change of circumstances that warrants a fresh application. (*Kalyan Chandra Sarkar* v. *Rajesh Ranjan* & *Pappu Yadav*, (2005) 1 SCC 801) It may be noted that efflux of time alone is not a circumstance that always warrants grant of bail.

S.438 of the Cr.P.C.: Anticipatory Bail

The provision for anticipatory bail was introduced for the first time in the Code. Such a provision was not available in the 1898 Code.

An order under S.438 of the Cr.P.C. comes into effect only upon the arrest of a person. Such an order is usually taken/granted where a person has reason to believe that she is about to be arrested in connection with a case. Upon consideration of such an application, a High Court or a Court of Session can direct the Investigating Authority to release the applicant on bail in the event of the applicant's arrest. It is reiterated that an order under S.438 of the Cr.P.C. takes effect only

upon arrest.

The power under S.438 Cr.P.C. is extraordinary in character and is to be exercised only in exceptional cases where it appears that a person may be falsely implicated, or where there are reasonable grounds to hold that a person accused of an offence is not likely to otherwise misuse his liberty. The *sine qua non* for an application seeking relief under S.438 of the Cr.P.C. is a reason to believe that a person may be arrested on an accusation of having committed a non-bailable offence (*Gurbaksh Singh Sibia* v. *State of Punjab*, 1978 Cri.L.J. 20)

Processes to Compel Appearance

Courts issue 'process' to compel the appearance of witnesses/accused persons before it. Chapter VI provides for various means for the Courts to issue process, depending on the antecedents of the person being compelled to appear. Chapter VI of the Cr.P.C. has been divided into four parts:

- Summons (Ss.61 – 69)
- Warrant of arrest (Ss.70 – 81)
- Proclamation and Attachment (Ss.82 – 86)
- Other Rules regarding processes (Ss.87 – 90)

Ss.61 – 69: Summons

S.62 of the Cr.P.C. provides *inter alia* that as far as practicable, summons shall be served personally on the person summoned. S.63 of the Cr.P.C. provides the method of summoning a corporate body/society.

S.64 of the Cr.P.C. provides that where a person summoned cannot be found after exercise of due diligence, the summons may be served on an adult male member of her family, residing with her.

S.65 of the Cr.P.C. provides for service by affixation. Where the summons cannot be served by any of the methods mentioned in the previous sections, the summons can be affixed on a conspicuous part of the residence of the person summoned, and a Court may declare the summons as being duly served. In the alternative, the court may also order issuance of fresh summons.

S.69 of the Cr.P.C. provides that notwithstanding Ss.61-68 of the Cr.P.C., service of summons can be effected by post, in addition to the methods described in Ss.61- 68 of the Cr.P.C.

Ss.70 – 81: Warrant of Arrest

S.70 of the Cr.P.C. provides that a warrant shall remain in force unless cancelled or executed.

Warrants are of two types: bailable and non-bailable warrants. Under S.71 of the Cr.P.C., a court may issue a warrant authorising the officer who is executing the warrant to take security from the person against whom the warrant is issued and then release such person from custody.

Such warrants are colloquially known as bailable warrants, whereas warrants that only direct the executing officer to arrest and produce the person before the court executing the warrant, are non-bailable warrants.

Warrants are ordinarily to be directed to police officers. (S.72 of the Cr.P.C.) The court, however, has the power under S.72(1) of the Cr.P.C. to direct a warrant that requires immediate execution to any person or persons for such execution.

Ss.77 – 81 of the Code provide for the manner in which warrants are to be executed outside the jurisdiction of the issuing Court. S.81 of the Cr.P.C. empowers the Chief Judicial Magistrate or the Sessions Judge of the district in which the person is arrested to grant such person bail even in non-bailable cases on consideration of information accompanying the warrant.

Ss.82 – 86: Proclamation and attachment

These sections provide that where a court has reason to believe that a person against whom a warrant has been issued is avoiding the said warrant, either by absconding or by

concealing herself, the court can issue a proclamation, under S.82 of the Cr.P.C., and also order the attachment of the movable/immovable property of such a proclaimed person, under S.83 of the Cr.P.C.

S.87 of the Cr.P.C. provides that a Court that can issue summons for the appearance of any person, may also issue a warrant of a person's arrest either before the issuance/service of the summons or after, upon recording its reasons in writing.

Illustration: While praying for the issuance of summons against J, the prosecution informs the Court that the police suspects that J is planning on leaving India immediately. The court may take this fact into consideration to decide whether it ought to issue a warrant of J's arrest along with the summons.

Processes to Compel the Production of Things

The Code empowers the Court and the investigating agencies to perform functions including to summon documents/things and to conduct searches and seizures. Chapter VII provides the framework within which documents/things can be summoned and the manner in which search/seizure ought to take place. The Code provides for safeguards to be followed against the possible abuse of the powers provided to Courts/investigating agencies by these provisions.

These provisions are also important from the point of view of maintaining the sanctity of evidence during trial. The Court must always be in a position to judge whether or not the strict mandate of the Code has been followed by the investigating agency.

This Chapter of the Code has been divided into four parts:

- Summons to produce (Ss.91 – 92)
- Search-warrants (Ss.93 – 98)
- General provisions relating to search (Ss.99 – 101)
- Miscellaneous (Ss.102 – 105)

S.91: Summons to Produce Document or Thing

S.91 confers vast powers on both the Court and any officer in charge of a police station for the production of any document or thing. However, these powers can only be exercised in circumstances where the production of such document or thing is necessary or desirable for the purposes of investigation, inquiry, trial, or other proceeding under the Code.

These powers are not, however, available to the accused to summon documents/things at the stage of consideration of his application for discharge. (*State of Orissa* v. *Debendra Nath Padhi*, (2005) 1 SCC 568)

Illustration: During cross-examination of a witness produced by the prosecution, the witness relies upon a document but does not produce the same. The accused may have a right to call for such a document under S.91 of the Cr.P.C., if she can show that such document is necessary or desirable for the purpose of the trial.

Ss.93 – 98: Searches with warrants

Under S.93 of the Cr.P.C., where a court has reason to believe that a person (to whom a summons/requisition has been made or is about to be made) will not produce the document or thing as required, such court may issue a search warrant and direct it to a person to search/inspect a place in terms of such warrant.

S.100: Search

S.100 of the Cr.P.C. provide conditions/restrictive parameters for a search. These include seeking independent witnesses to attend and witness the search, and giving a copy of the list of things seized to the occupant of the place.

S.102: Seizure

A police officer is empowered under S.102 of the Cr.P.C. to seize property that may be alleged or suspected to have been stolen,

which may be found in circumstances that create the suspicion of the commission of an offence.

The Supreme Court in *State of Maharashtra* v. *Tapas D. Neogy*, (1999) 7 SCC 685, held that a bank account of an accused would amount to property under S.102 of the Cr.P.C., and would be liable to be seized if it can be reasonably suspected that the said account has a direct link to the commission of the offence that is being investigated.

Order for Maintenance of Wives, Children, and Parents

Chapter IX, containing Ss.125 to 128 of the Cr.P.C., provides for the procedure to protect the interests of wives, children, and parents. These provisions are not inconsistent with the provisions of personal laws. These provisions apply to all persons, and do not derogate or dilute equivalent provisions found in different personal laws. (*Captain Ramesh Chander Kaushal* v. *Veena Kaushal*, (1978) 4 SCC 70)

S.125 of the Cr.P.C. provides that where a person having sufficient means neglects or refuses to maintain either his wife, children (as specified in S.125 (1)(b) and (c) of the Cr.P.C.), or parents, a Magistrate upon the proof of such neglect or refusal, may order such person to pay maintenance at a monthly rate as determined by the Magistrate.

The object of this Chapter is to provide summary proceedings by which liability to maintain wives, children, and parents can be enforced in a speedy manner. It has been held by the Supreme Court and a number of High Courts that the proceedings under S.125 of the Cr.P.C. are civil in nature.

Information to the Police and Investigation

One of the forms of reporting the commission of an offence is to give information of the commission of such offence to the police. Such information may be of two types, information relating to the commission of a cognizable case, and information relating to the commission of a non-cognizable case.

S.155: Information and Investigation in Non-Cognizable Cases

There is a bar on police officers from investigating a non-cognizable case without the order of the Magistrate having power to try such case or commit such case for trial. Upon receipt of information as to a non-cognizable case, the police must enter the information in a book as per rules and refer the informer to the magistrate.

Upon receipt of an order from a competent Court, however, the police may then investigate the case in the same manner as a cognizable case barring of course, the power to arrest without a warrant.

Illustration: The police receive information about the commission of an offence under S. 467 of the IPC, which is a non-cognizable offence. The police will not register an FIR under S.154 of the Cr.P.C.

S.154: Information in Cognizable Cases

S.154 provides for information to be given to the police in relation to cognizable cases. This information is colloquially known as the 'First Information Report' or 'FIR'. A police officer is bound to register an FIR/first information report upon receipt of information regarding the commission of a cognizable offence. Recently in the Supreme Court, there has been a divergence of views as to whether a police officer has any power of preliminary inquiry into the information received prior to the registration of the FIR.

In *Rajinder Singh Katoch* v. *Chandigarh Administration*, AIR 2008 SC 178, the Supreme Court has held that the police has a duty to conduct a preliminary inquiry prior to registration of an FIR. The Court held:

"*We are not oblivious to the decision of this Court in Ramesh Kumari v. State (NCT of Delhi) and Ors., wherein such a statutory duty has been found in the Police Officer. But, as indicated hereinbefore, in an appropriate case, the Police Officers also have a duty to make a preliminary*

enquiry so as to find out as to whether allegations made had any substance or not."

However, in *Lalita Kumari* v. *State of UP* ((2008) 7 SCC 164, the Supreme Court while giving directions passed the following order:

"*In view of the above, we feel that it is high time to give directions to Governments of all the States and Union Territories besides their Director Generals of Police / Commissioners of Police as the case may be to the effect that if steps are not taken for registration of F.I.Rs immediately and copies thereof are not made over to the complainants, they may move the concerned Magistrates by filing complaint petitions to give direction to the police to register case immediately upon receipt/production of copy of the orders and make over copy of the F.I.Rs to the complainants, within twenty four hours of receipt/production of copy of such orders... In case F.I.Rs are not registered within the aforementioned time, and/or aforementioned steps are not taken by the police, the concerned Magistrate would be justified in initiating contempt proceeding against such delinquent officers and punish them for violation of its orders if no sufficient cause is shown and awarding stringent punishment like sentence of imprisonment against them inasmuch as the Disciplinary Authority would be quite justified in initiating departmental proceeding and suspending them in contemplation of the same.*"

S.154(3) of the Cr.P.C. provides that upon refusal to register a FIR by a police officer, the informant may send the information to the Superintendent of Police concerned, who may then, if satisfied, either investigate the matter himself or direct an investigation by a police officer subordinate to him.

Since an FIR is the earliest information regarding a cognizable offence that reaches a police station, it has great significance during the course of a trial. However, it is not expected that an FIR contain minute details of offence. An FIR is not an encyclopaedia. (*Ramesh Maruti Patil* v. *State of Maharashtra*, AIR 1994 SC 28; *Surjeet Singh* v. *State of Punjab*, AIR 1992 SC 1389) An FIR must be viewed in the context of the circumstances within which it was given to the police and therefore may not have all details.

In *Superintendent of Police, C. B. I.* v. *Tapan Kumar Singh*, (2003) 6 SCC 1752, the Supreme Court held:

"*It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye-witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of the offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed...*".

An FIR is not a substantive piece of evidence, but can be used for corroboration under S.157 of the Indian Evidence Act, 1872. (*Aghnoo Nagesia* v. *State of Bihar*, AIR 1966 SC 119; *Faddi* v. *State of Madhya Pradesh*, AIR 1964 SC 1850)

A common defence/argument raised in trials relates to delay in lodging of an FIR. In *Amar Singh* v. *Balwinder Singh*, (2003) 2 SCC 518, the Supreme Court has observed that there is no hard and fast rules that any delay in lodging the FIR would automatically render the prosecution case doubtful. The court further held that it depends on the facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt on the veracity of the prosecution case. Furthermore, there is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging the FIR.

In *T. T. Antony* v. *State of Kerala*, (2001) 6 SCC 181, the Supreme Court held that a second FIR on the same facts was not permissible, although the police has a right to conduct

further investigation and submit reports in respect of the offences disclosed in the second FIR. (*Kari Chaudhary* v. *Sita Devi*, AIR 2002 SC 441; *Upkar Singh* v. *Ved Prakash*, (2004) 13 SCC 292)

After the registration of an FIR, the police conducts an investigation under Chapter XII of the Code. The police are empowered to perform several acts including to take statements of witnesses under S.161 of the Cr.P.C., to conduct searches and seizures under Ss.100, 165 and 102 of the Cr.P.C., to call for the production of documents and other things under S.91 of the Cr.P.C., and to require for the attendance of witnesses under S.160 of the Cr.P.C.

Ss.161 and 162: Examination of Witnesses by Police

An investigating police officer has been given power to orally examine any person supposed to be acquainted with the facts and circumstances of the case under Ss.161(1). S. 161(2) of the Cr.P.C. places a burden on such person to answer truly all questions put to him by an investigating officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

The police officer is not bound to create a verbatim record of any witness under S.161 of the Cr.P.C. What is to be recorded is a gist of his/her statement. A statement under S.161 of the Cr.P.C. is not a statement on oath.

S.162 of the Cr.P.C. places an express bar on the signing of statements made to a police officer, therefore, statements made under S.161 of the Cr.P.C. cannot be used as substantive evidence during trial, however, under S.154 of the Indian Evidence Act, 1872, while cross-examining a witness, a previous statement under S.161 of the Cr.P.C. made by him may be used to contradict his statement. (*Tehsildar Singh* v. *State of Uttar Pradesh*, AIR 1959 SC 1012)

S.164 of the Cr.P.C.: Recording of Confession and Statements

Although statements made to a police officer are not admissible in court, if any person wishes to give his statement or confession in the course of any investigation, such person may do so before a Metropolitan Magistrate or a Judicial Magistrate under S.164 of the Cr.P.C.

S.164 of the Cr.P.C. provides a procedure under which a Magistrate is empowered to record a confession/statement made before her.

A Magistrate has the discretion to record and not to record a confession; however, if a Magistrate elects to record a confession, she must comply with the provisions of S.164 of the Cr.P.C. A confession recorded in the presence of a Magistrate but not in accordance with the provisions of S.164 of the Cr.P.C. is inadmissible in evidence. (*Tandra Ravi* v. *State of Andhra Pradesh*, 2001 CRLJ 4048)

Under S.164 of the Cr.P.C. a Magistrate must explain to the person making a confession that the person is not bound to make a confession, and that if he does so, the confession may be used as evidence against her. A duty is cast upon the Magistrate to ensure that the person making a confession/statement is making the same voluntarily.

S.164(4) of the Cr.P.C. requires a magistrate to comply with the provisions of S.281 of the Cr.P.C. in recording of the examination of an accused person.

S.167 of the Cr.P.C.: Procedure when Investigation Cannot be Completed Within Twenty-four Hours.

S.57 of the Cr.P.C. provides that a person arrested without a warrant cannot be detailed by the police for more than 24 hours. If further detention is required, the police must comply with the terms of S.167 of the Cr.P.C. and obtain remand from a competent Court.

S.167(2) of the Cr.P.C. provides that a Magistrate may authorise the detention of an accused to the custody of the police for a period not exceeding 15 days. However, the Magistrate is empowered to remand a person

to judicial custody for up to 90 days, where the investigation relates to an offence punishable with death, imprisonment for life, or imprisonment for a term not less than 10 years. Alternatively, the Magistrate is empowered to remand a person for 60 days where the investigation relates to any other offence.

Upon the expiry of such a period, a person so remanded is entitled to be released on bail upon furnishing a bail. Bail granted under S. 167(2) of the Cr.P.C. is commonly referred to as statutory bail. (*Dinesh Dalmia* v. *State*, (2007) 8 SCC 770)

S.173 of the Cr.P.C.: Report on Completion of Investigation

Upon the completion of investigation, the officer in-charge of the police station shall forward a police report in a prescribed format to a court competent to take cognizance of the offence. Under S.173(2) of the Cr.P.C., it is open to the police to file what is termed as a closure report, which would state that no offence appears to have been committed.

The police report under S.173 of the Cr.P.C. contains facts and conclusions of the police drawn from such facts. Although this report is submitted to a Magistrate along with evidence collected and statements recorded during the course of investigation, the Magistrate is not bound by the conclusions reached in the report. A Magistrate is expected to apply her own judicial mind to the contents of a charge-sheet/police report and to come to her own conclusions.

Under S.173(8) of the Cr.P.C., it is open to the police to conduct further investigation in respect of an offence after a report has been forwarded to a Magistrate on the basis of further evidence that may come to light. This power of the police does not require any permission from the court, and can be conducted at any stage of the trial. However, several courts have held that the police ought to inform the court prior to conducting any further investigation. Further investigation may be bad in law in cases where the evidence/ material, on which further investigation is proposed, is already in the knowledge of the Magistrate. Upon completion of such further investigation, the police can file a supplementary charge-sheet. The power to conduct further investigation has been recognised in *Ramlal Narang* v. *State*, (1979) 2 SCC 322, and *Hasan Bhai Vali Bhai Quereshi* v. *State of Gujarat*, (2004) 5 SCC 347.

Cognizance of Offences by Courts

S.190 of the Cr.P.C.: Cognizance of Offence by Magistrates

'Cognizance' indicates the point at which a magistrate takes judicial notice of an offence. (*R. R. Chari* v. *State of Uttar Pradesh*, AIR 1951 SC 207) Cognizance is taken of an offence and not of an offender.

Under S.190 of the Cr.P.C., a Magistrate may take cognizance under three circumstances:

- Upon receipt of a complaint of facts which constitutes such an offence;
- Upon a police report of such facts; and
- Upon information received from a person other than a police officer or upon his own knowledge.

Once a police report under S.173 of the Cr.P.C. is filed before a Magistrate, it is open to the Magistrate to take cognizance under S.190(1)(b) of the Cr.P.C.

Apart from registration of an FIR under S.154 of the Cr.P.C., an informant also has an option of filing a complaint before a Magistrate under S.200 of the Cr.P.C. In such circumstances, a magistrate is empowered under S.190(1)(a) to take cognizance of offences based on such a complaint. Finally, a Magistrate is also empowered to take *suo moto* cognizance of offences that take place within his knowledge under S.190(1)(c).

A Magistrate has a fourth option of directing the police to conduct an investigation under S. 156(3) of the Cr.P.C. It may be noted that the powers under S.156(3) and under S.173(8) of the Cr.P.C. are distinct and are mutually

exclusive.

The test for cognizance is that there must be a *prima facie* evidence of the commission of an offence, which means that the evidence may raise the presumption of truth of facts unless controverted.

Illustration: A police report is filed before a Magistrate stating that the material contained in the report discloses the commission of offences under S.302 of the IPC. Upon a perusal of the report and the material contained therein, the Magistrate is of the opinion that an offence under S.302 of the IPC is not made out, but an offence under S.304A of the IPC has taken place. The Magistrate can take cognizance only of offences under S.304A of the IPC.

Complaints to Magistrate

Ss.200 - 203

Chapter XV (Ss.200 to 203 of the Code) deals with complaints to a Magistrate. As explained above, a Magistrate taking cognizance of an offence on a complaint is required by S.200 to examine upon oath the complainant and the witnesses present, if any.

S.202 of the Cr.P.C. provides that a Magistrate taking cognizance of a case upon complaint, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

S.203 of the Cr.P.C. empowers the Magistrate to dismiss the complaint, if, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the enquiry or investigation (if any) under S.202, the Magistrate is of the opinion that there is no sufficient ground for proceeding

S.204: Issue of Process

Chapter XVI deals with "Commencement of Proceedings before Magistrates". S.204 of the Cr.P.C. enables a Magistrate to issue a summons or a warrant, as the case may be, to secure the attendance of the accused, if the Magistrate taking cognizance feels there is sufficient ground for proceeding against the accused. (*H. S. Bains* v. *State*, (1980) 4 SCC 631) On receipt of a complaint, a Magistrate has several courses open to her. She may take cognizance of the offence and proceed to record statements of the complainants under S.200. Thereafter, she may chose to dismiss the complaint under S.203 of the Cr.P.C., if there is no sufficient ground to proceed with the complaint. If, however, a magistrate feels that there are sufficient grounds for proceeding, she may issue process under S.204 of the Cr.P.C.

Furthermore, a Magistrate has the option to postpone the issue of process, and either to enquire into the case herself, and direct that a investigation be made by a police officer or such other person as she thinks fit, to decide whether or not there are sufficient grounds for proceeding. In coming to a decision as to whether a process should be issued, the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in evidence led by the complainant in support of the allegations. (*Nagawwa* v. *Veeranna*, (1976) 3 SCC 736)

After the issue of process under S.204 of the Cr.P.C., the accused against whom process is issued is to appear before a court. Summoning of an accused is a serious matter, and the criminal law cannot be set into motion as a matter of course. The summoning order must reflect that the Magistrate has applied its mind to the facts of the case and the law applicable thereto. (*Pepsi Food Limited* v. *Special Judicial Magistrate*, (1998) 5 SCC 749)

Once summons have been issued, the Magistrate has no power to review/ reconsider her decision to issue process against the accused. (*Adalat Prasad* v. *Rooplal Jindal*, 2004 CrLJ 4874; *Subramanium*

Sethuraman v. *State of Maharashtra*, 2004 CrLJ 4609)

Under S.205 of the Cr.P.C., the Magistrate may dispense with the personal appearance of the accused.

S.207 of the Cr.P.C.: Supply of Copies

Under S.207 of the Cr.P.C., in proceedings instituted on a police report, the magistrate shall, without delay, furnish to the accused a copy of the police report along with certain other enumerated documents as specified. This provision is crucial for an accused, since this is the first time that she receives the material based on which a police report has been filed against her, and is therefore for the first time in a position to begin preparation for her defence.

Illustration: A chargesheet is filed against Q. The chargesheet is accompanied with 400 documents and 2 pen drives containing electronic records. Q is entitled to get copies of all the documents and clones of the pen drives under S.207 of the Cr.P.C.

The Supreme Court in *State of Uttar Pradesh* v. *Lakshmi Brahman*, (1983) 2 SCC 3872, has observed that the language of S.207 of the Cr.P.C. was mandatory, and the furnishing of copies by the Magistrate to the accused was not an administrative but a judicial function. (*Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Satyen Bhowmick & Others*, (1981) 2 SCC 109)

Charge

Chapter XVII of the Code deals with charge. A 'charge' can be understood as the formal accusation based on which a Court conducts a trial. The Court does not define charge. However, S.211 of the Cr.P.C. provides the contents of charge. Every charge must include the offence with which the accused is charged, the specific name by which the offence may be described, the law and section of law against which the offence is said to be committed, and the particulars as to time and place of the alleged offence. (Ss.211 to 214 of the Cr.P.C.)

S.215 of the Cr.P.C. provides that no error in stating either the offence or particulars required to be stated in the charge, and no omission to state the offence shall be regarded as material unless the accused was misled by such an error or such error or omission has occasioned in failure of justice. (S.264 of the Cr.P.C)

Illustration: A is charged with cheating B, and the manner in which she cheated B is not set out in the charge, or is set out incorrectly. A defends herself, calls witnesses, and gives her own account of the transaction. The court may infer from this that the omission to set out the manner of the cheating is not material.

Illustration:

A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

S.216 of the Cr.P.C. provides that any court may alter or add to the charge before judgment is pronounced. If the alteration or addition is such that proceeding immediately with the trial is likely to cause prejudice to the accused or the prosecutor, the court may direct a new trial or adjourn the trial for such period as may be necessary.

S.217 of the Cr.P.C. provides that whenever a charge is altered or added to by the court after commencement of trial, the prosecutor and the accused shall be allowed to recall or re-summon the witnesses and to call any further witness that the court may feel is material.

S.218 to 224: Joinder of Charges

S.218 of the Cr.P.C. provides that for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately.

However, if an accused person by an application in writing, or if a magistrate is of the opinion that such person is not likely to be prejudiced, the magistrate may try together all or any numbers of charges framed against such person.

S.219 of the Cr.P.C. provides that when a person is accused of one or more offences of the same kind committed within the space of 12 months from the first to the last of such offences, she may be charged with and tried at one trial for any number of them not exceeding three.

S.220 of the Cr.P.C. provides that if in a series of acts that constitute the same transaction, more offences than one are committed by the same person, such person may be charged with and tried at one trial for every such offence.

Illustration: A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable, in whose custody B was. A may be charged with, and convicted of, offences under Ss.225 and 333 of the IPC.

At the stage of framing of the charge, there needs to be only a *prima facie* case against an accused and there is no need to appreciate evidence at this stage.

Trial

Chapters XVIII, XIX, XX, and XXI provide the procedure for the conduct of different trials under the Code. The first schedule of the Code, as explained earlier, divides offences into various categories. The first schedule also categorises offences according to which court they are triable.

Ss.225 to 237: Trial before a Court of Session

Chapter XVIII provide for trials before a Court of Sessions of warrant cases, which are considered serious in nature. Under S.209 of the Cr.P.C., a competent Magistrate may take cognizance of an offence triable by a Sessions Court and then commit such case to the Court of Sessions for trial. A Court of Sessions, barring exceptions under S.199 of the Cr.P.C., cannot directly take cognizance of any offence even though such offence is exclusively triable by a Court of Sessions.

S.225 of the Cr.P.C. provides that a trial before a Court of Sessions shall be conducted by a Public Prosecutor.

Ss.227 and 228 of the Cr.P.C. deal with the consideration of charge by the Court of Sessions. Under S.227 of the Cr.P.C., if, upon consideration of the record of the case and the document submitted, and after hearing submissions from parties, a court considers that there are not sufficient grounds for proceeding against the accused, the judge shall discharge the accused, and shall record her reasons for the said discharge.

In *Yogesh* v. *State of Maharashtra*, (2008) 10 SCC 394, the Supreme Court has reiterated that if two views are possible and one of them gives rise to suspicion only, the Magistrate will be empowered to discharge the accused. (*See also*, *State of Karnataka* v. *L. Munniswami*, (1977) 2 SCC 699; *Union of India* v. *Prafulla Kumar*, (1979) 3 SCC 4)

S.228 provides that if the judge is of the opinion that there are grounds for presuming that an accused has committed an offence, a court may frame the charge, and the accused shall then be asked whether she pleads guilty to the offence charged, or claims a trial.

If the accused pleads guilty, the judge under S. 229 of the Cr.P.C., shall record the plea and may proceed to convict and sentence the accused on the basis of such plea.

However, in the event that the accused claims to be tried, the court shall fix a date for the examination of witnesses under S.230 of the Cr.P.C., and under S.231 of the Cr.P.C., the judge shall proceed to take all evidence as may be produced in support of the prosecution.

After the consideration of the evidence and hearing the prosecution and defence, the judge may record an order of acquittal under

S.232 of the Cr.P.C. If, however, the accused is not acquitted, she shall be called upon to enter her defence, and adduce evidence in support of such defence under S.233 of the Cr.P.C. After hearing arguments from both sides, the Judge under S.235 of the Cr.P.C. shall give a judgment in the case.

Under S. 235(2) of the Cr.P.C., even after conviction, the accused/convict shall be heard on the point of sentence. The object of S.235(2) of the Cr.P.C. is to give a fresh opportunity to the convicted person to bring to the notice of the court, such circumstances as may help the court in awarding an appropriate sentence, having regard to the personal, social and other circumstances of the case.

When a Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless the High Court confirms it. This is provided under S.366 of the Cr.P.C., under Chapter XXVIII, which deals with the submission of death sentences for confirmation.

Ss.238 to 243: Trial of Warrant Cases by Magistrates – Cases Instituted on a Police Report

Chapter XIX deals with the trial of warrant cases by a Magistrate. Chapter XIX of the Code has been divided into two parts: cases instituted on a police report, and cases instituted otherwise than on a police report.

S.238 of the Cr.P.C. mandates that a Magistrate, at the commencement of a trial, must satisfy herself that she has complied with the provisions of S.207 of the Cr.P.C.

Ss.239 and 240 of the Cr.P.C. are similar to Ss. 227 and 228. They deal with when an accused can be discharged and when charge ought to be framed against an accused. If an accused does not plead guilty under S.241 or S.242 of the Cr.P.C., the Magistrate shall fix the date for the examination of the witnesses and on the date fixed, the Magistrate shall take all evidence as may be produced in support of the prosecution. Under S.243 of the Cr.P.C., the accused can then enter her defence and produce her evidence in that regard.

Ss.244 to 247: Trial of Warrant Cases by Magistrates – Cases Instituted Otherwise than on a Police Report

Under S.244 of the Cr.P.C., when in any warrant case instituted otherwise than on a police report, the accused appears or is brought before the Magistrate, the Magistrate must proceed to hear the prosecution and shall take all evidence as may be produced in support of the prosecution.

Under S.245 of the Cr.P.C., if, after taking the evidence under S.244 of the Cr.P.C., the Magistrate considers that no case is made out against the accused, the accused may be discharged. Under S.245(2) of the Cr.P.C., a Magistrate may discharge the accused at any of the previous stages, if she considers the charge to be groundless.

S.246 of the Cr.P.C. provides that where a Magistrate is of the opinion that there are grounds to presume that the accused has committed an offence (triable under Chapter XIX), the Magistrate shall frame a charge in writing against the accused. Subsequently, the accused shall then be called upon to enter upon her defence and produce her evidence in terms of S.243 of the Cr.P.C.

Ss.248 - 250 of the Cr.P.C. apply to both parts of Chapter XIX. S.248 provides that if a Magistrate finds an accused not guilty, she shall record an order of acquittal. However, under S.248(2) of the Cr.P.C., if the Magistrate finds the accused guilty, she shall, after hearing the accused on the question of sentence, pass the sentence upon her according to law.

Ss.251 to 259: Trial of Summons Cases by Magistrates

Summons cases are tried in accordance with the procedure under Chapter XX of the Code. Since summons cases are less serious as compared to warrant cases, no charge is framed as in the case of warrant cases, but, under S.251 of the Cr.P.C., the substance of the

accusation is put to the accused, and she is asked whether she pleads guilty, or has any defence to make. In practice, the procedure under S.251 is often termed as 'framing of notice', as distinct from 'framing of charge'. It may be noted that although it is not necessary to frame a formal charge, framing of a formal charge is not prohibited under S.251 of the Cr.P.C., and is left to the discretion of the Magistrate.

Under S.256 of the Cr.P.C., if the summons has been issued on the complaint, and on the day appointed for the appearance of the accused (or any day thereafter), the complainant does not appear, the Magistrate shall acquit the accused unless the Magistrate thinks proper to adjourn the case.

Under S.258 of the Cr.P.C., in any summons case instituted otherwise than upon a complaint, the Magistrate of the first class with the previous sanction of the Chief Judicial Magistrate, may stop proceedings at any stage, and where the stoppage is after the evidence of principal witnesses has been recorded, the Magistrate may pronounce a judgement of acquittal, and in any other case, release the accused with the effect of discharge.

Chapter XXI, comprising Ss.260 - 265 of the Cr.P.C. provides the procedure for the trial of summary cases. S.260 enumerates offences, which may be tried in a summary way.

Provisions as to Inquiries and Trials

Chapters XXIII and XXIV of the Code contain provisions that govern the forms of inquiries and trials under the Code, for example, S.272 provides that the State Government may determine the language of each court within the State, other than the High Court. S.273 provides that the evidence must be taken in the presence of the accused.

Under S.280 of the Cr.P.C., the presiding judge, while recording the evidence of a witness, is duty bound to record any remarks that he or she thinks are material with respect to the demeanour of such witnesses while under examination.

Illustration: While deposing, Q, a witness, keeps on changing her answers. The Presiding Judge ought to note this behaviour while recording the evidence.

S.300 of the Cr.P.C. is the embodiment of A.20 (2) of the Constitution. The principal of *autrefois acquit* is the basis for the provision. The provision states that a person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted for such offence shall not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made.

Ss.306-308 of the Cr.P.C. provide for tendering of pardon to accomplices and other persons. S. 313 of the Cr.P.C. gives power to the court to put questions to the accused to enable the accused to personally explain any circumstances that appear in evidence against him. Such statement of an accused may be recorded although such statements are not recorded on oath and the accused shall not render herself liable for punishment by refusing to answer such questions or by giving false answers to such questions.

S.320: Compounding of Offence

Certain categories of offences have been deemed to be 'compoundable', whereby offences can be settled between the complainant and the accused in a manner that is just, fair, and reasonable to both parties. There are two types of offences that can be compounded under the Code. S.320(1) of the Cr.P.C. contains a list of offences that can be compounded without the permission of the court, whereas S.320(2) provides for offences that require the permission of the Court for them to be compounded.

The effect of an offence being compounded by a Court is that the accused would stand acquitted. This is provided under S. 320(8) of the Cr.P.C.

Illustration: A is being prosecuted at the instance of B for an offence under S.323 of the IPC, wherein B alleges that A caused him voluntary hurt. A and B settle their differences and are willing to compound the offence. Since the offence comes within the purview of S.320(1) of the Cr.P.C., A and B do not need the permission of the Court to compound the offence.

A is being prosecuted at the instance of B for an offence under S.500 of the IPC, wherein B alleges that A defamed her. A and B settle their differences and are willing to compound the offence. Since the offence comes within the purview of S.320(2) of the Cr.P.C., A and B need the permission of the Court to compound the offence.

Plea Bargaining

Chapter XXIA of the Code was introduced in 2006 by way of amendment. Ss.265-A to 265-L, which provide for an accused to enter into plea bargaining with the prosecution and with the permission of the court, were introduced.

The chapter of plea bargaining will not apply to offences that effect the socio-economic condition of the country, or have been committed against a woman or a child below the age of 14 years. The Central Government by notification has determined offences under various laws that constitute offences effecting the socio-economic condition of the country.

S.265(e) provides the circumstances within which the Court can dispose of a case after a 'mutually satisfactory disposition' has been reached between the accused and the Prosecution in terms of the Chapter.

Appeals, Revision, and Transfer

The powers of an appellate court are the same as that of the trial court. S.386 of the Cr.P.C. provides for powers of the Appellate Court. It has been held in a number of cases that appeal is a continuation of trial and the appellate court has the right to re-appreciate the evidence on record. Under S.391 of the Cr.P.C., the appellate court has powers to take further evidence or direct such evidence to be taken. It may be noted that under S.394 of the Cr.P.C., appeals under S.377 or S.378 shall finally abate on the death of the accused.

S.374: Appeal Against Conviction

Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge, or on a trial held by any other court in which sentence for imprisonment for more than 7 years has been passed against her, may appeal to the High Court under S.374(2) of the Cr.P.C.

Under S.374(3) of the Cr.P.C., any person aggrieved by a sentence in terms of S.374(3) (a), (b), or (c), may appeal to the Court of Sessions, except as provided under S.374(2) Cr.P.C.

S.377: Appeal by State against Sentence

S.377 of the Cr.P.C. provides that the state may appeal to the Court of Sessions, if the sentence is passed by the Magistrate, on the grounds of its inadequacy. If, however the sentence is passed by any other Court, such appeal would lie to the High Court.

S.378: Appeal Against Acquittal

The State may file an appeal against a judgement of acquittal.Though the High Court has powers to review the entire evidence and come to its own conclusions, it is well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the Trial Court, and therefore an acquittal ought to be overturned only for very compelling and substantial reasons.

In *State of Madhya Pradesh* v. *Munshi Singh*, (2009) 14 SCC 170, the Supreme Court held that if two views on the evidence are possible, while considering an appeal against acquittal, one supporting the acquittal and one indicating conviction, the High Court would not be justified in interfering with the acquittal merely because it is of the view that sitting as trial court, a different view could

have been taken.

S.389: Suspension of Sentence Pending Appeal

Under S.389 of the Cr.P.C., pending an appeal by a convicted person, the appellate court may order that the execution of the sentence and order appealed against her be suspended, and if such convicted person is in confinement, that she be released on bail.

Under S.389(3) of the Cr.P.C., if a convicted person satisfies the Court by which she is convicted that she intends to file an appeal, and if the following conditions are met:

- That the convict was on bail, and was sentenced to imprisonment for a term not exceeding three years;
- Where the convict has been convicted of a bailable offence and the convict is on bail,

the Court shall order that the convicted person be released on bail to enable the convicted person to present an appeal and to obtain orders from the Appellate Court for suspension of the sentence pending appeal.

Illustration: A is convicted for one year's simple imprisonment by the Court of a Magistrate. A intends to file an appeal before the Court of Sessions. A was on bail throughout the case before the Court of the Magistrate. A is entitled to be released on bail by the Court of the Magistrate to enable him to file and appeal and obtain orders from the Court of Sessions for the suspension of sentence pending appeal.

Ss.397 to 405: Powers of Revision

S.397 provides that a High Court or a Sessions Court may call for and examine the record of any proceeding before any inferior court within its local jurisdiction to satisfy itself as to the correctness, legality, regularity, or propriety of any finding, sentence, or order recorded or passed.

S.399 of the Cr.P.C. provides for the powers of revision of a Sessions Court. S.401 of the Cr.P.C. provides for powers of revision of a High Court.

Some differences between the Appellate and Revisional jurisdiction of a High Court are as under:

- In an appeal, the High Court will interfere if it is satisfied as to the guilt of the accused, but in revision it will interfere only if it is brought to its notice that there has been a miscarriage of justice.
- In an appeal, the High Court can convert a finding of acquittal into one of conviction and *vice versa*, but in its Revisional jurisdiction, the High Court cannot convert a finding of acquittal into a conviction. (*See* S.410(3) of the Cr.P.C.)
- The Appellate jurisdiction of the High Court (or of the Sessions Court) can be invoked only upon the conclusion of trial. However, Revisional jurisdiction can be invoked upon any stage whereupon a final order is passed, for instance against an order framing charge under S.216 of the Cr.P.C.
- The High Court can exercise its Revisional jurisdiction at the instance of any party, and even *suo moto*, however, Appellate jurisdiction can only be invoked by a party having *locus standi*, such as the accused, the prosecution.

Chapter XXXI: Transfer of Criminal Cases

Ss.406 - 412 of the Cr.P.C. deal with transfer of criminal cases by different courts. S.406 provides that the Supreme Court may transfer cases and appeals from one High Court to another High Court or from one criminal court subordinate to a High Court to another criminal court subordinate to another High Court.

Illustration: T makes a speech on television that is broadcast throughout India. Due to the inflammatory nature of the speech, FIRs are registered against T in twenty different cities across different states of India. T is entitled to seek transfer of all the cases to one Court. Since all the cases are within the jurisdiction of different High Courts, such a transfer petition can only be moved before the

Supreme Court.

S.407 empowers the High Court to transfer cases within its jurisdiction. The High Court also has the power to withdraw a case from a criminal court subordinate to it and to try the case before itself.

Inherent Powers of the Court

S.482 of the Cr.P.C. recognises the inherent powers of the High Court. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely: (i) to give effect to an order under the Code; (ii) to prevent abuses of the process of the Court; and (iii) to otherwise secure the ends of justice. This power can be used to quash criminal proceedings on the grounds mentioned above. There are number of decisions that explain the scope of S.482 of the Cr.P.C. It must be noted that unlike under the Civil Procedure Code, 1908, the inherent powers under the Code are only available to the High Court. Though the powers possessed by the High Court under S.482 of the Cr.P.C. are very wide but these should be exercised in appropriate cases to do real and substantial justice. The Supreme Court, while explaining the ambit of inherent powers of the High Court has repeatedly held that inherent powers are to be exercised very carefully and with great caution so that a legitimate prosecution is not stifled.

Illustration: An FIR is registered against Q1 by C under criminal trespass and theft. Q2 has lived abroad for the last 20 years and does not know C. After cognizance, process is issued to Q2 instead of Q1. Q2 is entitled to seeking a quashing of the criminal case under S.482 of the Cr.P.C.

Nevertheless, where the High Court is convinced that the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety, do not, prima facie, constitute any offence or make out a case against the accused or where the allegations made in the FIR or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the powers of the High Court under the said provision should be exercised.

Illustration: A has a contract with B to supply goods. A fails to supply the goods due to a natural calamity. B files a criminal complaint saying that A deliberately cheated B in not supplying the goods and cognizance is taken on such a complaint and process is issued to A. A is entitled to seeking quashing of the criminal complaint under S. 482 of the Cr.P.C.

See R. P. Kapur v. *State of Punjab*, AIR 1960 SC 866; *State of Harayana* v. *Bhajan Lal*, (1992 Supp (1) SCC 335); *Inder Mohan Goswami* v. *State of Uttaranchal*, (2007) 12 SCC 1; *Divine Retreat Centre* v. *State of Kerala*, (2008) 3 SCC 542; *SMS Pharmaceuticals Limited* v. *Neeta Bhalla*, (2007) 4 SCC 70.

x-x

Notes:

All India Bar Examination Preparatory Materials

Subject 7: Drafting, Pleading, and Conveyancing

Legal Drafting

'Legal Drafting' can be defined as the crystallisation and expression of a legal right, privilege, function, duty, or status in a definitive form.

Legal Drafting generally implies:

- Drafting of a deed, instrument or a document,
- Embodiment as an agreement between parties,
- Intended to regulate the legal relationship between those parties.

Two important rules of Legal Drafting are:

- *'Ordinary sense' of words*: Ensure that that words and phrases have been used in their normal and ordinary sense. The meaning of an ordinary English word is a question of fact and needs to be adhered to.
- *'Consistent Terminology'*: Ensure that each recurring word or term has been used consistently. Do not change your language unless you wish to change the meaning, but always change the language if you wish to change your meaning. It is also an elementary rule that the same word cannot have two different meanings in the same document, unless the context compels the adoption of such a course.

Types of Legal Drafting

- *Functional*: This type of drafting is intended to achieve a particular result, and usually defines and regulates the legal relationship between two or more parties.

Examples: Sale Deeds, Mortgage Deeds, Gifts, and Wills.

- *Persuasive*: The layout of a persuasive draft is usually dictated by the line of arguments intended to emanate from the document and is designed to convince the reader to accept a certain viewpoint.

Examples: Plaints, Written Statements, Memorandums of Appeal, and Bail Applications.

- *Informative*: Such drafts normally only contain the information necessary and useful for the reader.

Examples: Letters to Client, and Legal Opinions.

Three Stages in Legal Drafting

While there are many different approaches to Legal Drafting, the three-stage process described here may be helpful for advocates new to the profession:

The Planning Stage

- *Take instructions from the Client*: In this regard, it is also important to check whether the instructions have been given by the authorised or appropriate person.
- *Analyse those instructions and compartmentalise them in a factual and legal context*: Ascertain if all the material information, including the details of the parties, the consideration, the obligations of the parties, and any warranties and representations are available to you. In case of complex commercial property matters, it would be ideal to make a site visit and ascertain the layout of the land personally.
- *Ascertain the purpose and objective behind creating the document*: Most drafting produced by a Lawyer is intended to carry out the Client's instructions. Thus, it is important as the very first step to identify the Client's goals, concerns, and instructions. In case of a corporate entity, it is also necessary to ascertain the Client's business objectives.
- *Research the relevant up-to-date law and find appropriate forms or precedents*: Consider and research the law affecting the deed or document to be prepared, and determine whether there are any restrictions imposed

by law or even whether there has been a change in law.

- *Identify options*: Preparation may reveal alternative ways of dealing with the matter. The same may be conveyed to the Client, and the alternative ways may be opted for keeping in mind that the primary objective is to achieve what the Client wants in a legal context.

The Writing Stage

- *Prepare a skeleton draft*: After the general scheme of the draft has been conceived, the draftsman should note down the matters or points that he intends to incorporate in the draft. Ascertain if all the material matters have been stated in this skeleton draft and whether there is any material information required from the Client. If so, seek instructions.
- *Create ideas for the draft*: Once the skeleton draft has been prepared, analyse it and consider any more ideas, both of law and of fact, which can be incorporated in the draft.
- *Ensure that all the content conceived during the Planning stage has been incorporated in the draft*: It is ideal at this stage to refer to your notes made during the Planning stage. It is necessary to check at this stage whether the draft forms a coherent and consistent whole and if the draft is logically organised. Also check, if grammar and language have been adhered to. Prepare a checklist to make sure that all the material clauses have been included.

Revision Stage

- Re-analyse the instructions, factual situation and legal research;
- Re-write to ensure coherence;
- Re-organise the material in a clear and user-friendly manner;
- Edit the material; and
- Concentrate on spelling and grammar.

Principles of Construction and Interpretation

Every competent draftsperson must keep the principles of construction and interpretation in mind when preparing a draft. Principles of interpretation are important because they demonstrate how courts approach the draft in order to ascertain its true intent. Some of these principles of interpretation are:

- Noscitur a sociis (A word is known by the company it keeps)

This rule is used to construe words with reference to words found in immediate connection with them. This is a contextual principle whereby a word or phrase is not to be construed as it stands alone, but in the light of its surroundings.

'English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words' (Based on *Peart* v. *Stewart*, (1983) AC 109)

Illustration: A statute declared that all explosives taken into a mine must be in a 'case or canister'. The Defendant used a cloth bag for the said purpose. The question before the court was whether the cloth bag was within the said definition. By using the *noscitur a sociis* rule, it was held that the cloth bag would not fall within the said definition as the intention of the legislature was to use something with similar strength to that of a case or canister. (Based on *Foster* v. *Diphwys Casson*, (1887) 18 QBD 428)

- Ejusdem Generis (Of the same kinds, class or nature)

This rule is another facet of the *noscitur a sociis* principle. Where a list of two or more items belonging to the same genus is followed by general words, the general words are construed as confined to the same class. By virtue of this principle, wide words associated in the text with more limited words are taken to be restricted by implication, to matters of the same limited character. The *ejusdem generis* principle, however, applies only when a contrary

intention does not appear.

Illustration: The question arose as to whether the list 'meat, fish, poultry, vegetables, fruit and other provisions' included bread and confectionery. It was held that while 'meat, fish, poultry, vegetables, fruit' were a class of natural products, bread and confectionery were manufactured items. Hence, by application of the *ejusdem generis* principle, it was held that they did not fall within the catch-all phrase of other provisions, being of a separate class. (Based on *Hy Whittle Ltd.* v. *Stalybridge Corporation*, (1967) 65 LGR (UK) 344)

This rule can only be used when specific words belong to a class. If they lack an identifiable class, then general words must be taken at face value and given the meaning they normally bear. As is evident, the true purpose of this rule is intended as a guide to discern the true intentions of the parties.

The *Ejusdem generis* rule applies when:

- The subject contains an enumeration of specific words;
- The subjects of enumeration constitute a class or category;
- That class or category is not exhausted by the enumeration;
- The general terms follow the enumeration; and
- There is no indication of a different intent.

(*C. I. T., Udaipur* v. *McDowell & Co.*, (2009) 10 SCC 755)

- Expressio unius est exclusio alterius (The expression of one thing is the exclusion of another)

Known in short as the *expressio unius* principle, it is applied where a provision may have covered a number of matters but in fact mentions only some of them. Unless these are mentioned as examples, or not mentioned for some other sufficient reason, the rest are taken to be excluded from the proposition.

As a general rule, a list is taken to be illustrative and not exhaustive by the usage of words such as 'includes'.

Illustration: The statement that 'each citizen is entitled to vote' implies that non-citizens are not entitled to vote.

The Supreme Court of India has held that in appropriate cases, the expression of the word 'only' or 'exclusive' are not necessary in an ouster of jurisdiction clause and that even without such words, the maxim *expressio unius est exclusio alterius* may be applied and jurisdiction may be ousted. (A. B. C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem, AIR 1989 SC 1239)

- Reddendo singula singulis (Refers only to the last)

"Where a sentence in a statute contains several antecedents and several consequences, they are to be read distributively; that is to say, each phrase or expression is to be referred to its appropriate object." (*Black's Interpretation of Laws*) Where a complex sentence has more than one subject, and more than one object, the provision is to be read distributively by applying each object to its appropriate subject.

Illustration: A testator states 'I devise and bequeath all my real and personal property to B'. The term 'devise' is appropriate only for real property and the term 'bequeath' is appropriate only to personal property. Accordingly, by application of this principle, the testamentary disposition is read as if it were worded 'I devise all my real property and bequeath all my personal property, to B'.

Pleadings

Pleadings Generally

Order VI Rule 1, Code of Civil Procedure, 1908 ("**the CPC**") provides that 'Pleading' means plaint or written statement.

Pleadings have also been defined as:

"The mutual altercations between the Plaintiff and Defendant in a suit; which at present are set down and delivered into the proper office in writing as pleadings." (*Tomlin's Law Dictionary*)

"Pleading is the statement in a logical and legal form of the facts, which constitute the Plaintiff's cause of action or the Defendant's grounds of defence." (*Law Lexicon*)

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings), was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing." (*London & Lancashire Insurance Co.* v. *Benoy Krishna Mitter*, AIR 1999 SC 162)

Therefore, the underlying object of pleadings is to:

- Ascertain the real dispute between the parties;
- Narrow down the area of conflict;
- Make each side aware of the questions to be argued;
- Preclude one party from taking the other by surprise; and
- Thus, prevent miscarriage of justice.

Pleadings include:

- For the Plaintiff, the Plaint, and for the Defendant, the Written Statement.
- Statements of parties or counsel recorded before framing of issues for clarification of the points in dispute.

Pleadings do not include documents referred to in the Plaint or Written Statement.

Inconsistent pleadings refer to those statements made in a Plaint or a Written Statement that are mutually repugnant or contrary to one another, to the extent that the acceptance or establishment of one implies the abrogation of the other. The court may consider alternative pleas that are not mutually destructive.

Courts read pleadings as a whole to ascertain their true import.

'Courts would be slow to throw out a claim on a mere technicality of pleading, when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the Plaint may be worded.' (*Kedar Lal* v. *Hari Lal*, AIR 1952 SC 47)

Fundamental Rules of Pleading (Order VI, Rule 2, CPC)

- *Every pleading must state facts and not law*:

This rule arises from the premise that it is for the court to find out and examine all pleas of law whether urged by the parties or not. It is defective pleading to state the inferences of law without setting out the facts.

Illustration: A states in her Plaint that she is an heir of deceased B. This is an inference. A is required to plead as to how she has inherited from deceased B.

Exception to rule: The rule against pleading law does not include foreign law. Courts are only bound to take judicial notice of the law of the land and do not do so when foreign law is concerned. Foreign law must be pleaded as a fact if the party wants to rely on such foreign law.

- *It must state material facts and material facts only*:

A material fact is one which is essential to the Plaintiff's cause of action or to the Defendant's defence. Material facts are those facts which must be alleged and proved in

order to establish the existence of the cause of action or defence. The facts which the parties are not required to prove are not material facts.

There is a distinction between material facts and material particulars. Where all the material particulars are not pleaded, the Court can ask for 'better particulars'. Omission to state material facts is fatal for the suit or for the defence.

No amount of proof can substitute pleadings.

Illustration: A files a suit to recover monies from B. When there is no averment in the Plaint that B promised to pay such time-barred debts, such a plea cannot be raised in trial.

Exceptions to Rule:

- An averment of the performance or occurrence of all conditions precedent necessary for the case of the Plaintiff or Defendant shall be implied in the pleading, and is not required to be averred specifically. As performance of a condition precedent is to be implied, it is for the other side to plead that there was a condition precedent and that it was not performed. On failure to plead such, due performance will be presumed. (Order VI, Rule 6, CPC)
- Neither party need plead any material fact which the law presumes in their favour or as to which the burden of proof lies on the opposite party, unless the same has been specifically denied. (Order VI, Rule 13, CPC)
- The Defendant need not specifically deny any allegation in the Plaint with regard to damages. However, special damages, and facts relating to aggravation or mitigation of damages need to be specifically denied or refuted. (Order VIII, Rule 3, CPC)

• *Pleadings to state facts and not evidence*:

This rule highlights the difference between the fact to be proved *(factum probandum)* and the facts by means of which the party alleging the fact to be proved proves the same *(factum probantia)*.

Illustration: A files a suit for damages against B for a wrongful act. In the Plaint, it is necessary to allege the wrongful act, that B committed it and that A has suffered loss and damage on account of the same. It is not necessary, however, to set out the means by which the wrongful act produced these consequences.

Exceptions to rule: Certain instances of exceptions which have been informally permitted in India are setting up previous admissions of the other party, alleging that transactions have been entered in their books, and alleging that notices have been exchanged between the parties.

• *Such facts to be stated in a concise form*:

When necessary, the pleading shall be divided into paragraphs and numbered consecutively and dates, sums and numbers shall be expressed in figures as well as in words. Whenever practicable, simple sentences should be used and passive voice and pronouns are to be avoided.

The forms in Appendix A to the CPC, when applicable, must be used for all pleadings. When they are not applicable, forms of the like character must be used. (Order VI, Rule 3, CPC)

The Gujarat High Court has held that the forms of pleadings in Appendix A are merely model forms and not statutory forms. These forms are to be read along with Order VI, Rule 3, and not word-for-word. (*Nazarali Kazamali* v. *Fazlanbibi*, AIR 1975 Guj 81)

No ground of claim or allegation of fact which is inconsistent with the prior pleading of the party concerned is permitted, except by way of an amendment. 'A departure in pleading' is not permitted. (Order VI, Rule 7, CPC)

A bare denial of a contract by the opposite

party would be construed as a denial of the fact of the said contract, and not as a denial of the legality or sufficiency in law of such contract. (Order VI, Rule 8, CPC)

Illustration: If A sues B on a contract, and B in her Written Statement merely denies the contract, such a denial will only be taken to mean that there was no such contract as alleged. It will not be construed as a denial of the legality or sufficiency of such contract. In order for B to raise a contention that the contract was a void contract, the same ought to be specifically pleaded in the Written Statement, and a mere denial of the contract would not suffice.

In case a document is to be pleaded generally, it is enough to plead the effect of the document without setting out the whole or any part thereof. (Order VI, Rule 9, CPC)

Exception to rule: In a claim for defamation, the specific words used are material and require to be set out.

Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise term of such notice or the circumstances from which such notice is to be inferred, are material. (Order VI, Rule 11, CPC)

When such notices form a part of the cause of action, there are to be specifically pleaded as a fact. When, however, the same is merely the performance of a condition precedent under Rule 6, it need not be pleaded.

The court may, at any stage in the proceedings, order to be struck-out or amended, any matter in any pleading (Order VI, Rule 16, CPC):

- Which may be unnecessary, scandalous, frivolous, or vexatious; or
- Which may tend to prejudice, embarrass, or delay the fair trial of the suit; or
- Which is otherwise an abuse of the process of the Court.

Amendment of Pleadings

Amendment of pleadings by either party is permitted at any stage of the proceedings, in such manner and on such terms as the court thinks just. All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. (Order VI, Rule 17, CPC)

Amendment of pleadings can arise in five different ways:

- Amendment of clerical, arithmetical mistakes in judgments, decrees, and orders (S.152, CPC);
- Amendment of proceedings in a suit by the court to determine the real question between the parties (S.153, CPC);
- Striking out or joining of parties (Order I, Rule 10 (2), CPC);
- Amendment of opponents pleadings mandated by the court (Order VI, Rule 16, CPC); and
- Amendment of own pleading subsequent to application made (Order VI Rule 17, CPC)

Amendment cannot be claimed as a matter of right, and the power to either grant or refuse amendments is in the discretion of the Court. Under Rule 17, courts have wide discretion to allow a party to amend pleadings, subject to certain limitations laid down by judicial pronouncements as under:

- Where the amendment is not necessary to determine the real questions in controversy between the parties, as where it is either merely technical or useless, and being of no substance;
- Where the Plaintiff's suit would be wholly displaced by the proposed amendment;
- Where the effect of the amendment would be to take away from the defendant, a legal right which has accrued to her by lapse of time;
- Where the effect of the amendment would be a totally different, new, and inconsistent case, and the application is made at a late stage in the proceedings; and
- Where the application is not made in good

faith.

The principles applicable to the amendment of a Plaint are, in general, also applicable to the amendment of a Written Statement. Courts, however, are more generous in allowing the amendment of a Written Statement, since the question of prejudice is less likely to operate in that event.

Plaint

Every suit must be instituted by the presentation of a Plaint and in every Plaint, the facts must be proved by an affidavit. (S.26, CPC)

Order VII, Rule 1 of the CPC lays down the mandatory particulars which must be stated in a Plaint:

- The name of the court in which the suit is brought;
- The name, description, and place of residence of the Plaintiff;
- The name, description and place of residence of the Defendant, so far as they can be ascertained;
- Where the Plaintiff or Defendant is a minor or a person of unsound mind, a statement to that effect;
- The facts constituting the cause of action and when it arose;
- The fact showing that the court has jurisdiction;
- The relief which the Plaintiff claims;
- Where the Plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

All Plaints can virtually be divided into the following:

Heading and Cause-title: The heading includes the description of the court and cause-title, including the name, age, and the place of residence of both parties, along with respective descriptions as the Plaintiff and Defendant.

Body: The body of the Plaint could be sub-divided into the following:

- The introductory part, being explanatory statements, introducing the substantial or material averments of the Plaint following the matter of inducement;
- All the material facts and material particulars;
- Statements disclosing a cause of action; and
- Statements regarding jurisdiction of the Court, either pecuniary and/or territorial and including the valuation of the suit for the purpose of court-fee.

Prayer: The reliefs, which the Plaintiff is entitled to, depend on the prayers made in the Plaint, and therefore, relief has to be sought accurately. It may also be noted that even if the Plaintiff fails to establish her own case, she may get relief on the basis of the case made out by the Defendant.

A relief which is incidental to the main relief need not be pleaded specifically.

Illustration: A files a suit for partition of ancestral property challenging the alienation made by his father during his minority. A need not seek a prayer for cancellation of alienation as the same is an incidental relief.

Certain specific rules in relation to Plaints are as under:

- Where the Plaintiff seeks recovery of money, the Plaint must state the precise amount claimed, but when the Plaintiff sues for *mesne* profits or for an amount which cannot be estimated despite the exercise of reasonable diligence, then the Plaint shall state the approximate amount of valuation sued for. (Order VII, Rule 2)
- Where the subject-matter of the suit is immovable property, the Plaint shall contain a description of the property sufficient to identify it, along with the available boundaries or numbers in a record of settlement or survey. (Rule 3)
- Where the Plaintiff sues in a representative

capacity, the Plaint shall show that she has taken the steps necessary to enable her to institute such a suit. (Order VII, Rule 4)

- The Plaint must show that the Defendant is, or claims to be interested in the subject-matter, and that she is liable to be called upon to answer the Plaintiff's demand. (Order VII, Rule 5)
- In the event that the Plaint has been instituted after the period of limitation prescribed under law, the Plaint must show the grounds upon which an exemption is being claimed. (Order VII, Rule 6)

Written Statement

A Written Statement can be described as the Defendant's reply to the Plaintiff's Plaint, dealing with all the material facts set out in the Plaint. When a Defendant files a Written Statement to the suit, it discloses her defence, and the suit enters into a contest, and invites the Court to adjudicate upon the dispute. All the rules applicable to pleadings generally, and to the Plaint, are also applicable to the Written Statement.

Order VIII, Rule 1 of the CPC grants 90 days' time to the Defendant from the date of service of summons on her, to present her Written Statement to the Court.

Rules 3, 4, and 5 of Order VII the CPC enjoin upon a Defendant to specifically deny each allegation of fact made in the Plaint. The Defendant cannot give an evasive, vague, or routine denial, and has to specifically answer the point of substance made in the Plaint. Every allegation of fact in the Plaint will be taken to be admitted if it is not denied specifically or by necessary implication or is stated to be not admitted.

'The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but is evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary.' (*Badat and Co.* v. *East India Trading Co.*, AIR 1963 SC 538)

A defence of the Defendant can take the following forms:

- *Traversal*: The Defendant may deny or admit the facts alleged in the Plaint by way of traversal. The Defendant is bound to deal specifically with each allegation of fact. Failure to do so would result in an admission of the allegation of fact in most cases.
- *Special defence of confession and avoidance*: A defendant may admit the allegations made by the Plaint, but may seek to destroy their effect by alleging certain new facts.
- *Legal Defence*: The Defendant may raise defences on questions of law, including the maintainability of the suit, and its valuation. However, a bare statement questioning the maintainability of the suit would not be sufficient pleading, and it has to be specifically averred as to why the suit is not maintainable.
- *Set-off or counter-claim*: The Defendant must take such defences of set-off or of counter-claim at the first hearing of the suit. These defences can be raised at a later stage only with the permission of the Court, and for due cause.

Subsequent Pleadings

Order VIII, Rule 9 of the CPC states that no pleading subsequent to the Written Statement of a Defendant other than by way of defence to a set-off or counter-claim shall be presented except with the leave of the Court, and upon such terms as the Court thinks fit.

Under this rule, a replication or rejoinder can be filed by either the Plaintiff or the Defendant, with the leave of the Court and upon such terms as the Court deems fit. No new cause of action or case can be urged by way of such replication or rejoinder, and the purpose of these are limited to denying or clarifying the facts stated in the pleading of the other side.

Pleadings in Criminal Law

Though pleadings are more of a civil nature and have not been defined under the criminal law, such drafting would generally entail:

- Drafting of a Private Criminal Complaint under S.200, Criminal Procedure Code, 1963 ("**the Cr.P.C.**")
- Drafting of an Application for Discharge of Accused under S.245, Cr.P.C.;
- Drafting of an Application to seek exemption of presence of the Accused under S.317, Cr.P.C.;
- Drafting of an Application for Bail of the Accused under Ss.436 or 437, Cr.P.C.;
- Drafting of an Application for Anticipatory Bail under S.438, Cr.P.C.; and
- Drafting of a Petition under S.482, Cr.P.C., seeking to invoke the inherent power of the High Court for quashing of summons.

Conveyancing

'Conveyance' includes a conveyance on sale and every instrument by which property, whether movable or immovable is transferred during one's lifetime. (S.2(10), Indian Stamp Act, 1899)

A 'conveyance' is the name given to the transfer of title of land from one person, or class or persons, to another, by a deed. Therefore, conveyancing means performing all the necessary actions required for the transfer of title from one person to another, including:

- Examination of title;
- Drafting documents relating to the transfer of title;
- Working out the details of the transfer; and
- Making necessary arrangements for all the formalities to be met.

Conveyancing is the transfer of legal title of property from one person to another, or the granting of an encumbrance such as a mortgage or a lien. A typical conveyancing transaction contains two major landmarks, the exchange of contracts, whereby the equitable title passes, and completion, whereby legal title passes.

Examination of Title

Examination of title is an examination of all public and private records that affect the title to the property or to the interest in question. Such a search normally involves review of past deeds, trusts, wills, and encumbrances to ensure that the title has passed correctly to each new owner. Defective title implies a title to real property which is invalid because a claimed prior holder of the title did not have title, or when there is an inaccurate description of the property, or when there is any other defect in the title and its transfers.

The best way to investigate title to immovable property is to prepare an abstract of title in the first instance. An abstract of title is a concise and orderly summary of the deeds and other instruments in the chain of title to immovable property arranged in chronological order, and containing a statement of all encumbrances and charges to which the immovable property may be subject, and of which the purchaser should be informed.

A deed has been defined as:

- A formal writing of a non-testamentary character,
- Which purports or operates to create, declare, confirm, assign, limit, or extinguish,
- Some right title or interest.

On the other hand, an instrument can be any document of a legal nature, by which any right or liability is or purports to be created, transferred, limited, extended, extinguished, or recorded.

Parts to a Deed of Transfer of Title

Description of the Deed

The description of the deed is not conclusive as to its nature and character. While interpreting deeds, it has been held that too much importance cannot be attached to the description of the deed. The description of a deed may at times conceal the real transaction,

and one has to look beyond the description to identify the essence and reality of the transaction.

Illustration: A deed was styled as a partition deed and purported to partition the properties of the father. It was, however, observed that the separate property of the father was being transferred to the son, and upon construction, it was construed as a gift deed. (*Ponu* v. *Taluk Land Board, Chittur*, AIR 1982 Ker 330)

Date of Execution

Every deed has to be dated. A deed will not be invalid if a deed does not bear any date, or bears an impossible date, and evidence will be admissible to ascertain the true date of the deed.

There is a rebuttable presumption that the deed was made or executed on the date it bears. (*Rukmani Ammal* v. *Ankama Naidu*, AIR 1926 Mad 744)

Parties to the Deed

There must necessarily be at least two persons to any deed. In deeds arising out of a contract, the parties should be competent to contract. In deeds relating to transfer of property, however, a minor or any other person under a disability can be a transferee in a case where no obligation is imposed on such transferee of action or omission. Even in such cases, no person can be a transferor of property if that person is not competent to contract.

The parties to the deed need to be correctly described. However, even if a false description is given and a party gives a name which is not her correct name, the deed will be upheld on evidence of identity.

Individuals comprising a class which is capable of being ascertained may be made parties by the name of that class, such as 'all of A's creditors'.

Recitals

Recitals have been defined as 'Statements in a deed, agreement or other formal instrument introduced to explain or lead up to the operative part of the instrument'. (*Dictionary of English Law – Jowitt*)

Though subordinate to the operative part, recitals are relied upon to ascertain the intention of the parties. In this regard, Lord Esher has stated as follows:

'*If the recitals are clear, and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and operative part is clear, the operative part must prevail. If both the recitals and operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.*'

The reciting part of a deed is not a necessary part in law, though it may be used to explain any doubts regarding the intention of the parties. (*Union of India* v. *Amarendra Nath Sarkara*, AIR 1967 Cal 119)

Recitals in a deed may be compared to a preamble in a statute, so as to be a proper key to ascertain the meaning of the operative part.

Recitals can be generally divided into two types:

- *Narrative recitals*: These disclose the history of title of the transferor leading up to the time of the execution of the deed, including the manner in which the title had been acquired by the transferor.
- *Introductory recitals*: These show the motive or intention of the parties in entering into the deed in question and making reference to any other deed or agreement in fulfilment of which the deed is being executed.

Habendum

The purpose of the *habendum* is to define the interest being conveyed to the transferee. By virtue of the *habendum*, the interest can be either absolute or of a restricted kind. If the property being conveyed is encumbered, reference thereto should be made in the *habendum*.

Covenants

Covenants are agreements or stipulations that bind one party or the other, or the both of them, or some or all of them. It is appropriate to denote severally and in serial order the various covenants of the transferor and transferee respectively, so that no confusion is created as to whether any covenant is being imposed for the benefit of the transferee or the transferor. For instance, in case of a transfer for consideration, the vendor's covenants regarding titles would be:

- That the transferor is the owner of the quantum of interest that is being transferred, and that she has the authority to transfer the same.
- That the transferee shall have quiet enjoyment of the interest conveyed to her.
- That the subject-matter of the transfer is free from any encumbrances.
- That the transferor shall execute such other document by way of assurance as may be found necessary to perfect the title of the transferee in respect of the quantum of interest conveyed to her.

Testatum

The *testatum* is the witnessing part of a deed, containing the intention of the parties, and is usually expressed as:

"Now this deed witnesses as follows" or "This indenture witnesseth".

Operative Part

The operative part usually contains the following:

- *Consideration*: Consideration may be described generally as some matter accepted or agreed upon as a return or equivalent for the promise made *(Leake on Contracts)*. Where the contract consists of mutual promises, there is an obligation on each party to perform her own promise and to accept performance of the other's promise.

The adequacy of consideration is for the parties to consider at the time of entering into the transaction, and courts are circumspect in deciding the matter of consideration, and do not generally interfere with the liberty of contract and the exercise of judgment and free will by the parties by not allowing them to decide the benefits to be derived from their bargains. The parties are at liberty to agree upon any consideration, provided it is one that the law recognises.

- *The receipt clause*: It is necessary to state information regarding the receipt of consideration in the deed itself. In the case of negotiable instruments such as bills of exchanges, promissory notes, and cheques, however, the law presumes that these were drawn or made for consideration.
- *Operative words*: These disclose the nature of the transaction and the intention of the parties. These operative words have to be clear and unequivocal.

Parcels

'Parcels' mean the description of the property or quantum of interest being conveyed. Such a description has to be precise, and want of care may attract litigation. If the property or interest is designated by a particular name, it is appropriate to describe it by that name. It is also advisable to add a schedule to the deed containing the exact description of the property or interest being conveyed.

Exceptions and Reservations

The conveyance of property may be expressed subject to exceptions and reservations, and the general description of the property conveyed may be qualified by these exceptions and reservations.

An exception is a withdrawal from the operation of the grant of some part of what has been granted in general terms. All exceptions should necessarily relate to the property, and a right that is in existence at the time of execution of the deed. Such exceptions

cannot be repugnant to the deed.

Illustration: While conveying her property to B, A stipulates in the deed that she shall retain the right to extract mines and minerals from her land. This is an exception to the conveyance of the property. However, it should not be repugnant to the deed inasmuch as such a right to extract minor minerals does not imply a right to dig the sub-soil so as to endanger the surface of the land conveyed to B.

A reservation is the creating of some incorporeal hereditament out of the property conveyed. These are normally regarded as a grant made by the transferee in favour of the transferor.

Illustration: A, while conveying property to B, can create a reservation of the right of easement over the property, for either herself or for another person.

Testimonium

In witness of the matters contained in the deed, the parties usually express this fact at the end of the deed using expressions such as:

"In witness whereof, we the aforesaid parties, have signed this deed on this day and year stated above, in the presence of the witnesses herein mentioned"

This is the concluding part of the deed, instrument or contract and though not compulsory, it is ideal to incorporate the testimonium at the end of the same. If the deed is executed by a company or any other legal entity, the testimonium may also incorporate that the parties have signed and set their seals thereon.

Subsequent to drafting and finalisation, the formalities of authenticating the deed or instrument must be performed. These formalities could include attestation, registration, or stamping or all or any of these, depending on the relevant law regulating such deed or instrument.

Attestation of Documents

Attestation of a deed or instrument means that one or more persons are present at the time of its execution, and that in evidence thereof, they sign the attestation clause, stating such execution.

The essential conditions of a valid attestation are generally that two or more witnesses:

- Must have seen the executant sign the deed or instrument; or
- Must have received from her a personal acknowledgement of her signature; and
- Each of them must sign the deed or instrument in the presence of the executant.

Unless mandated by statute, it is not necessary to the validity of a deed that its execution is attested by any witness. Attestation of a document after its execution is compulsory *inter alia* in the following cases:

- *Mortgage*: S.59 of the Transfer of Property Act ("**the TP Act**");
- *Gift*: S.124 of the TP Act; and
- *Will*: S.63 of the Indian Succession Act, 1925.

By virtue of Order VI, Rule 15(4) of the CPC, all pleadings require to be filed along with an affidavit. Any affidavit has to be necessarily attested by an Oath Commissioner or a Notary Public.

Registration of Documents

The object and purpose of registration of documents, amongst other things, is:

- To provide a method of public registration of documents,
- So as to give information to the public regarding legal rights and obligations,
- Arising or affecting a particular property, and
- To perpetuate documents which may afterwards be of legal importance, and also,
- To prevent fraud.

Registration lends inviolability and importance to certain classes of documents. (*Jogi Das* v. *Fakir Panda*, AIR 1970 Orissa 22)

The following documents are compulsorily registrable (S.17, the Registration Act, 1908 ("**the Registration Act**")):

- Instruments of gift of immovable property;
- Non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in the present or in the future, any right, title or interest, whether vested or contingent, of a value of more than one hundred rupees, to or in immovable property;
- Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration assignments, limitation, or extinction of any such right, title, or interest;
- Leases of immovable property from year to year, or for any term exceeding one year; and
- Non-testamentary instruments transferring or assigning any decree or order of court or any award when such decree, order, or award purports or operates to create, declare, assign, limit, or extinguish, whether in the present or in the future, any right, title or interest, whether vested or contingent, to or in immovable property.

In addition to exemptions granted by the State Governments by publication in the Official Gazette, the following documents have been exempted from registration:

- Any composition deed;
- Any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such company consist in whole in part of immovable property;
- Any debenture issued by such company and not creating, declaring, assigning, limiting, or extinguishing any right or title to or in immovable property;
- Any endorsement upon or transfer of any debenture issued by such Company;
- Any document, itself not creating declaring, assigning, limiting, or extinguishing any right or title to or in immovable property;
- Any decree or order of a court, except a decree or order expressed to be made on a compromise, and comprising immovable property other than that which is the subject-matter of the suit or proceeding;
- Any grant of immovable property by the Government;
- Any instrument of partition made by a Revenue Officer;
- Any order made under the Charitable Endowments Act, 1890 vesting or divesting any property in the Treasurer of Charitable Endowments;
- Any endowment or receipts on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money; and
- Any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

The registration of the following documents is optional (S.18, Registration Act):

- Instruments, other than instruments of gift and will, which purport or operate to create, declare, assign, limit, or extinguish, whether in the present or in future, any right, title or interest, whether vested or contingent, of a value of less than one hundred rupees, to or in immovable property;
- Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest;
- Leases of immovable property for any term not exceeding one year;
- Instruments, other than wills, which purport or operate to create, declare, assign, limit, or extinguish any title or interest to or in movable property; and
- Wills.

Registration of a will is optional and would only be used as evidence of its execution. It does not have greater sanctity than due attestation of the will as *per* S.63(c) of the Indian Succession Act, 1925.

As *per* S.32, Registration Act, every document which requires to be registered under the Act shall be presented at the registration office by:

- A person executing or claiming under the same;
- A representative or assign of such person; or
- An agent of the said person, representative, or assign, duly authorised by a power of attorney.

Under S.33 of the Registration Act, the following power of attorney alone shall be recognised:

- If, at the time of executing the power of attorney, the principal resides in any part of India in which the act is in force, then a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;
- If, at the time of executing the power of attorney, the principal resides in any part of India in which the act is in force, then a power of attorney executed before and authenticated by any magistrate; and
- If, at the time of executing the power of attorney, the principal does not reside in India, then a power of attorney executed and authenticated by a Notary Public or any Court, Judge, Magistrate, Consul or Vice-Consul or a representative of the Central Government.

The following persons shall not be required to attend at any registration office or Court for the purpose of executing such power of attorney:

- Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;
- Persons who are in jail under a civil or criminal process; and
- Persons exempt by law from personal appearance in Court.

'A document required to be registered, if unregistered, is not admissible in evidence under S.49 of the Registration Act. It can, however, be used as evidence for a collateral transaction / purpose as provided in the proviso to S.49. Collateral transaction must be independent of, or divisible from the transaction which requires registration. The collateral transaction must not by itself be registrable.' (Based on *K.B. Saha & Sons Pvt. Ltd* v. *Development Consultant Ltd.*, (2008) 8 SCC 564)

Stamping of Documents

Under the Constitution of India:

- The entire proceeds of stamp duties are assigned to the State in which they are levied;
- The power of prescribing rates of duties is vested in the Union Legislature (Entry 91 of the Union List, Seventh Schedule to the Constitution);
- The power to reduce or remit such duties is vested in the State Legislature (Entry 63 of the State List, Seventh Schedule to the Constitution); and
- All matters relating to the mechanism of collection and management of stamp duties are subject to Entry 44 of the Concurrent List of the Seventh Schedule to the Constitution.

Instruments which normally attract stamp duty are for:

- Transfer;
- Sale;
- Lease;
- Mortgage;
- Gift; or
- Any other such commercial transaction.

The Stamp Act sets out schedules prescribing the nature of transaction and the stamp duty payable for the same. One has to examine the nature of the document which is explaining the transaction, and accordingly, seek the stamping of the document under the relevant article under the schedule.

'When an insufficiently stamped document is tendered in evidence, the court is obliged by S.33 of the Stamp Act, to impound it and to

recover the stamp duty and penalty under S. 35. Till such duty and penalty is paid, the document is not admissible in evidence under S.35.' (*Ram Rattan* v. *Bajrang Lal*, AIR 1978 SC 1393)

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 8: Evidence Act

Introduction

The law of evidence as set out in the Indian Evidence Act, 1872 ("**the Act**"), is a procedural law, not a substantive law. The law of evidence is the same in civil as well as criminal proceedings, though there are sections of the Act that have exclusive application to either civil law (for instance, Ss.52 - 55, and Ss.115 - 117) or to criminal law (for instance, Ss.24 - 30).

The main principles of the law of evidence are:

- Evidence must be confined to the matters in issue;
- Hearsay evidence must not be admitted;
- The best evidence must be given in all cases. (*Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*, (2003) 2 SCC 91)

Part I: Relevancy of Facts

Definitions

S.3 of the Act defines several important terms, including 'Court', 'fact', 'document', 'evidence', 'proof', and 'conclusive proof'. Several of the definitions are not exhaustive, but rather, are inclusive in nature, for example, see the definitions of 'Court', 'fact', 'facts in issue', and 'evidence'.

The term 'fact' has been defined inclusively and includes any thing, state of things, or relations of things, capable of being perceived by the senses, and any mental condition of which any person is conscious.

Illustration: That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

One fact is said to be 'relevant' to another when the one is connected with the other in any of the ways referred to in the provisions of the Act relating to the relevancy of facts. A 'fact in issue' includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows. All relevant facts may not form part of the facts in issue.

Illustration: A is accused of the murder of B by clubbing B to death. At A's trial, the following facts may be in issue: (1) That A caused B's death; (2) That A intended to cause B's death; and (3) That A had received grave and sudden provocation from B. The fact that B had an incurable disease may be a relevant fact, but may not be a fact in issue.

The term 'evidence' has been defined inclusively and can be understood as the material placed before a court, based on which a court determines the existence or non-existence of a fact in issue. The definition under S.3 of the Act specifically covers oral and documentary evidence.

A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. (*See definition of 'proved'*) The Act makes a difference between matters being 'not proved' and 'disproved'. This is important from the point of view of understanding burden and standard of proof.

Burden of Proof

The normal rule is that the burden of proving a fact lies on the party who alleges a fact.

However, this rule is subject to presumptions in law that may apply to a party. (*Syed Akbar* v. *State of Karnataka*, AIR 1979 SC 1848)

For instance, in a criminal case under S.138 of the Negotiable Instruments Act, 1881, though the burden to prove the case is upon the complainant / drawee of the cheque, there exists a presumption in his favour (under S.139 of the Negotiable Instruments Act, 1881) that the cheque was drawn by the drawer for the discharge of a debt or liability. It is, however, open for the drawer / accused to rebut such a presumption by leading appropriate evidence in trial.

Standard of Proof

The standard of proof depends on the nature of proceedings. In civil cases, the standard of proof is generally a preponderance of probabilities or balance of probabilities, whereas in criminal cases, the standard of proof is that of beyond all reasonable doubt. The standard of proof in criminal cases is higher than in civil cases.

The more serious the offence, the stricter the degree of proof that is required, since a higher degree of assurance is required to convict the accused. (*Mousam Singha Roy* v. *State of West Bengal*, (2003) 12 SCC 377) In criminal cases, the accused enjoys a presumption of innocence that the prosecution must disprove to secure a conviction from a Court. It is not enough for the presumption of innocence to remain not proved.

Reference must be made, however, to provisions of vicarious liability in criminal statutes, such as S.141 of the Negotiable Instruments Act, 1881, S.10 of the Essential Commodities Act, 1955, S.140 of the Customs Act, 1962, and S.9AA of the Excise Act, 1955, where the accused is prosecuted by virtue of her designation in a company / firm, and the burden of proof shifts onto the accused to disprove knowledge of an offence or to prove due diligence to prevent such an offence.

The Relevancy of Facts

S.3 states that one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Act relating to the relevancy of facts. Chapter II of the Act (Ss.5 to 55) deals with the relevancy of facts.

The terms 'admissibility' and 'relevance', though often used interchangeably, are different terms with distinct meanings. *Phipson* states that a fact may be relevant and yet, on grounds of convenience or policy, evidence of it may be inadmissible. To decide whether evidence of a fact is admissible, it is correct to first ask if it is a relevant fact, and then to see whether there are any provisions / construction of law governing its admissibility.

Illustration: The fact that litigant A has written to his counsel B admitting liability for the breach of a contract may be a relevant fact, but this fact has been rendered inadmissible by virtue of S.126 of the Act.

S.6 of the Act: 'Res Gestae'

This section deals with the relevancy of facts forming part of the same transaction. The section provides that facts are relevant, even though they are not in issue, if they form part of the same transaction. This is true for all such facts, whether they occur at the same time and place, or at different times and places.

Sir James Stephen defines the term 'transaction' as a group of facts so connected together as to be referred to by a single name, including as a crime, a contract, a wrong, or any other subject of enquiry which may be in issue.

Illustration: A is accused of the murder of B by beating him. Whatever was said or done by

A or B or the bystanders at the beating, or shortly before or after it, so as to form part of the transaction, is a relevant fact.

Illustration: The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

The facts admitted under S.6 of the Act are admitted in English law under the principle '*res gestae*'. The meaning of the term '*res gestae*', however, is ambiguous (differently interpreted including as being equivalent to the fact in issue, and the surrounding circumstances) and so, the considered opinion of several authors is to avoid the term altogether. That being said, it is still important to understand the context of the use of the term.

Ss.7 - 9 of the Act

Ss.7 - 9 of the Act illustrate the principle of the relevance of facts forming part of a transaction, as laid down in S.6.

S.8 makes relevant any fact that shows or constitutes motive or preparation for any fact in issue or relevant fact. S.8 also includes 'preparation' and 'conduct' of a party in relation to any suit or proceeding as being relevant.

Explanation (1) to S.8, while explaining the word 'conduct' states that the word 'conduct' does not include statements, unless those statements accompany and explain acts other than that statement itself. Thus, it is clear that the distinction is, on the one hand, between statements *simplicitor,* and on the other hand, statements that accompany and explain a certain act.

Explanation (2) to S.8 provides that when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is also relevant.

Illustration: The question is, whether A owes B Rs.10,000/-. The fact that A asked C to lend him money, and that D said to C in A's presence and hearing "I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.

Illustration: A is accused of a crime. The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to herself, on that she destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

Motive

In cases involving circumstantial evidence, proof of motive behind acts / omissions of parties gains significance. Motive is different from intention. *Black's Law Dictionary* defines motive as something that leads one to act. When there is evidence of a relevant fact or fact in issue, motive becomes irrelevant.

Illustration: A sues B upon a bond for payment of money. B denies the making of the bond. The fact that at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

S.11 of the Act

S.11 of the Act is often regarded as the residuary provision of Chapter II of the Act. It differs from facts made relevant by other provisions of the Act, such as S.7 or S.32, inasmuch as for a fact to be relevant under S. 11, it must first satisfy the test that it makes the existence of a relevant fact or a fact in issue highly probable or improbable.

It is important to remember that the plea of alibi often taken in criminal trials is a rule of evidence under S.11.

Illustration: The question is, whether A committed a crime in Calcutta on a certain day. The fact that on that day, A was in Lahore, is relevant. The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

Ss.17 – 23 of the Act: Admissions

Admissions are defined in S.17 as a '*statement, oral or documentary or contained in electronic form, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons, and under circumstances, hereinafter mentioned.*'

Ss.18-20 describe the persons and circumstances as referred to in the definition of 'admission' in S.17.

An admission is a statement of fact that waives or dispenses with the production of evidence by conceding that the fact asserted by the opposite side is true. This section only deals with oral or written (documentary) admissions. S.18 deals with conduct that would amount to an admission.

Admissions are admitted as evidence against a party, since they are inconsistent with the truth of a contention put forward by that party. For instance, if a person contends in a civil suit that his business partner owes him money, a statement by him in the form of a letter to the same business partner stating there are no dues between them would form an admission and would belie his claim.

Admissions can be broadly classified into judicial and extra-judicial admissions. Judicial admissions are made by a party at a proceeding prior to the trial and constitute a waiver of proof being binding on the party that makes the admission. Extra-judicial admissions are those that do not appear on the record of the case and may occur in the ordinary course of life or business. Unlike judicial admissions, however, extra-judicial admissions are only binding partially, except where they have the effect of estoppel.

S.21 provides that admissions are relevant and may be proved as against the person who makes them, but that they cannot be proved by or on behalf of the person who makes them except in certain circumstances. The principle behind this provision is that a person making an admission should not be permitted to prove his own statements since it would be easy for such person to lay grounds for escaping the consequences of his or her wrongful acts by making such admissions.

Illustration: The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B states that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the Deed is forged. But, A cannot prove a statement made by himself that the deed is genuine nor can B prove a statement made by himself that the deed is forged.

S.21, however, provides three exceptions where admissions can be proved by the person making them. Communication made "without prejudice" that finds mention during negotiations in civil cases is protected by S.21, and no admission made in those negotiations would be relevant or can be proved against the party making them.

Ss.24 – 30 of the Act: Confessions

Ss.24 - 26 of the Act deal with confessions that are irrelevant, while Ss.27 - 30 of the Act deal with confessions that the Court can take into account. The term 'confession' is not defined in the Act.

The Privy Council in *Pakala Narayana Swami* v. *Emperor* (AIR 1939 PC 47) held that a confession must either admit, in terms of the offence, or at any rate substantially, all the facts, which constitute the offence. In subsequent cases, the Supreme Court, while referring to *Pakala Narayanswami's case*, has held that a confession must either admit the offence, or at any rate, substantially admit all the facts which constitute the offence. A statement that contains self-exculpatory matter cannot amount to a confession.

All confessions are admissions, though the reverse is not true. Confessions are only made in criminal cases whereas admissions may be made in both civil and criminal proceedings. A confession by its very nature may have serious penal consequences for the maker and hence, the Act places great significance on the voluntary nature of any such confession. For a confession to be relevant, apart from being voluntary, the same must be made by an accused herself.

Confessions are of two types, judicial and extra-judicial. Judicial confessions are recorded under S.164 of the Code of Criminal Procedure, 1973 ("**Cr.P.C**"), and for them to be relevant, the provisions and safeguards of S. 164 of the Cr.P.C. must be met.

Extra-judicial confessions are considered to be a weak form of evidence, and would ordinarily require corroboration before any reliance can be placed upon them. S.24 expressly bars any confession made by a person, which appears to the Court as having been made by virtue of any inducement, threat, or promise, proceeding from a person in authority. Note that for the confession to be considered irrelevant, formal proof of such things as coercion and influence need not be shown. It is sufficient if doubt is created in the mind of the court. (*State of Rajasthan* v. *Raja Ram*, (2003) 8 SCC 180)

S.25 bars confessions made to police officers by accused persons. The purpose of S.25 is to ensure that police officers do not extort confessions by using illegal means of coercing, torturing, or otherwise forcing accused persons to make confessions, which may or may not be true. This danger in criminal trials has been recognised as far back as in 1884. (*Queen Empress* v. *Babu Lal*, (1884) ILR 6 All 509) In *Babu Lal's case*, the court recorded that S.25 of the Evidence Act had been drafted with a view that the malpractices of police officers in extorting confessions from accused persons, in order to gain credit by securing a conviction, had to be stopped / nullified. Conditions have since still not improved, however, and S.25 is a valuable right available to an accused person and acts as a deterrent to the police from attempting to extort or otherwise coerce accused persons.

In addition, S.25 protects the constitutionally guaranteed rights against self-incrimination. Customs and excise officers, while acting in their *quasi*-criminal capacity, have been held to be exempt from the rule under S.25. (*State of Punjab* v. *Barkat Ram*, AIR 1972 SC 276)

Statutes like TADA and POTA have departed from the rule in S.25, and permit confessions made to senior police officers as being admissible under strict safeguards.

S.26 of the Act

Under S.26, no confession made by any person while in the custody of a police officer, unless made in the immediate presence of a Magistrate, shall be proved as against such person. This section can be considered to be an extension of the principle enshrined in S.25, and is based on the same fear that the police may illegally coerce or force an accused to confess, if not to the police then to someone else. It may be noted that the term 'custody' does not mean actual arrest.

S.27 of the Act

S.27 provides that where any fact is discovered as a consequence of information received from an accused person while in the custody of a police officer, such information that relates distinctly to the fact discovered may be proved. This section is used by investigating agencies to make what are known as 'disclosures'.

It is important that the information should lead to a recovery since if the police already knew about a material object in a particular place, the section has no application. S.27 is founded on the principal that if a confession made by an accused person is supported by the discovery of the fact, such confession inasmuch as it relates to the discovery of the fact, can be presumed to be true and not extracted.

S.27, partly due to its language, has been understood to be a proviso to Ss.25 and 26. In *Pulukuri Kotayya* v. *King-Empero*r, AIR 1947 PC 67, the Privy Council held:

"*Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of information as relates distinctly to the fact thereby discovered may be proved.*"

In *State of Bombay* v. *Kathi Kalu Oghad*, AIR 1960 SC 1125, an eleven-judge bench of the Supreme Court held that statements admissible under S.27 would not fall within the prohibition of A.20(3) of the Constitution unless compulsion has been used in obtaining the information.

The constitutionality of this provision was challenged in *State of Uttar Pradesh* v. *Deoman Upadhyay*, AIR 1960 SC 1125. The Supreme Court held that S.27 does not violate A.14 of the Constitution inasmuch as there is a valid distinction between persons in custody and persons not in custody and they do not require identical protection.

In a recent decision, *Smt. Selvi & Others* v. *State of Karnataka*, 2010 (4) SCALE 690, the Supreme Court has ruled that compulsory brain mapping, narco analysis, and lie detection tests are unconstitutional as they violate individual rights. Information obtained through such tests was sought to be made relevant under S.27 of the Act, but the Supreme Court held that only such information that was obtained after an accused voluntarily agreed to be tested would be admissible.

Illegally Obtained Evidence

In *State* v. *Navjot Sandhu & Afsan Guru*, (2005) 11 SCC 600, a question was raised by the accused as to the admissibility of tape recorded evidence / phone tap recordings that were obtained in violation of due process of law under the Telegraph Act. The Supreme Court held that the non-compliance or inadequate compliance with the provisions of the Telegraph Act does not, *per se*, affect the admissibility and cited the decisions of *R. M. Malkani* v. *State of Maharashtra*, 1973 Cri. L. J. 228.

Courts in India, while dealing with the issue of admissibility of illegally obtained evidence (for example, from an illegal search of a premises or a person), have held that even if evidence is obtained by illegal means, it could be used against a party charged with an offence. A Constitution Bench of the Supreme Court in *Pooranmal* v. *Director of Inspection*, (1974) 1 SCC 345, has also approved of this principle.

S.29 of the Act

S.29 deals with extra-judicial confessions that are not governed by Ss.24 - 28.

S.30

S.30 deals with confessions of co-accused persons. This provision may be contrasted with S.133, which deals with the evidence of an accomplice. S.133 provides that an accomplice shall be a competent witness against an accused person.

The Supreme Court has held that evidence of an accomplice must be corroborated before the same can be used to convict an accused person, and this view has been followed for interpreting evidence under S.30 as well. (*Kalpanath Rai* v. *State*, 1997 (8) SCC 732)

In *Suresh Budharmal Kalani* v. *State of Maharashtra*, 1998 (7) SCC 337, it has been held that the confession of an accused cannot be used against a co-accused unless the former is also facing trial.

Illustration: A and B are jointly tried for the murder of C. It is proved that A said "B and I murdered C". The Court may consider the effect of this confession as against B.

Illustration: A is on trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said – "A and I murdered C." This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Ss.32 and 33: Statements by Persons, Who Cannot be Called as Witnesses

S.32 provides that statements made by:

- A person who is dead;
- A person who cannot be found;
- A person who has become incapable of giving evidence;
- A person whose attendance cannot be procured without unreasonable delay or expenses;

are relevant in enumerated circumstances.

Dying Declarations

S.32(1) deals with the statements made in relation to cause of death. Statements made under this provision are otherwise known as dying declarations. S.32 is an exception to the hearsay rule. This provision is often brought into use during dowry harassment cases, where the dowry victims are afforded opportunities to give their statements, after being declared competent to do so by a medical professional; these statements can then be used in a criminal proceeding.

In *Pakala Narayanswami's case*, the deceased made a statement to his wife that he was going to the accused to collect money. A few days later the deceased's body was found in a trunk that had been purchased by the accused. It was held that the statement made by the deceased to his wife was admissible in evidence under S.32(1) as a circumstance of the transaction that resulted in his death. For a dying declaration to be relevant, the person making the statement must be proved to have died as a result of injuries received in the incident.

Ss.40 - 45 of the Act: Judgments of Courts of Justice When Relevant

S.40 of the Act

S.40 provides that the existence of any judgment, order, or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or hold such trial. Thus, the relevance of a judgment under S.40 depends on the existence of a law of the nature described in the provision. The underlying

principle in this provision is that a person should not be vexed twice for the same cause of action.

Under criminal law, this principle is enshrined in A.20(2) of the Constitution and elaborated in S.300 of the Cr.P.C., wherein if a person is tried by a competent Court and either acquitted or convicted, he cannot be tried a second time for the same offence or offences arising from the same facts.

Illustration: A, a resident of Delhi, is accused of theft and is convicted and sentenced by a court of competent jurisdiction. Since part of the cause of action also arose in Kanpur, a court in Kanpur now seeks to try A on the same facts. A can produce this judgment convicting and sentencing her before the Kanpur Court, which would be relevant under S.40 and would prevent the Kanpur Court from conducting a second trial on the same facts.

In civil law, this principle is found in S.11 of the Code of Civil Procedure, 1908, which deals with the principle of *res judicata*. A matter in dispute or issue that has once been decided by a competent court, cannot be re-agitated between the same parties. Judgments of trial courts would therefore be relevant under S.40 to prevent a cognizance of any further suit or proceeding on the same facts.

Relevance of a Judgment of a Civil Court on a Criminal Court and Vice Versa

An important question is the relevance of a judgment of a civil court in a criminal case or vice-a-versa. In *K. G. Premshanker* v. *Inspector of Police & Another*, (2002) 8 SCC 87, the Supreme Court *inter alia* held:

- The previous judgment which is final can be relied upon as provided under Ss.40 - 43 of the Evidence Act;
- In civil suits between the same parties, the principle of *res judicata* may apply;
- In a criminal case, S.300 of the Cr.P.C makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; and
- If the criminal case and the civil proceedings are for the same cause, the judgment of the civil court would be relevant if any of the conditions of Ss.40 - 43 are satisfied, but it cannot be said that the same would be conclusive, except as provided in S.41.

The Court further held that a court would have to decide to what extent a judgment, order, or decree passed in a previous civil proceeding (if relevant under Ss.40 and 42 or other provisions of the Act) is binding or conclusive with regard to the matters decided therein.

Illustration: In a case of alleged trespass by A on B's property, B filed a suit for declaration of its title and to recover possession from A. The suit is decreed. Thereafter, in a criminal prosecution by B against A for trespass, the judgment passed between the parties in civil proceedings would be relevant, and the court may hold that it conclusively establishes B's title as well as possessionof the property. In such case, A may be convicted for trespass.

Hence in every case, the first question which would require consideration is whether the judgment, order, or decree is relevant, and the second question is, if relevant, what is its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case.

Recent decisions on this point of law are *Seth Ramdayal Jat* v. *Lakshmi Prasad*, JT 2009 (5) SCC 461, and *Syed Askari Hadi Ali Augustine Imam* v. *State of Delhi*, JT 2009 (4) SCC 522, wherein it has been observed that as held in *K. G. Premshanker's case*, that if the judgment of a civil court is not binding on a criminal court, a judgment of a criminal court will certainly not be binding on a civil court.

In a criminal trial, it is for the court to determine the question of the guilt of the accused and it must do this upon the evidence before it, independently of the decision in civil litigation between the same parties. A judgment or a decree is not admissible in evidence in all cases.

S.44 of the Act

S.44 provides that any party can show that any judgment sought to be made relevant by the opposite party under Ss.40, 41, and 42 of the Act, was either delivered by a court without competence, or that it was obtained either by fraud or collusion.

Ss.45 - 51 of the Act: Opinion of Third Person When Relevant

When disputes relate to certain areas, courts require the assistance of experts. Although the opinions or beliefs of third persons to proceedings before a Court are irrelevant and are therefore inadmissible, third party evidence of a certain nature has been made relevant under the Act.

Expert Evidence

S.45 provides that when the Court has to form an opinion upon a point of foreign law, science, or art, or identify handwriting or finger impressions, the opinions of experts are relevant facts.

This form of evidence has been held to be weak. A credible eyewitness / ocular testimony has been held preferable to medical opinion / evidence by medical professionals in criminal trials. (*See Ramakant Rai* v. *Madan Rai*, 2003 (12) SCC 395) Courts have advised exercise of due care and caution along with an attempt to lead evidence as a whole, while dealing with expert evidence. (*See Murari Lal* v. *State of Madhya Pradesh*, AIR 1980 SC 531)

Ss.45 and 47 recognise that handwriting can be proved by an opinion of an expert, by evidence of the author, and by evidence of a person acquainted with the handwriting of the person in question. It may be noted that under S.73 of the Act, the court itself is competent to compare signatures, writing, or a seal.

S.52 - 55 of the Act: Character When Relevant

Ss.52 and 55 deal with the evidence of the character of parties in civil cases, while Ss.53 and 54 deal with the evidence of character of parties in criminal cases. The term 'character' under the explanation to S.55 includes both, the reputation and the disposition of a person.

Under S.54, in a criminal trial, the previous bad character of an accused is irrelevant unless evidence has been given that he has a good character, in which case the fact that the accused has a bad character, becomes relevant.

Part II: On Proof

Ss.56 - 58 of the Act: Facts which need not be Proved

S.57 provides facts of which the Court must take judicial notice and by virtue of S.56, such facts need not be proved. These facts include, for instance, all laws in force in the territory of India, the divisions of time, the geographical divisions of the world, public festivals, fasts, and holidays notified in the official gazette.

S.58 provides that facts that have been admitted by the parties need not be proved.

Ss.59 - 60 of the Act: Oral Evidence

All statements which the Court permits or requires to be made before it by witnesses in relation to the matter of fact under inquiry are called oral evidence. S.59 provides that all facts barring the contents of documents may be proved by oral evidence. S.60 is an expression of the 'hearsay rule' and requires that oral evidence in all cases be direct.

Therefore, a witness can only give evidence of a fact of which he has first-hand knowledge.

Illustration: A is sued by B for a sum of money owed to B by A. C in his evidence states that B is owed money by A, which fact is in his personal knowledge by virtue of the fact that C was present at the time when B lent money to A. C's oral evidence is relevant and would constitute direct evidence. If, however, C in his evidence says that X told me that "A owes money to B", the same would be hearsay evidence and would not be relevant.

As described earlier, S.6, S.32, and the evidence of experts given under S.45, are exceptions to the hearsay rule and are expressly made relevant by the Act.

Documentary Evidence

S.74 defines (and illustrates) a class of documents as 'public documents' and S.75 provides that all documents other than public documents are private documents. The term 'documentary evidence' is defined in S.3, as all documents produced for the inspection of the court.

Primary and Secondary Evidence

S.61 states that the contents of documents can be proved either by primary or secondary evidence.

S.63 provides an inclusive definition of secondary evidence and includes within its ambit, certified copies, copies made from the original by a mechanical process, counter-parts of documents, and oral accounts of the contents of a document given by a person, who has himself or herself seen it.

The Act under S.65 provides circumstances where secondary evidence can be used to prove a document in the absence of primary evidence for the same. Primary evidence is considered to be the best evidence and affords the greatest certainty of facts in question.

Secondary evidence can only be given when the primary evidence of the document itself is admissible. Secondary evidence cannot be given of a document, when the original is found to be inadmissible.

Illustration: A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

Illustration: A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence, but the copy not so compared is not secondary evidence of the original, though the copy from which it was transcribed was compared with the original.

The Act was amended by the Information Technology Act, 2000, to provide for the admissibility of electronic records. S.65–A provides that the contents of electronic records can be proved in accordance with S.65-B. S. 65-B provides conditions under which electronic records can be proved.

Ss.91 – 100 of the Act: Exclusion of Oral by Documentary Evidence

S.91 of the Act

S.91 provides that when the terms of a contract have been reduced into a document, and in all cases in which any matter required by law is reduced to a document, such document can be proved only by the document itself, or by secondary evidence of its contents in certain specified cases.

This section embodies the 'best evidence' rule - that best evidence ought to be placed before a court to prove a fact.

Illustration: If a contract be contained in several letters, all the letters in which it is contained must be proved.

Illustration: A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

S.92 of the Act

S.92 supplements S.91 by providing that once a contract has been proved by writing, then no evidence can be given of any oral agreement as between the parties to contradict, vary, add to, or subtract from its terms. The section contains six provisos, which further explain the intention behind this provision.

Illustration: A policy of insurance is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship, which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

Illustration: A agrees absolutely in writing to pay B Rs.1,000/- on March 1, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till March 31, cannot be proved.

Illustration: A hires lodging from B, and gives B a card on which is written – "Rooms, Rs. 200/- a month". A may prove a verbal agreement that these terms were to include partial board.

Part III: Production and Effect of Evidence

Burden of Proof

Ss.101 – 111 of the Act

Proceedings before a court seek to determine the rights and liabilities of parties before such court. Under Ss.101 - 111, the Act specifies which party must discharge the burden to prove what facts.

S.101 of the Act

S.101 states that whoever asserts the existence of a fact must prove that those facts exist and when a person is bound to prove the existence of the fact, it is said that the burden of proof lies on that person.

Illustration: A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

S.103 of the Act

S.103 provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

Ss.104 – 113 of the Act

Ss.104 to 113 provide the rules for when the burden of proof, or of introducing evidence about a particular fact, is laid on a specified person.

S.105 of the Act

S.105 provides that in a criminal case, whenever an accused seeks to bring her case under any of the general exceptions under the Indian Penal Code, 1860 ("**the IPC**"), or within any special exception or proviso contained in either the IPC or any other law, the burden of proving such circumstances lies on the accused, and the Court must presume the absence of such circumstances.

Illustration: A, accused of murder, alleges that, by reason of unsoundness of mind, she did not know the nature of the act. A must prove that she is of unsound mind.

Illustration: A, accused of murder, alleges that, by grave and sudden provocation, she was

deprived of the power of self-control. A must prove that there was grave and sudden provocation.

S.106 of the Act

S.106 provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon such person. This section is an exception to the general rule contained in S.101 that provides that the burden is on the person who asserts the fact. The principle underlying S.106 applies only to such matters of defence, which are in the personal knowledge of the defendant, and cannot apply when the fact is such as to be capable to be known also by a person other than the defendant.

Illustration: When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him. A is charged with travelling on the railway without a ticket. The burden of proving that he had a ticket is on him.

Presumptions

When the court presumes the existence of a fact, it is known as a 'presumption'. It is a rule and a creation of law and a court by invoking a presumption, draws a particular inference from a particular fact or from evidence. If, however, the truth / correctness of such an inference is disproved, the presumption would then stand rebutted.

The effect of a presumption is that a party in whose favour a fact is presumed is relieved of the initial burden of proof until and unless the presumption is rebutted, whereupon the burden then would shift back on to the first party.

Presumptions are grounded on either general human experience, or on policy and experience. Presumptions are of two types: presumptions of fact, and presumptions of law. The Act, *vide* S.4, states that courts 'may presume' a fact where provided by the Act, 'shall presume' a fact where directed by the Act, and shall on the proof of certain facts regard another fact to be 'conclusively proved'.

Ss.79 - 90 of the Act

Ss.79-90 provide presumptions relating to documents including presumptions as to the genuineness of certified copies (S.79), presumptions as to documents produced as record of evidence (S.80), presumptions as to map of plans made by authority of government (S.83), and presumptions as to documents that are 30 years old (S.90).

S.113-A, 113-B, and 114-A of the Act

Ss.113-A, 113-B, and 114-A have been added by amendments made in 1983, 1984, and 1986, respectively. These provisions have been added as a deterrent and as a means to increase the rate of conviction in crimes against women.

S.113-A (read with S.498-A of the IPC) provides that when the question is whether the commission of suicide by a woman has been abetted by her husband or any relative of her husband, and it is shown that she has committed suicide within seven years of the date of her marriage and that her husband or relative has subjected her to cruelty, the court may presume that such suicide has been abetted by her husband or by such relative of her husband. A presumption under this section is not mandatory.

S.114-A provides that where a woman states in her evidence before the court that she did not consent to sexual intercourse, and where sexual intercourse by the accused is proved, and the question is whether intercourse occurred with or without the consent of the woman, the court shall presume that she did not consent. It may be noted that S.114-A

applies to prosecutions for rape under S.376(2) of the IPC, barring S.376(2)(f).

S.113-B (read with S.304-B of the IPC) provides that where the question is whether a person has committed dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment in relation to dowry, the court shall presume that such person has caused dowry death. The term 'soon before' is relevant and is a relative term. It would depend upon the facts and circumstances of each case and there must be a proximate and live link between the effect of cruelty based on dowry demand and the alleged consequential death.

These three provisions have been extensively dealt with by the Supreme Court, and the court and attention is drawn to decisions of the Supreme Court in *Rajbabu & Another* v. *State of Madhya Pradesh*, JT (2008) SC 25, and *Gopal* v. *State of Rajasthan*, JT (2009) 2 SC 419.

S.114 of the Act

S.114 permits the court to presume the existence of any fact which it thinks likely to have happened in the common course of natural events, human conduct, and public and private business in relation to the facts of the case before it. S.114 is a permissive but not mandatory section and a court may refuse to raise a presumption in a particular case although such a presumption might have been properly raised in other cases.

Illustration: A court may presume:

- That a man who is in the possession of stolen goods soon after the theft, is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession;
- That judicial and official acts have been regularly performed;
- That evidence which could be, and is not produced would, if produced, be unfavourable to the person who withholds it;
- That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.

Ss.115 – 117 of the Act: Estoppel

S.115 provides that where a person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Estoppel is a principle of law, by which a person is held to be bound by the representations made by him, or arising out of his conduct. It is not a rule of law or equity, but is a rule of evidence. Estoppel is a rule of civil law, and does not apply in criminal proceedings.

Difference between Estoppel and Res Judicata

Estoppel is different from the principle of *res judicata*. In a case of estoppel, a person is prevented from saying the opposite to what he or she has earlier represented, whereas, with *res judicata*, after having obtained a decision from a competent court, the same matter cannot be agitated again before a court.

In *res judicata,* it is the subsequent court that does not have jurisdiction, whereas, in a case of estoppel, a person asserting a fact or leading evidence contrary to an earlier representation / declaration is estopped.

There is also a difference between estoppel and fraud. An action cannot be founded on estoppel whereas fraud gives rise to a cause of action. Estoppel is also distinct from waiver.

Illustration: A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. A must not be allowed to prove his want of title.

Ss.116 and 117 of the Act

Ss.116 and 117 are illustrative of the principle of estoppel and deal with estoppel in specific cases. In *Chhaganlal Mehta* v. *Hari Bhai Patel*, 1982 (1) SCC 223, conditions to bring a case within the scope of estoppel were enumerated. Estoppel may be of several types, including estoppel by matter of record, estoppel by deed, and estoppel *inpais.*

Estoppel by matter of record is chiefly concerned with the effect of a judgment and its admissibility in evidence. The doctrine of estoppel by deed would apply when a person sought to be estopped, or his predecessor in interest, has obtained possession of property or some advantage under a deed. Estoppel *inpais* arises from agreement of contract and from a act of misconduct or misrepresentation, which has induced a change of possession in accordance with the intention of the party against whom the estoppel is alleged.

Ss.118 – 134 of the Act: Witnesses

S.118 provides that all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease, whether of mind or body, or for any other cause, they are prevented from understanding the questions put to them or from giving rationale answers to those questions. The Act provides that witnesses who are unable to speak may give evidence in any other manner in which he or she can be intelligible. Such evidence under S.119 would be deemed to be oral evidence.

Husbands and wives under S.120 are competent witnesses against each other in both criminal and civil proceedings. S.121 of the Act provides that no judge or magistrate can be questioned as to his conduct within a court as a judge or magistrate, except under a special order of a court to which he is subordinate; in all other circumstances, however, a judge or a magistrate is a competent witness.

S.122 – 129 of the Act: Privileged Communications

Ss.122 – 129 provide that certain forms of communication are protected from disclosure. For instance, S.122 places a privilege on communication giving in marriage, subject to certain exceptions.

S.123 - 126 of the Act

S.123 places a privilege on affairs of state and bars any person from giving evidence derived from unpublished official record relating to any affair of the state except with the permission of the head of the department concerned. S.124 places a privilege on communications made to a public officer in official confidence if such officer feels that public interest would suffer by his disclosure.

Professional communications between lawyers and clients are protected under S.126 subject to two provisos.

Illustration: A, a client, says to B, an attorney – "I have committed forgery, and I wish you to defend me". This statement would be protected from disclosure.

Illustration: A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B

in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

S.132 of the Act

S.132 places a duty to speak the truth on all witnesses. S.132 provides that a witness cannot take refuge in not answering the question on the ground that the answer may incriminate her.

The section, however, *vide* a proviso, states that no such answer that a witness is compelled to give shall subject such witness to any arrest or prosecution or be proved against such witness in any criminal proceedings, except a prosecution for giving false evidence by such answer.

Although S.132 is seemingly in contravention of A.20(3) of the Constitution, the proviso protects the section and makes it *intra vires* the Constitution. (*Laxmipat Choraria* v. *State of Maharashtra*, AIR 1968 SC 938)

S.135 – 166 of the Act: Examination of Witnesses

S.134 provides that no particular number of witnesses shall in any case be required for proof of any fact. The Supreme Court has held in a number of cases that it is the quality and not quantity of evidence that matters.

S.135 provides that civil and criminal procedural laws as applicable shall determine the order in which the witnesses are produced and examined.

S.137 defines examination-in-chief as the examination of a witness by the parties that call her. It further defines cross-examination as the examination of a witness by the adverse party. S.137 also defines re-examination as the examination of a witness by the party that calls her after cross-examination.

S.138 clearly provides for the order of examination, and most importantly, provides that cross-examination need not be confined to facts to which a witness testified during her examination-in-chief.

Cross-Examination and Use of Statements Made During Investigation

S.145 provides that a witness may be cross-examined as to previous statements made by her in writing or reduced into writing and that are relevant to the matter in question.

While cross-examining a witness, statements made during investigation can be used only to contradict a prosecution witness in the manner indicated in S.145. (*See Sat Paul* v. *Delhi Administration*, AIR 1976 SC 294)

Under the proviso to S.162 of the Cr. P.C., statements of witnesses recorded by the police during investigation can only be used by the prosecution to contradict a prosecution witness in the manner indicated in S.145 of the Evidence Act. In view of the special mention made in the proviso to S.162(1) of the Cr.P.C., such a statement made under S.161 cannot be used for corroboration of a prosecution, defence, or Court witness. (*See Tahsildar Singh* v. *State of Uttar Pradesh*, reported as AIR 1959 SC 1012)

Leading Questions

S.141 defines a leading question as any question suggesting the answer, which the person putting it wishes or expects to receive. Such questions are not permitted during examination in chief or during re-examination except by permission of court (S.142). S.143, however, provides that leading questions may be asked during cross examination. The purpose of cross-examination is to elicit suppressed facts and to impeach the creditworthiness of a witness.

Hostile Witnesses

S.154 permits a person who calls a witness to put any questions to her, which might be put in cross examination by the adverse party. This section used to deal with the testimony of what are colloquially known as 'hostile witnesses'.

When a witness states something that is destructive to the prosecution case, the prosecution is entitled to pray that the witness be treated as hostile and in such a case, the trial court ought to allow the public prosecutor to treat the witness as hostile. (*See G. S. Baksh* v. *State*, AIR 1979 SC 569)

In *Rabinder Kumar Dey* v. *State of Orissa*, AIR 1977 SC 170, and in *Koli Lakhmanbhai* v. *State of Gujarat*, AIR 2000 SC 210, it has been held by the Supreme Court that the entire testimony of a hostile witness need not be rejected and the court can rely upon that part of the testimony which inspires confidence and credit. The testimony of a hostile witness can be used to the extent to which it supports the prosecution case. Keeping in view recent trends wherein prosecution witnesses turn hostile during the course of trial and contradict their earlier statements given to the police, trial courts are now encouraged to begin prosecution under the procedure prescribed in S.340 of the Cr.P.C. against such witnesses where their stand has been demonstrably false.

Impeaching the Creditworthiness of Witnesses

Ss.153 and 155 provide for ways in which the creditworthiness of a witness may be impeached. It may be noted that *vide* an amendment in 2003, S.155 stands amended and S.155(4) has been omitted. S.155(4) had provided that a prosecutrix in a rape case may be cross-examined on her alleged immoral character to impeach her creditworthiness.

Illustration: A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B. Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B. The evidence is admissible.

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 9: Jurisprudence

Introduction

Jurisprudence covers 'legal theory' and 'philosophy of the law'. It is not merely concerned about 'what' but also 'why'. "Jurisprudence is the name given to a certain type of investigation into law, an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems." (P. J. Fitzgerald (Ed.), *Salmond on Jurisprudence*, 12th edn., Universal Law Publishing Co. Pvt. Ltd., 1966, p.1) Legal theory is connected closely with answering the question "What is law?", in order to understand law better. Various answers have been provided over time in answer to this question; however, it may be convenient to study them in terms of 'schools', or groups of thoughts that are based on broadly the same fundamental premise.

The Natural Law Theory

The Natural Law theory postulates that law consists of rules that are in accordance with reason; that "there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason." (P. J. Fitzgerald (Ed.), *Salmond on Jurisprudence*, 12th edn., Universal Law Publishing Co. Pvt. Ltd., 1966, p.15)

One of the most fundamental aspects of modern legal systems is the existence of the 'rule of law'. The rule of law exemplifies that 'howsoever high you may be; the law is above you'. The rule of law signifies that law is supreme, and that no human being is higher than the authority of law.

In India, the sources of law consist of the Constitution, Central and state legislation, and case law of the Supreme Court and the high courts. These sources may all be termed 'positive law'. Since the rule of law is constitutionally guaranteed, it means that the authorities are bound by the letter as well as by the spirit of law. Conformity to the rule of law, however, does not necessarily guarantee fairness. The best example to illustrate this is the doctrine of 'Basic Structure' as developed by the Supreme Court of India in *Keshavananda Bharati* v. *Union of India*, AIR 1973 SC 1461. In this celebrated case, the Supreme Court stated that there is an unwritten rule under the Constitution of India to ensure that Parliament's power to amend the Constitution is not unfettered. All amendments to the Constitution should follow the norms of the *basic structure doctrine*, which ensures that the essential features of the Constitution remain intact.

The basic structure doctrine demonstrates the crux of the debate between several schools of jurisprudence: what is the connection between law and morality? Recall here the concept of "objective moral principles which depend on the essential nature of the universe" that Salmond has used in his description of the Natural Law School. The Natural Law School draws a connection between law and morality, and claims that positive law derives its authority from the superior natural law, or moral standards, and that it ceases to have any authority when it deviates from such a superior moral law or standard.

While the Natural Law Theory proclaims that there is a necessary connection between law and morality, Legal Positivism contests the connection, and suggests that there is no necessary connection between law and morality. While the positivists may agree with natural lawyers that there are objectively valid moral propositions, they may not agree with the proposition of natural lawyers that such propositions constitute a superior law, and that failure to conform to such a superior law deprives ordinary positive law of all legality. (P. J. Fitzgerald (Ed.), *Salmond on Jurisprudence*, 12th edn., Universal Law Publishing Co. Pvt. Ltd., 1966, p.16) It would be useful here to examine the connection between law and morality in more detail.

Three Versions

While the statement that there is a 'necessary connection between law and morality' appears *prima facie* simple, it is fraught with subtleties in its several versions. The Natural Law theory itself has had different proponents over time, and their theories can be broadly divided into three distinct versions. The first version, the traditional version, propounded by Thomas Acquinas, suggests that the rules of positive law that conflict with natural law are invalid. The second version, as propounded by Harvard Law School professor Lon Fuller, merely suggests that any genuine legal system ought to abide by certain moral principles. The third version, as championed by Professor H. L. A. Hart's successor at Oxford University, Professor Ronald Dworkin, suggests that the introduction of moral judgements is necessary in order to interpret and apply laws.

Traditional Natural Law Theory

As Salmond has noted, the central idea of the traditional natural law theory is that 'there are objective moral principles, which depend upon the essential nature of the universe and which can be discovered by human reason'. The corollary to this understanding of natural law is *les injusta non est lex*, which means that 'unjust law is no law'. This inference of the traditional version of natural law has been severely diluted by later proponents such as Lon Fuller.

Fuller's Inner Morality of Law

Professor Lon Fuller, while truncating the expansionist claim of the traditional natural law theory, introduced the idea that moral principles will continue to be of foremost consideration in any genuine legal system. He spoke of an inner morality of law that ought to govern legal systems. The eight principles that Lon Fuller emphasised are as follows:

- The rules must be general;
- The rules must be promulgated;
- Retroactive rulemaking and application must be minimised;
- The rules must be understandable;
- Rules must not be contradictory;
- Rules must not be impossible to obey;
- The rules should remain relatively constant through time; and
- There should be a congruence between rules as announced and as applied

Fuller is unclear whether these eight principles of legality make a legal system an 'all-or-nothing affair". Is adherence to these principles a question of degree? Adherence to the inner morality of law would, nevertheless, create a *prima facie* obligation to obey the law. And, in the case of unjust laws, the *prima facie* obligations may be overridden.

Dworkin's Interpretative Theory

Ronald Dworkin's theory can be best understood through an illustration of what he termed as the 'Original Problem'. This is based upon the case of *Riggs* v. *Palmer*, 115 NY 506, where a person sought to bequeath the property of a person who he himself had killed. Denying the benefit to him, the court used the principle of 'no person should benefit from her own wrong'. Dworkin suggests that the principle used in *Riggs* indicates that law is not merely a system of rules. There are also 'principles, policies and other sort of standards' that govern the legal system. According to Dworkin, the application of the *Riggs* principle was justified owing to its content - the moral requirement of fairness.

It must be noted, however, that Dworkin does not necessarily concede his points of view to be that dictated by the 'natural law theory'. There is just one article where he has reluctantly suggested that '[i]f the crude description of natural law I just gave is correct, that any theory that makes the content of law sometimes depend on the correct answer to some moral question is a natural theory, then I am guilty of natural law'. (Ronald Dworkin, "'Natural' Law Revisited', 34 *University of Florida Law Review* 165 (1982).

Legal Positivism

Legal Positivism rejects all strands of the natural law theory. Contrary to the natural law theory, it believes that there is no necessary connection between law and morality. This school focuses on an analysis of positive law, and, speaking very broadly, moves away from the natural lawyers in that there is no credence accorded to the theory of a higher, or superior law from which positive law derives its authority, and to which it is subject.

Different versions of legal positivism have been championed by scholars such as John Austin, H. L. A. Hart, and Joseph Raz.

John Austin

John Austin famously suggested an extremely simplistic conception: law is the command, laid down by political sovereign, enforceable by sanction. (P. J. Fitzgerald (Ed.), *Salmond on Jurisprudence*, 12th edn., Universal Law Publishing Co. Pvt. Ltd., 1966, p. 25-26) This simplistic version, as suggested by Salmond, has raised more questions than answers.

What is a command? How is it different from 'request'? If X is asked by his boss, Y, to fetch her a glass of water, is that a command or a request? Should there necessarily be a relationship of power between the 'commander' and the 'commanded'? Austin suggested that the general command laid down by God to human beings is divine law and creates moral obligations. Similarly, general commands laid down by the political sovereign are positive law, and impose legal obligations.

It must be noted, however, that defining law as a 'command' can be misleading. It may perhaps be true for criminal laws, but what about the law of contract, or matrimonial laws? The former does not mandate citizens to necessarily enter into obligations, and the latter do not command citizens to get married. Matrimonial laws simply suggest that if one wishes to get married, there are certain formalities and procedural requirements that one has to fulfil. It does not make it mandatory for citizens to marry.

Austin defined 'political sovereign' as ' any person, or body of persons, whom the bulk of a political society habitually obeys, and who does not himself habitually obey some other person or persons'. As *per* this definition, who would be sovereign in India? Under the Constitution, the highest office of the President of India is also bound by the rule of law as laid down in the Constitution. As we have seen earlier, owing to the doctrine of basic structure as laid down in the *Keshavananda Bharati case*, there are limitations on the powers of Parliament to amend the Constitution. 'We, the people' as a political sovereign is too diffuse a body to locate sovereignty with certainty.

As per Austinian logic, the idea of a sanction is built into the notion of law. Accordingly, people who act contrary to rules ought to be liable for punishment.

Rejecting the assertion of natural law theory about the connection between law and morality, Austin suggests that law is a concept based upon the notion of power and it need not be looked at from the perspective of moral concepts. Indeed, in his famous repartee, Austin said, "[t]he existence of law is one thing; its merit or demerit is another. Whether it be or not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry."

H. L. A. Hart: Inclusive Legal Positivism

The strand of legal positivism developed by Professor H. L. A. Hart rejects John Austin on the one hand, and the natural law theory on the other. Hart equated Austin's 'command of the sovereign' definition as akin to a gunman situation, where a person is faced with the conundrum of 'your money or your life'. Hart asserted that legal obligations are different from gunman situations. He extensively analysed the power of language as used in everyday context and famously said that being *obliged* to do something is not the same as being *obligated* to do it.

Since Hart merely asserts that there is 'no *necessary* connection between law and morality' and does not completely discount the possibility of interface between law and morality, his theory is characterised as 'Inclusive Legal Positivism'.

Hart defines law as a union of primary and second rules. For Hart, a rule exists when people (a) behave in a certain way (external condition); and (b) regard deviation from the expected behaviour as an adequate ground for criticism (internal condition). Primary rules are those that impose obligations. The term 'secondary' in secondary rules does not mean unimportant. But secondary rules cannot exist unless there are primary rules imposing obligations. Kinds of secondary rules, according to Hart, are: (a) rule of recognition (rules that help identify those rules that create obligations); (b) rule of change (how legally valid rules can be altered); and (c) rule for responsibility (identification of specific individuals who would apply the rules).

Raz and Marmor: Exclusive Legal Positivism

The fundamental difference between exclusive legal positivism and inclusive legal positivism is that while inclusive legal positivism concedes that there can be instances where moral considerations may play a role in legal validity, exclusive legal positivism completely discounts such a possibility.

Exclusive legal positivism asserts that the questions of 'ought' are qualitatively different from questions of 'is'. Law has an independent authority. There is an obligation to obey law *qua* law. Since norms are meant to replace the decision making of the agents, if agents could question norms, the norm would lose its authoritativeness. The source of law cannot be moral considerations but legal authority.

Significant proponents of Exclusive Legal Positivism include Joseph Raz and Andrei Marmor. The position of Exclusive Legal Positivism is diametrically opposite to that of Ronald Dworkin. Recall that in Dworkin's 'Original Problem' of *Riggs* v. *Palmer,* he had justified the principle 'no person should benefit from her own wrong' on the basis of content - the moral requirement of fairness. Exclusive legal positivism would suggest that *Riggs* is valid not because of the content, but the source - a duly constituted court of law. According to Exclusive Legal Positivism since the purpose of the norm is to replace debates by the citizens, if citizens could re-initiate the debate about legal validity through the inchoate idea of fairness, the norm itself will lose its authoritativeness. Hence, the legal validity of the norm shall be located in source not content.

Hart, Devlin and Morality in the Modern Age

While society faces such twisted notions of 'morality', one must bear in mind the difference between 'conventional morality' and 'critical morality'. Jurisprudential theories such as the Natural Law Theory and Legal Positivism, when they speak about a connection between law and morality, are by and large concerned about critical morality that denotes rational standards that do not depend upon the majority's point of view in society.

There is, however, a debate in jurisprudence, known as the Hart-Devlin debate that concerns itself with the role of conventional morality that reflects the moral views of the majority in the society.

In order to appreciate the Hart-Devlin debate, one needs to understand J. S. Mill's 'harm principle'. In his *locus classicus* titled '*On Liberty'*, Mill had formulated the dichotomy between the public and private spheres. He said that the legitimate role for society exists in the public domain. The basis on which society can interfere with the liberty of an individual is that of the 'harm principle', that is, prevention of harm to others.

Taking a cue from Mill, perhaps, the Constitution, in Chapter III on Fundamental Rights through A.19(1)(a) denies the State the power to take away an individual's liberty

such as freedom of speech and expression. To be sure, the Constitution hastens to qualify the aforementioned freedom with the 'reasonable restrictions' of 'public order, decency and morality' in A.19(2).

The presence of Fundamental Rights in the Constitution may be thought as supportive of Hart's claim that there are liberties of this sort which override ordinary considerations of utility. On the other hand, Devlin argued that a society has a right of self-defence against any harm that may ensue to the moral code that binds it – and the Constitutional limitation of 'reasonable restrictions' could be considered an example of the validity of this proposition.

Devlin relied upon marriage laws to prove his point - while some societies tolerate polygamy, others emphasise monogamy owing to their differences in the moral code that binds them together. (Andrew Altman, *Arguing About Law*, 2nd edn., Wadsworth Publishing Company, Belmont, 2001, pp.161- 164).

It must be noted, however, that Devlin glossed over the inherent contradiction in his argument. Is society's moral code so fragile that a few deviants could be in a position to endanger it at any given point of time? If a minority dissent from the moral code that supposedly binds the entire society together, wouldn't an appropriate response on the majority's part be to lead by example and resolve to follow the model code in letter and spirit rather than mounting attack on others? Furthermore, the inarticulate major premise of Devlin's argument is that society's moral code is stuck in a time warp. For, if the moral code were immutable, India would still witness *sati* and relish child marriages. Though law banned *sati*, society evidently survived.

Indeed, Professor H. L. A. Hart, one of the greatest jurists whose theory on legal positivism we have dealt with above, mounted a criticism of Devlin suggesting that societies are known for the change that they undergo. Undue insistence on preservation of moral fibre risks stagnation. (Andrew Altman, *Arguing About Law*, 2nd edn., Wadsworth Publishing Company, Belmont, 2001, pp. 161-164).

Hart as well as Devlin debated within the framework of a legal response. While arguing for society's right to defend its public order and decency, Devlin was clear that if society wishes to take action in order to protect its morality, the appropriate vehicle is law.

Philosophically speaking, there are two kinds of morality that one needs to be concerned about: conventional morality and critical morality. While conventional morality reflects the moral views of the majority of the population, critical morality denotes what *in fact* is right irrespective of the opinion held by the majority of society. Merely because the agency of interpretation lies with human beings, it does not necessarily guarantee an accurate understanding of critical morality.

The 'Functional Approach' to Law

Another approach to understanding law is the 'functional approach'. This approach emerged as a reaction to the theories of the 'analytical positivists', such as Jeremy Bentham, John Austin, and Hans Kelsen.

This approach emphasises actual social circumstances as the origin of law and legal institutions, and examines man as a part of society, rather than as an individual. Broadly speaking, one may divide the 'functional approach' into the Historical and Sociological schools.

A simplistic, but workable understanding of the functional approach might be achieved by trying to draw a distinction between this approach on the one hand, and the 'natural law school' and 'analytical positivists' on the other, by looking at what each considers the source, or origin of law: while various lines of thought from the natural law and analytical schools consider law as the command of a sovereign, or, perhaps, as the legislative manifestation of a *grundnorm*, the functional approaches consider, broadly, law as the result of the evolution of society, or a result of historical developments – it is argued that the

law is not so much made by man, as it by social and economic circumstances, or pre-existing facts.

The functional approach may be divided into the Historical and Sociological schools.

The Historical School

Friedrich Carl von Savigny (1779-1861) and Henry Maine (1822-1888) are considered as belonging to the Historical School. Law, for Savigny (1779-1861), was a reflection of the spirit of the people who evolved it. As such, Savigny argued, it had its source in the *Volksgeist*, or common consciousness of people. It could only be understood, therefore, by looking at the historical roots and development of the state of the common consciousness. This was a move away from the thought that law was a product of man's free will. Legislation, which involves the conscious 'creation' of law, could only be undertaken by trying to understanding the history of the nation or society for whom the law was being made; but a legislator could therefore only be considered the mouthpiece of common consciousness.

Maine introduced the comparative and anthropological approaches to studying law. He identified four stages in the development of law, broadly:

- A time when law was made by the commands of a ruler, acting under 'divine inspiration';
- A second stage, where such commands gain wider currency as customary law;
- The emergence of a minority, such as priests, who have control of the knowledge and administration of customary law; and
- The promulgation of law as a code.

Some societies may not progress beyond these four stages, and these Maine called 'static'. The ones that do progress beyond these stages, he called progressive societies. Progressive societies may use legal fiction, equity, and legislation to further develop law. Maine also postulated that "*The movement of progressive societies has hitherto been a movement from Status to Contract*." At a very simple level, one could understand this to mean the movement away from:

- *Status*: One's relation to the law as a result of a fixed position which an individual finds herself in without any act of will on that person's part, and which that person cannot change by an act of will (*pater familias* of a family, for example); to
- *Contract*: One's position as a member of a network of societal ties, characterised by individual freedom, and where rights, duties, and liabilities are the result of the exertion of human will.

The Sociological School

One way of describing the Sociological School could be to say that it took the approach to understanding law a few steps further away from the position of the analytical positivists.

According to Roscoe Pound (1870-1964), law was a tool, a means of harmonising social interests that may be in conflict. 'Social engineering' through law, therefore, could be used to "*…harmonize these [conflicting] interests so as to satisfy the maximum of wants, and eliminate friction and waste*". This approach embraces various disciplines in understanding society, and consequently, law, expanding tremendously the approach of the Historical School in looking at law as something enmeshed with society, rather than something outside of society.

Pound's theory seems to be that the subject-matter of law are interest; law should "… make a selection of the socially most valuable objectives and secure them." These interests could be individual (private), public, or social. In order to prioritise conflicting interests, Pound theorised, one must consider various assumptions, or 'jural postulates', on the basis of which every society is ordered. One such jural postulate is that in a civilised society, men must be able to assume that others will not commit intentional aggressions upon

them.

Justice

What is Justice? What are the parameters of justice?

These questions have long dogged intelligent minds. One of the most celebrated works on justice has been written by Professor John Rawls, who wrote a seminal text named *A Theory of Justice.* (John Rawls, *A Theory of Justice*, Oxford University Press, Oxford, 1972). In his book, Rawls mentioned two principles of justice:

- The First Principle of Justice (*Principle of Liberty):* Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others;
- The Second Principle of Justice (*Difference Principle):* Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

The aforementioned principles of justice were formulated by Rawls through a hypothetical situation: drawing upon the 'social contract theory', he assumed that human beings, in what he termed as an 'original position', where they had a 'veil of ignorance' about their future positions in society would agree to the above principles in mutual interest. The principles seem fairly straightforward. They do not, however, settle the matter. Rawls himself seemed aware of the nuances of the situation. Note that he titled his book as *A Theory of Justice* and not *The Theory of Justice.*

Practically, Rawls' theory of justice is easier stated in words than utilised in order to solve societal problems. For instance, how does one look at the quota system for the disadvantaged in educational institutions? The quota system clearly violates the first principle of justice, the liberty principle, as a person who passes a 'merit' based examination loses her position to someone who is disadvantaged owing to the accident of birth. Would such an affirmative action programme follow Rawls' second principle of justice whereby social and economic inequalities have to be arranged so that they are to the greatest benefit of the least advantaged?

In recent times, Professor Amartya Sen has taken a re-look at the idea of justice in his latest book titled *The Idea of Justice.* Professor Sen evokes the complexity involved in understanding justice through an interesting illustration. Sen takes an example of three children Anne, Bob, and Carla, who quarrel over a flute. While Anne claims the flute on the ground that she knows how to play it, Bob claims it on the ground that he is poor and does not have access to any other toys. Carla claims that she is the one who made the flute and therefore it rightly belongs to her. Anne, Bob, and Carla, each seem to have compelling, albeit competing, arguments in their favour. (Amartya Sen, *The Idea of Justice*, Penguin Books, New York, 2009, p.12).

Sen's illustration is akin to the societal problems that we face everyday. In claiming a seat in an engineering college, for example, there are competing but sometimes equally strong claims. So, how should one grapple with such claims in a society? Sen suggests that the way out is that instead of being inordinately obsessed with what 'justice' means, society ought to concentrate its energy upon reducing all forms of 'injustice'. Perhaps, therefore, it would be better to ensure that 'injustice' is reduced for both the student who seeks a seat in the engineering college through an affirmative action quota as well as the student who is missing out on the said admission.

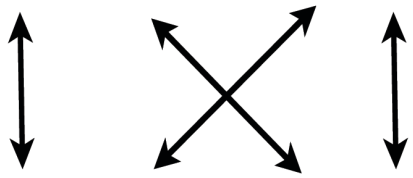
Specific Legal Concepts

Certain legal concepts such as right, duty, liberty, privilege, immunity, and liability have generally been inadequately understood. Owing to the prevalent confusion amongst jurists' understanding of such concepts, Hohfeld devised a matrix. Hohfeld's framework expounded legal concepts in order to illuminate understanding. (*See*, Hohfeld, 23

Yale Law Journal 16 (1923) and Hohfeld, 26 *Yale Law Journal* 710 (1917))

Hohfeld sought to understand the meanings of terms such as rights and duties as a jural relationship. A jural relation presupposes *vinculum juris* between two parties and the absence of a third party effect. Hohfeld conceived two kinds of jural relationships - jural correlatives and jural opposites. In particular, jural correlatives indicate concepts that are logically consistent and where one necessarily implies the other. On the contrary, jural opposites, also known as jural negations, denote concepts where the presence of a concept implies the absence of its opposite. The following chart would amplify.

Right/Claim *Liberty/Privilege*



Duty *No-right/No-claim*

The vertical arrow between 'right/claim' and 'duty' indicates that they are jural correlatives. Since right/claim are jural correlatives, as per Hohfeld's framework, the presence of right/claim in X necessarily implies the presence of duty in Y. Further, the vertical arrow between 'liberty/privilege' and 'no-right/no-claim' indicates that they are jural correlatives and in accordance with Hohfeld's framework, the presence of 'liberty/privilege' in X necessarily implies the presence of 'no-right/no-claim' in Y.

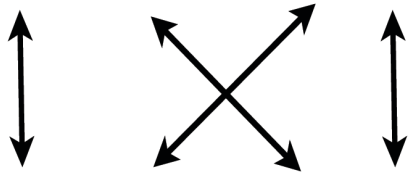
The diagonal arrows indicate that 'right/claim' and 'no-right/no-claim' are jural opposites. Accordingly, as per Hohfeld's matrix, the presence of 'right/claim' in X necessarily implies the absence of 'no-right/no-claim' in himself. The presence of 'liberty/privilege' in X implies the absence of 'duty' in himself.

Illustration: In the case of *S.R. Batra* v. *Smt. Taruna Batra,* (2007) 3 SCC 169, the daughter-in-law, Smt. Taruna Batra, petitioned the Supreme Court to declare the house where she was living after marriage as the 'matrimonial home'. The house in question was owned by the mother-in-law, and not Smt. Taruna Batra's husband. The bench of Justice S. B. Sinha and Justice Markendeya Katju held that the rights of Smt. Taruna Batra available under any Indian law could be enforced only against her husband, and not against her father-in-law or mother-in law.

This can be easily understood through Hohfeld's matrix. The Supreme Court has clearly characterised Smt. Taruna Batra's presence in the house owned by her mother-in-law as a 'liberty/privilege'. The vertical arrow between 'liberty/privilege' and 'no-right/no-claim' indicates that they are jural correlatives and in accordance with Hohfeld's framework, the presence of 'liberty/privilege' in mother-in-law implies the presence of 'no-right/no-claim' in the daugher-in-law Smt. Taruna Batra. Similarly, 'liberty/privilege' is the jural opposite of 'duty' owing to the diagonal relationship in the above figure. The presence of 'liberty/privilege' in mother-in-law' necessarily implies the absence of 'duty' on behalf of the mother-in-law.

Hohfeld interpreted other concepts such as power, liability, immunity and disability in a similar fashion. The following chart would amplify.

Power *Immunity*



Liability *Disability*

The vertical arrow between 'power' and 'liability' indicates that they are jural correlatives. Since 'power' and 'liability' are jural correlatives, as per Hohfeld's framework, the presence of power in X necessarily implies the presence of liability in Y. Further, the vertical arrow between 'immunity' and 'disability' indicates that they are jural correlatives and in accordance with Hohfeld's framework, the presence of 'immunity' in X necessarily implies the presence of 'disability' in Y.

The diagonal arrows indicate that 'power' and 'disability' are jural opposites. Accordingly, as per Hohfeld's matrix, the presence of 'power' in X necessarily implies the absence of 'disability' in himself. Further, 'immunity' and 'liability' are jural opposites. The presence of 'immunity' in X implies the absence of 'liability' in himself.

Illustration: In the case of *P. V. Narasimha Rao* v. *State (CBI/SPE)*, famously known as the JMM bribery case, the question was whether the Members of Parliament could claim immunity from charges of cash-for-vote under Article 105 of the Constitution of India.

A.105 of the Constitution states: "(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament; (2) No Member of Parliament shall be liable to *any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof*, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, papers, votes or proceedings; (3) In other respects, *the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House*, shall be such as may from time to time be defined by Parliament by law, and until so defined, shall be those of that house and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978. (emphasis supplied).

A Constitution Bench of the Supreme Court consisting of Justices S. C. Agarwal, G. N. Ray, A. S. Anand, S. P. Bharucha, and Rajendra Babu, by majority, held that a Member of Parliament enjoys immunity under Aa.105(2) or 105(3) of the Constitution from being prosecuted for allegations of bribery for the purpose of speaking or giving his vote in Parliament or in any committee thereof.

While the above Supreme Court judgement has been severely criticised for the effect of letting off bribe-takers merely because they were Members of Parliament, the reasoning in the judgement can be easily understood through Hohfeld's matrix. The Supreme Court has clearly endorsed and upheld the 'immunity' of the Members of Parliament. The vertical arrow between 'immunity' and 'disability' indicates that they are jural correlatives and in accordance with Hohfeld's framework, the presence of 'immunity' in Member of Parliament implies the presence of 'disability' in the court of law of to prosecute for an offence of bribery. Similarly, 'liability' is the jural opposite of 'immunity' owing to diagonal relationship in the above figure. The presence of 'immunity' in the Member of Parliament necessarily implies the absence of 'liability' in himself.

Interpretation of Statutes

Assume that you give a hundred-rupee note to your friend, and ask her to get you some chocolate. What should your friend do? Which chocolate should she purchase? Which shop should she go to? Should she return the money left over after buying the chocolate? What is true of the aforementioned simple statement is *a fortiori* true of laws. If your friend in the above instance has any doubts, she may seek immediate clarification from you. However, it is not possible to seek such clarification from the legislature in the context of statutes.

Every day, lawyers deal with laws in several forms – the Constitution, legislation, case laws, rules, regulations, guidelines, notifications, bye-laws, and others.

Irrespective of the elegance (or lack thereof) in drafting of these legislation, no draftsperson will ever be able to envisage all possible situations for application of the statute. Hence, interpretation is inevitable.

While interpreting a statute, one has internal and external aids to construction. Internal aids to construction include long title, preamble, headings, definitions, provisos, and explanation. An 'external aid to construction' refers to Parliamentary history, Law Commission of India reports, other statutes, dictionaries, and foreign decisions. In addition to the definition section in the statute itself, the General Clauses Act, 1897 ("**the General Clauses Act**") helps in understanding commonly used words in the legislation. The General Clauses Act tells us, for instance, that singular includes the plural (and *vice versa*) and 'man' includes 'woman' (and *vice versa*). S. 13 of the General Clauses Act states that 'In all Central Acts and Regulations, unless there is anything repugnant in the subject or context – (1) words importing the masculine gender shall be taken to include females; and (2) words in the singular shall include the plural, and *vice versa'*.

There are several rules that help in the interpretation of statutes. We shall look at some of the significant ones.

The Literal Rule

The simplest rule of interpretation, the literal rule, states that when the words of the statute are plain and unambiguous, words must be interpreted as they are without any addition of subtraction. Even the draftspersons of the legislation would not have much say in interpreting the 'plain and unambiguous' rule differently.

The literal rule is helpful. It must be noted, however, that the practical reason behind the application of the 'literal rule' is political: judges do not wish to be seen as creating laws but merely applying them. But, the dichotomy between creation of laws and interpretation could be false. Let us take the following illustration from the famous Hart-Fuller debate. (H. L. A. Hart, "Positivism and the Separation of Law and Morals", 71 *Harvard Law Review* 593, 619 (1958)). Professor Hart took the instance of a simple rule that stated: "No vehicle shall enter the park". If a Volkswagen Polo intends to enter the park, it is clear that the only word that requires interpretation is 'vehicle'. Is a Volkswagen Polo a vehicle? Yes. Should it be denied entry? In accordance with the rule, since a 'vehicle' is prohibited from entry, the answer ought to be in the affirmative.

Now, let us look at the slightly altered situation. A man walking in the park suddenly has a cardiac arrest and a Volkswagen Polo is being used as an emergency ambulance. Would that Volkswagen Polo fall foul of the statute? A literal interpretation of the rule would suggest that the car is a vehicle and hence it ought to be prohibited from entry. But, this sort of a literal interpretation will clearly militate against common sense. It is difficult to reconcile the literal rule with the purpose/context of the rule. The context/purpose of the rule would not suggest that a person who needs medical care in the park not be permitted any medical care or attention. Accordingly, the context/purpose of the rule is extremely significant.

The Context Rule

The context/purpose rule of interpretation is in accord with common sense. Words are normally interpreted in their context.

In order to illustrate, assume that in the above-mentioned park where a Volkswagen Polo was involved, now faces another problem. A physically challenged person wishes to enter the park in his motorised wheelchair. Is the wheelchair a 'vehicle' within the meaning of the rule 'no vehicle shall enter the park'? Would the wheelchair be prohibited?

Our common sense tells us that it would be 'unfair' to prohibit the wheelchair in the park. Why? What is the context/purpose behind the rule? It is likely that entry of vehicles would

disturb the users of the park, and hence it does not make sense to let vehicles enter the park. A physically challenged person, however, would not be able to use the park at all if his wheelchair is prohibited. Does the context/purpose of the rule intend to exclude a class of people, physically challenged persons, from using the park? The answer is in the negative.

Sometimes, words used in the rule themselves indicate the applicable interpretation. The rules of *noscitur a sociis* and *ejusdem generis* are used in such context. *Noscitur a sociis* is a Latin maxim which stands for 'a word is known by the company it keeps'. *Ejusdem generis,* which in Latin means, 'of the same kind or class', suggests that when a general word or phrase follows specific words or phrase, the general word or phrase will be interpreted to include only the items of the same type as those listed.

Illustration: In the phrase 'horses, cattle, sheep, pigs, goats, or any other farm animal', the general language 'or any other farm animal' — despite its seeming breadth — would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens. (*Black's Law Dictionary*)

Illustration: A.12 of the Constitution states that '[i]n this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". In the question whether International Airport Authority of India is 'State' within the meaning of A.12 of the Constitution, the Supreme Court has held in the affirmative, suggesting that the phrase 'other authorities' takes its colour from the remaining provisions in the Article. (*Ramana Dayaram Shetty* v. *International Airport Authority of India*, AIR 1979 SC 1628)

The Mischief Rule

The mischief rule states that one should not only be concerned with the statute in question, but also the position before the statute. Accordingly, it is critical to keep in mind the situation before the statute and the 'mischief' that the statute intended to remedy. The statute should then be interpreted in such a manner as to suppress the mischief and advance the remedy.

Illustration: In *Hindustan Lever Employees Union* v. *Hindustan Lever Limited,* AIR 1995 SC 470, the scheme of amalgamation between Tata Oil Mills Company Limited (TOMCO) and Hindustan Lever Limited was in dispute. The employees of both Hindustan Lever Limited and TOMCO were concerned about the amalgamation. One of the grounds of attack against the scheme was the absence of approval of the central government as required under S.23 of the Monopolies and Restrictive Trade Practices Act, 1969. That, however, was deleted in 1991. Referring to the mischief rule, the Supreme Court, speaking through Justice S. C. Sen, stated in para 69 that it is significant to take into account the mischief that was sought to be cured through the amendment of the statute. Accordingly, the court held that once the said section has been deleted from the statute book, the requirement of prior approval of the Central Government cannot be brought back through the backdoor.

Interpretation to Avoid Absurdity: The Golden Rule

The "golden rule" is that (a) the literal (primary) meaning must be adopted unless (b) this results in absurdity. While some call (a) the golden rule for the addition that it brings, others merely refer to (b) as the golden rule. The rule, however, is in consonance with context/purpose-based interpretation. A statute cannot be interpreted to the extent that it becomes absurd.

Illustration: In *S.R. Batra* v. *Smt. Taruna Batra,* (2007) 3 SCC 169, in her claim against her mother-in-law, Smt. Taruna Batra relied upon the definition of 'shared household' under Section 2(s) of the Protection of Women from Domestic Violence Act, 2005. That section, read along with Ss.17 and 19(1) of the Act suggested that 'shared household' means a

household irrespective of title where the aggrieved person 'lives or at any stage has lived in a domestic relationship...' The Court rejected the above suggestion as absurd, as the reliance upon such an argument would mean that even though the couple may have stayed at the house of any number of relatives such as husband's uncles and others, the wife would have a claim against all such properties. The claim of the wife has to be balanced against others' property rights. The Court confined the claim of the wife against the property owned/rented by the husband and not other relatives. Justice Markenday Katju categorically stated that '[i]t is well settled that any interpretation which leads to absurdity should not be accepted' (para 20).

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 10: Professional Ethics and the Code of Conduct for Advocates

Introduction

Although it is primarily the Bar Council of India ("**the BCI**") that has the power to frame rules laying down standards of professional conduct to be followed by advocates, the rules framed by the BCI are not exhaustive. The rights, privileges, and obligations of advocates would be found, *inter alia*, in the Code of Civil Procedure, 1908 the Advocates Act, 1961 ("**the Advocates Act**"), as well as recognised principles, doctrines and traditions governing the members of the Bar, and finally, the rules framed by the various High Courts and the State Bar Councils. (*Oil and Natural Gas Commission* v. *Offshore Enterprises*, AIR 1993 Bom 217)

Definition of an Advocate

'Advocate' means an advocate entered into any roll under the Advocates Act (S.2(1)(2), Advocates Act).

Admission and Enrolment

The BCI may make rules to discharge its functions under the Advocates Act, and in particular, such rules could prescribe the class or category of person entitled to be enrolled as advocates. (S.49(1)(ag), Advocates Act)

The Advocates Act provides that certain persons shall not be admitted as advocates on the state rolls. These persons are:

- Those convicted of an offence involving moral turpitude;
- Those convicted of an offence under the provisions of the Untouchability (Offences) Act, 1955);
- Those dismissed or removed from employment or office under the state or on any charge involving moral turpitude.

The Section provides that the prohibition will cease to have effect on elapse of a period of two years from the convict's release, or the employee's/ officer's dismissal/removal from service. (S.24A(1), Advocates Act) (*See J. N. G. Gupta* v. *L. G. Assam*, AIR 1959 Assam 134) (Sec. 24(a)(1) makes no mention of 'conviction'. It lays down that The bar does not extend to a person who, having been found guilty, has been dealt with under the Probation of Offenders Act, 1958 (S.24(A)(2), Advocates Act)

Illustration: A applied for a government job. A certain percentage of seats had been reserved for a certain backward class. A, who was keen on getting the job, and did not belong to the reserved class, submitted a false certificate in order to secure a position. It was held, that the act of submitting a false certificate amounted to a crime of moral turpitude, and A was convicted. A would be prohibited from being enrolled as an advocate for a period of two years of release. (*Kumari Madhuri Patil* v. *Additional Commissioner*, *Tribal Development*, AIR 1995 SC 94)

Illustration: A, an advocate assaulted the opposing counsel B, with a knife, during the lunch interval in a Munsif's Court. A pistol shot is also said to have been fired by A at the time of incident. A was convicted of the offence, and the High Court affirmed the conviction. The State Bar Council can debar A from practicing as an advocate for serious misconduct. The Disciplinary Committee of the State Bar Council would be empowered to pass an order imposing punishment on an advocate found guilty of professional or other misconduct. (Based on *Himkat Ali Khan* v. *Ishwar Prasad Arya*, AIR 1997 SC 864)

Note that an applicant who applies to be enrolled as an advocate, and is convicted of a crime of moral turpitude as illustrated above, would be denied enrolment for two years from the date of release.

Illustration: In the example above, instead of attacking someone with a knife, had A been convicted of stealing money as an officer in a state institution (such as the State Bank, or the Income Tax Department), A having committed a crime of moral turpitude, would be removed from the roll of advocates for a period of two years.

Had A been an applicant who had been removed from the rolls for conviction of a crime of moral turpitude, A would not be allowed to enrol as an advocate till after a period of two years, from his release.

Illustration: A, an advocate would also be removed from the rolls , if convicted of an offence under the provisions of the Untouchability (Offences) Act, 1955. Similarly, an applicant would be prohibited from being enrolled for a period of two years from conviction of an offence under the provisions of the Untouchability (Offences) Act, 1955.

Fraud or Misrepresentation in Enrolment

The BCI may remove an advocate's name from the rolls if it is satisfied that a person has had his name entered on the roll of advocates by misrepresentation as to an essential fact or by fraud or undue influence. This removal, however, will not take place without giving such a person an opportunity of being heard. (S. 26 (1), Advocates Act)

Fraud is a cheating intended to get an advantage. (*S. P. Chegakvaraya Naidu* v. *Jagnath*, AIR 1994 SC 583)

Illustration: P seeks enrolment as an advocate. P, however, did not disclose prior convictions under Ss. 411 and 473 of the Indian Penal Code. P's name was removed from the rolls. Under S.17 of the Indian Contract Act, P had a duty to speak; therefore, even if there was no column in the form for disclosing previous convictions, P should have disclosed it. (*Joginder Singh* v. *Bar Council of India*, AIR 1975 Del 192)

Illustration: P, a pleader, concealed the fact that there was a proceeding pending against P for misconduct. P is not entitled to seek enrolment under the Advocates Act. (*Inder Singh*; *In re*; 1963 (65) PLR 619)

Please see the illustrations to S.17 of the Indian Contract Act, and the definition of 'misrepresentation' in S.18 of the Indian Contract Act in this context.

Once a State Bar Council has refused a person's application for admission as an advocate, no other State Bar Council may entertain an application for admission of the same person as an advocate, unless both, the Bar Council which refused the application, and the BCI, consent in writing. (S.27, Advocates Act)

Restriction on other Employment

A person who wishes to take up the legal profession must make a choice. If she enters the profession of law as a pleader, she must make up her mind to conduct the business of pleader and nothing else. (*Re S, a Pleader, Raghunathpur*, AIR 1936 Pat 1)

The Bar Council of India Rules, 1975 ("**the BCI Rules**") impose restrictions on other employment.

- An advocate cannot personally engage in any business; but an advocate may be a sleeping partner in a firm, as long as, in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession. (BCI Rules, Part VI, Chapter II, Section VII, Rule 47)
- An advocate can be Director or Chairman of the Board of Directors of a Company with or without any ordinary sitting fee; however, an advocate's duties as a Director or Chairman of the Board of Directors of a company cannot not be of an executive character. An advocate shall not be a Managing Director or a Secretary of any Company. (BCI Rules, Part VI, Chapter II, Section VII, Rule 48)
- An advocate cannot be a full-time salaried

employee of any person, government, firm, corporation or concern, while the advocate is engaged in practice.

- If an advocate takes up an employment, the advocate has to inform the fact to the Bar Council on whose roll the name of the advocate appears, and shall not practice as an advocate as long as she is employed. (BCI Rules, Part VI, Chapter II, Section VII, Rule 49)
- The State Bar Council can allow an advocate to serve as a full-time salaried Law Officer of the Central or state government, or of any public corporation or a statutory body. (Ss 28(2)(d) and 24(1)(e), Advocates Act, read with the BCI Rules, Part VI , Chapter II, Section VII, Rule 49)
- A 'Law Officer' is a person who is required to act and/or plead in Courts on behalf of the Central Government or a State Government, or any public corporation or body constituted by statutes. (BCI Rules, Part VI, Chapter II, Section VII, Rule 49)

An advocate who has inherited, or succeeded by survivorship to a family business may continue in the family business. An advocate may not, however, personally participate in the management of such a business. An advocate may continue to hold a share with others in any business that the advocate received by survivorship or inheritance or by will. The advocate cannot, however, personally participate in the management of any business which was descended to her by survivorship or inheritance or by will. (BCI Rules, Part VI, Chapter II, Section VII, Rule 50)

Illustration: A received a maintenance allowance under S.17B of the Industrial Disputes Act, whilst a workmens' dispute involving A was pending in the higher court and was simultaneously, practicing law as an enrolled Advocate. A is guilty of misconduct and would be prohibited from practicing law. (*Shaik Mahboob Hussain* v. *Bar Council of State of Andhra Pradesh High Court Hyderabad,* AIR 2003 NOC 295)

Illustration: In the example above, if, instead of receiving compensation under the Industrial Disputes Act, even if A had simply been a full-time salaried employee of any person, government, firm, corporation or concern, while A is engaged in practice, A would be in violation of the rules.

Illustration: In the example above, A could be allowed under the State Bar Council rules to be a full-time salaried law officer acting and/or pleading in Courts on behalf of the Central or state government or of any public corporation or body constituted by statutes.

Illustration: In the example above, if, instead of receiving compensation under the Industrial Dispute Act, A was serving as a director or chairman of the board of directors of a Company with or without any ordinary sitting fee, A would not be violating the Rules. Additionally, none of A's duties as a Director or Chairman of the Board of Directors should be of an executive character, nor can A be a Managing Director or a Secretary of any Company.

Illustration: In the example above, A could continue a family business, had A by survivorship or inheritance or by will, received a share in a family business. A would not, however, be permitted to personally participate in the management of such a business.

An advocate may:

- Review Parliamentary Bills for a remuneration;
- Edit legal text books at a salary;
- Do press-vetting for newspapers;
- Coach pupils for legal examination;
- Set and examine question papers; and
- Subject to the rules against advertising and full-time employment, engage in broadcasting, journalism, lecturing and teaching subjects, both legal and non-legal. (BCI Rules, Part VI, Chapter II, Section VII, Rule 51)

The B.C.I. Rules allow an advocate to be engaged in part-time employment, with the consent of State Bar Council, provided:

- That in the opinion of the State Bar

Council, the nature of the employment does not conflict with her professional work, and

- Is not inconsistent with the dignity of the profession.
- This Rule is subject to any directives issued by the BCI in this regard, from time to time. (BCI Rules, Part VI, Chapter II, Section VII, Rule 52)

Duties of an Advocate

Under the BCI Rules, apart from other duties, an advocate also owes a duty to a client, the court, colleagues, and opponents.

Duties of an Advocate towards Clients

Duty to Accept Brief

An advocate must accept any brief in the Courts or Tribunals or any other authorities; the fee should be consistent with the advocate's standing at the Bar and the nature of the case. An advocate may refuse to accept a particular brief in special circumstances. (BCI Rules, Part VI, Chapter II, Section II, Rule 11)

Illustration: In a criminal case against C, C could not secure the services of any senior members of the Bar. C went to every member of the Bar, however each one of them refused to represent C. Some senior members of the bar refused to appear because of their connection with the complainant, and all others had been retained by the complainants. It was held that, a lawyer has no right to reject a brief offered to her on payment of the fee agreed upon between the parties on grounds of connection to the opposing party. (*Lalta* v. *Zahoor Ahmed*, AIR 1925 Oudh 672)

Duty to not withdraw from an engagement: An advocate cannot ordinarily withdraw from an accepted engagement, without:

- Sufficient cause; and
- Unless reasonable and sufficient notice is given to the client.

If an advocate withdraws from an engagement, the advocate must refund any part of unearned fee to the client. (BCI Rules, Part VI, Chapter II, Section II, Rule 12)

Illustration: A, an advocate, wanted to retire from a case. A did not, however, file any instruction providing sufficient cause to retire. Further, A did not provide sufficient notice to the client, C. A also did not ensure the refund of the parts of fees that was unearned. A would not be allowed to retire from the case. (*Patel Maganlal Dhanijbhai* v. *Patel Laxmidas Narainbhai Kansagara*, AIR 1988 Guj 48)

Duty to not accept brief where an advocate is likely to be called as a witness: An advocate should not accept a brief or appear in a case in which an advocate has reason to believe that she will be a witness. If, after being engaged in a case, it becomes clear to the advocate that she is a witness on a material question of fact, she should not continue to appear as an advocate, if the advocate can retire without putting at risk the client's interests. (BCI Rules, Part VI, Chapter II, Section II, Rule 13)

A civil court has an inherent power to order a person to cease to appear as an advocate, if the advocate has become a material witness, and a *bona fide* application for withdrawal of the advocate is made. (S.151, Code of Civil Procedure, 1908)

Illustration: In a partition suit, A, an advocate, was representing defendant, D. D submitted an affidavit from P, which was critical to the case. The affidavit contained identification by the advocate, A. A here is a material witness to prove the genuineness of the affidavit. A is disbarred from appearing in the case, due to the possibility being called as a witness. (*Chhatrapati Shivaji* v. *State of Bihar*, AIR 1990 Pat 157)

An advocate has a duty to make full and frank disclosure pertaining to any interest in the controversy or connection with the parties. An advocate should (at the beginning and during an engagement with the client), make full and frank disclosures to the client, relating to any connection with the parties. An advocate must also disclose any interest the advocate might have, in or about the controversy, that a client

would like to know to decide whether to engage the advocate, or continue the engagement of the advocate. (BCI Rules, Part VI, Chapter II, Section II, Rule 14)

Illustration: Advocate A was engaged by C, the client, to file a suit on two promissory notes for recovery with interest due against a debtor, D. Advocate A knew the D for 7-8 years and had been appearing for her in succession certificate proceedings. A, however, accepted the brief and did not inform C about prior connection with D. A has violated Rule 14, as A should have made a full and frank disclosure to C. A could only continue representing C, if C had asked A to continue after A had disclosed his connection with D. (*V. C. Rangaduri* v. *D. Gopalan*, AIR 1979 SC 281)

An advocate has a duty to uphold the interest of the client, regardless of personal opinion. An advocate must fearlessly uphold the interests of the client, by all fair and honourable means, without regard to any unpleasant consequences to herself or to any other. An advocate shall defend a person accused of a crime, regardless of the advocate's personal opinion as to the guilt of the accused. An advocate must understand that an advocate's loyalty is to the law, and law requires that no person should be convicted without adequate evidence. *(*BCI Rules, Part VI, Chapter II, Section II, Rule 15)

Illustration: A is retained by C, the client, to defend C from an offence C allegedly committed under S.289 of the India Penal Code. C was charged with criminal negligence in taking care of a pet which had aggressive tendencies. The pet caused serious harm to a person, J. Assume that A is very scared of aggressive pets, and feels strongly that pets which can harm human beings have no place in society. A also believes that such pet owners should be taught a lesson. Here, A is obligated under the rules to not let A's personal opinion come in the way of an effective defence for C in a criminal matter. A cannot be concerned about unpleasantness to anyone else in the course of defending C either. A must also appreciate that C should be not be convicted without adequate evidence. (Based on *Muhammad Sadique* v. *Emperor*, (1904) 1 Cr LJ 1059 (All))

Duty to prosecute in a fashion that does not lead to conviction of innocent: A prosecutor of a criminal trial must prosecute in a manner, which does not lead to conviction of the innocent. A prosecutor must also ensure that there is no suppression of material that can establish the innocence of the accused. (BCI Rules, Part VI, Chapter II, Section II, Rule 16)

Illustration: P was prosecuting D in a high-profile murder case. The case received immense media attention, and P was praised for building a strong case. P had found nine witnesses, who were ready to testify that D was the murderer. As time went by, however, P found that 8 of those 9 witnesses had contradicted themselves or withdrawn their statement. P started developing serious doubts about the truthfulness of the witnesses. P also discovered that the only witness willing to testify herself had a motive to murder the victim. Under the circumstances, P has an obligation to disclose the facts and refrain from prosecuting D based on the statement of questionable witnesses. (Based on *Davis* v. *State*, 660 S.E.2d 354)

There is also a duty to refrain from breaching obligations of nondisclosure of privileged and confidential information relating to a client under S.126 of The Indian Evidence Act, 1872 ("**the Evidence Act**"). An advocate must not, directly or indirectly, breach the obligations under Section 126 of the Evidence Act. (BCI Rules, Part VI, Chapter II, Section II, Rule 17)

S.126 of the Evidence Act deals with professional communications, and confidential information, and includes:

- Any communication for the purpose of engagement made to the advocate by the client during the engagement.
- Contents or condition of any document with which the advocate has become acquainted, for the purpose of his professional employment, during engagement, and

- Any advice given by advocate to the client during the engagement. (S.126, Evidence Act)

This duty of non-disclosure does not extend to:

- Any communication made in furtherance of an illegal purpose; and
- Any fact observed by an advocate, in the course of his employment that shows that any crime or fraud has been committed, since the commencement of his employment, irrespective of whether such fact comes to his knowledge through or on behalf of his client.

Illustration: A says to B, an attorney - "I have committed forgery and I would like you to defend me." As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure. (S.126(a), Evidence Act)

An Advocate may disclose information in the following situations:

- An advocate can disclose information if the client gives express consent to disclose any communication.

Illustration: For instance, in the illustration above, where A says to B, an attorney: "I have committed forgery and I would like you to defend me", A also says to B "I really want to come clean, so if the judge pardons me I would be more than happy to accept the charges." Here, B can disclose the information to the court, if the judge is willing to pardon A. Please note that the only reason B can disclose this information is that the client has given express consent.

- An advocate can disclose the information if the client makes any communication in furtherance of any illegal purpose. (S.126(1), Evidence Act)
- In the landmark case of *Clark* v. *United States*, the U.S. Supreme Court held, "A client who consults an attorney for advice that will serve the client in the commission of a fraud will have no help from the law. " The client must let the truth be told. (*Clark* v. *United States*, 289 U.S. 1, 15 (1933))

Illustration: A, a client, says to B, an attorney: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue." The communication, being made in furtherance of a criminal purpose, and is not protected from disclosure. (S.126(b), Evidence Act)

Illustration: A, being charged with embezzlement, retains B, an attorney to defend her. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, and that this entry was not in the book at the commencement of his employment. This, being a fact observed by B in the course of employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure. (S.126(c), Evidence Act)

The obligation imposed by S. 126 continues after the employment has ceased. (S.126, Evidence Act)

Duty to refrain from fomenting litigation: An advocate must not, at any time, foment litigation. In other words, an advocate must not encourage or push a party into litigation (BCI Rules, Part VI, Chapter II, Section II, Rule 18)

It should be the first duty of a member of the legal profession to compose family differences and settle dispute and controversies, by amicable settlement, and thereby prove how mistaken is the popular notion that lawyers foment dissentions for their own ends. (Justice Raj Kishore Prasad, *Paper Read at Rotary Club Meeting Patna*, 1956 AIR Journal Section)

Illustration: C is one of the three children and heirs with a one-third interest in undivided ancestral property. C approaches A, an advocate, requesting an alternative to litigation through which the share in the familial property could be settled fairly and amicably. A says to C that from twenty years

of professional experience, A is of the view that the person who "…goes to the court and fights really dirty gets the most in a ancestral family dispute of this nature." A, here is fomenting litigation. C came to A with the purpose of finding a way in which to amicably settle the matter; whereas A is encouraging C to drag the family into litigation.

An advocate has a duty to act only on the instruction of the client, and no one else. **(**BCI Rules, Part VI, Chapter II, Section II, Rule 19)

Illustration: A, an advocate, withdrew a suit filed by the client for declaration that she was not the lawfully wedded wife of the defendant. A then filed an application for maintenance without instructions from the client by obtaining her signature on blank sheets, on a false premise. A is guilty of professional misconduct for acting without the client's instructions. (*Gian Chand* v. *Bar Council of India*, (1997) 11 SCC 108)

Illustration: P initiated a manufactured litigation in name of J, who is very old, weak and mentally infirm. P instructs advocate A in the matter. A had never met J, and is not sure whose instruction P is acting on. Under the circumstances, the litigation cannot continue, as P does not have the legal capacity to instruct A. A has an obligation under Rule 19 to act solely on the instruction of the actual client, J. (*Mahendra Pratap Singh* v. *Padam Kumaru Devi*, AIR 1993 AIR 143)

Duty to refrain from a fee arrangement contingent upon outcome of litigation: An advocate cannot fix a fee based on the results of the litigation or agree to share the proceeds of litigation. (BCI Rules, Part VI, Chapter II, Section II, Rule 20)

Illustration: A, an advocate, entered into an agreement with C, the client, who was dismissed from service. The fee agreement entailed that, that if A were able to recover past salary and allowance, A would receive a fee of Rs.5,000/-. A is barred from agreeing to receive a fee dependent on the success of suit or agree to share the proceeds of that litigation under Rule 20, and this arrangement is not permitted. (*P. Venkatadri Shastri* v. *Sardar Kesar Singh*, 1975 (2) APLJ 180)

An advocate cannot buy or traffic in or stipulate for or agree to receive any share or interest in any actionable claim.

This restriction does not apply to:

- Stock, shares and debentures of government securities, or
- Any instruments which are, for the time being, by law or custom, negotiable or
- Any mercantile document of title to goods. (BCI Rules, Part VI, Chapter II, Section II, Rule 21)

Illustration: A, an advocate, represented a client, C, in a matter against D. The suit was decreed and A bought the decree from C through a deed of transfer. The deed of transfer stated that D owed C a sum of Rs. 276/- under the decree, and the decree was transferred to A for this amount. A then proceeded to execute the decree against D. A is guilty of misconduct under Rule 21, as A has purchased an interest in an actionable claim. (*Re L, a Pleader*, AIR 1938 Mad 276)

An advocate cannot, directly or indirectly, bid for or purchase (either in the advocate's own name or in any other name, for the advocate's own benefit or for the benefit of any other person):

- Any property sold in the execution of a decree or order in any suit, appeal or other proceeding in which the advocate was in any way professionally engaged;
- An advocate is not, however, prohibited from bidding for or purchasing for a client, any property that the client may herself legally bid for or purchase; and
- The client must have expressly authorised the advocate in writing to bid on the client's behalf. (BCI Rules, Part VI, Chapter II, Section II, Rule 22**)**

Illustration: A, an advocate, purchased a property which was under litigation. The sale deed was fictitiously drawn in the name of B, to conceal the actual purchase by A. A,

however, appeared as a pleader in the litigation, and succeeded. B executed a deed of relinquishment in favour of A. A is guilty of misconduct under Rule 22 as A acquired an interest in a pending suit, in which A was acting as an advocate. (*Sheo Narain Lal* v. *Mir Amjad Ali*, AIR 1925 Oudh 130)

Duty to refrain from bidding in court auction or otherwise acquiring a property that is subject matter of litigation: An advocate cannot (directly or indirectly):

- Bid in court auction; or
- Acquire through sale, gift, exchange or any other mode of transfer **(**either in his own name, or in any other name for its own benefit, or for the benefit of any other person);

Any property that is the subject matter of any suit, appeal or other proceedings (in which the advocate was in any way professionally engaged.) (BCI Rules, Part VI, Chapter II, Section II, Rule 22A**)**

An advocate is not prohibited from bidding for, or purchasing for her client, any property which the client may herself legally bid for or purchase, provided the Advocate has been expressly authorised in writing by her client to bid, in this behalf. (BCI Rules, Part VI, Chapter II, Section II, Rule 22**)**

Duty to not adjust fee payable to the advocate by the client against personal liability owed by the advocate to the client: An advocate must not adjust fees payable to the advocate by a client against the advocate's own personal liability to the client, when such liability does not arise in the course of his employment as an advocate. (BCI Rules, Part VI, Chapter II, Section II, Rule 23)

Illustration: A, an advocate, owes C Rs.500/- as a debt for rent. C approaches A to draft his will.. A says to C "I will draft the will; in any event, I owe you Rs.500/-, and it will be a good way to settle the debt." A is in violation of Rule 23, as A is adjusting the legal fees for writing a will against the rent money, which is a personal liability A owes to C.

An advocate must not abuse or take advantage of the confidence reposed in her by the client. (BCI Rules, Part VI, Chapter II, Section II, Rule 24)

Illustration: A, an advocate, was retained by the testatrix, T, to draft a will. A made an entry to this effect in the register of wills maintained by A, and also gave a receipt to T. After the death of her husband, T hired another advocate, B. B requested A to return the will. A denied having the will. A's act of not returning the will that was entrusted to A by T is an abuse of trust reposed in A by T. (*John D'Souza* v. *Edward Ani*, (1994) 2 SCC 64)

An advocate should keep accounts of the client's money entrusted to the advocate by the client.

The accounts should show:

- The amounts received from the client or on the client's behalf;
- The expenses incurred for the client; and
- The debits made on account of fees (with respective dates and all other necessary particulars). (BCI Rules, Part VI, Chapter II, Section II, Rule 25)

Illustration: A, an advocate, was representing C, the client, in a criminal appeal. A received a sum of Rs.750/- from the client towards printing expenditures. A deposited the sum with the Court. Later, A withdrew the unspent balance of Rs.242/- without C's consent, and kept it. A is guilty of misconduct, as she should have kept a proper account of the money when she received it from the client and also when she received it from the Court. A should also have shown in detail how much A received in the form of expenses, and how much was refunded to A by the court. A should also have kept a detailed note with dates and particulars of expenditure. (*M, an Advocate, Re*, AIR 1957 SC 149)

Where moneys are received from or on account of a client, the entries in the accounts should contain a reference as to whether the amounts have been received for fees or

expenses. During the course of the proceeding, no advocate may, except with the consent in writing of the client concerned, be at liberty to divert any portion of the expenses towards fees. (BCI Rules, Part VI, Chapter II, Section II, Rule 26)

Illustration: A, an advocate, withdrew an amount from the court without the consent of his client. Furthermore, A did not pay the entire amount withdrawn to the client, but instead only paid the balance that was left after deducting the fees alleged to be due. When A received money from the court on behalf of C, A should have, in consultation with C, maintained an account of money with reference to whether the money was received on account of fees or expense. A is guilty of misconduct, as A could not have diverted the funds towards fees without C's consent, before the proceedings in court are over. (*Varigonda Kameswaramma* v. *Duvvuri Viswanadhan*, AIR 1964 AP 158)

Where an advocate receives any amount given by or on behalf of a client, the advocate must inform the client, as early as possible, of the receipt. (BCI Rules, Part VI, Chapter II, Section II, Rule 27)

Illustration: A, an advocate, received money on behalf of a client, C. A, however, did not intimate C of the receipt. On discovering that A had received the money, C demanded the money. Despite C's demands, A failed to return the money to C. A is guilty of misconduct. A should have informed C as early as possible when A had received money on C's behalf. (*Re an Advocate*, AIR 1961 Ker 209 (FB))

Upon the termination of proceedings, an advocate can appropriate any sum remaining unexpended out of the amount paid or sent to her for expenses or any amount that has come into his hands in that proceeding, towards the settled fee due to her. (BCI Rules, Part VI, Chapter II, Section II, Rule 28)

Illustration: In the example above, A could have kept a portion of the amount from the money received towards any unsettled fee due to her, had it been at the end, of a proceeding.

At the termination of the proceeding, where the fee has been left unsettled, the advocate can deduct from the client's money remaining with the advocate (in the same matter) the fee payable to the advocate under the rules of the Court in force at the time. The balance, if any, must be refunded to the client. (BCI Rules, Part VI, Chapter II, Section II, Rule 29)

Illustration: In the example above, A could have kept a portion from the amount of money A had received towards any unsettled fees, if the proceedings had come to an end. The amount of unsettled fees retained by A, however, should be under the rules of the Court in force for at that time. A is also obligated to refund the balance amount to the C.

An advocate must furnish a copy of client's account, if a client so demands, provided that the client pays the necessary copying fees. (BCI Rules, Part VI, Chapter II, Section II, Rule 30)

Illustration: In the example above, A is obligated to furnish a copy of the client C's accounts, if C so demands.

An advocate cannot enter into arrangements whereby funds in the advocate's hands are converted into loans. (BCI Rules, Part VI, Chapter II, Section II, Rule 31)

Illustration: In the example above, A would be prohibited from appropriating the money A had received on C's behalf into a loan. In other words, the balance of money left after fees and expenditure should be supplied to C as early as possible.

An advocate is prohibited against lending money to the client for the purposes of any action or legal proceedings: An advocate cannot lend money to the client for the purpose of any action or legal proceedings, in which the advocate is engaged by such a client. (BCI Rules, Part VI, Chapter II, Section

II, Rule 32)

Explanation: An advocate does not breach this rule, if in the course of a pending suit or proceeding, and without any arrangement with the client in respect of the same, the advocate feels compelled by reason of the rule of the Court to make a payment to the Court on account of the client for the progress of the suit or proceeding.

An advocate who has, at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, shall not act, appear, nor plead for the opposite party. (BCI Rules, Part VI, Chapter II, Section II, Rule 33)

Illustration: A, an advocate, appeared for C, the complainant, in a criminal matter. Later, A accepted a brief on behalf of D, the accused in the same matter. A has violated Rule 33, as A has first appeared on behalf of the complainant and then accepted a brief from the opposite party in the same matter, unless A has obtained the consent of all involved parties after a full disclosure of all facts. (*Chandrashekhar Somi* v. *Bar Council of Rajasthan*, AIR1983 SC 1012)

Duty to the Court

An advocate should always conduct herself with dignity and self-respect before the court. An advocate should not be servile. Whenever there is proper ground for serious complaint, against a judicial officer, it is an advocate's right and duty to submit his grievance to the proper authorities. (BCI Rules, Part VI, Chapter II, Section I, Rule 1)

An advocate, who has been guilty of contempt of court, shall not be permitted to hear, act, or plead in any court unless the advocate is purged of the contempt. (*Shaymalal Vyas* v. *Inderchand Jain and Another*, AIR 2008 MP 15)

The High Court can prevent a person under contempt to appear before it, as the High Court may make rules laying down the conditions subject to which an advocate may be permitted to practice in the High Court and the courts subordinate thereto. (S.34(1), Advocates, Act)

The Supreme Court of India is similarly empowered to prevent an advocate guilty of contempt, to act or plead before it, as the Supreme Court, with the approval of the President, can make rules for regulating the practice and procedure of the Court, which includes rules as to the persons practising before the Court (A.145(1)(a) of the Constitution of India)

The Supreme Court of India is also a court of record, and shall have all the powers of such a court, including the power to punish for contempt of itself. (A.129 of the Constitution of India)

Similar power to punish contempt is vested in every High Court. A High Court is also a court of record, and has all the powers of such a court, including the power to punish for contempt of itself. (A.215 of the Constitution of India)

Contempt of Court could be of Two Types

Civil Contempt

Civil contempt is a wilful disobedience of any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court. (S.2(b), The Contempt of Courts Act, 1971 ("**the Contempt of Courts Act**"))

Criminal Contempt

Criminal contempt is the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever, which:

- Scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or
- Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or
- Interferes or tends to interfere with, or

obstructs or tends to obstruct, the administration of justice in any other manner. (S.2(c), Contempt of Courts Act)

Illustration: Advocate A, aggrieved by an order of the Supreme Court dismissing a matter *in limine*, filed a writ petition before the Supreme Court, wherein A stated that the matter was improper for the Chief Justice of India to hear, and further stated that the dismissal was totally unjust, unfair, arbitrary, and unlawful, and a flagrant violation of the mandate under A.14; that was a violation of the sacred oath of office; and to declare that the Chief Justice's holding office was unfair. It was also asserted that since the first petition was not disposed of by a five-judge bench, the order was *non est*.

The Court held that scandalous and reckless use of such a language is a misconduct and violation of Rule 2, and amounts to criminal contempt. Also, the assertion that the order was *non est* interferes with the administration of justice, as it attacks judicial finality, and questions the authority of the court. (*Dr. D. C. Saxena* v. *Hon'ble Chief Justice of India*, AIR 1996 SC 2481)

An advocate must maintain a respectful attitude towards the court and must understand that the dignity of the judicial office is essential for the survival of a free community. (BCI Rules, Part VI, Chapter II, Section I, Rule 2)

Duty to refrain from unduly influencing a decision of court relating to a pending matter: An advocate should never influence the decision of a court by any illegal or improper means. Private communications with a judge relating to a pending case are forbidden. (BCI Rules, Part VI, Chapter II, Section I, Rule 3**)**

Illustration: A, an advocate, was defending D in a criminal matter. D was charged with an attack on the complainant, C. C had received head injuries and was examined by a doctor R, who submitted a report stating that C had sustained a fracture. A approached D and said she wished to secure a favourable report for Rs.300/-. A has engaged in an act of misconduct and violated Rule 3 as she was trying to influence the decision of the court by illegal or improper means by bribing R. (*Chandrashekhar Somi* v. *Bar Council of Rajasthan*, AIR 1983 SC 1012)

An advocate must make best efforts to restrain and prevent a client from:

- Engaging in unfair practices; or
- Doing anything in relation to the court, opposing counsel, or parties, which the advocate herself should not do.

An advocate must refuse to represent a client, who wants to continue improper conduct. An advocate should not consider herself a mere mouthpiece of the client. Furthermore, an advocate should exercise her own judgment in the use of restrained language in correspondence; must avoid scurrilous attacks in pleadings; and should not use intemperate language during arguments in court. (BCI Rules, Part VI, Chapter II, Section I, Rule 4)

Illustration: In the illustration above, where A, an advocate, was defending D in a criminal matter; D having been charged with an attack on complainant C, who had received head injuries; instead of A approaching D to secure a favourable report through bribery, had D approached A with a proposal to provide a favourable report on the payment of a bribe, it would have been A's duty to restrain D from engaging in an unfair and illegal practice. If D still insists on bribing the doctor, Rule 4 provides that A must refuse to represent D.

An advocate should appear in court at all times only in the prescribed dress and in a presentable manner. (BCI Rules, Part VI, Chapter II, Section I, Rule 5**)**

An advocate must not appear, act, plead, or practise before a court, tribunal, or any other authority mentioned in S.30 of the Advocates Act, if the sole or any member of the court, tribunal, or authority is related to the advocate as:

- Father, grandfather, son, grand-son, uncle, brother, nephew, first cousin, husband, wife, mother, daughter, sister, aunt, niece,

father-in-law, mother-in-law, son-in-law, brother-in-law daughter-in-law, or sister-in-law.

For the purposes of this rule, 'Court' means a Court, Bench or Tribunal in which the abovementioned relation of the advocate is a Judge, member, or the Presiding Officer. (BCI Rules, Part VI, Chapter II, Section I, Rule 6)

An advocate may not wear bands or a gown in public places other than in courts, except on such ceremonial occasions and at such places as the Bar Council of India or the court may prescribe. (BCI Rules, Part VI, Chapter II, Section I, Rule 7)

An advocate may not appear before any court, tribunal, or any other authority for or against an organisation, institution, society, or corporation, if the advocate is a member of the executive committee of that organisation, institution, society, or corporation. (BCI Rules, Part VI, Chapter II, Section I, Rule 8) "Executive Committee", by whatever name it may be called, includes any Committee or body of persons, which, for the time being, is vested with the general management of the affairs of the organisation or institution, society or corporation. This rule, however, does not apply to such a member appearing as friend of court (*amicus curiae*), or without a fee on behalf of a Bar Council, Incorporated Law Society, or a Bar Association.

An Advocate should not act or plead in any matter in which the advocate has a pecuniary interest. (BCI Rules, Part VI, Chapter II, Section I, Rule 9)

Illustration: A, an advocate, should not act in a bankruptcy petition when she herself is also a creditor of the bankrupt. *(*Illustration, BCI Rules, Part VI, Chapter II, Section I, Rule 9)

Illustration: A should also not accept a brief from a company of which she is a Director. (*Illustration*, BCI Rules, Part VI, Chapter II, Section I, Rule 9)

An advocate cannot act as a surety, or certify the soundness of a surety for a client for any legal proceedings. (BCI Rules, Part VI, Chapter II, Section I, Rule 10)

Illustration: A, an advocate, was representing C in a criminal matter. C was charged with a bailable offence. A certified C's solvency. A has violated Rule 10. (*Vijay Singh Rathore* v. *Murarilal*, 1980 1 (SCR) 205)

Duty to Opponent

An advocate must only communicate or negotiate with an opposing party regarding the controversy, through the counsel representing the opposing party. (BCI Rules, Part VI, Chapter II, Section I, Rule 34; *See also American Bar Association: Code of Professional Responsibility*, DR-7104)

Illustration: A, an advocate was representing W in a property dispute between two sisters, W and S. S was represented by another lawyer, T, in the matter. W told A that she does not care if she did not receive the most valuable part of the property, but she really wanted the village home, as she had fond memories of the place. A approached S directly and made her an offer whereby S could get most of the property except the village home. A has violated Rule 34 by negotiating directly with S about the controversy. A should have contacted T.

An advocate should do her best to carry out all legitimate promises made to the opposite party even though not reduced to writing or enforceable under the rules of the Court. (BCI Rules, Part VI, Chapter II, Section I, Rule 35)

Illustration: A, an advocate bought a property, from a client C. The property was the subject matter of a litigation. There were serious doubts about the validity of C's claim raised in the litigation, and A was aware of this. A subsequently sold the property to a third person, leading to further complications. A is guilty of misconduct; A owes a duty to be fair not just to the client, but also to the third party and court. Here, A has brought the process of administration of justice into disrepute. (*P. D. Gupta* v. *Ram Murthi*, (1997) 7 SCC 147)

Duty to Colleagues

An advocate should not solicit work or advertise, either directly or indirectly:

- By circulars, advertisements, touts, personal communications; or through
- Interviews, which are not warranted by personal relations; or
- By giving or inspiring comments in newspapers; and

An advocate should not allow her photographs to be published in connection with cases (in which the advocate has been engaged or concerned). (BCI Rules, Part VI, Chapter II, Section I, Rule 36)

An advocate's sign-board or name-plate, should comply with the certain specifications:

- It should be of a reasonable size;
- It should not state that the advocate is, or has been, President or Member of a Bar Council, or of any Association;
- It should not state that the advocate has been associated with any person or organisation, or with any particular cause or matter;
- It should not state that the advocate specialises in any particular type of work; and
- It should not state that the advocate has been a Judge or an Advocate General. (BCI Rules, Part VI, Chapter II, Section I, Rule 36)

Illustration: A, an advocate, addressed a letter to the State Government, soliciting their brief. A is guilty of professional misconduct under Rule 36 for soliciting work. (*Bar Council of Maharastra* v. *M. V. Dabolkar*, AIR 1976 SC 242)

An advocate cannot permit her professional services or name to be used in aid of, or to make possible, the unauthorised practice of law by any law agency. (BCI Rules, Part VI, Chapter II, Section I, Rule 37)

Illustration: A, an advocate, entered into a partnership with E, an engineer. The partnership deed provided that both, A and E, would have an equal share in the profit and loss of the partnership. Both A and E render legal advice regarding engineering contracts. A has violated Rule 37 by entering into a partnership arrangement with an engineer, whereby A and E were to share remuneration earned for legal services rendered. Further, A is enabling E in giving legal advice, although E is not authorised to do so by the State Bar Council. (*Based on* Canon 5.24 of the New York Bar Association)

An advocate cannot accept a fee less than the fee payable under the Rules when the client is able to pay the fees. (BCI Rules, Part VI, Chapter II, Section I, Rule 38)

x-x

Notes:

All India Bar Examination
Preparatory Material

Subject 11: Property Law

The term 'property' has not been defined in any statute in India. It is understood in the most generic sense to include all legal rights and benefits, which have an economic value. Property can, further, be classified into various categories: moveable and immoveable, tangible and intangible, corporeal and incorporeal.

The term 'immoveable property' has been defined in the General Clauses Act, 1897 to include:

- Land;
- Benefits arising out of land; and
- Things attached to earth or permanently fastened to things attached to earth.

Lease, mortgage and, charge, which constitute interest in immoveable property are considered as immoveable property. Rights such as the right to collect rent from the tenants of the land, and right to collect dues at a fair held on a plot of land, are benefits arising out of land, and hence immoveable property.

Under the Transfer of Property Act, 1882 ("**the Transfer of Property Act**"), a material is considered attached to earth in the following circumstances:

- *If the material is rooted in the earth (such as trees and shrubs)*: Trees and shrubs have been recognised to be rooted in earth, and hence immoveable property. Under the Transfer of Property Act, however, '*immoveable property shall not include standing timber, growing crops and grass*'. Standing timber is understood to mean trees that are fit for use for the purposes of building or repairing houses. A standing timber, as opposed to timber tree, includes only such trees which, if cut, can be used as a timber. A timber tree (that is, a tree which is growing and still deriving sustenance from soil) is an immoveable property.

  Illustration: In the Indian context, standing timber may include neem, sheesham, babul, and teak trees.

- *If the material is embedded in the earth*: In order to determine whether something is embedded in the earth or not, both the mode and the object of annexation are considered, the object of annexation being the more important consideration.

  Illustration: Blocks of stone placed on top of one another (with or without mortar, cement or other binding agent) for the purposes of forming a dry wall would be considered embedded in land, and hence, part of the immoveable property. Whereas, the same blocks of stone if deposited in builder's yard, and for convenience, if stacked one top of another to form a wall, would not be considered embedded in earth, and hence, will continue to be moveable property.

- *If the material is attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached*: This category includes the fixtures such as doors, windows and shutters of a house, which are attached to the house for the permanent beneficial enjoyment of the house.

Transfer of Property

Change in ownership of a property may occur in many ways, including on account of:

- Voluntary transfer by a person (regulated under the Transfer of Property Act);
- Transfer by way of succession or inheritance (regulated by the personal laws of succession);
- Transfer of property by operation of law (such as the Land Acquisition Act, 1894).

The Transfer of Property Act is the primary legislation that regulates transfer of properties between two or more 'living persons' (including companies, association of persons or bodies of individuals). The Transfer of Property Act defines transfer of

property to mean '*an act by which a living person conveys property, in present or in future, to one or more living persons, or to himself, or to himself and one or more other living persons*'.

'Living persons' also include companies, associations or body of individuals, whether incorporated or not.

Under S.7 of the Transfer of Property Act, a person is entitled to transfer property if (i) the person is competent to contract, and (ii) the transferor has either the title to the property, or has the authority to transfer the property. If the transferor does not have the title to the property, the transferor must have been authorised to transfer, such as by way of a power of attorney, or agency.

'*Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interests which the transferor is then capable of passing in the property and in the legal incidents thereof*'. (S.8 of the Transfer of Property Act)

Illustration: The legal incidents of the property may include the following:

- Where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;
- Where the property is machinery attached to the earth, the movable parts thereof; and where the property is a house the easements annexed thereto the rent thereof accruing after transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith.

Certain rights are not transferable as transfer of property. Such rights include the following:

- The chance of an heir apparent succeeding to an estate, or a relation succeeding to a legacy or similar rights. The possibility referred here is a bare possibility and not a possibility coupled with interest, such as contingent remainders or future interests.

Illustration:

- A, a Hindu, owning self acquired property, has a widow B and a brother C. C had a bare chance of succession in case he survives B; this right cannot be transferred.
- If A makes a settlement during his lifetime to his spouse B, and then to his child if any, and in default of a child, to C. C has an interest contingent on A having a child, and such interest is transferable.

- Mere right of re-entry on breach of condition subsequent is not transferable.

Illustration: A grants a lease of plot of land for 5 years to B with the condition that B shall not dig a tank on the land. B digs the tank. A transfers to C the right of re-entry for the breach of the condition committed by B. The transfer is invalid.

- Easement is not transferable independently of the dominant heritage (that is, the property to which the easement attaches).

Illustration: Right over one piece of land, such as right of way, for the benefit of another piece of land cannot be transferred without the transfer of the land.

- An interest in property, restricted in its enjoyment to the owner personally, cannot be transferred.

Illustration:

- A house lent to a person for personal use cannot be transferred by such person.
- A agreed to manufacture salt for B, and the terms of contract allowed B credit for payment and a discretion as to the quantity of salt to be demanded, B could not assign the contract as the right available to B was personal to B. (*Namasivaya Gurukkul* v. *Kadir Ammal*, (1894) ILR 17 Mad 168).

- Right to future maintenance cannot be

transferred.

Illustration: Villages allotted to a person under a compromise, for maintenance but without the power to transfer during the lifetime, was considered be a right to future maintenance and, hence not transferable. *Rajindra* v. *Sundara Bibi*, ((1925) ILR 47 All 385).

- Mere right to sue is not transferable.

The word 'mere' is of importance. A right to sue is personal to the party aggrieved, and there can be no transfer of right to sue for damages for tort or for breach of contract. However, where a property is transferred along with the right to recover damages or compensation in respect of that property, the transfer is valid. A debt or an actionable claim is not a mere right to sue and hence the transfer of such property is valid. Similarly, where a claim has been merged into a judgment and decreed, it is no longer a mere right to sue, and hence it is transferable.

Illustration: A agrees to sell 10 gunny bags to B on a future date. B transfers her interest to C. Thereafter A breaches the contract, and C proceeds to recover damages from A. C will be able to recover damages, since the assignment from B to C was not of a mere right to sue, but of its right to receive the performance of the contract. On the other hand, assignment by B to C of the right to recover damages after the breach of the contract would have been a mere right to sue and hence invalid.

- Public offices and salaries of public officers are not transferable.
- Stipends allowed to military, naval, air force, and civil pensioners of the Government and political pensions are not transferable.
- No transfer can be made in so far as it is (a) opposed to be the nature of the interest affected thereby, or (b) for an unlawful object or consideration, or (c) to a person legally disqualified to be a transferee.

There are certain things which, by, their own nature, are not transferable. These may include *res communes* (for example things belonging to the community, or of which no one is the owner), such as air, water, light etc; and *res extra commercium* (things which are outside the scope of commerce), such as things dedicated to public or religious use.

If a person is prohibited under law to transfer a property, such person is not entitled to transfer property under the Transfer of Property Act. For example, S.136 of the Transfer of Property Act prohibits a judge, legal practitioner or an officer connected with the court from purchasing an actionable claim.

- A tenant having an untransferable right of occupancy, and a farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of wards are not permitted to transfer their interest.

S.43 of the Transfer of Property Act stipulates that where a person fraudulently or erroneously represents that such person is authorised to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. For S.43 to become applicable, there must be a fraudulent or erroneous representation, such that the transferee has been misled into believing that the transferor has the power to transfer. The benefit of S.43 cannot be claimed by the transferee if the transferee did not believe in or act upon the representation. Also, the transfer must have been made for consideration, gratuitous transferees such as in case of gifts do not get the benefit of S.43. Finally, the right under S.43 is not automatic, but must be exercised, but only with respect to the interest transferor, while the contract subsists. If the transferee has repudiated the contract, or recovered the purchase money, the benefit under S.43 cannot be availed.

Illustration: A, a Hindu, who has separated

from his father B, sells to C three fields, X, Y, and Z, representing that A is authorised to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition, but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him. The right of the transferee under S.43 can be defeated if prior to the exercise of the option, the transferor transfers the property to another *bona fide* transferee without notice of the option of the first transferee.

Illustration: A represents a transferable interest in a property and mortgages it to B, while A had no interest in the property. A subsequently acquires a valid transferable interest in the property and transfers it to C, who had no notice of B's mortgage in the property. The transfer was made prior to the exercise of the option by B. B's mortgage will be subject to the right of C.

Restraints on Transfer

Under S.10 of the Transfer of Property Act, any condition or limitation absolutely restraining the transferee (or any person claiming under him) from transferring the property is void. While an absolute restraint is invalid, partial restraints are not prohibited under S.10. In determining whether a restraint is partial or absolute, the effect of the restraint is looked into, and not merely the words that describe the restraint.

Illustrations:

- A restriction that A shall not transfer the property by way of gift is valid, as it is a partial restraint.
- A condition that the transferee shall not transfer the property for a period of 3 years is valid, being a partial restraint. On the other hand a condition that the transferee shall not transfer the property for a period of 20 years has been held to be an absolute restraint.
- A sells the property to B, and B executes an independent agreement with A whereby B undertakes to grant A the first right to purchase the property, if B intends to sell the same. The agreement is valid.

S.10 of the Transfer of Property Act recognises two exceptions. First, in cases of leases, restrictions on alienations, which are for the benefit of the lessor, or those claiming under the lessor are valid. Second, in case property is transferred to a married woman (other than Muslim, Hindu, or Buddhist women), restrictions can be imposed on the ability of such woman to transfer or charge the property during her marriage.

S.11 of the Transfer of Property Act stipulates that in the event of a transfer of property where an absolute interest is created in the property by one person in favour of the other, but the terms of transfer direct that such interest be applied or enjoyed in a particular manner, the transferee may enjoy or dispose off the interest as if there is no such condition. While S.10 deals with restrictions on the transfer of property, S.11 relates to the enjoyment of the interest. It may be noted that a restriction on enjoyment may be inconsistent with absolute interest, but may be consistent with a limited interest. S.11 applies only in cases of absolute transfer of an interest.

Illustrations:

- A makes an absolute gift of a house to B with the direction that B shall reside in it. The gift is absolute, therefore, the direction is void. B may or may not live in the house.
- A makes a gift of the house to B in a condition that the gift will be forfeited if B does not reside in it. The condition is valid as the gift is not absolute for subject to the condition of defeasance.

Where, however, a direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of property belonging to the transferor, the transferor may enforce such direction or seek remedy for breach of the same.

Illustrations:

- A makes an absolute gift of a house to B,

and directs that B shall not raise the height of the house such that it obstructs the passage of light and air to A's adjoining house. The condition is valid.

- A grants a lease of a property to B, reserving for own use a few plots in the middle of the property, and directs B to allow passage to the reserved plots. The direction is binding.

A contractual obligation of the parties in relation to transfer of an immoveable property is commonly referred to as a 'covenant'. A covenant may take two forms: a positive covenant (that is, an obligation to perform an act or pay money), or a negative covenant (a restrictive covenant which forbids the commission of some act, for example, not to erect a building). In the case of immoveable property, covenants may run with the land, that is, the obligation or the benefit attaches to the land in such a manner that it passes to the transferee of the land (such as covenant of title). Covenants that run with the land affect the nature, quality or value of the land. Restrictive or Negative covenants run with the land, while positive covenants do not run with the land.

S.40 of the Transfer of Property Act prescribes that where:

- For the more beneficial enjoyment of an immoveable property;
- A person, independently of a right in the immoveable property of another;
- Has a right to restrain the enjoyment in a particular manner of the latter's property;

Such right may be enforced against a transferee with notice or a gratuitous transferee of the property affected by the right. Such a right cannot be enforced against a transferee for consideration and without notice of the right.

The above-mentioned rule incorporated in S. 40 of the Transfer of Property Act is famously known as the *Tulk* v. *Moxhay* rule (*Tulk* v. *Moxhay*, (1848) 41 ER 1143). By virtue of S.11 read with S.40 of the Transfer of Property Act:

- The original transferee is bound by both positive as well as negative covenants;
- A subsequent transferee is bound only by a negative covenant, provided the following conditions are fulfilled:

  - The transferee for consideration has notice of the covenant; and
  - The covenant is for the benefit of the adjoining land, and it must annex to the covenantee's land.

- A transferee with consideration and without notice is not bound by even the negative covenants. On the other hand, transferee without consideration is bound by the negative covenants even if the transferee does not have notice of the covenant.

Illustrations:

- If A has only one piece of land and sells it to B, a covenant (negative or positive) will not be binding on B.
- If A has two pieces of land X and Y and sells X to B with a covenant for the beneficial enjoyment of Y, the covenant would bind B, whether it is positive or negative.
- If B sells X to C, C would be bound by the covenant with A, if the covenant is negative and C has notice of it.

Transfer to Unborn Person and Rule against Perpetuities

While S.5 of the Transfer of Property Act defines transfer as a transaction between two living persons, S.13 recognises transfer for the benefit of unborn person. Two conditions are required to be fulfilled for transfer in favour of an unborn person to take effect:

- The transfer to the unborn person must be preceded by a transfer in favour of a living person, such as by way of trust; and
- The transfer to the unborn person must be transfer of the whole of residual interest in the property.

Therefore, while the property may be

transferred to any number of living persons prior to vesting in the unborn person, a limited transfer for life to an unborn person is not permitted under S.13.

Illustrations:

- A transfers property to B, in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest child of the intended marriage for life, and after the death of the eldest child, for A's second eldest child. The interest created in favour of A's eldest child does not take effect because it is limited only to his lifetime.
- A transfers his property to B for life, and thereafter to B's unborn first child, with the condition that if B's child changes religion, the property shall be forfeited. The interest created in favour of B's first child does not take effect as the transfer to the unborn child is not of the whole of the residual interest, since it is limited by a condition.

S.14 of the Transfer of Property Act stipulates that any transfer of property cannot operate to create an interest that takes effect after the lifetime of one or more persons living at the date of transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom the interest created is to belong upon attaining full age. S.14 provides that the vesting of the property cannot be postponed beyond the life-time of any one or more persons living at the date of the transfer, that is there must be no interval between the termination of the precedent interest of a living person, and the vesting of the interest in the unborn person. If the unborn person (on the date of the transfer) is born on the date of termination of the prior interest, such person takes a vested interest in the property at birth, immediately on termination of the prior interest. The vesting of the property, however, may be postponed until the age of majority, that is,18 years of age.

Illustrations:

- A is given an estate for life, and then to B for life, and then to B's unborn child. The child in this case must be in existence 'on or before' the date of expiry of the life estate in favour of B (that is, before B's death).
- A transfers a property to B for life and thereafter to such child of B as shall attain the age of 25 years, the child being unborn on the date of transfer. The transfer in favour of B for life is valid, but interest created in favour of B's son is void, as that extends beyond the minority of an unborn person.
- A transfers the property to B for life, thereafter to C for life and then to C's child as shall attain the age of 17 years. The interest created in favour of C's child is valid.

The rule stipulated under S.14 does not apply to personal agreements that do not create an interest in property. Also, S.15 provides that where in a transfer of property, an interest is created in favour of a class of persons in respect of some of whom the interest fails on account of Ss.13 or 14 of the Transfer of Property Act, the interest fails merely with regard to such persons, and not the whole class.

Illustration: A makes a transfer of property to B for life, and then to B's unborn children, with the condition that a female child shall get only a life interest. The interest of the daughter will fail on account of Section 13, but it does not fail with regard to the whole class, or the sons.

S.16 of the Transfer of Property Act stipulates that '*where by reason of the rules contained in Ss. 13 and 14, an interest for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.*'

Illustration: A made a gift of a property to B who was her nephew's daughter. The gift was made to B for life, and then to B's descendants absolutely, if she should have any, but, if B had no male descendants, then to B's daughters without any power of alienation,

and if there were no descendants of B, male or female, to A's nephew. Since the gift to B's unborn daughters is void, being a transfer of limited interest, the transfer to A's nephew failed under S.16.

It may be noted that if subsequent interest is not dependent on the prior interest, but is an alternative to the prior interest, the subsequent interest does not fail under S.16. If there are two alternative limitations, one branch of which is remote and the other capable of taking effect, the void limitation is disregarded to give effect to the valid alternative.

Illustration: A made a gift to B for life and then to his unborn child for life, or in case of B dying issueless, to C. The transfer to the unborn child was void, but in the event B died issueless, the alternative to gift to C was valid.

S.17 of the Transfer of Property Act prescribes that if the terms of transfer are such that the income from the property sought to be transferred is required to be accumulated for a period longer than the life of the transferor, or a period of eighteen years from the date of transfer, then such condition, to the extent it exceeds the abovementioned period, is void.

Illustration: A transfers property to B for life and thereafter, to B's child who attains the age of 18, with a direction to accumulate the income during the lifetime of B and for a period of 20 years after vesting of the property in B's child. The condition is invalid in so far as it exceeds the period of 18 years. Accordingly the income may be disposed off as if the restrictive period has expired.

This rule is subject to three specific exceptions, namely:

- Direction for accumulation for the payment of debts of the transferor or any other person taking an interest through the transfer;
- The provision of portions for children or remoter issue of transferor or any other person taking an interest in the transfer; and
- Preservation or maintenance of the property transferred.

General Exceptions to the Rule in Ss.14, 16, and 17 of the Transfer of Property Act

The rules set out in Ss.14, 16, and 17 do not apply where the transfer of the property is for the public or charitable purpose.

Vested and Contingent Interests

An interest in a property may be a vested interest or a contingent interest. A vested interest has been defined under S.19 of the Transfer of Property Act to mean, unless a contrary intention appears from the terms of the transfer, '*where on a transfer of property, an interest therein is created in favour of a person:*

- *Without specifying the time when it is to take effect; or*
- *Specifying that it is to take effect forthwith; or*
- *On the happening of an event which must happen.'*

An interest may be a vested interest, even if (a) the enjoyment of the interest is postponed, (b) prior interest in the same property is given or reserved to some other person, (c) income arising from the property is directed to be accumulated until the time of enjoyment arrives, or (d) upon the happening of certain events, the interest passes to another.
A vested interest cannot be defeated by the death of the transferee prior to obtaining possession. Such an interest becomes the property of the transferee, which can even be transferred as well as inherited before obtaining possession. Upon the death of the transferee, a vested interest vests in the legal heirs of the transferee, even if the transferee had not obtained possession.
Where an interest is created in favour of an unborn person, such person acquires a vested interest, immediately upon birth, though the enjoyment of the same may be deferred to a future date. (S.20, Transfer of Property Act)

Illustrations:

- A transfers certain property to B for life

and thereafter, to C. C's interest is vested, as determination of B's interest (upon B's death) is a certain event.

- A transfers property to B in trust for C, and directs B to give possession of the property to C, when C attains the age of 25 years. C's interest in the property is vested, and C is entitled to the possession of the property at the age of 18 years, by virtue of S.14 of the Transfer of Property Act.
- A property is transferred to A, B, and C in equal proportions to be paid to them when they attain the age of 18 years. The transfer contains a proviso that if they die under the age of 18 years, the property shall go to D. The interest of A, B and C is a vested interest, even though the interest is liable to be divested upon the happening of a specified event.

A 'contingent interest' has been defined to mean an interest where, on a transfer of property, an interest therein is created in favour of a person to take effect, only on the happening or not happening of a specified uncertain event. Such an interest becomes a vested interest if the contingent event happens or becomes impossible, as the case may be. In a contingent interest, no proprietary right is created in the present. The contingency is the condition precedent for the right to be created. A contingent interest is normally transferable; however, if the transferee of a contingent interest dies before obtaining the possession, the interest fails, and therefore, cannot be inherited.

A contingent interest is different from a mere right to sue. A contingent ownership of a right, being more than a simple chance or possibility of becoming an owner of the property, title is in existence on the date of the transfer, but it is incomplete on account of the future contingency.

Illustration:

- A, a Hindu owning separate property, dies leaving his widow B and brother C. C only has a chance of becoming the owner of A's estate.
- A, a Hindu, owning separate property, makes a settlement of his property to spouse B for life, thereafter to child C, if any, and in default to D. D's interest is a contingent interest.
- A transfers an estate to B for life, and thereafter to C, if C is still living, and in default to D. The interest of C and D is contingent until the event which is to vest it in one or the other has happened.

S.21 of the Transfer of Property Act specifies that an interest shall not be considered contingent merely because the property vests only upon attaining a particular age, if the income from the interest is to be given to such person or the income is to be applied for the benefit of such person.

Conditional Transfer

Where an interest is created in a property dependent upon a condition, the interest fails if the condition becomes impossible, or is forbidden by law, of is of such a nature that, if permitted would defeat the provisions of law, or is fraudulent, or involves or implies injury to the person or property of another. Further, the condition is deemed fulfilled if it is substantially complied with.

Illustration:

- A transfers certain property to B on the condition that B marries C. At the date of the transfer, C was dead. The transfer is void.
- A transfers a property to B on the condition that B shall desert her husband. The transfer is void.
- A transfers a property to B, on the condition that B shall marry with the consent of C, D, and E. E dies. B marries with the consent of C and D. B shall be deemed to have complied with the condition.

In case of a conditional transfer, if the transfer is conditional upon performance of an act by the person taking the interest, and no time is specified for the performance of the act, the condition is deemed broken if the person taking the interest makes the performance

impossible, permanently or for an indefinite period.

Illustration: A makes a bequest to B, with a condition that it shall not have any effect if B does not marry A's daughter. B marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have an effect.

On the other hand, if time is specified for performance of the act and upon failure of the act, the interest is to go to another person, if the performance within the specified time is prevented by the fraud of the person who shall be directly benefited by the non-fulfilment of the condition, such additional time shall be granted as may be required for the fulfilment of the act. If the performance has been rendered impossible or indefinitely postponed on account of the fraud by the person having the interest in non-fulfilment, the condition shall be deemed to have been fulfilled against such person.

Doctrine of *Lis Pendens*

S.52 of the Transfer of Property Act recognises the doctrine commonly known as the doctrine of *lis pendens* ('pending litigation'). Under this section, a transfer of, or otherwise dealing in, an immoveable property is prohibited if the following conditions are fulfilled:

- There must be pendency of a suit or a proceeding in a competent court;
- The suit or the proceeding must not be collusive;
- The right to the immoveable property must be directly or indirectly in question in the suit or the proceeding;
- The property in dispute must be transferred or otherwise dealt with by a party to the litigation; and
- The alienation of the property must affect the rights of the other party.

The prohibition under S.52 is only to the extent that it affects the rights of any party to the suit whose rights may be affected by the decree that may be made. The transfer or dealing in such immoveable property is, therefore, not void but voidable at the option of the party affected by the transfer, and is subject to the result of the litigation. This principle applies whether or not the purchaser has the notice of the suit.

Illustrations:

- A sues B in respect of a house in B's possession. During the pendency of the litigation, B sells the house to C. A's suit is dismissed. B's transfer to C shall hold good.
- A sues B in respect of a house in B's possession. During the pendency of the litigation, B sells the house to C. A's suit is decreed in A's favour. B's transfer to C is voidable at A's option.
- A leases certain land to B. B files a suit of ejectment against C, who is in wrongful possession of the land. During the pendency of the suit, A transfers the property to D. The transfer from A to D is not affected by the pendency of the suit as A is not party to the suit.
- A sold a house to B. C thereafter challenged the right of A to sell the house in court, and prayed for declaration of title with respect to the house. While the suit was pending, B sold the house to C. C's title to the house will not be affected even if C obtains a decree against A, as A transferred the house before the institution of the suit, and B was not a party to the suit at the time of the transfer of the property from B to C. (*Bala Ramachandra* v. *Daula*, 27 BLR 38).
- A and B secretly agree that B would file a suit against A in respect of a house in A's possession; that A would seriously contest the suit; and that during the pendency of the suit, B would sell the house to C, and the money received from C would be divided between them. B files the suit, A contests the same, and during the pendency of the suit, B transfers the property to C in the belief that the sale deed for transfer will be set aside having been executed during the pendency of the suit. B's suit is decreed. The suit being collusive, the transfer to C will not be set aside.

Doctrine of Part Performance

S.53A of the Transfer of Property Act embodies the doctrine of part performance. If the following conditions are fulfilled, then even though the contract is required to be registered and had not been registered, or the transfer has not been completed in the manner required under law, the transferor is debarred from claiming any relief (other than the rights expressly provided in the contract) in respect of the property of which the transferee has taken possession:

- There should be a contract to transfer, for consideration, any immoveable property by a writing signed by the transferee or by someone on behalf of the transferee, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

  Illustration:

  - Defence of part performance cannot be claimed in case of a gift, because a gift is a transfer without consideration.
  - A contract signed by a *karta* on behalf of a Hindu Undivided Family is a valid signing of the contract for the purposes of S.53A.

- The transferee should, in part performance of the contract, have taken possession of the property, or any part thereof, or if already in possession, should have continued to be in possession in part performance of the contract, and should have done some act in furtherance of the contract. Undertaking an act in furtherance of the contract implies that the act must follow the contract.
- The transferee should have performed, or should be willing to perform the part of the contract.

  Illustration: A prospective vendee who has taken possession cannot resist dispossession, if the vendee is not willing to pay the price agreed upon. (*Bachardas* v. *Ahmedabad Municipality*, AIR 1941 Bom 346)

The defence of part performance can be used to continue possession, and not to obtain possession of the property. Furthermore, S. 53A recognises an exception in favour of a transferee for consideration and without notice of the part performance. Therefore, the defence of part performance cannot be taken against a transferee who has paid the consideration and has no notice of part performance. The burden to prove that the transferee is indeed a transferee for consideration and without notice is, however, on the transferee.

The principle contained in S.53A also does not apply to cases where the agreement itself is void under any law.

Illustration: Transfer of possession in pursuance of a contract of sale, without obtaining the previous sanction of the *tehsildar* as required under the Hyderabad Tenancy Act (the sale being by a tribal in favour of a non-tribal) was unlawful. Therefore, protection under S.53A is not available. (*Meram Pocham* v. *Agent to the State Government*, AIR 1978 AP 242)

Sale of Immoveable Property

The sale of immoveable property has been defined under the Transfer of Property Act to mean '*a transfer of ownership in exchange for a price paid or promised or part –paid or part-promised*.' The word 'price' has been interpreted to mean a money consideration. If the consideration is not money, the transaction cannot be classified as a sale.
Sale of tangible immoveable properties of the value of Rs.100/- or reversions and other intangible rights related to an immoveable properties are required to be transferred only by way of a registered document. In such cases, registration is a pre-requisite for sale, and the property does not pass until the registration of the deed. An intangible right related to an immoveable property refers to the rights that a person has without the actual possession of the land, for example, a license to enter into the land for fishing, or a mere right of way, are intangible rights.

S.54 of the Transfer of Property Act

distinguishes a 'contract *of* sale' from a 'contract *for* sale'. A contract *for* sale is an agreement to sell the property at a future date. Until such date when the property is indeed transferred, the interest in the property vests in the transferor.

Under S.56 of the Transfer of Property Act, if the owner of two or more properties mortgages them to one person and sells one of the two properties to another, the buyer, in the absence of a contract to the contrary, is entitled to have the mortgage debt satisfied out of the property or properties not sold to the buyer so far as the same will extend. This right is known as the right of marshalling. The right of marshalling will be without prejudice to the rights of the mortgagee, or any other person claiming under the mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

Illustration: Properties X, Y, and Z are subject to a mortgage. The mortgagor sells X to A free from all encumbrances. Marshalling enables A to require that the mortgagee shall satisfy mortgage as far as possible out of properties Y and Z.

Mortgage

A mortgage is a transfer of interest in a specific immoveable property for the purpose of securing (i) the payment of money advanced (or to be advanced) by way of a loan, (ii) an existing or a future debt, or (iii) performance of an engagement that may give rise to a pecuniary liability. The transferor of the interest is called the 'mortgagor', the transferee is called the 'mortgagee', and the principal money and the debt are called the 'mortgage- money'.

The Transfer of Property Act recognises the following forms of mortgages:

Simple Mortgage

In a simple mortgage, the mortgagor is bound to pay the mortgage money personally, failing which the mortgagee has the right to cause the sale of mortgaged property and apply the proceeds for repayment of the mortgage money. There is no transfer of possession, and therefore the mortgagee does not have the right to rents and profits of the property. The property also cannot be acquired by the mortgagee by way of foreclosure (that is, retention of the property in lieu of the mortgage money). The only right that the mortgagee has the right of sale through the court.

In so far as the mortgagor is bound to pay the mortgage-money, the mortgagee can sue for mortgage money or may proceed against the property or both. If the mortgagee sues for the mortgage money, the decree is a money decree. On the other hand, if the mortgagee proceeds against the mortgaged property, mortgagee obtains an order for sale of the property.

Illustration: The words 'in default I shall on the security of the house site belonging to me, pay and make good the principle and the interest' have been held to constitute a simple mortgage. (*Balasubramania* v. *Sivaguru,* (1911) 21 Mad LJ 562)

Mortgage by Conditional Sale

In this kind of mortgage, the mortgagor ostensibly sells the mortgaged property on the condition that (i) on default of the payment of mortgage money, the sale shall become absolute, and (ii) on payment of the mortgage money, the sale shall become void, or the buyer shall transfer the property to the seller. Also, a mortgage by conditional sale is treated as such only if the condition of retransfer is embodied in the same document which purports to effect the mortgage. The sale is not actual, but ostensible (that is, it has the *appearance* of a sale).

In a mortgage by conditional sale, there is no personal liability on the mortgagor to pay the mortgage money, and the remedy of the mortgagee is by way of foreclosure only. If the mortgagee obtains a decree of foreclosure, the mortgagor will be debarred from the right of redemption (that is, the right to reclaim the mortgaged property), and the ostensible

ownership will ripen into absolute ownership.

Illustration: Parties to the same transaction in relation to the same property executed two separate documents (that is, a sale deed and a reconveyance deed). The mortgage is not a mortgage by conditional sale.

Usufructory Mortgage

In a usufructory mortgage, the mortgagor delivers the possession of the property to the mortgagee on the condition that the mortgagee shall retain the possession until repayment of the mortgage money, and receive and apply the rent and profits from the property towards repayment of the interest, or the principal, or both. Since the agreement is for possession, a mortgagee in this case can sue for possession of the property, but not for sale or foreclosure of the property.

Illustration: A, a mortgagor, agreed to give possession of certain property to B, a mortgagee, on a subsequent date, and to pay interest at the rate of 24%, until possession was delivered. The mortgage is a usufructory mortgage.

English Mortgage

In an English mortgage, the mortgagor undertakes to pay the debt, and transfers the mortgaged property absolutely to the mortgagee, with a condition that upon repayment of the mortgage money, the property shall be retransferred to the mortgagee. As opposed to a mortgage by conditional sale, the sale is not ostensible, but real. However, the right of an English mortgagee is inferior to that of a buyer in a sale. An English mortgagee has the right to sell the property to realise the mortgage money, sometimes even without the intervention of courts, but not foreclosure.

Mortgage by Way of Deposit of Title Deed

In this form of mortgage, also known as equitable mortgage, the mortgage is created simply by way of deliverance of the title deed of an immoveable property by the mortgagor to the mortgagee (or the mortgagee's agent), with the intent of creating a security on such property. The rights of the mortgagee are similar to those in case of simple mortgage; that is, the mortgagee can obtain an order for sale or the property, as well as bind the mortgagor to repay the mortgage money in a money suit.

Anomalous Mortgage

This is a residuary category of mortgage, that is, a mortgage which is not any form of mortgage mentioned above is anomalous mortgage.

Illustrations:

- A simple mortgage usufructory is an anomalous mortgage. In this mortgage, the mortgagee has the right to possession for payment of the interest / principal through the rents and profits, as well as the right to cause a sale of the property upon the expiry of the date fixed for payment.
- A mortgage usufructory by conditional sale is an anomalous mortgage. In this, the mortgagee is in possession of the property, and upon the failure of payment of the mortgage money by a fixed date, the mortgagee acquires the rights as a mortgagee by conditional sale.

Mode of Mortgages

A mortgage may be effected by (a) delivery of possession, (b) registered instrument, or (c) deposit of title deed.

A mortgage for securing a sum in excess of Rs. 100/- must be by way of a registered instrument. Mortgages by way of deposit of title deed are an exception to this rule, as no separate instrument of mortgage is required in such a case. In a simple mortgage, since the mortgage cannot be effected by delivery of possession, such mortgage will need to be by way of a registered instrument. A registered instrument is required to be signed by the parties and attested by at least two witnesses.

Right to Redemption

Under S.60 of the Transfer of Property Act, a mortgagor has a right to redeem the mortgaged property contemporaneously with the repayment of the mortgage money. This right is triggered after the repayment of the mortgage money has become due, and in such case the mortgage has the right to demand:

- The return of the mortgage instrument, including the title deed;
- Delivery of possession of the property (where the mortgagee is in possession); and
- Retransfer of the property (at the mortgagor's cost) or an acknowledgement in writing of the extinction of mortgagee's right, and to get the same registered (where the mortgage is by way of a registered instrument).

The right of redemption is available only before a suit for enforcement of the mortgage has been filed.

The right of redemption is a statutory right, and a clog or a fetter on the right of redemption of the mortgagor is null and void.

Illustrations:

- A mortgage deed prescribed a condition that if the right of redemption is not exercised within a specified period, the mortgagee shall have no right over the mortgaged property and the mortgage deed shall be deemed to be a deed of sale. Such a condition is void, being a clog on redemption. (*Gangadhar* v. *Shankarlal*, AIR 1958 SC 773)
- A period of 200 years on the mortgage has been held to be a clog on redemption, and hence, void.

Charge

'Charge' has been defined under S.100 of the Transfer of Property Act: '*Where immoveable property of one person is by the act of the parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have charge on the property*'. All provisions of the Transfer of Property Act that apply to a simple mortgage also apply to charges.

Illustrations:

- A inherited an estate from his maternal grandfather, and executed an instrument promising to pay his sibling, B, a fixed annual sum out of the rents of the estate. B has a charge on the estate.
- A sued B for a sum of money, and the compromise decree directed that the immoveable property specified therein should be hypothecated for the realisation of the said money, and that B would not be able to create any encumbrance on the immoveable property. A has a charge on the property for the amount of the decree.

Lease

'Lease' has been defined under S.105 of the Transfer of Property Act to mean a transfer of a right to enjoy an immoveable property for a certain time, or in perpetuity, against consideration of a price paid or promised, or money, or other things of value to be paid / rendered periodically, or on specified occasions. The consideration, paid or promised, is referred to as the premium, while the periodic payments are called the rent. The transferor is the lessor, and the transferee, the lessee.

A lease creates a right or an interest in the property, and may be understood to be in contra-distinction with a license. Under the Indian Easements Act, 1882, if a document gives a right to another to come on the land or premises and use them in some way, while the other remains in possession and control of the premises, such a right is called a licence. A licence does not give rise to any interest in the property, and is non-heritable and non-transferable. On the other hand, leases give rise to an interest in the property and hence, are transferable and heritable.

Illustrations:

- A lets a plot of land to be used as a *haat* or market, to B for a fixed period, for a fixed sum. B has the right to collect tolls in the

market, and covenants to keep the *haat* clear, not to interfere with the rent of any permanent shop owner, not make any alterations without the permission of A, and to give up possession, at the end of the term. In spite of the restrictions, B has sufficient control of the land to make the instrument a lease and not a licence.

- The premises belonging to a bank were used for the residence of a manager, without the obligation to pay anything in return. The manager is merely a licencee.

A lease of immoveable property from year-to-year, or for any term exceeding one year, or where a yearly rent is reserved, can be made only by way of a registered instrument. All other leases can be made by a registered instrument, or an oral agreement accompanied by possession.

Gift

A gift is a transfer of ownership in an existing moveable or immoveable property, made voluntarily and without consideration. The property must be in existence, and therefore, there cannot be a gift of a future property. Also, a gift not made of free will, but because of a vitiating cause such as coercion, is not valid.

A gift of an immoveable property must only be effected by a registered instrument attested by two witnesses, whereas a gift of moveable property may be made by way of delivery of possession as well.

A gift once made is irrevocable at the instance of the donor (that is, the gift cannot be revoked merely on the will of the donor). However, a gift can be revoked in the following circumstances:

- If the donor and the donee agree that, upon the happening of a certain specified event, which does not depend on the will of the donor, the gift shall be revoked; and
- A gift may be revoked under circumstances in which, if it were a contract, it may be rescinded (except for the want of consideration). Such grounds include instances of undue influence and fraud.

Remedies of Specific Relief

A remedy of specific relief is an equitable relief, which is normally granted in lieu of compensation, where compensation is not an adequate remedy. Also, the person claiming the relief of specific performance ought to be ready and willing to perform the contract. Under Ss.5 and 6 of the Specific Relief Act, 1963 ("**the Specific Relief Act**"), the following types of actions may be brought in a court of law, for recovery of possession of a specific immoveable property:

- A suit based on title by ownership;
- A suit based on possessory title; and
- A suit based merely on the previous possession of the plaintiff, where the plaintiff has been dispossessed without consent and otherwise than in the due course of law.

Under S.5 of the Specific Relief Act, a person entitled to a specific immoveable property is entitled to recover the same in the manner prescribed under the Code of Civil Procedure, 1908. A suit for recovering possession, where a person has been dispossessed without consent and otherwise in due course of law, is required to be brought within six months of the dispossession. Also, no suit may be brought against the Government on this ground.

A remedy of a specific relief based on a contract or an agreement, entitles the defendant to claim all such defences that such person may claim under the law governing contracts. Such defences may include: no concluded contract; or that the contract is void for ambiguity; frustration on account of impossibility; and the object or the performance of the contract becoming illegal.

Illustration: A suit for specific performance, where the agreement did not mention the *khasra* number or the exact area of the land sold, and its boundaries, was held to be not specifically enforceable, as the contract was void for uncertainty. (*Nahar Singh* v. *Harnak*

Singh, (1996) 6 SCC 699)

Under S.10 of the Specific Relief Act, to claim the relief of specific performance, the court needs to be satisfied of the following two conditions:

- There exists no standard to ascertain the actual damage caused by the non-performance of the act agreed to be done; or
- When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

In cases of transfer of immoveable property, unless the contrary is proved, the court shall presume that in cases of breach of contract to transfer an immoveable property, compensation in money is not an adequate remedy.

Illustration: Where A contracts with B to sell a house for a sum of Rs.1,00,000/-, B is entitled to a decree directing A to convey the house to B, by payment of the purchase money.

Under S.13 of the Specific Relief Act, in cases where a person contracts to sell or lease an immoveable property of which such person has no title or an imperfect title, the purchaser or the lessee has the following rights:

- If the vendor or the lessor subsequently acquires any interest in the property, the purchaser or the lessee may make good the contract out of such interest.

Illustration: A assigned leasehold rights in a property lease from the Government to B. A was not entitled to assign such interest, and therefore, the Government forfeited the lease and leased it to B. A's claim against the Government for forfeiture succeeded, and A obtained repossession of the property. A surrendered the property to the Government after the expiry of the lease. B has the right to reclaim it from the Government. (*Kalyanpur Lime Works* v. *State of Bihar*, AIR 1954 SC 165)

- Where the concurrence of some other person, or conveyance by some other person is necessary to validate the title, and such other person is bound to concur or convey at the request of the vendor or the lessor, the vendor or the lessor is required to obtain such consent.

Illustration: Where a person is entitled to assign a lease with the consent of the lessor, and the lessor is required not to withhold the consent if the lease is to a respectable person, the purchaser of the leasehold right is entitled to seek a specific direction to the seller, that the seller must obtain such consent.

- Where the vendor sells an unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money, and the vendor has only a right to redeem it, the purchaser may compel the vendor to redeem the mortgage and obtain a valid discharge.
- Where a vendor or lessor sues for specific performance, and the suit is dismissed for want of title or an imperfect title, the defendant has the right to the return of the amount deposited, along with interest and the cost of suit. To secure this deposit, interest, and the cost, the defendant also has a lien on the immoveable property in question.

Furthermore, a contract for sale or lease of an immovable property cannot be specifically enforced in favour of a vendor or a lessor:

- Who entered into the contract knowing that such person did not have a valid title to the property at the time of the contract; and
- Who cannot give the purchaser or the lessee a title free from reasonable doubt on the time fixed by the parties or the court for completion of the sale or the letting.

Therefore, in a suit by a purchaser, the vendor cannot claim the defence of bad or incomplete title, whereas in a suit by the vendor, the purchaser can claim such a defence.

Illustrations:

- A contracts to sell B an estate which A knows belongs to C. A cannot seek specific performance of this contract, though C is willing to confirm the sale.
- After the parties made an agreement to sell, a notice for acquisition was issued under the relevant law. Between the date of the agreement and date of completion, the vendor's title did not remain beyond reasonable doubt. The vendor cannot claim the defence of imperfect title, but the purchaser can. (*Associated Hotels of India Limited* v. *Rai Bahadur Jodhmal Kothalia*, [1953] FCR 441 (Pak))

Declaratory Decrees

A person entitled to a right in any property may institute a suit against any person denying or interested to deny the title of such person. The suit may merely seek a declaration that the person indeed has the title to the property.

Illustration: A is in the possession of certain property, B alleges to be the owner of the property, and claims the possession back from A. A may seek a declaration to hold the property.

Injunctions

Under the Specific Relief Act, injunctions, temporary or perpetual, may also be obtained. An injunction is an order whereby a person is ordered to refrain from doing something, or is ordered to do a particular act or thing. Injunctions may be temporary or perpetual. Courts grant temporary injunctions by applying the following tests (*Gujarat Bottling Co.* v. *Coca Cola Co.*, AIR 1995 SC 2372):

- Whether the plaintiff has a *prima facie* case;
- Whether the balance of convenience is in favour of the plaintiff; and
- Whether the plaintiff will suffer an irreparable injury, if the application for interlocutory injunction is disallowed.

Perpetual injunctions may normally be granted to the plaintiff to prevent the breach of an obligation existing in favour of the plaintiff. In particular, when a defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the courts may grant perpetual injunction in the following cases:

- Where the defendant is trustee of the property of the plaintiff;

Illustration: Where A makes a settlement of an estate on B and his children, and then contracts to sell the estate to C. B, or any of his children, may sue for injunction to restrain the sale.

- Where there exists no standard to ascertain the actual damage caused, or likely to be caused, by the invasion;
- Where the invasion is such that compensation in money would not be affordable relief; and
- Where the injunction is necessary to prevent multiplicity of proceedings.

Illustration: The inhabitants of a village claim right of way on A's land. In a declaratory suit against several such villagers, A obtains a declaration that they do not have a right of way on their land. Several other villagers file suits against A for obstructing their way. A may file a suit for perpetual injunction.

x-x

Notes:

All India Bar Examination Preparatory Material

Book 1 of 2

First edn.: August, 2010

Bar Council of India,

225, Okhla Industrial Estate, Phase-III,

New Delhi – 110020

India

info@barcouncilofindia.org

www.barcouncilofindia.org

Rainmaker

THE LEGAL PEOPLE

612, Crystal Paradise,

Off Veera Desai Road,

Andheri (West),

Mumbai – 400053

India

info@rainmaker.co.in

www.rainmaker.co.in