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Institute of Management & Technology

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Reference Material for Five Years

Bachelor of Law (Hons.)

Code: 035

Semester–V

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

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ENVIRONMENT STUDIES & ENVIRONMENT LAW (301)

ENVIRONMENT MEANING:

- Environment can be defined as surroundings or conditions in which human beings, plants and animals live.
- Natural world as a whole.
- Everything around a living being.
- The term environment has been derived from a French word "Environia" means to surround. It refers to both a biotic (physical or non-living) and biotic (living) environment.
- The word environment means surroundings, in which organisms live. Environment and the organisms are two dynamic and complex component of nature. Environment regulates the life of the organisms including human beings. Human beings interact with the environment more vigorously than other living beings. Ordinarily environment refers to the materials and forces that surrounds the living organism.
- Circumstances, objects or condition by which one is surrounded.
- Section 2(a) of Environment Protection Act, 1986 defines Environment.

Environment includes :

a.)Water,airand land

b.) The inter-relationship which exists among and between,

i) water, air, land, and

ii) human beings, other living creatures, plants, microorganisms and property .

Objectives of Environment Protection- The main objectives of the Environment Protection are as follows :-

1. Controlled, restricted and mindful use and exploitation of natural resources ;
2. Maintenance and protection of environmental quality;
3. Protecting and balancing of the eco-system;
4. Achievement of substantial development;
5. Environment awareness among the people;

6. Working out the pollution problems;
7. Environmental education and training; and
8. Punishment of the polluter.

- The introduction of different harmful pollutants into certain environment that make this environment unhealthy to live in. Pollution of the environment is causing great damage to ecosystem that depend upon the health of this environment. Air and water pollution can cause death of many organisms in given ecosystem, including humans.
- Pollution is legally defined as the wrongful contamination of the atmosphere, water or soil to the material injury of the right of an individual.
- Section 2 (c) of Environment protection Act, 1986 define Environmental pollution as environmental pollution" means the presence in the environment of any environmental pollutant.
- Section 2 (b) of Environment Protection Act, 1986 define Environment Pollutant as environmental pollutant means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be injurious to environment.
- Section 2 (e) of Environment Protection Act,1986 defines hazardous substance" means any substance or preparation which, by reason of its chemical or physio-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plant, micro-organism, property or the environment.

Constitution and Environmental law

In India, concern for environmental protection was not only raised to the status of fundamental law of the land but also it is now well established that it is the basic human right available to human beings in order to live in pollution free environment.

When our constitution was drafted there were no provisions for environment and even the word environment did not find place in the constitution of India but there are certain provisions which are closely related to environment protection so that citizens of India can live in pollution free environment with full human dignity such as Article 47 provides for improvement for public health, Article 48 provides for organization of agriculture and animal husbandry on modern and scientific line, Article 49 provides for protection of monuments etc.

In Case of **Vellore Citizen Welfare Forum v. Union Of India (1996)5 SCC 647** Supreme Court held that essential feature of "Sustainable Development such as "Precautionary principle" and

"Polluter pays Principle" are the integral part of the Environmental law of the country.

The preamble of our Constitution provides that our country is based on "Socialistic" pattern of society, where the State pays more attention to the social problems than on any individual problems. Environmental pollution which has emerged as one of the biggest social problems is being regarded as a real problem affecting the society at large and thus state is under an obligation to fulfil the basic aim of socialism, that is, to provide decent standard of living to all which can be possible from a pollution free environment.

The preamble further declares that, the great rights and freedoms which the people of India intended to secure all citizens include justice, social, economic and political. Justice also includes environmental justice. Although the particular word 'environment' does not find a place here, we can very well interpret this to include environmental justice. Environment as a subject matter has entered in our day to - day life in such a way that we cannot ignore deliberations on environmental matters when discussing about socio - economic or socio - political scene of the country.

Under Indian federal system, governmental power is shared between the Union

and the State governments. Part XI of the Constitution governs the legislative and administrative relations between the union and the states. Parliament has the power to legislate for the whole country, while the State Legislatures are empowered to make laws for their respective states. Article 246 of the

Constitution divides the subject areas of legislation between the union and the states. The union list (List I) in the seventh schedule to the Constitution contains subjects over which parliament has exclusive power to legislate. This include defence, foreign affair, atomic energy, inter-state transportation shipping, major ports, regulation of air traffic, regulation and development of oil fields,mines and mineral development and inter-state rivers. The State Legislatures have exclusive powers to legislate with respect to subjects in the State List (List II), such as public health and sanitation, agriculture, water supplies, irrigation and drainage and fisheries. Under the Concurrent list(List III) both Parliament and State Legislatures have overlapping and shared jurisdiction over some subject areas including forest, the protection of wild life, mines and mineral developments not covered in the union list, population control and family planning, minor ports and factories.

Parliament has residual power to legislate on subjects not covered by the three lists. When a Central Law conflicts with a State Law on a concurrent subject the former prevails. State Law passed subsequent to the Central Law will prevail, however, if it has received Presidential assent

under Article 254. The division of legislative powers shows that, there are ample provisions to make laws dealing with environmental problems at the local level as well as at the national level.

The Constitution and Legislative measures – The Constitution of India and Environment.

To protect and improve the environment is a constitutional mandate. It is the commitment for a country wedded to the ideas of a welfare State. The Indian constitution contains specific provisions for environmental protection under the chapters of Directive Principles of the State Policy and Fundamental Duties. The absence of any specific provision in the Constitution recognising the fundamental right to (clean and wholesome) environment has been set off by judicial activism in the recent times.

Article 48A and 51 (A)(g)

A global adaption consciousness for the protection of the environment in the seventies prompted the Indian Government to enact the 42nd Amendment (1976) to the Constitution. The said amendment added Art. 48A to the Directive Principles of State Policy. It Declares:-

"the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country".

A similar responsibility imposed upon on every citizen in the form of Fundamental Duty.

Art. 51(A) (g)

This Article provides for protection and improvement of the natural environment including forest, lakes, rivers and wildlife, and to have compassion for living creatures".

In L.K Kollwal V State of Rajasthan**, (AIR 1988 RJ 2**)a simple writ petition by citizens of Jaipur compelled the municipal authorities to provide adequate sanitation. The court observes that when every citizen owes a constitutional duty to protect the environment (Art.51A), the citizen must be also entitled to enlist the court's aid in enforcing that duty against recalcitrant State agencies. The Court gave the administration six month to clean up the entire city, and dismissed the plea of lack of funds and staff.

The Public Trust Doctrine, evolved in **M.C. Mehta v. Kamal Nath**, states that certain common properties such as rivers, forests, seashores and the air were held by Government in Trusteeship for the free and unimpeded use of the general public. Granting lease to a motel located at the bank of the River Beas would interfere with the natural flow of the water and that the State Government had breached the public trust doctrine.

A matter regarding the vehicular pollution in Delhi city, in the context of Art 47 and 48 of the Constitution came up for consideration in M.C. Mehta vs. Union of India (Vehicular Pollution Case). It was held to be the duty of the Government to see that the air did not become contaminated due to vehicular pollution. The Apex court again confirming the right to healthy environment as a basic human right stated that the right to clean air also stemmed from Art 21 which referred to right to life. This case has served to be a major landmark because of which lead-free petrol supply was introduced in Delhi. There was a complete phasing out old commercial vehicles more than 5 years old as directed by the courts. Delhi owes its present climatic conditions to the attempt made to maintain clean air.

In **Rural Litigation and Entitlement Kendra v. State of UP** (AIR1987 SC 359) Justice R.N. Mishra opined that "preservation of the environment and keeping the ecological balance unaffected is a task which not only the government but also every citizen must undertake.

It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshr ined in Article 51-A(g) of the Constitution".

In **Kinkari Devi v. State (AIR 1988 HP 4)** Justice P.D. Desai remarked: "There is both a constitutional pointer to the state and a constitutional duty of the citizens not only to protect but also to improve the environment and to preserve and safeguard the forest, the flora and fauna, the rivers and the lakes and all other water resources of the country.

ENVIRONMENTAL PROTECTION AND RIGHT TO LIFE.

Article 21 provides "No person shall be deprived of his life and personal liberty except according to procedure established by law".

The right to life as guaranteed by Article 21 of the Constitution is basic human right and the concept of right to life and personal liberty have been transformed into positive rights by active judicial interpretation. Article 21 covers plethora of Rights and among them right to protect environment and to live in healthy environment is one of them.

This view of the Supreme Court was also reflected in **Francis Carolie Mulhin v.Administrator Union Territory of Delhi** (AIR 1981 SC 746) where Justice Bhagawati observed that "the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something more than just physical survival"

Again the Apex Court in **Chameli Singh v.State of UP** (AIR 1996 SC 1051) held that the need for a decent and civilized life includes the right to food, water and a decent environment.

Article 21 guarantees the right to life, a life of dignity, to be lived in a proper environment, free of danger of disease and infection. It is an essential fact that there exists a close link between life and environment. Right to life would become meaningless if there is no healthy environment.

The disturbance of ecology and pollution of water, air and environment by reason of quarrying operation definitely affects the life of the person and thus involves the violation of right to life and personal liberty under Article - 21 of the Constitution.

In **M.C. Mehta v. Union of India (AIR1987 SC1086)** popularly known as oleum gas leakage gas case the Supreme Court once again impliedly treated the right to live in pollution-free environment as a part of fundamental right to life under Article - 21 of the Constitution.

In **M.C. Mehta v. Union of India (AIR1988 SC1037)**Where a group of tanneries doing business on the banks of the river of Ganga were alleged to be polluting the river. Justice K.N. Singh remarked: "We are conscious that closure of tanneries may bring unemployment, loss of revenue but life, health and ecology have greater importance to the people".

In **Charanlal Sahu v. Union of India (1980) 1 SCC 613** the Supreme Court of India held that, in the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under

Articles 21, 48–A and 51–A (g).

In **Subash Kumar v. State of Bihar (1991) 1 SCC 598** the Supreme Court observed: Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution - free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

In **T.Damodhar Rao v. S.O. Municipal Corporation, Hyderabad (AIR 1987 AP 171)** the A.P. High Court observed that:

"It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution.

In **M.C. Mehta v. Union of India (1992) 3 SCC 256** the Supreme Court took note of environmental pollution due to stone crushing activities in and around Delhi. The court was conscious that environmental changes are the inevitable consequences of industrial development in our country, but at the same time the quality of environment cannot be permitted to be damaged by polluting the air, water and land to such an extent that it becomes a health hazard for the residents of the area. Showing deep concern to the environment, the Court observed that 'every citizen has a right to fresh air and to live in pollution -free environment'.

Therefore it is evident from all above mentioned cases it is evident that there has been a new development in India and right to live in a healthy and pollution free environment is considered as the fundamental right under Article 21, without this, right to life and livelihood would become meaningless and it is evident that the judiciary has certainly prevented the flagrant violation of the right to safe environment.

Also Scope of Article 21 was further expanded to included Right to livelihood i.e. Right to Life and Personal Liberty also includes Right to Livelihood.

In **M.C.Mehta v. Union of India (popularly known as Tajmahal case) (1997) 2 SCC 353 -** the Supreme Court once again followed the path of sustainable development and directed that th e industries operating in taj Trapezium Zone (TTZ) using coke/coal as industrial fuel must stop functioning and they could relocate to the alternate site provided under the Agra Master Plan. In this case also the Supreme Court specified the rights and benefits to which the workmen of such industries were entitled and thus, protected their right to livelihood and followed the guiding principle of sustainable development.

RIGHT TO KNOW AND ENVIRONMENT PROTECTION

The right to know is also implicit in Article 19(1) (a) and it has a close link with Article 21 of the Constitution particularly in environmental matters where the secret government decision may affect health, life and livelihood of the people. The right to know or access to information is the basic right for which the people of democratic country like India aspire for.

The right to know plays a very important role in environmental matters. Any governmental plan

of construction of dam or information of the proposed location of nuclear power stations or thermal power plants and hazardous industries, which directly

Affect the lives and health of the people of that area, must be widely published.

The Judiciary has broadened the scope of the right to know in **S. P. Gupta v. Union of India(AIR 1982 SC 149 at 234)-** the Supreme Court recognized the right to know to be implicit in the right to free speech and expression. The Supreme Court observed: "This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of open government is the direct emanation from the right to know which seems to be implicit in Article - 19(1) (a). Therefore, disclosures of information in regard to the functioning of the government must be the rule and secrecy exception justified only where the strictest requirements of public interest so demands".

In **Research Foundation for Science Technology and Natural Resource Policy v.Union of India (2005) 10 SCC 510** -the Supreme Court has stated that the right to information and community participation necessary for protection of environment and human health is an inalienable part of Article 21 and is governed by the accepted environment principles. Accordingly, the government and the authorities have to motivate the public participation by formulating necessary programmes.

RIGHT TO EQUALITY AND ENVIRONMENT PROTECTION.

Article 14 of the Constitution of India provide right to equality. This indicates that any action of the 'State' relating to environment must not infringe upon the right to equality. The judiciary, on various occasions, have struck down the arbitrary official sanction in environmental matters on the basis that it was violative of Article- 14.4In

Bangalore Medical Trust v.B.S Muddappa (1991) 4 SCC 54 - the Supreme Court prevented an attempt to convert a public park site into nursing home. The City Improvement Board of Bangalore had prepared the Development scheme for the extension of the City of Bangalore. Under the scheme an area was kept for being developed as low Level Park. Subsequently, under the direction of the Chief Minister of the State the area kept for laying a park was converted to a civic amenity site where hospital was to be constructed by the appellant. When the construction activity was noticed, the resident of the area approached the High Court which allowed the petition. The Appellant came in appeal before the Supreme Court contenting that the decision to allot a site for a hospital rather than a park is

matter within the discretion of t he development authority and thus, the diversion of the user of the land for that purpose is justified under the Act. The Supreme Court dismissed the appeal and highlighted the importance of public parks and open space in Urban Development as follows:

"Protection of the environment, open spaces for recreation and fresh air, play grounds for children and other conveniences are matters of great public concern

and are vital interest to be taken care of in a development scheme. The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user; it would be in direct conflict with the Constitutional mandate".

In **State of Himachal Pradesh v. Ganseh Wood Products (AIR 1996 SC 149)-** the Supreme Court held that a decision making authority must give due weight and regard to ecological factors such as the environmental policy of the government and the sustainable use of natural resources. A government decision that fails to take into account relevant consideration affecting the environment is invalid.

In **Kinkiri Devi v. State of H.P. (AIR 1998 HP 4**)- Article 14 can also be invoked to challenge the government action where permission for mining and other activities with high environmental impact is granted arbitrarily.

Thus the Supreme Court and High Court has played the crucial role in development of environmental jurisprudence.

ENVIRONMENT PROTECTION THROUGH PUBLIC INTEREST LITIGATION.

Public Interest Litigation is the litigation for the protection of the public interest. It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. Public interest litigation is the power given to the public by courts through judicial activism. However, the person filing the petition must prove to the satisfaction of the court that the petition is being filed for a public interest and not just as a frivolous litigation by a busy body. In a public interest case, the subject matter o f litigation is typically a grievance against the violation of basic hum an rights of the poor and helpless or about the content or conduct of government policy.

In the area of environmental protection, PIL has proved to be an effective tool. In Rural Litigation

and Entitlement Kendra vs. State of U.P.(AIR 1985 SC 652)- the Supreme Court prohibited continuance of mining operations terming it to be adversely affecting the environment.

In Indian Council for Enviro-Legal Action vs. Union of India(AIR 1996 SC 1446) , the Supreme Court cautioned the industries discharging inherently dangerous Oleum and H acid. The court held that such type of pollution infringes right to wholesome environment and ultimately right to life.

There are several landmark decisions of the Supreme Court where the Apex Court had enthusiastically supported and applied various principles in order to prevent Environmental degradation through Public Interest Litigation.

The first case before Supreme Court was brought in sharp focus the conflict between the development and conservation was **Dehradun Quarrying Case (AIR 1987 SC)**- Where Court emphasized the need for reconcililng the two concepts in the large interest of the society. The principle laid down in the dehradun quarrying case applied by the High Court of Himachal Pradesh in **Kinkari Devi v. State Of H.P.-** If industrial growth is sought to be achieve by reckless mining resulting in the loss of life, loss of property, loss of eminities like water supply, and creation of ecological imbalance. There may be no real economic growth and no real prosperity.

In case of **M.C. Mehta v. Union Of India (1977)** also known as taj trapezium case where Supreme Court by applying precautionary principle observed at environment measures must anticipate, prevent and attack the causes of environmental degradation. According to this Supreme Court ordered all the industrial operation in the taj trapezium zone to use natural gas instead of coke and coal. Those industries which for any reason were not able to get natural gas connections were ordered to stop functioning in taj trapezium zone.

In **Vellore Citizen Welfare Forum v. Union Of India (1996)** popularly known as tamil nadu tennaries case Supreme Court adopted Principle of sustainable development as a balancing concept rejecting the traditional view that the development and ecology are opposed to each other. The court observed that precautionary principle and polluter pays principle are essential feature of sustainable development and that they have been accepted as part of the law of the land of India.

In **D.C. Wadhera v. Union Of India (1996) –** Supreme Court held that the residence of the city had the constitutional as well as statutory right to live in clean city. Appropriate orders were accordingly passed to ensure that delhi would not have the dupious distinction to have an open dustbin.

Thus there are various provision under constitution for preventing environmental degradation.

LAW OF TORTS AND ENVIRONMENTAL PROTECTION

Litigation related to environmental contamination and toxins has grown at a rapid pace, as businesses come under greater scrutiny for their environmental practices and face potentially costly claims. Industrialization has posed serious concern for the protection of environment. There are various remedies in law of torts which prevent environmental degradation and protect environment.

1. Damages

A plaintiff in a tort action may sue for damages and injunction or both. Damages are the pecuniary compensation payable to the plaintiff for the wrong suffered by him. The purpose of such damages is the restitution : to restore the plaintiff in the position he or she would have been if the tort has not been commited.

In Shri Ram Gas leak Case olium gas escaped from a unit of shri ram food and fertilizers industry and injured few delhi citizens. Court observed that in such cases "compensation must be correlated with the magnitude and capacity of the enterprise because such compensation must have a dettrent effect. The larger and prosperous the enterprise is greater must be the amount of compensation payable by it.

2. Injunction

Injunction is basically a judicial process where person who has infringed or is about to infringed the right of another person is restrained from pursuing such an act. It may require a party to refrain from doing a particular act which has tendency to infringe the right of another person.

In Ram Bhuj Singh v. Babu Lal (AIR 1982 ALL 285) where the hazardous dust from brick grinding machine polluted the air of a neighboring medical practioner the polluter was permanently restrained from operating the machine.

3. Rule of Strict and Absolute Liability

The English rule of strict liability is illustrated in more classic form in the judgement passed in Ryland v. Fletcher where court held that a person who keeps dangerous things on his land is liable if such things escaped and cause loss and damage to others.

The English law of torts recognizes several exceptions to the rule laid down in Ryland v. Fletcher

i.e. act of god, act of third party, fault of plaintiff etc. the rule cannot be applied in cases where any such defence is available to the defendant.

Chief justice bhagwati in Shri Ram Gas Leak case voiced his concern for innocent citizen and evolved stricter doctrine of Absolute Liability it was held that an enterprise engaged in hazardous or inherently dangerous things it owes an absolute and non deligible duty to compensate any one whose health and safety is adversely affected by accident in operating such an industry. In other words the liability in such cases is not strict liability but absolute liability. None of the exception or defences to the rule of Ryland v. Fletcher can be invoked by such an enterprise.
The rule of absolute liability later incorporated in Public Liability Insurance Act,1991 under which certain sums are to be given to the victims or their heirs, on 'no fault basis and without the proof of negligence'.

The Doctrine of Absolute Liability was further extended by National Environment Tribunal Act, 1995 under which tribunal has power to award compensation in cases of death, injury , sickness of person or of damage to a person's property or to environment resulting from accidents involving hazardous substance. In MC Mehta v. Union of India, which was popularly known as the Oleum gas leak case. It was public interest litigation under Article 32 of the Indian constitution.

In the judgment, on the substantive law it was emphasized that the principle of absolute liability should be followed to compensate victims of hazardous and inherently dangerous activity'. Industries engaged in such activities are absolutely liable to compensate those who are affected by the harm arising from such activities.

4. Negligence

Common law negligence may be brought to prevent environmental pollution. In an action for negligence the plaintiff must show that :

a.) The defendant was under the duty to take reasonable care to avoid damage complained off.
b.) There was the breach of the duty.
c.) The damages was caused by the breach of the duty.

The degree of care required in the particular case depends upon the surrounding circumstances and varies according to the risk involved and magnitude of the injury.

IPC AND ENVIRONMENT PROTECTION.

Environmental crime refers to the violation of laws intended to protect the environment and human health. These laws govern air and water quality and dictate the ways in which the disposal of waste and hazardous materials can legally take place. Individuals or corporations can be found guilty of environmental crimes.

- Chapter XIV of IPC containing Sections 268 to 290 deals with offenses affecting the public health, safety, convenience, decency and morals. Its object is to safeguard the public health, safety and convenience by causing those acts punishable which make environment polluted or threaten the life of the people.
- Section 268 & 290 of IPC defines public nuisance and provides for punishment of fine up to Rs. 200 for public nuisance respectively. Under these provisions any act or omissions of a person which caused injury to another by polluting the environment can be controlled.

Public Nuisance: a person is guilty of public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger to the people in general who dwell or occupy the property in the vicinity or cause injury, danger , obstruction to persons who use any public right.

- Section 269 & 270 of IPC provides, whoever negligently does any act which spreads the infection of disease dangerous to life, can be controlled by punishing the person responsible for such act with imprisonment upto six months to six years or with fine or both respectively.
- Section 277 provides, whoever voluntarily fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment for three months or with fine of five hundred rupees or with both.
- Section 278 provides, whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons dwelling or carrying on business in the neighborhood or passing along the public way, shall be punished with fine up to Rs.500.

The above two provisions have direct relevance to environmental protection as they seek to prevent water and air pollution through a penal strategy.

- Section 284 provides, whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, shall be punished with imprisonment for a term of 6 months or with fine up to Rs.1000 or with both.
- Section 286 provides, whoever does, with any explosive substance, any act rashly or negligently as to endanger human life, to be likely to cause or injury to any other person, shall be punished with imprisonment for a term of 6 months, or with fine up to Rs.10000 or with both.
- Under sections 426,430,432 of IPC general pollution caused by mischief can be controlled and the same is punishable.

PUBLIC NUISANCE AND ENVIRONMENT PROTECTION.

A public nuisance may be broadly defined as an unreasonable interference with a general right of the public. Because a public nuisance with a public right, it is not tied to interference with the enjoyment and use of property and remedies against public nuisance are therefore available to every citizen. Section 268 of IPC defines the offence of public nuisance.

Persons who conduct any offensive trades and thereby pollutes air or cause loud and continuous noise that affect the health and comfort of dwelling in the neighborhood are liable to prosecution for causing public nuisance.

Section 133 to 144 of Crpc, provides summary remedy against public nuisance. This section empowered magistrate to pass a conditional order for the removal of public nuisance within a fixed period of time.

The important role played by the judicial activism of the eighties made its impact felt mire in the area of the environmental protection than in any other field. Municipal council, Ratlam v. Vardhichand(AIR 1980 SC 1622) is a leading case where Supreme Court identified the responsibilities of local bodies towards the protection of environment and developed the law of

public nuisance in the Code of Criminal procedure as a potent instrument for enforcement of their duties.

2nd Unit- Prevention and Control of Water, Air, Noise and Land Pollution.

Powers and functions of State Board and Central Board.

Section 17 of the Act, State Board is empowered to exercise the following functions:

1.) To plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the state and ensure the proper execution of the same.
2.) To advice state Government on any matter concerning the prevention, control or abatement of water pollution.
3.) To encourage and conduct investigation and research relating to problems of water pollution and prevention, control of the water pollution.
4.) To lay down, modify or annul effluent standards for the sewage and trade effluent and for receiving quality of water.
5.) To lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream.
6.) To evolve efficient methods of disposal of sewage and trade effluents on land.
7.) To collect and disseminate information relating to water pollution and prevention, control or abatement of water pollution.
8.) To lay down effluent standards to be complied with by persons while causing discharge of sewage.
9.) To advice the State Government with respect to location of any industry which carry or likely to carry such business which can pollute a stream or well.
10.) To perform such other functions as may be prescribed by state government or entrusted to it by Central Government or State Government.

Power to give direction:

Section 18 provides for the Power to give direction-

a.) The Central Board is bound by the written directions issued by the Central Government.
b.) The State Board is bound by the written directions of the Central Board or the State Government.

If the direction given by the State Government is inconsistent with the direction given by the Central Government then the matter shall be referred to the central government for its decision.
Where the central government is of the opinion that State Board has defaulted in complying with the directions given by the Central board which caused grave emergency and it is necessary to do in public interest, the Central Government may by order direct the Central Board to perform such functions of State Board for such period and for such purpose as specified.

Other Powers of the State Board:

1.) To make survey of any area and keep the records of the flow, volume or other characterstics of the stream, well and can also take steps for measurement and recording of the rainfall etc. [20(1)].
2.) To give directions requiring any person who is extracting substantial water form any stream, well or discharging sewage or trade effluents to such stream or well to give information in the prescribed manner.[20(2)].

3.) To give directions requiring any person incharge of any establishment where any industry, operation, process or disposal or any other treatment is carried on to give information regarding such construction, installation or operation of any disposal system.[20(3)].

4.) The State Board is shall have the power to take sample of water from any stream, well, or any sewage or trade effluent for purpose of analysis and the result of such analysis shall not be admissible in any of legal proceedings.

Additional Powers Of the State Board:

1.) Power to refuse or withdraw consent (Sec 27)
2.) Power to carry out certain works in accordance n the conditions so specified (Sec 30).
3.) Power to make the emergency provisions at the cost of the polluter (Sec32).

Common Powers of the Central and the State board:

1.) Power to give directions for:
a.) The closure, prohibition or regulation of any industry, operation or process.
b.) The stoppage or regulation of supply of electricity, water or any other service. [Sec 33-A]

Case Laws- **Oil Country Tubular Ltd. V. A. P. Pollution Control Board, and anothers, 2005(3)ALD95(DB)** learned division bench of the High Court of Andhra Pradesh held that the effluents discharged by the petitioner industry are trade effluents and satisfy the definition of pollution in 2 (e) of Water Act,1974. The petitioner industry comes with in the purview of the Water Act,1974 and the Air Act,1981 and consequently the board has the authority to control, regulate or interfere with the operations of the petitioner industry.

M/S Suma Traders v. Chairman, K.S. Pollution Control Board, (AIR 1998) – power of the board to order for closure of industry, it is essential for board to after due enquiry conducted in accordance with the law, to come to the conclusion as to whether the industry should suffer an order of closure.

M/S Executive Apparel Processor V. Taluk Executive Magistrate and Another (1997 2 ALT Crl (603) (Kar.) Power of the board to issue directions.

Sample of effluents: Procedure; Restraint Order

Section 21 of the Water (Prevention and control of pollution) Act provides for power to take sample of effluent and procedure to be followed:

State Board or any other officer empowered in this behalf has power to take samples of water

from any stream or well or sewage or trade effluents.
The samples of any trade effluent shall not be admissible in any of the legal proceeding unless the reuirements under section (3), (4), (5) are complied with.
When any sample of trade effluent and sewage is taken for analysis then the person taking sample shall-
Serve a notice on a person incharge or to the person having control over the plant, vessels etc.
Sample must be divided in two parts in the presence of the occupier or his agent and each part to be placed in container which shall be marked and sealed and also it must be signed by both persons taking the sample.
In case of Union Territory- if sample is taken from any area situated in UT, then the sample must be sent to the laboratory established by Central Board under Section 16.
In any other case- laboratory established by State Board under Section 17.
When occupier is absent- where any sample of sewage or trade effluent is taken for analysis and occupier or his agent was willfully absent then the following procedure to be followed-
The container in which sample is taken shall be marked and sealed and signed by the person taking sample and sent that sample to the laboratory for analysis. The person shall inform the Govt. analyst appointed in writing about willful absence of the occupier or his agent.
When Occupier is present but refuse to sign the marked and sealed container- then it shall be signed by the person taking the sample and the sample shall be sent for analysis to the laboratory.
Cost incurred shall be payable by occupier or agent and in case of any default the same shall be payable by the occupier or agent after giving reasonable opportunity of being heard to the occupier or agent.

Consent requirement: Procedure, Grant/Refusal, Withdrawal.
Section 27 of the Water (prevention and control of pollution) Act, 1974 provides for refusal or withdrawl of consent of the State Board.
The State Board should not grant its consent unless the industry, operation or process and disposal system or the outlet so established, as to comply with any condition to exercise its right to take sample of the effluent.
A State Board may also review any conditions imposed under Section 25 and 26 and may serve a notice revocking or making any variation and can also refuse any to give consent without any condition and may make such order as deem fit.

Citizen Suit Provision
The Environment (Protection) Act, provided for the first time in 1986, citizen suit provisions in the lower courts. Under Section 19 of the Act, a citizen may prosecute a polluter by filing a complaint to a Judicial Magistrate Court. It can be done after giving 60 days notice to the State Pollution Control Board of his or her intention to the file a case. Hitherto, only the government could file a case. Later, similar provisions have been provided under **Section 43 of the Air Act, 1981 and Section 49 of the Water Act, 1974,** by way of amendments. All these provisions make it mandatory for the pollution control boards to disclose all relevant internal reports to a person who intends to prosecute the polluter.

AIR (PREVENTION AND CONTROL OF POLLUTION), ACT,1981
Powers and functions of State Board.
Section 17 of the Act, State Board is empowered to exercise the following functions:

1.)To plan a comprehensive programme for the prevention, control or abatement of pollution of streams and wells in the state and ensure the proper execution of the same.
2.)To advice state Government on any matter concerning the prevention, control or abatement of water pollution.
3.)To encourage and conduct investigation and research relating to problems of water pollution and prevention, control of the water pollution.
4.)To lay down, modify or annul effluent standards for the sewage and trade effluent and for receiving quality of water.
5.)To lay down standards of treatment of sewage and trade effluents to be discharged into any particular stream.
6.)To evolve efficient methods of disposal of sewage and trade effluents on land.
7.)To collect and disseminate information relating to water pollution and prevention, control or abatement of water pollution.
8.)To lay down effluent standards to be complied with by persons while causing discharge of sewage.
9.)To advice the State Government with respect to location of any industry which carry or likely to carry such business which can pollute a stream or well.
10.)To perform such other functions as may be prescribed by state government or entrusted to it by Central Government or State Government.
Power to give direction:
Section 18 provides for the Power to give direction-
a.)The Central Board is bound by the written directions issued by the Central Government.
b.)The State Board is bound by the written directions of the Central Board or the State Government.
If the direction given by the State Government is inconsistent with the direction given by the Central Government then the matter shall be referred to the central government for its decision.
Where the central government is of the opinion that State Board has defaulted in complying with the directions given by the Central board which caused grave emergency and it is necessary to do in public interest, the Central Government may by order direct the Central Board to perform such functions of State Board for such period and for such purpose as specified.

Other Powers of the State Board:
1.)To make survey of any area and keep the records of the flow, volume or other characterstics of the stream, well and can also take steps for measurement and recording of the rainfall etc. [20(1)].
2.)To give directions requiring any person who is extracting substantial water form any stream, well or discharging sewage or trade effluents to such stream or well to give information in the prescribed manner.[20(2)].
3.)To give directions requiring any person incharge of any establishment where any industry, operation, process or disposal or any other treatment is carried on to give information regarding such construction, installation or operation of any disposal system.[20(3)].
4.)The State Board is shall have the power to take sample of water from any stream, well, or any sewage or trade effluent for purpose of analysis and the result of such analysis shall not be admissible in any of legal proceedings.

Additional Powers Of the State Board:
1.)Power to refuse or withdraw consent (Sec 27)

2.)Power to carry out certain works in accordance n the conditions so specified (Sec 30).
3.)Power to make the emergency provisions at the cost of the polluter (Sec32).

Common Powers of the Central and the State board:

1.)Power to give directions for:
a.)The closure, prohibition or regulation of any industry, operation or process.
b.)The stoppage or regulation of supply of electricity, water or any other service. [Sec 33-A]

Case Laws- Oil Country Tubular Ltd. V. A. P. Pollution Control Board, and anothers, 2005(3)ALD95(DB) learned division bench of the High Court of Andhra Pradesh held that the effluents discharged by the petitioner industry are trade effluents and satisfy the definition of pollution in 2 (e) of Water Act,1974. The petitioner industry comes with in the purview of the Water Act,1974 and the Air Act,1981 and consequently the board has the authority to control, regulate or interfere with the operations of the petitioner industry.

Air Pollution Control Areas

Section 19 of the Act provides the State Government after consultation with the State Board and by the notification in the official gazette, declare any area with in the state as air pollution control area and also can alter such pollution control areas by way of extention or reduction. (sec 19 (1) & (2).)

The state government after consulting with the state board and by notification in the official gazette, prohibit the use of any fuel other than an approved fuel in any air pollution control area from such date not being less than three months from the date of publication of the notification, as may be specified in the notification. [Sec 19(3)].

No appliance shall be used other than approved appliance in the air pollution control area. [Sec 19 (4)].

The State Government in consultation with the state board shall give necessary instructions to the concerned authorities inchrge of registration of motor vehicle under MV Avt,1987 to ensure that the standards of emission of air pollutants from automobiles as laid down by the state board are complied with.

Consent Requirement: Procedure, Grant/Refusal, Withdrawal

Section 21 of the Act provides for application for consent. An application shall be accompanied with the prescribed fee and should be made in the prescribed manner.

The state board shall grant the consent with in 4 months after making due enquiry into the application for consent.

The state board can also refuse such consent by recording the reasons. The state board can also cancel the consent before expiry of the prescribed period or can refuse to grant further consent after the expiry of the conditions if the condition on which consent is granted has not been complied with.

Before cancelling the consent he person concerned should be given a reasonable opportunity of being heard. Person who has been granted consent shall comply with the following conditions:

a.)the control equipment with such specifications as the state board may approve shall be installed and operated in the premises where industry carry on their business.

b.) the existing equipment shall be altered or replaced in accordance with the directions of the

state board.
c.) The control equipments should be kept in good condition.
d.) such other conditions as may be specified.
e.) chimney of such specification as state government may approve shall be erected or re-erected in the premises.

Sample of Effluents: Procedure; Restraint Order
As per Section 26 the State Board has power to take sample of air or emission from any chimney, fuel, duct or any other outlet for the purpose of analysis in the manner as prescribed.
The result of such analysis shall not be admissible in any of the legal proceedings unless the provisions of sub-section (3) and (4) of section 26 are complied with.
When a sample of emission is taken for analysis the person taking the sample shall-
1.)serve a notice on occupier or his agent.
2.) in presence of the occupier or his agent, collect a sample of emission for analysis.
3.) Cause the samp0le to be placed in a container which shall be marked and sealed and also it must be signed by the person taking the sample and the occupier or his agent.
4.) send the sample to the laboratory established or recognized by the state board.

Citizen Suit Provision
The Environment (Protection) Act, provided for the first time in 1986, citizen suit provisions in the lower courts. Under Section 19 of the Act, a citizen may prosecute a polluter by filing a complaint to a Judicial Magistrate Court. It can be done after giving 60 days notice to the State Pollution Control Board of his or her intention to the file a case. Hitherto, only the government could file a case. Later, similar provisions have been provided under **Section 43 of the Air Act, 1981 and Section 49 of the Water Act, 1974,** by way of amendments. All these provisions make it mandatory for the pollution control boards to disclose all relevant internal reports to a person who intends to prosecute the polluter.

Noise Pollution Control Order,2000.
1. Definitions:
(a) "Act" means the Environment (Protection) Act, 1986 (29 of 1986);
(b) "area/zone" means all areas which fall in either of the four categories given in the Schedule annexed to these rules;
(c) "authority" means any authority or officer authorised by the Central Government, or as the case may be, the State Government in accordance with the laws in force and includes a District Magistrate, Police Commissioner, or any other officer designated for the maintenance of the ambient air quality standards in respect of noise under any law for the time being in force;
(d) "person" in relation to any factory or premises means a person or occupier or his agent, who has control over the affairs of the factory or premises;
(e) "State Government" in relation to a Union territory means the Administrator thereof appointed under article 239 of the Constitution.

2. Ambient air quality standards in respect of noise for different areas/zones.

(1) The ambient air quality standards in respect of noise for different areas/zones shall be such as specified in the Schedule annexed to these rules.
(2) The State Government may categorize the areas into industrial, commercial, residential or silence areas/zones for the purpose of implementation of noise standards for different areas.
(3) The State Government shall take measures for abatement of noise including noise emanating from vehicular movements and ensure that the existing noise levels do not exceed the ambient air quality standards specified under these rules.
(4) All development authorities, local bodies and other concerned authorities while planning developmental activity or carrying out functions relating to town and country planning shall take into consideration all aspects of noise pollution as a parameter of quality of life to avoid noise menace and to achieve the objective of maintaining the ambient air quality standards in respect of noise.
(5) An area comprising not less than 100 metres around hospitals, educational institutions and courts may be declared as silence area/zone for the purpose of these rules.

3. Responsibility as to enforcement of noise pollution control measures.
(1) The noise levels in any area/zone shall not exceed the ambient air quality standards in respect of noise as specified in the Schedule.
(2) The authority shall be responsible for the enforcement of noise pollution control measures and the due compliance of the ambient air quality standards in respect of noise.

4. Restrictions on the use of loud speakers/public address system.
(1) A loud speaker or a public address system shall not be used except after obtaining written permission from the authority.
(2) A loud speaker or a public address system shall not be used at night (between 10.00 p.m. to 6.00 a.m.) except in closed premises for communication within, e.g. auditoria, conference rooms, community halls and banquet halls.

5. Consequences of any violation in silence zone/area.
Whoever, in any place covered under the silence zone/area commits any of the following offence, he shall be liable for penalty under the provisions of the Act:
(i) whoever, plays any music or uses any sound amplifiers,
(ii) whoever, beats a drum or tom-tom or blows a horn either musical or pressure, or trumpet or beats or sounds any instrument, or
(iii) whoever, exhibits any mimetic, musical or other performances.

6. Complaints to be made to the authority.
(1) A person may, if the noise level exceeds the ambient noise standards by 10 dB(A) or more given in the corresponding columns against any area/zone, make a complaint to the authority.
(2) The authority shall act on the complaint and take action against the violator in accordance with the provisions of these rules and any other law in force.

7. Power to prohibit etc. continuance of music sound or noise.
(1) If the authority is satisfied from the report of an officer incharge of a police station or other information received by him that it is necessary to do so in order to prevent annoyance, disturbance, discomfort or injury or risk of annoyance, disturbance, discomfort or injury to the

public or to any person who dwell or occupy property on the vicinity, he may, by a written order issue such directions as he may consider necessary to any person for preventing, prohibiting, controlling or regulating:
(a) the incidence or continuance in or upon any premises of -
(i) any vocal or instrumental music,
(ii) sounds caused by playing, beating, clashing, blowing or use in any manner whatsoever of any instrument including loudspeakers, public address systems, appliance or apparatus or contrivance which is capable of producing or re-producing sound, or
(b) the carrying on in or upon, any premises of any trade, avocation or operation or process resulting in or attended with noise.
(2) The authority empowered under sub-rule (1) may, either on its own motion, or on the application of any person aggrieved by an order made under sub-rule (1), either rescind, modify or alter any such order:
Provided that before any such application is disposed of, the said authority shall afford to the applicant an opportunity of appearing before it either in person or by a person representing him and showing cause against the order and shall, if it rejects any such application either wholly or in part, record its reasons for such rejection.

Case laws- **Church of god (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Association and others, AIR 2000 SC 2773-**
Supreme Court held that no religion prescribes that prayers should be performed by disturbing the peace of others nor does it provides that they should be through voice-amplifiers or beating of drums. In a civilized society in the name of the religion, activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during day-time or other person carrying on other activities cannot be permitted. Every person is entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for the exams is entitled to concentrate on his studies without unnecessary disturbance and similarly old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Thus all these rights are required to be honoured.
Further court held that due to urbanization or industrialization the noise pollution in some area of town or city might be exceeding permissible limits and prescribed rules but that would not be a ground for permitting others to increase the same by beating of drums or by use of voice amplifiers, loud speakers or by such other musical instruments. Therefore rules prescribing reasonable restrictions i.e. Noise Pollution (Regulation and Control) Rules, 2000 are required to be enforced.

In **Sayeed Maqsood Ali v. The State of M.P. and Others (AIR 2001 M.P.220)**
High Court held that premises should not be let out to such persons or associations or organizations who have not obtained permission from the competent authority with regard to the use of loud speaker or public address system. No function should be carried out in violation of the Act and Rules,2000.

In **Moulana Mufti Syed Md. Noorur Rehman Barkati and others v. State of West Bengal and others,(AIR 1999 Cal.15)**
The writ petition was filed for a declaration that rule 3 of the Environmental Protection Rules, 1986 and Schedule III do not apply in case of mosques more particularly at the time of call of

azan and for a further declaration that schedule III of the said rules is ultra vires of the article 14 and 25 of the constitution.
High Court held that restriction on the use of them microphones as imposed by the court,Central Pollution Control Board and State Pollution Control Board have to be carried out by all concerned at any cost. Use of microphones and loudspeaker is not essential and integral part and therefore restrictions can be imposed on such use.

Land Pollution

Land pollution can be defined as any physical or chemical alteration to land which cause its use to change and render it incapable of beneficial treatment without treatment. Alternatively it can be defined as misuse of land, disuse of land, and chemical contamination of land.
It can also be defined as de-spoilation of land human beings survive on.
Environment Protection Act, 1974 does not defined land pollution.

UNIT-III: General Environment Legislations and Protection of Forests and Wild Life

I) Environmental (Protection) Act, 1986

a.) Meaning of 'Environment', 'Environment Pollutant', 'Environment Pollution**'.**
"environment" **includes water, air and land and the inter- relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.**

"environmental pollutant" **means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment.**

"environmental pollution" **means the presence in the environment of any environmental pollutant.**

b.)POWER OF CENTRAL GOVERNMENT TO TAKE MEASURES TO PROTECT AND IMPROVE ENVIRONMENT. (Section 3)

- planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;
- laying down standards for the quality of environment in its various aspects;
- laying down standards for emission or discharge of environmental pollutants from various sources.
- laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;
- laying down procedures and safeguards for the handling of hazardous substances;
- collection and dissemination of information in respect of matters relating to environmental pollution.

Laws related to forest.

1.) Forest Act,1927

The Indian Forest Act, 1927 was an act to consolidate the then existing laws relating to forest, the transit of forest products and duties that can be levied on "Forest Product" as defined in Section 2 (iv) (a) and (b) of the act. The act deals with reserved forest, village forest, protected forest, control over forests and lands not being property of government, the duty on timber and other forest produce, regulation transit of forest products, collection of timber, penalties and procedures, cattle – trespass, forest officers and other miscellaneous provisions.

This act does not lay down a specific definition for forests. The act establishes three categories of forests, reserve forest, protected forest and village forest. The reserved forests (section 3 to 27 of the Act of 1927) can be notified by the State Government on any forest land or waste land to which the government has ownership or right. To be categorized as a reserved forest, the land must be forest land or waste land in the absence of which the notification could be quashed. Section 26 of the Indian Forest Act 1927 prohibits a number of activities including making fresh clearings, tree felling, lopping, burning, grazing, quarrying, manufacturing activities, hunting, shooting, etc. in the forest. Violation of provisions of Section 26 specifically with regards to creating fire, felling, girdling, lopping, etc. of trees, quarrying and manufacturing operations or clearing breaking up of any land for cultivation is punishable with imprisonment for a term which may extend to two years or with fine which may extend to Rs. 20,000 but which shall not be less than Rs. 5,000.

For other offenses under Section 26 an imprisonment for a term which may extend to 6 months or with fine which may extend to Rs. 1,000 or with both and on the second and every subsequent conviction for the same offense, with imprisonment which may extend to 6 months or with fine which may extend to Rs. 2,000 or with both is prescribed. It also provides for adjudication of forest rights, uses by local people as allowed by forest officer, appeals and denotification. Section 25 specifically empowers the forest officer to stop any public or private way or water coarse in reserved forest. The act also provides for issuing notification regarding appointment of forest settlement officer to adjudicate rights and granting permissions for activities and claims.

Section 28 provides for assigning rights of reserved forests or protected forests or any forest belonging to the state government to any village community and provisions relating to reserved

forest, protected forest or forest belonging to the government shall apply. Such forests are called village forests.

Section 29 provides for the notification of protected forests. Protected forests are also notified on forest land or waste land. The state government under provision of Section 30 may declare any tree or class of trees in a protected forest to be reserved, it can also declare any portion of a protected forest as closed for a term not exceeding 30 ears during which the rights of private persons shall be suspended provided that alternate rights are available in the remainder of the forest. It can also prohibit specified activities within the area Violation of prohibited activities in protected areas as prescribed in Section 30 and 32 are punishable offences liable to be punished with imprisonment for a term which may extend to 2 years or with a fine which may extend to Rs. 5,000 or with both and on the second and every subsequent conviction for the same offence, with imprisonment for a term which may extend to 2 years and with fine which may extend to Rs. 10,000.

The state government also has the powers to regulate or prohibit activities in any forest or waste land not being the property of the government after providing suitable opportunity to the owner of such forest or land.

Types of forest:

Reserved Forest- The State Government may constitute any forest-land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest

Protected Forest- The State Government may, by notification in the Official Gazette, declare the provisions of this Chapter applicable to any forest-land or waste-land which,, is not included in a reserved forest but which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest produce of which the Government is entitled.

(2) The forest-land and waste-lands comprised in any such notification shall be called a "protected forest". (Section 29)

Village Forest - The State Government may assign to any village-community the rights of Government to or over any land which has been constituted a reserved forest, and may cancel such assignment. All forests so assigned shall be called village-forests.

(2) The State Government may make rules for regulating the management of village forests, prescribing the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce or pasture, and their duties for the protection and improvement of such forest.

(3) All the provisions of this Act relating to reserved forests shall (so far as they are not inconsistent with the rules so made) apply to village-forests. (Section 28)

The Forest (Conservation) Act, 1980

The Forest Conservation Act, 1980 is a Central Act of Parliament with a view to provide for the conservation of forest and for matters connected therewith or ancillary or incidental thereto. The act extends to the whole of India except the state of Jammu and Kashmir. Section 2 of the act makes a provision of a prior approval of the Central Government necessary before a State Government or any other authority issues direction for de-reservation of reserved forests (which have been reserved under the Indian Forest Act 1927), use of forest land for non – forest purpose, assigning forest land by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organization not owned, managed or controlled by the government and clear felling of naturally grown trees. The term "forest land" mentioned in Section 2 of the Act refers to reserved forest, protected forest or any area recorded as forest in the government records. Lands which are notified under section4 of the Indian

Forest Act would also come within the purview of the Forest Conservation Act 1980. The Supreme Court has also held that "forest" as understood in the dictionary sense would also be included under "forest land". The term "forest" shall not be applicable to the plantation raised on private land except notified private forest. Tree falling in such plantation would however be governed by state acts and rules. The term "tree" will have the same meaning as defined in section 2 of the Indian Forest Act 1927.

Appeals against orders made under section 2 of the forest conservation act on or after the commencement of the National Green Tribunal Act 2010 lie with the National Green Tribunal. The procedures along with formats for obtaining clearances under the act have been prescribed under the Forest Conservation Rules 2003 and 2004 which also has constituted a forest advisory committee and regional empowered committee. The regional empowered committee shall decide the proposal involving diversion of forest land upto 40 ha. Proposals involving forest land of more than 40 ha. and all proposals relating to mining and encroachments irrespective of the area of

forest land involved, shall be forwarded by the concerned State Government / Union Territory along its recommendations to the MoEF Government of India. Non – compliance of provisions of section 2 of the act shall be punishable with simple imprisonment for a period which may extend upto 15 days.

Wild Life (Protection) Act,1972:

Authorities to be appointed under the Act- Chapter II of the Act.

Appointment of director and other officers (Section-3)

The Central Government may appoint
(a) A Director of Wildlife Preservation;
(b) Assistant Directors of Wildlife Preservation; and
(c) Such other officers and employees as may be necessary.
(2) In the performance of his duties and exercise of his powers by or under this Act, the Director shall be subject to such general or special directions, as the Central Government may, from time to time, give.
(3) The Assistant, Directors of Wildlife Preservation and other officers and employees appointed under this section shall be subordinate to the Director.

Appointment of Chief Wildlife Warden and other officers – (Section 4)
(1) The Government may, for the purposes of this Act, appoint –
(a) a Chief Wildlife Warden;
(b) Wildlife Wardens; One Honorary Wildlife Ward in each district;
(c) such other officers and employees as may be necessary.
(2) In the performance of his duties and exercise of his powers by or under this Act, the Chief Wildlife Warden shall be subject to such general or special directions, as the State Government may, from time to time, give.

Constitution of the Wildlife Advisory Board.– Section 6

(1) The State Government, or, in the case of a Union Territory, the Administrator,after the commencement of this Act, constitute a Wildlife Advisory Board consisting of the following member, namely:

(a) the Minister in charge of Forest in the State or Union Territory, or, if there is no such Minister, the Chief Secretary to the State Government, or, as the case may be, the Chief Secretary to the Government or the Union Territory, who shall be the Chairman;

(b) two members of the State Legislature or, in the case of a Union Territory havinga Legislature,

two members of the legislature of the Union Territory, as the case may be;

(c)Secretary to the State Government, or the Government of the Union Territory

(d) The Forest Officer in charge of the State Forest Department, by whatever designation called, ex-officio;

(e) an officer to be nominated by the Director;

(f) Chief Wildlife Warden, ex-officio;

(g) Officers of the State Forest Government not exceeding five;

(h) such other person, not exceeding ten, who, in the opinion of the State Government, are interested in the protection of Wildlife, including the representatives of tribals not exceeding three.

(1A) The State Government may appoint a Vice-Chairman of the Board from amongst the members referred to in clauses (b) and (h) of sub-section (1).

(2) The State Government shall appoint the forest Officer incharge of the Forest Department or Chief Wildlife Warden as the Secretary to the Board.

Hunting of wild animals- Chapter III Of the Act.

Prohibition of Hunting (Section 9) – No person shall hunt any wild animal specified in Schedule, I, II, III and IV except as provided under section 11 and section 12.

Hunting of Wild animals to be permitted in certain cases (Section 11)–

(a.) The Chief Wildlife Warden may, if he is satisfied that any wild animal specified in Sch. 1 has become dangerous to human life or is so disabled or diseased as to be beyond recovery, by order in writing and stating the reasons therefor, permit any person to hunt such animal or cause animal to be hunted;

(b) the Chief Wildlife Warden or the authorised officer may, if he is satisfied that any wild animal specified in Sch. II ,Sch, III or Sch. IV has become dangerous to human life or to property (including standing crops on any land) or is so disabled or diseased as to be beyond recovery, by order in writing and stating the reasons therefore, permit any person to hunt such animal or cause such animal to be hunted.

(2) The killing or wounding in good faith of any wild animal in defence of oneself or of any other person shall not be an offence; Provided that nothing in this sub-section shall exonerate any

person who, when such defence becomes necessary, was committing any act in contravention of any provision of this Act or any rule or order made there under.

(3) Any wild animal killed or wounded in defence of any person shall be Government property.

Grant of permit for special purposes (Section 12)- It shall be lawful for the Chief Wildlife Warden, to grant a permit, by an order in writing stating the reasons therefore, to any person, on payment of such fee as may be prescribed, which shall entitle the holder of such permit to hunt, subject to such conditions as may be specified therein, any wild animal specified in such permit, for the purpose of, –

(a) education;

(b) scientific research;

(c) scientific management;

d.) Collection of specimens;

e.) derivation, collection or preparation of snake-venom for the manufacture of life saving drugs.

Protection of specified plants (Chapter IIIA, SECTION 17A- 17H)

17A. Prohibition of picking, uprooting, etc., of specified plants. – Save, as otherwise provided in this Chapter, no person shall –

(a) willfully pick, uproot, damage destroy, acquire or collect any specified plant from any forest land and area specified, by notification, by the Central Government,

(b) possess, sell, other for sale, or transfer by way of gift or otherwise, or transport any specified plant, whether alive or dead, or part.

17B. Grant of permit for special purpose–. The Chief Wild Life Warden may with the previous permission of the State Government, grant to any person a permit to pick, uproot, acquire or collect from a forest land or the area specified under section 17A or transport, subject to such conditions as may be specified therein, any specified plant for the purpose of

(a) education;

(b) scientific research.,

(c) collection, preservation and display in a herbarium of any scientific institutions; or

(d) propagation by a person or an institution approved by the Central Government in this regard.

17C. Cultivation of specified plants without licence prohibited. – (1) No person shall cultivate a specified plant except under, and in accordance with a licence granted by the Chief Wild Life Warden or any other officer authorised by the State Government in this behalf.

17D. Dealing in specified plants without licence prohibited. - (1) No person shall, except under and in accordance with a licence granted by the Chief Wild Life Warden or any other officer authorised by the State Government in this behalf, commence or carry on business or occupation as a dealer in a specified plant or part or derivative.

(2) Every licence granted under this section shall specify the premises in which and the conditions, if any, subject to which the licensee shall carry on his business.

17F. Possession, etc., of plants by licensee. - No licensee under this chapter shall

(a) keep in his control or possession Of

(i) any specified plant, or part or derivative

(ii) any specified plant, or part or derivative thereof which has not been lawfully acquired under the provisions of this Act or any rule, or order made there under;

(b) (i) pick, uproot, collect or acquire any specified plant, or

(ii) acquire, receive, keep in his control, custody or possession, or sell, offer for sale or transport, any specified plant or part or derivative thereof, except in accordance with the conditions subject to which the licence has been granted and such rules as may be made under this Act.

17G. Purchase, etc., of specified plants– No person shall purchase, receive or acquire any specified plant or part or derivative thereof otherwise than from a licensed dealer.

Protected Area – Chapter IV , Sections 18 to 38.

Section 18 provides that the State Government may, by notification, declare its intention to constitute any area other than area comprised with any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment. For the purposes of this section, it shall be sufficient to describe the

area by roads, rivers, ridges, or other well-known or readily intelligible boundaries.

The Chief Wildlife Warden may, on an application, grant to any person a permit to enter or reside in a sanctuary for the following purposes;

a) Investigation or study of wildlife and any purpose ancillary or incidental thereto;

b) Photography

c) Scientific research

d) Tourism

e) Transaction of lawful business with any person in the sanctuary

Only a public servant on duty or permit holder or a person having a right over immovable property within the limits of a sanctuary, person passing through pathway in the sanctuary and dependants of the above can also enter or reside in the sanctuary.

In **Gujarat Navodaya Mandal V. State,** the Gujarat High Court observed that there is nothing illegal in giving permission to lay down pipeline in and through the Marine National Park/ Sanctuary, Jamnagar. Because all the possible measures are taken to protect the ecology and environment. An more over there were conditions on permission to proper management as well as for the improvement of wildlife.

National Park

The state government, for the purpose of protecting, propagating or developing wildlife may by a notification declare that an area, by reason of its ecological, faunal, floral, geomorphological or zoological association or importance, needed to be constituted as a National Park. Once a National Park is declared, no alteration of the boundaries shall be made except on the resolution passed by the legislature of the state. In a National Park, the following activities are strictly prohibited;

a) Destroying, exploring or removing any wildlife,

b) Destroying, damaging the habitat of any wild animal,

c) Deprive any wild animal of its habitat,

d) Grazing of any livestock

In **Animal and Environment Legal Defence Fund V. Union of India** , which was a writ petition came to Supreme Court, the petitioners filed the petition challenging the validity of granting

permits for fishing to 305 tribal families in reservoirs within the Pench National Park (Madya Pradesh). But the Supreme Court adopted humanitarian approach keeping in mind the economic sustainability and environment protection. The Supreme Court directed the forest authorities and wildlife authorities to take adequate measures to protect the environment and at the same time keep watch on the villagers. The villagers were also directed not to enter other areas other than the reservoir.

Trade or Commerce in Wild Animals, Animal Articles and Trophies; Its Prohibition.

The term trophy means the whole or any part of any captive animal or wild animal, other than vermin, which has been kept or preserved by any means, whether artificial or natural, and includes, rugs, skins, and specimens of such animals mounted in whole or in part through a process of taxidermy, and antler, horn, rhinoceros horn, feather, nail, tooth, musk, eggs, and nests. And uncured trophy means the whole or any part of any captive animal, other than vermin, which has not undergone a process of taxidermy, and includes a [freshly killed wild animal ambergris, musk and other animal products];

Sec. 39 of the Act, declares that every wild animal other than vermin, which is hunted or kept or bred in captivity or found dead or killed by mistake, shall be the property of the State Government. Likewise, animal articles, trophy or uncured trophy, meat derived from any wild animal, ivory imported to India, article made from such ivory, vehicle vessel weapon, trap or tool that has used for committing an offence and has been seized shall be the property of the state government. If any of the above is found in the sanctuary or a National Park declared by the Central Government then it shall be property of the Central Government. In Rajendra Kumar V. Union of India, the petitioner challenged the above clause which imposed a complete ban on import of ivory and articles made form it. It affected his livelihood and freedom of trade and business provided under Article 19(1). Moreover, he contended that ivory derived from a mammoth was not ivory derived from a scheduled animal, therefore, any article made out of such fossil ivory could not be brought within the purview of the Act. But the Court observed that, the Chapter V-A of this Act, is incorporated in accordance with the direction of Convention on International Trade in Endangered Species of Wild Fauna and Flora. The object and reasons of the Amendment Act, 1991 make it amply clear that trade in African ivory is proposed to be banned after giving due opportunity to traders to dispose of the existing stocks. So this Section can not be void.

Declaration as to no. of captive animals (Section40)

This section provides that every person having the control, custody or possession of any captive animal as specified in Schedule I or part II Of schedule II etc. to declare to the chief wilf life warden or the authorized officer the number and the description of such animals or such article etc. subject to the conditions specified there under.

Section 40-A empowers the Central Government by notification to declare any person to the Chief

Wild Life Warden or the authorized officer any captive animal, animal article etc. as specified in schedule I or part II of Schedule II in his control, custody or possession in respect of which no declaration was made under Section 40(4) or 40(1) in the prescribed form and manner.

Preparation of Inventories (Section 41)
This section empowers the chief wild life warden or the authorized officer for the preparation of inventories of animal article etc. in the prescribed manner.

Section 42 provides that the chief wild life warden to issue certificate of ownership to any person, who is in lawful possession of any wild animal or article etc.

Prohibition on transfer of animals etc. (Section 43)

This section prohibits transfer by sale or offer for sale or by any other mode of consideration of commercial nature, any animal or article or trophy or unsecured trophy in accordance in the manner prescribed.
Section 44 prohibits a person to commence or carry on a business as manufacturer of or dealer in, any animal article or, dealer in trophy without a license duly granted under Section 44 (4).

LAW OF EVIDENCE (303)

LLB 303
Law of Evidence

Unit 1: Introduction and Relevancy
b. Definitions: Facts, Facts in Issue, Relevant Fact, Evidence Proved, Disproved, not Proved, Oral and Documentary Evidence, *Factum Probandum* and Factum *Probans*, Proof and Evidence:

- **Facts:**

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

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

- **Facts in issue**

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

The expression "facts in issue" means and includes—any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Expiations: Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

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

- **Relevant facts:**

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

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

- **Evidence proved, disproved and not proved:**

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

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

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

  "Proved":

  The English author, Cunn, gives the analogy of a merchant who receives information that the rate of exchange will vary, or a General who gets information about the movement of the enemy.

The success of either will depend on his judging soundly when he ought to act on the assumption that what he hears is true, or when prudence bids him to assume it to be false.

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

"Matters before It":

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

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

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

'Legal Proof' and 'Moral Conviction':

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

Oral and Documentary Evidence

Oral Evidence– **Section 60** of the Indian Evidence Act explains Oral Evidence. Oral Evidences are those evidences which are personally seen or heard by the witness giving them and not heard or told by some one else. All the statements which are permitted by the court or the court expects

the witness to make such statements in his presence regarding the truth of the facts, are called as Oral Evidences.

- Oral evidences must always be **direct**. Evidence is direct when it establishes the main fact in issue.

Documentary Evidences – are defined under section 3 of the Act. All those documents which are presented in the court for inspection regarding a case, such documents are known as documentary evidences.

Relevance and admissibility

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

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

In criminal cases in civil-law countries, relevance relates to such questions that are so far removed from the case that they have no evidence value at all. Admissions and confessions do not exclude further evidence. According to Anglo-American law, the accused may be a competent witness under the admissibility rules, but, in contrast to an ordinary witness, he has

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

Facts not otherwise Relevant (Plea of Alibi)

Plea of alibi is that form of defense through which accused attempts to prove that he was in some other place at the time when alleged offense was committed. In fact, criminal's laws have provided accused different defenses to prove his innocence against accusation. No-doubt, plea of alibi is one of such defenses. However, plea of alibi is considered different from all of other such defenses.

Essentials of Plea of Alibi

a) **may taken plea of Alibi**

A person taking Plea of Alibi must be accused of an offence.

(b) Absence of accused at place where crime was committed

He must plead his presence elsewhere, at the time of the commission of alleged offence.

(c) Covering of Entire time

It should be impossible for him to reach the place of occurrence at the time of commission of offence. Therefore plea should be cover the whole time of the alleged offence.

(d) Raised at earliest opportunity

The plea of Alibi must be raised by accused at the earliest possible time.

- **Doctrine of Res gestae**

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

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

Facts forming part of same transactions (Section 6):

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

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

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

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

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

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

Facts suggesting motive (say example previous fighting, property dispute, love affair, family dispute, business rivalry etc.) or preparation (say example just before the murder accused

purchased a gun or bullets, or took training for shooting, or in case of forgery, he purchase few stamp papers to forged a sale deed etc) or conduct, whether previous or subsequent of the parties are also relevant (examples of previous conducts like, previous attempts, any fights; example of subsequent conduct such as being missing from house after committing murder, suspicious act of hiding himself or certain goods used for the offence etc.)

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

Test Identification Parade

'Identification parades' are held at the instance of the investigating officer for the purpose of enabling the witnesses to identification either the properties which are the subject matter of alleged offence or the accused persons. The idea is to test the veracity of the witness on the question of capacity to identify an unknown person whom the witness may have seen only once.

The parade should be taken by a magistrate and the police should not be present at that time. However, it could also be done by the police and any citizen.
Section 9 Facts necessary to explain or introduce relevant facts. —Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Value of Identification Parade:
The Supreme Court in number of cases has explained the value of evidence of identification. It is helpful both for the investigation agency and for the accused. Even, when the witness is a stranger to the accused he may be able to identify the alleged culprit in case TI Parade is held at earliest possible time. "It is in adopting this course alone that justice and fair play can be assured

both to the accused as well as to the prosecution." Where one of the witnesses failed to identify the accused at the TI Parade, identification by him of the accused in the court was useless.

Where the accused is not known to the prosecution witnesses and is identified in the test identification parade as well as in court by a solitary witness, the evidence of identification by him has to be scrutinized with great care and caution than in the case of known accused and should not be accepted unless free from all reasonable doubts. When TI Parade was conducted after long period after the arrest of the accused no reliance could be placed on identification made on test identification parade.

CONSPIRACY

Section 10 of Indian evidence act:

Things said or done by conspirator in reference to common design.—Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

'Conspiracy' means a combination or agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means.

Conditions of relevancy under Sec. 10 are:

1. There shall be prima facie evidence.
2. Anything said, done or written by him should have been said, done or written by him after the time when the intention to conspire was first entertained by any of them
3. The acts/statement of a conspirator can only be used for the purpose of proving the existence of the conspiracy or that a particular person was a party to it.
4. Anything said, done or written may be proved against a conspirator who joined after or left before such thing was said, done or written.

Unit II Statement – Admissions / Confessions and Dying Declarations:

Admission: Section 17:An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by a party or any person connected with him and under the circumstances hereinafter mentioned.

Admissibility of Admissions

According to Phipson the admission is relevant on the following reasons.

1. "Admissions as waiver of proof:

An admission of a party is a statement of fact which dispenses or waives with the necessity of proving the fact against him. It operates as a waiver of proof. "Admissions are admitted because the conduct of a party to a proceeding, in respect of the matter in dispute, whether by acts, speak or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. An admission, therefore as an admission is not conclusive against the person making it, but it may operate as an estoppel under section 115 of the Evidence Act. Under the proviso to Section 58 the court may ask some other independent evidence to support the admitted facts. The court is not bound to give judgment in accordance with admission."

2. "Admissions as statement against interest:

It is natural for a man to make statement in his favour. An admission, being a statement against the interest of the maker should be supposed to be true, for it is highly improbable that a person will voluntarily make false statement against his own interest."

3. "Admissions as evidence of contradictory statements:

Where there is contraction between the statements of the party and his case, the contradiction is relevant. For example, A sues B upon a loan. The account book shows that the loan was given to C. The statement in his Account Book contradicts his case against B."

4. "Admissions as evidence of truth: The statements made by the party about the facts of the case, whether they may go in his favour or against his interest, should be relevant as representation or reflecting the truth as against him. Whatever a party says in evidence against himself may be presumed to be so."

Evidentiary value of an admission:

According to Section 17 an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made to any person, and under

circumstances mentioned in Sections 18 to 31. Even though an admission plays a very important part in judicial proceedings, it is only prima facie of proof.

The Supreme Court observed that admissions are very weak kind of evidence and the court may reject them if it is not satisfied from other circumstances that they are untrue. It is to be noted that admissions are not conclusive proof of matters admitted unless they operate as estoppels. The value of admission depends upon the circumstances in which it made and to whom it is made.

If one party to a suit or proceeding proves that the other party has admitted his case then the work of the court becomes easier. But, in certain cases an admission are used in discrediting the parties' statement by showing that he has on other occasions made statements inconsistent with the cases afterwards set up. In such cases the truth of admission is not relied upon. Section 153(3) deals with such use of admissions. The evidentiary value of admission depends upon circumstances under which they are made.

An erroneous admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel and the court is not precluded from deciding the rights of the parties on a true view of the law.

Confessions

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

Lord Atkin in *Pakla Narayan Swami v. Emperor*[1] provided interesting example of confession. If accused admit the guilt which highly inclupatory and says that he had stabbed the victim to death through his knife, and admit the knife as well, it is still not confession because prosecution would have to prove whether or not act of accused is covered by any private defense or protected under any general exception such as unsoundness of mind.

Rule regarding Admissibility of Confession—

- According to section 24 of IEA, No confession given by an accused person would be relevant if it given in a criminal proceeding, and it was given under any inducement, threat or promise, with reference to the charge against the him, and such inducement, threat or promise was given

by a person in authority in relation to that case and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

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

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

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

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

- It is difficult to rely upon the extra judicial confession as the exact words or even the words as nearly as possible have not been reproduced. Such statement cannot be said to be voluntary so the extra judicial confession has to be excluded from the purview of consideration for bring

home the charge; *C.K. Raveendran v. State of Kerala*[2].

Exception to Rules of Confession—

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

- The condition necessary to bring the section 27 into operation is that the discovery of a fact in a consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved; *PulukuriKottaya v.Emperor*[3].

- If such a confession as is referred to in Section 24 is made after the impression caused by any fession to him and he (B) promises that he will not disclose it to any one. Since, it is extra inducement, threat or promise has, in the opinion of the Court been fully removed it is relevant.

- Section 29 provides that Confession otherwise relevant not to become irrelevant because of promise of secretary etc. Say for example B asked A, an accused of murder to make con judicial confession which is admissible, it will not be held inadmissible only because there was a promise of its secrecy.

- Section 30 of IEA provides that when a confession is given by one accused, and the same was proved, it can be used against the co-accused if he is tried together in the same case during the joint trial. However, as per Illustration (b) of Section 114 of IEA, such confession should not be

relied until the same is proved with material corroboration. Why corroboration is important in this case? Let's examine. A committed murder of B with the help and conspiracy of X, Y and Z. all four were put on joint trial. During trial, X became approver and made confession. Now, since, he is also a co-accused, as per law, i.e. section 30 r/w 133 (Section 133 defines that accomplice/approver is a good witness) his statement is good evidence against all others accused. Rule of logic suggest that if X can ditch his closest friend like A, Y and Z, he must be very shrewd person and, what is guarantee that he will tell truth now. So, illustration (b) of section 114 provides rule of logic or rule of prudence that such testimony should not be relied on until corroborated in material particular i.e. through other evidence.

Dying Declaration

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

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

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

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

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

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

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

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

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

(8) Or is made by several persons and express feelings relevant to matter in question – When the

statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

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

Public Entries, documents & Judgment of the Court:

- Section 35 provides that entry in public record or an electronic record made in performance of official duty is relevant for example it has been held regarding proof about legitimacy of child that the Birth Certificate proceeding on the basis of Baptism Certificate, containing fact that Baptism record was read and checked before the god parents and signed by person along with god parents, such certificate is valid. Thus, Birth Certificate proceeding on basis of Baptism Certificate, legally recognised legitimacy; *Luis Caetano Viegan v. Esterline Mariana R.M.A. Da'Cost*[4].

- Section 36 provides that statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts, or plans are themselves facts.

- According to Section 37, When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

- Section 40 provides that the existence of any judgment etc which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is, whether such Court ought to take cognizance of such suit or to hold such trail.
- A final judgment or order or decree of a Competent Court, in exercise of probate,

matrimonial, admiralty or insolvency jurisdiction, which confers upon or to take away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing not as against any specified person but absolutely, is relevant when the existence of any legal character, or the title of any such person to any such thing, is relevant.

- Judgments, orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the inquiry; nut such judgments, orders or decrees are not conclusive proof of that which they state.
- judgments, orders or decrees other then those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant, under some other provision of this Act.
- Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Unit-III: Method of proof of facts

Presumptions

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

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

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

Presumptions can be classified into certain categories:

1. Presumptions of fact.
2. Presumptions of law.
3. Mixed Presumptions.

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

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

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

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

- Discretionary Presumptions
- Mandatory Presumptions
- Conclusive Proof

The Sections of the Indian Evidence Act which deal with Discretionary Presumptions relating to

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

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

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

Expert Opinion

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

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

Who is an expert?

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

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

Expert as a witness:

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

The Cases in which Expert Evidence can be admitted:

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

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

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

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

Expert Evidence in Indian Evidence Act:

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

Therefore the opinion of persons having special knowledge of the subject – matter of the enquiry and described as experts is made relevant. However, whether a particular person is a competent witness or not is to be proved in the Court of Law before his testimony is admitted. The competency of an expert is a preliminary question before the Judge. An expert need not be a paid professional expert who makes living by giving such evidence, but he must have devoted sufficient time and study to the subject so that he can make his evidence trustworthy.

Subject Matters of Expert Evidence: The subjects of expert testimony mentioned by the section are foreign law, science, art and the identity of handwriting or finger –impressions. Expert on any other subject is not admissible. This was the position in 1954. No more it is the law. Law

related to expert evidence has developed in a piece meal method growing hand by hand with the development of technology in every field. The word science or art if interpreted in a narrow sense, would exclude matters upon which expert testimony is admissible such as matters related to trade, handicrafts, ballistics and many more. Every business or employment which has a particular class devoted to its pursuit is an art or trade. When the question of foreign law is raised the evidence of professional lawyer or the holder of an official situation which requires and therefore implies legal knowledge or a teacher of law is admissible. As far as science and art concerned they are to be broadly construed so as to include all subjects on which a course of special study or experience is necessary to the formation of an opinion and embrace also the opinion of an expert in footprint as well.

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

The explanation further elaborates the circumstances under which a person is said to have known the disputed handwriting. Under this section a person who is deposing the evidence need not be a handwriting expert. Indeed the knowledge the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstance of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person. One can get acquainted with others handwriting in many ways. The former might have seen the latter writing a particular handwriting. He might be receiving letter from the latter regularly. A superior officer might have seen his subordinate's writing on several occasions and vice versa. But, the evidence given by a person who has insufficient familiarity should be discarded. Indian Evidence Act insists that documents either be proved by primary evidence or by secondary evidence.

S.67of the Indian Evidence Act prescribes the mode of proving the signature in a document. However, the opinion as to handwriting is admissible only if the condition laid down in S. 47 is fulfilled, that is the witness is established to have been acquainted with the writing of the particular person in one of the modes enumerated in this section.20 However, the opinion of an expert is relevant when the Court has to form an opinion on a point of science or art. At times expert opinion differs on proven or admitted facts. But when the facts are not admitted the Court will have first to come to a conclusion on the evidence as to what facts have been proved and

then to apply to such facts the various expert opinions which have been offered. The opinion of an expert in handwriting should be received with great caution and should not be relied on unless corroborated.21 But no such corroboration is need in the case of finger prints. Of course, an expert can always refresh him memory by referring to the text books. A doctor can refer to medical books, a value to the pricelists, a foreign lawyer to legal codes, texts and other journals

The expert opinion is not confined to handwriting alone. The opinions in relation to customs are also admissible according to S. 48 of Indian Evidence Act.40 Section 1341 and S.32 (4) also mentions about custom.42S.13 deals with all rights and customs, public, general and private and Refers to specific facts which may be given in evidence. The latter is a hearsay evidence where a secondhand opinion can be admissible in the Court of law where the person who opined cannot be brought before the Court (because of death or inability) upon the question of the existence of any public right or custom or matter of public or general interest made ante litem motan. But Section.48 deals with the evidence of a living witness, who stood before the Court sworn to depose and subject to cross examination. Not only custom under this section opinion regarding usage is also admissible.

Oral and Documentary evidence

There are two methods of proving a fact, one is by producing witnesses of fact (oral evidence) and other by producing a document, which records the fact, in question (documentary evidence).

Section 59 of the Indian evidence act reads as-:

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

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

Evidentiary Value-: Oral evidence is a much less satisfactory medium of proof than documentary proof. But justice can never be administered in the most important cases without resorting to it. In all civilized systems of jurisprudence there is a presumption against perjury. The correct rule is to judge the oral evidence with reference to the conduct of the parties, and the presumptions and probabilities legitimately arising in the case. Another test is to see whether the evidence is consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with well-known principles of human action.

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

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

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

(c) Whether they agree in their testimony.

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

Electronic Records-The section was amended by the Information Technology Act, 2000 so as to include within the meaning of the term “document”, electronic records also. Hence, every other fact, except contents of an electronic record or of any document, can be proved by oral evidence.

S.60 deals with Oral evidence must be direct -Oral evidence must, in all cases, whatever, be direct; that is to say—

- If it refers to a fact which could be seen, it must be the evidence of a witness who says he seen it;
- If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
- If it refers to an opinion or to the grounds in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds -

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

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

Reasons for Exclusion of Hearsay-:

(a) The irresponsibility of the original declerant;

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

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

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

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

Hearsay evidence is the statement of a witness not based on his personal knowledge but on what he heard from others. If the evidence is that of a fact the happening of which could be heard, for example, the noise of an explosion, the evidence must be that of a person who personally heard the happening of the fact. The evidence of a reporter that after filing the F.I.R at the instance of his companion, who told by the people there, by naming the accused, that he assaulted the deceased and escaped, was held to be irrelevant, being not an eye witness account. Thus all the cases the evidence has to be that of a person who himself witnessed the happening of the fact of which he gives evidence in whatever way the fact was capable of being witnessed. Such a witness is called an eye-witness or a witness of fact and the principle is known as that of direct oral evidence or of the exclusion of hearsay evidence. A post mortem report was produced by the record clerk of the hospital. The doctor who conducted the post mortem was not produced. The court ruled that in such circumstances the report was not provable. Only the original report stand not a copy of it is admissible.The accused person was prosecuted for causing hurt by throwing a stone at prosecutor. So soon he was hit by the stone a woman who saw a man throwing the stone drew his attention towards a house and said: "*the person who threw the stone went in there*." Very soon thereafter he was caught and arrested in that house. But the above statement was held to be not relevant. The prosecutor himself had not seen any person throwing a stone at him and thereafter entering a particular house and, therefore, the statement was not hearsay.

Documentary Evidence

Section 61: "The content of documents may be proved either by primary or by secondary evidence"

Documentary evidence means all documents produced for the inspection of the court. Documents are denominated as 'dead proof' as distinguished from witnesses who are said to be 'living proofs'. Documentary evidence is superior to oral evidence in permanence and in many respects in trustworthiness. There is no third method of proving the contents of a document. The

Contents need not be proved by the author of documents and can be proved by any other evidence.

Section 62: Primary evidence –

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1. – Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. – Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Section 63: Secondary Evidence –

Secondary evidence means and includes.

1. Certified copies given under the provisions hereinafter contained;
2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy and copies compared with such copies;
3. Copies made from or compared with the original;
4. Counterparts of documents as against the parties who did not execute them;
5. Oral accounts of the contents of a document given by some person who has himself seen it.

Burden of Proof

(i) Matters of which Proof is not required.

Facts of which Proof is not required

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

(1) Facts judicially noticed.

(2) Facts admitted by the Parties.

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

(i) Facts judicially noticed.

1. Sections 56 and 57 deals with facts judicially noticed.
2. Section 56 says no fact of which the Court will take judicial notice need be proved.
3. Sec. 57 lays down 13 matters of which the Court must take judicial notice.
4. Principle of the Section. Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

(ii) Facts admitted by parties. Section 58

There are two sorts of admissions which must be distinguished.

(1) Formal admissions made touching matters related to a proceeding in a Court and made

intentionally by parties so as to dispense with their Proof.

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

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

Proof of such facts would be futile. The Court has to try the questions on which the parties are at issue and not on which they are agreed.

Estoppel

1. Under the English Law Estoppels are usually classed under three heads.

(i) (i) Estoppel by Record.

(ii) (ii) Estoppel by Deed.

(iii) (iii) Estoppel by Conduct

2. Estoppel by Record means estoppels by the Judgment of a competent Court.

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

(a) (a) By the Code of Civil Procedure. *Sections 11-4.*

(b) (b) By the Evidence Act. *Sections 40-44.*

3. Estoppel by Deed.

1. Under the English Law a party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. This rule affords an illustration of the exaggerated importance of a ' seal ' in English law. Neither sealing wax nor Walter is necessary to constitute a seal. Apparently, a smudge of ink on document purporting to be a deed is a seal if so intended, and it makes a greater importance in law than a deliberate and identifiable signature.

There is no estoppel in the case of ordinary signed documents.

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

3. But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. In some cases such a statement amounts to a

mere admission of more or less evidential value according to circumstances, but not conclusive. In other cases namely those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation under Section 115.

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

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

Particular Estoppels.

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

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

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

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

Section 116.deals with Estoppels between

i) Landlord and Tenant and

ii) Licensee and Licensor of immovable property.

I. Landlord and Tenant.

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

2. This estoppel applies also to a person claiming through the tenant. In other words, if a tenant

sublets his property without the knowledge or permission of the landlord, the sub-tenant will also be estopped from denying that the landlord had the title in the beginning.

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

There are two possible cases in which premises may be let :
(i) Where the Plaintiff has let the Defendant into possession of the land.
(ii) When Plaintiff is not himself the person who lets the Defendant into possession, but claims under a title derived from the person who did.
This section applies to the first case and estops the tenant from denying the Landlord's title. It does not apply in the second case where the title of the landlord is derivative i.e. by sale, lease or inheritance so that when the Plaintiff claims by a derivative title, the defendant is not estopped from showing that the title is not in the Plaintiff but in some other person. The tenant can show that he has no derivative title. This is the effect of the absence of the words “claiming through the landlord ".

This estoppel applies to a denial of title at the beginning of the tenancy, so that a tenant can show that his landlord's title has expired or is determined. In such a case he does not dispute the title, but confesses and avoids it by a matter *ex-post facto*. Justice requires that the tenant should be permitted to raise this plea, for, a tenant is liable to the person who has the real title and may be faced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.
4. The Scope of the Estoppel. A tenant or his representative will not be permitted to deny that on the day on which his tenancy commenced, the landlord who granted the tenancy had title to the property.
5. This Estoppel binds the tenant only so long as the tenancy continues. Once the tenancy has ceased he is free to deny that his landlord had any title even on the day on which tenancy commenced.

II. Licensee and Licensor of immovable property.
1. The rule is the same as a licensee, namely, that the licensor had title to such possession at the

time when such license was given.

2. Difference between a tenant and a licensee.

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

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

Section117 deals with

(1) Estoppel of acceptor of a bill of exchange.

(2) Estoppel of a Bailee.

(3) Estoppel of a Licensee.

(1) The Estoppel with regard the Acceptor is to the effect that he should not be permitted to deny that the drawer had an authority to draw the Bill or to endorse it.

Privileged Communications

There are certain matters which a witness cannot either be compelled to disclose or even if the witness is willing to disclose, he will not be permitted to do so. Such matters are known as 'privileged communications'. The production of certain communications and documents is either privileged from disclosure or prohibited from being disclosed, as a matter of public policy or on the ground that the interest of state is supreme and overrides that of an individual.

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

i) Communications during marriage:

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

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

i) in suits between married persons , or

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

ii) Affairs of State :-

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

Section 123 of the Indian Evidence Act lays down that no one shall be permitted to give any evidence derived from any unpublished official records relating to any affairs of the State except with the permission of the officer at the head of the Department concerned , who shall give or withhold such permission as he thinks fit .

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

iii) Official Communications:

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

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

iv) Information as to crime:

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

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

v) Professional Communication:

This rule is made in the interest of justice.

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

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

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

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

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

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

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

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

Unit 4: Emerging Areas in the Law of Evidence

Evidence by Accomplice

An accomplice is a person who has taken part, whether big or small, in the commission of an

offence. Accomplice includes principles as well as abettors.

Not an Accomplice - person under threat commits the crime, person who merely witnesses the crime, detectives, paid informers and trap witnesses.

Generally, a small offender is pardoned so as to produce him as a witness against the bigger offender. However, evidence by an accomplice is not really very reliable because –

1) he is likely to swear falsely in order to shift blame,

2) as a participator in a crime, he is a criminal and is likely immoral, and so may disregard the sanctity of oath, and

3) since he gives evidence in promise of a pardon, he will obviously be favorable to prosecution.

Even so, an accomplice is allowed to give evidence. As per Section 133, he is a competent witness against the accused and a conviction based on his evidence is not illegal merely because his evidence has not been corroborated. At the same time, Section 114(b) contains a provision that allows the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particular. The idea is that since such a witness is not very reliable, his statements should is required or not. So some guiding principles were propounded in the case of R vs Baskerville be or verified by some independent witness. This is interpreted as a rule of caution to avoid mindless usage of evidence of accomplice for producing a conviction. Since every case is different, it is not possible to precisely specify a formula for determining whether corroborative evidence, 1916.

According to this procedure –

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

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

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

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

Accomplice and Co-accused

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

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

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

Definition of Witness, Witness Protection Scheme

Definition of Witnesses
The witness can be divided mainly into two categories-

(1) Eye Witness

(2) Circumstantial Witness

Witness can be further divided into following kinds-

(1) **Prosecution Witness**– Prosecution is the institution or commencement of criminal proceeding and the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the state or government by indictment or information. A prosecution exists until terminated in the final judgment of the court to write the sentence, discharge or acquittal, a witness which appears on behalf of the prosecution side is known as a Prosecution Witness.

(2) **Defense Witness**– Defense side in a criminal proceeding is opposing or denial of the truth or validity of the prosecutor's complaint, the proceedings by a defendant or accused party or his legal agents for defending himself. A witness summoned on the request of the defending party is known as a Defense Witness.

(3) **Expert Witness**– An 'expert' is not a 'witness' of fact. His evidence is really of an advisory character. The duty of an 'expert witness' is to furnish the judge with the necessary scientific criteria for testing the accuracy of the conclusion so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data furnished which form the basis of his conclusions.

(4) **Eye Witness**– A witness who gives testimony to facts seen by him is called an eye witness, an eye witness is a person who saw the act, fact or transaction to which he testifies. An eye witness must be competent (legally fit) and qualified to testify in court. A witness who was intoxicated or insane at the time the event occurred will be prevented from testifying, regardless of whether he or she was the only eyewitness to the occurrence. Identification of an accused in Court by an 'Eye witness' is a serious matter and the chances of a false identification are very high. Where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."

"Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded into and no amount of corroboration can cure that defect."

On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in *Vadivelu Thevar case* and, therefore, conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and, not on the quantity of evidence."

Witness Protection Scheme

Witness plays a very crucial role in outcome of verdict in Criminal Cases. It has been given restricted meaning witness protection would imply efforts to protect the witness from physical harm, in Indian Context. But it's understood in real sense, from discomfort and inconvenience, through lack of facilities witness suffered should be protected. Generally speaking, implementation of protection of witness from such law and programmers reach of far cry and silent. Today, the witness harassed a lot. The accused may be richer (or) influential person, due to this the witness being pressured and threatened. In India ironically, there is no compressive legislation and statutory for the witness protection law to ensure safety among the witness who are insecure & hostile.

The issue of Witness Protection should be studied in light of the fact that conviction rate is low in India and acquittal rate is high. The Supreme Court too observed in *Swaran Singh* v *State of Punjab*, that the procedures being followed is one of reasons for a person to abhor becoming a witness.

The disturbing fact that such a big democracy as India does not have a Witness Protection law. In the event of the creation of such a law, the focus should be the protection of witnesses, not only before, but also during and after the trial

The word witness has not been defined anywhere in the Code of Criminal Procedure. Any Court may, at any stage of any inquiry, trial or other proceeding under the Criminal Procedure Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.

Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

Evidence as defined in Section 3 of the Indian Evidence Act, 1872 covers evidence of witnesses and documentary evidences. Chapter IX titled "OF WITNESSES" of the Indian Evidence Act, 1872 consists of seventeen Sections spreading from Sections 118 to 134. The main aspects are dealt with here are:

1. Competency- A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence.
2. Compellability- Further a witness though compellable to give evidence may be privileged or protected from answering certain questions[xxviii].Even if witness be willing to depose about certain things, the court will not allow disclosure in some cases
3. Privileges
4. Quantity of Witnesses required for judicial decisions (No particular number of witnesses is required for proof of any fact and this section enshrines the maxim that *Evidence has to be weighed and not counted*.)

Section 151 and 152 of the Evidence Act protects the witnesses from being asked indecent, scandalous, offensive questions, and questions which intend to annoy or insult them. Also, when an accused is released on bail, one of the terms and conditions imposed by the Court on the accused is that he shall not tamper the evidence, or approach the witnesses. This, again, is not as a provision for protection of the witnesses per say, but only to ensure the trial is not tampered with.

There are provisions to protect witnesses, though not physically, under the special statues like The West Bengal Act of 1932, Juvenile (Care and Protection of Children) Act, 2000. Section 17 of the National Investigation Agency Act, 2008 says that on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness, if the Special Court is satisfied that the life of such a witness is in danger, it may take measures it deems fit for keeping the identity of such witnesses secret. Any person who contravenes any decision or direction with regard to this will be punished with imprisonment for a term which may extend to three tears and with fine up to one thousand rupees.

Examination of Witness, Cross Examination, Leading Questions and Hostile Witness

Stages of Examination

Section 137 defines three stages of examination of a witness as follows -

- Examination-in-chief – The examination of a witness, by the party who calls him, shall be called his examination-in-chief.
- Cross-examination – The examination of a witness by the adverse party shall be called his cross-examination
- Re-examination – The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

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

Let us discuss these stages one by one –

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

2. Cross Examination – The second stage is where the witness is cross examined by the opposite party. In this stage the goal of the party which is examining the witness is to poke holes in the story of the witness with a view to discredit the evidence that the witness has given. However, when it is intended to suggest to the court that the witness is not speaking the truth on a particular point, it is necessary to direct his attention to it by questions in this stage. The witness must then be given an

opportunity to explain the apparent contradictions while he is in the witness box. For example, in the case of *Ravinder Kumar Sarma vs State of Assam*, 1999, the appellant sued two police officers for damages for malicious prosecution. The appellant put

3. questions in that regard to one of them who denied the allegation that he demanded a bribe. He did not put the allegation on the other police officer. It was held that the appellant had not properly substantiated the allegation.

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

The Re Examination is not confined to the matters discussed in Examination in Chief. New

matter may be elicited with the permission of the court and in such a case, the opposite party can again Cross examine the witness on new matters.

What is a leading question? (Section 141)

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

When leading questions may and may not be asked –

As per Section 142 – Leading questions must not, if objected to by the adverse party, be asked in an

examination-in-chief, or in re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed or which have, in its opinion, been already sufficiently proved.

Further, Section 143 provides that Leading questions may be asked in cross-examination. The purpose of Examination in Chief of a witness is to enable the witness to tell the court the relevant facts of the case. A question should be put to him about a relevant fact and he should be given ample scope to answer the question from the knowledge that he posses about the case. The witness should be left to tell the story in his own words. However, as seen in the previous example, instead of eliciting information from a witness, information is being given to the witness. This does not help the court arrive at the truth. If this type of questioning is allowed in Examination in Chief, the examiner would be able to construct a story through the mouth of the witness that suits his client. This affects the rights of the accused to a fairs trial as enshrined in Article 21 of the constitution and is therefore not allowed. A question, "do you not live at such and such address?" amply gives hint to the witness and he will immediately say yes. Instead, the question should be, "where do you live?" and he then should be allowed to answer in his own words.

Hostile Witness-The witness who makes statements adverse to the party calling and examining him and who may with the permission of the court, be cross examined by that party. Now it is true that in Coles v. Coles, and it may be in other cases, a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good -definition of a hostile witness and the Indian Evidence Act is most careful in Section 154 not to restrict the right of 'cross-examination' even by committing itself to the word 'hostile'.

Refreshing Memory

Meaning of "Refreshing memory"

"When a witness's statement is offered as the basis of an evidential reference to the truth of his statement, it is plain that at least three distinct elements are present, or put it another way, these three processes, in the absence of any one of which we cannot conceive of testimony. First, the witness must know something; to this element may be given the generic term 'observation.'

Secondly, the witness must have a recollection of these impressions, the result of this observation this must be termed 'recollection.' Thirdly, he must communicate this recollection to the tribunal, that is, there must be communication, or narration or relation."—WIGMORE.

Ordinary meaning of refreshing memory means the opportunity is given to the witness to recollect event.

Section 159: **A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.**

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory- Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non – production of the original.

An expert may refresh his memory by reference to professional treatises.

According to section there are two kinds of recollection of memory, viz.,

(a) Present recollection

(b) Past recollection. Section 159 deals with present recollection whereas Section 160 refers to past recollection.

Impact of Forensic Science: Evidentiary Value in DNA Test, Narco-analysis

Forensic Science plays a very significant role in the detection of any crime; it acts as an aid/tool to the investigation process. It's a science through which all physical evidences are collected and tested by forensic experts. It has been viewed as a last resort in many of the cases and the reports of forensic reports plays a very important role not only in terms of criminal justice system but also in terms of civil *lis* and other matters. Physical evidences should be collected from the scene of crime in a proper manner, so that experts should be able to conduct the tests of physical relevant evidences in the laboratories with proper reports.

Definition of forensic science:

Sciences used in forensics include any discipline that can aid in the collection, preservation and analysis of evidence such as chemistry (for the identification of explosives), engineering (for examination of structural design) or biology (for DNA identification or matching).

Forensic evidence- Evidence usable in a court, specially the one obtained by scientific methods such as ballistics, blood test, and DNA test. Also forensic evidences are those who have strong scientific background to prosecute the trial in a court of law.

Forensic admissibility of Narco-Analysis

Introduced in 1936. termed as psychological third degree method.

"Clause (3) of Article 20 declares that no person accused of an offence shall be compelled to be a witness against himself. This provision may be stated to consist of the following three components:"

1. It is a right pertaining to a person accused of an offence
2. It is a protection against compulsion to be a witness; and
3. It is a protection against such compulsion resulting in his giving evidence against himself. For invocation of Article 20(3) of the constitution of India all the three ingredients must co-exist.

DNA Technology in Indian Legal Scenario

Indian courts have time and again held that the evidence for proving non-access must be strong, distinct, satisfactory and conclusive. DNA tests can be strong evidence as they are correct up to 99% if positive and 100% if negative.

Indian courts have laid down certain guidelines regarding DNA tests and their admissibility to prove parentage.

- That courts in India cannot order blood test as a matter of course;
- Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
- The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

- No one can be compelled to give sample of blood for analysis

Deoxyribonucleic acid is commonly known as DNA that contains the genetic instructions used in the development and functioning of all known living organisms. The main role of DNA molecules is the long term storage of information. DNA found in the nucleus of the cell is termed "nuclear DNA". Touted as the most significant analytical tool introduced into forensic science since fingerprinting, DNA typing of biological evidence has far exceeded expectation. The scientific evidence has a highly technical basis that requires an expert witness with specialized

knowledge to assist the tier of fact to better understand it. At the outset of the study it is worth nothing that to give expert evidence is not law but subject to the exception, which are enacted in

this set of Articles, where the evidence of a witness's opinion is either inevitable or desirable. It is inevitable where it is not reasonably practicable for the witness to separate the observe facts from the inferences that the witness draws from the facts. Expert evidence is desirable where it consists of inferences to be drawn in relation to some matter involving special skill or knowledge which is outside the normal experience and competence.

CORPORATE LAW (305)

UNIT 1

INCORPORATION AND FORMATION OF COMPANY

COMPANY AND OTHER FORMS OF BUSINESS ORGANIZATION

A business can be organized in one of the several ways, and the form its owner chooses will affect the companies and owner's legal liability and income tax treatment.

1. SOLE PROPRIETORSHIP: This structure is acceptable if you are the business's sole owner and you do not need to distinguish the business from yourself. In a sole proprietorship all profits, losses, assets and liabilities are the direct and sole responsibility of the owner, however, he can take the help of his family members and also make use of the services of others such as a Manager and other employees. This type of business organization is also called single ownership or single proprietorship. If the business primarily consists of trade, the organization is a sole trading organization. Small factories and shops are often found to be sole proprietorship organizations. It is the simplest and most easily formed business organization. This is because not much legal formality is required to establish it. For instance to start a factory the permission of the local authorities is sufficient. Similarly to start a restaurant, it is only necessary to get the permission of local health authorities. Or again, to run a grocery store, the proprietor has only to
follow the rules laid down by local administration.

Features of Sole Proprietorship:

(i) Individual Initiative: One person is the owner in a sole proprietary form of organization.

(ii) Risk Bearing: The proprietor is the sole beneficiary of profits in this form organisation. If there is a loss he alone has to bear it. Thus the risks of business are borne by the proprietor himself.

(iii) Management and control: Management and control of this type of organisation is the responsibility of the sole proprietor. He may, however, employ a manager or other people for the purpose.

(iv) Minimum government regulations: The government does not interfere with the working of the sole proprietorship organization. However, they have to comply with the general laws and rules laid down *by* government.

(v) Unlimited liability: The sole proprietor has to bear the losses and is responsible for the

liabilities of the business. If the business assets are not sufficient to meet the liabilities, he may also have to sell his personal property for that purpose.

(vi) Secrecy: All important decision taken by the owner himself. He keeps all the business secrets only to himself.

2. **PARTNERSHIP**: A partnership is similar to sole proprietorship except that there are two or more owners (partners).

   In a general partnership all the partners share gains and losses and have unlimited liability for all the partnership debts.

   a. LIMITED PARTNERSHIP – A limited partners liability for Business debts is limited to the amount that partner contributes to the partnership. E.g.- Real Estate Venture

   Types of partners:

   - Active partner
   - Sleeping or dormant partner
   - Secret partner
   - Nominal partner
   - Partner by estoppels
   - Partner by holding out

3. **CORPORATION**: A corporation is a legal 'person' separate and distinct from its owners, and it has many of the rights and duties and privileges of an actual person. They can sue and be sued and can enter into contracts.
4. **JOINT HINDU FAMILY**: JHF is a specific form of business organization found only in India. It is the oldest form of business organization in the country. It refers to the forms of the organization wherein the business is owned by the members of the Hindu undivided family. It is governed by Hindu law. The business is controlled by head of the family called 'Karta'
5. **COOPERATIVE SOCIETY**: The cooperative society is a voluntary association of persons, who join together with the motive of welfare of the members. They are driven by the cooperative form of organization wherein persons voluntarily associate together as human beings on the basis of equality for the promotion of an economic interest for themselves.

   E.g. - Farmers cooperative society, credit cooperative society, cooperative housing societies

6. **JOINT STOCK COMPANY**: A company is an association of persons formed for carrying out business activities and has a legal status independent of its members. The company form of organization is governed by The Companies Act, 1956. It has a separate legal entity, perpetual succession and a common seal. The capital of the company is divided into smaller parts called 'shares' which can be transferred freely from one shareholder to another person(except in a private company.

DIFFERENT TYPES OF COMPANIES:

From the point of view of **formation**, the companies are of three kinds:

(1) Chartered Companies

Those companies which are incorporated under a special charter by the king or sovereign such as East Indian Company. Such companies are rarely formed now-a-days as trading companies.

(2) Statutory Companies

These companies are formed by special acts of Legislatures or Parliament. e.g. The Reserve Bank of India, the Industrial Finance Corporation, Damodar Valley Corporation.

(3) Registered Companies

Such Companies which incorporate under the Companies Act, 1956 or were registered under the previous Companies Act.

From the point of view of liability there are three kinds of Companies

(1)LimitedCompanies

In case of such companies, the liability of each member is limited to the extent of a face value of shares held by him. Suppose A takes a share of Rs 10, he remains liable to the extent of that amount. As soon as that amount in paid, he is no more liable.

(2) Guarantee Companies

The liability of the member of such companies is limited to the amount he has undertaken to contribute to the assets of the company in the event of its wound up. This guaranteed amount is limited to fixed sum which is specified in the memorandum. Chambers of commerce, trade associations and sports clubs is usually guarantee concerns. The object of such companies is not to make profit and distribute dividend.

(3) Unlimited Companies

They are nothing but large partnership registered under the Companies Act and the members just

like partners have unlimited liability and both share contribution as well as their property are at stake when the company is to be wound up. Such companies are rare these days.

From the point of view of Public investment companies may be of two kinds:

(1) Private Companies:

A private company means a company which by its articles

(a) Restricts the right to transfer its shares, if any

(b) Limits the number of its members to fifty excluding past or present employees of the company who are also members of the company.

(c) Prohibits any invitation to the public to subscribe for any shares in our debentures of the company.

(2) Public Companies:

Public companies are those companies which are not private companies. All the three restrictions are not imposed on such companies.

ONE PERSON COMPANY (OPC) REGISTRATION

The concept of One Person Company in India was introduced through the Companies Act, 2013 to support entrepreneurs who on their own are capable of starting a venture by allowing them to create a single person economic entity. One of the biggest advantages of a One Person Company (OPC) is that there can be only one member in a OPC, while a minimum of two members are required for incorporating and maintaining a Private Limited Company or a Limited Liability Partnership (LLP). Similar to a Company, a One Person Company is a separate legal entity from its promoter, offering limited liability protection to its sole shareholder, while having continuity of business and being easy to incorporate.

Though a One Person Company allows a lone Entrepreneur to operate a corporate entity with limited liability protection, a OPC does have a few limitations. For instance, every One Person Company (OPC) must nominate a nominee Director in the MOA and AOA of the company - who will become the owner of the OPC in case the sole Director is disabled. Also, a One Person Company must be converted into a Private Limited Company if it crosses an annual turnover of Rs.2 crores and must file audited financial statements with the Ministry of Corporate Affairs at the end of each Financial Year like all types of Companies. Therefore, it is important for the Entrepreneur to carefully consider the features of a One Person Company prior to incorporation.

Reasons to Register a One Person Company

Single Promoter

One Person Company is the only type of corporate entity that can be started and operated by a single promoter with limited liability protection in India. A corporate form of legal entity in One Person Company ensures that the business has perpetual existence and easy ownership transferability.

Uninterrupted Existence

A company has 'perpetual succession', meaning uninterrupted existence until it is legally dissolved. A company being a separate legal person, is unaffected by the death or other departure of any member and continues to be in existence irrespective of the changes in ownership.

Borrowing Capacity

Banks and Financial Institutions prefer to provide funding to a company rather than partnership firms or proprietary concerns. However, a one person company cannot issue different types of equity security, as it can only be owned by one person at all times.

Easy Transferability

Ownership of a business can be easily transferred in a company by transferring shares. The signing, filing and transfer of share transfer form and share certificates are sufficient to transfer ownership of a company. In a one person company, the ownership can be transferred by altering the shareholding, directorship and nominee director information

Owning Property

A company being an artificial person, can acquire, own, enjoy and alienate, property in its name. The property owned by a company could be machinery, building, intangible assets, land, residential property, factory, etc., Further, the nominee director cannot claim any ownership of the company while serving as a nominee director.

Foreign Company:

In General, a foreign company is a company which is incorporated outside India but having its place of business in India.

Definition of Foreign Companies under the Companies Act 2013: The Act clearly defines a foreign company under Section 2(42). A foreign company is any company or body corporate incorporated outside India which—

1. has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
2. conducts any business activity in India in any other manner.

Hence, a foreign entity to be considered as a foreign company, has to fulfill both the criteria mentioned above, i.e., having a place of business in any manner specified above, and conducting any business activity in India.

MEMORANDUM OF ASSOCIATION

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

1. Memorandum of Association
2. Articles of Association

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

with the company is within the objects of the company.

Form of Memorandum (Sec. 14)

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

Table B Memorandum of a company limited by shares

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

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

Table E Memorandum of an unlimited company

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

Printing and signing of Memorandum (Sec. 15).

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

Contents of Memorandum

1. Name clause

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

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

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

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

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

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

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

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

The omission to use the word 'Limited' as part of the name of a company must have been deliberate and not merely accidental.

Note the following case in this regard: *1Dermatine Co. Ltd. v Ashworth, (1905*) A bill of exchange drawn upon a limited company in its proper name was duly accepted by 2 directors of the company. The rubber stamp by which the word of acceptance were impressed on the bill was longer that the paper of the bill and hence the word 'Limited' was missed. Held, the company was liable to pay and the directors were not personally liable.

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

In *Osborn v The Bank of U. A. E*; it was held that the name of a company is the symbol of its personal existence. The name should be properly and correctly mentioned. The Central Government may allow a company to drop the word "Limited" from its name.

2. Registered Office Clause

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

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

3. Object Clause

This is the most important clause in the memorandum because it not only shows the object or objects for which the company is formed but also determines the extent of the powers which the company can exercise in order to achieve the object or objects.

Stating the objects of the company in the Memorandum of Association is not a mere legal technicality but it is a necessity of great practical importance. It is essential that the public who purchase its shares should know clearly the objects for which they are paying.

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

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

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

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

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

Crown Bank. Re 1890- A company's objects clause enabled it to act as a bank and further to invest in securities land to underwrite issue of securities.

The company abandoned its banking business and confined it self to investment and financial

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

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

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

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

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

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

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

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

4. Capital Clause

In case of a company having a share capital unless the company is an unlimited company, Memorandum shall also state the amount of share capital with which the company is to be registered and division thereof into shares of a fixed amount. The capital with which the company is registered is called the authorized or nominal share capital. The nominal capital is divided into classes of shares and their values are mentioned in the clause. The amount of nominal or authorized capital of the company would be normally, that which shall be required for the attainment of the main objects of the company. IN case of companies limited by guarantee, the amount promised by each member to be contributed by them in case of the winding up of the company is to be mentioned. No subscriber to the memorandum shall take less than one share. Each subscriber of the Memorandum shall write against his name the number of shares he takes.

5. Liability Clause

In the case of company limited by shares or by guarantee, Memorandum of Association must have a clause to the effect that the liability of the members is limited.

It implies that a shareholder cannot be called upon to pay any time amount more than the unpaid portion on the shares held by him. He will no more be liable if once he has paid the full nominal value of the share. The Memorandum of Association of a company limited by guarantee must further state that each member undertakes to contribute to the assets of the company if wound up, while he is a member or within one year after he ceased to be so, towards the debts and liabilities of the company as well as the costs and expenses of winding up and for the adjustment of the rights of the contributories among themselves not exceeding a specified amount.

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

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

6. Association or Subscription Clause

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

Alteration of Memorandum of Association

Alteration of Memorandum of association involves compliance with detailed formalities and

prescribed procedure. Alternations to the extent necessary for simple and fair working of the company would be permitted. Alterations should not be prejudicial to the members or creditors of the company and should not have the effect of increasing the liability of the members and the creditors.

PROCESS OF INCORPORATION:

1. NATURE AND CONTENT-

CORPORATE PERSONALITY- From the date of its incorporation of company becomes in law a different person altogether from the members who compose it. Thus, an incorporated company has a legal personality distinct from that of its members from the date of its incorporation.

The recognition of the legal personality of an incorporated company was firmly established in 1897 in the case of ***SALOMAN V. SALOMAN &CO. LTD***. In the case a person called Aron Saloman had for many years carried on business as leather merchant and boot manufacturer. He decided to form a limited company to purchase his business, but he wanted to have control over the conduct of the business and, therefore, his plan was that the members of the company should be limited to himself and the member of his family. The company was incorporated under the name "Saloman & co. ltd." The subscribers to the memorandum were saloman, his wife, his daughter and his four sons. Saloman sold his company for 387382 pounds. Instead of paying him whole price in cash , the company gave him 20,000 fully paid up shares of 1 pound each 10,000 pounds in debentures and the balance was paid to him in cash. Saloman was appointed as the managing director and his two elder sons as directors. Because of a depression and strike in the boot trade, the company did not prosper and when it was wound up, it was found that the company was liable to pay 10,000 pounds to saloman as a debenture holder and 7000 pounds to the unsecured creditors, while its assets were 6000 pounds only. A debenture holder was and is given priority over an unsecured creditor. Thus, it was found that if the assets of the company were applied in the payment of debentures held by saloman, there would be no fund for the payment of debentures held by saloman, there would be no fund for the payment of unsecured creditors. The unsecured creditors objected. It was contended on behalf of the unsecured creditors that the company had no independent existence, it was mere alias or agent for saloman. Since saloman was the principal and the company was his agent, saloman was liable to indemnify the company against the claims of the unsecured creditors and no payment should be made on debentures held by saloman until the

secured creditors had been paid in full. The house of lords gave the judgements in favor of saloman .

REQUIREMENTS:- Any 7 or more persons where the company to be formed will be a private company, any two or more persons associated for any lawful purpose may, by subscribing their names to a memorandum and otherwise complying with the requirements of this act , form an incorporated company with or without limited liability.

DOCTRINE OF INDOOR MANAGEMENT

The Doctrine of Constructive Notice is subject to the **Doctrine of Indoor Management**. According to this Doctrine, an outsider who deals with the company is required to see that the authority of dealing had been given by articles to the person with whom the outsider is dealing but he is cannot be assumed to do any more.

The Doctrine evolved out of **Royal British Bank v Turquand**

Every outsider is entitled to assume the regularity of the internal proceedings unless he has the knowledge of irregularity. Shareholders, for example, need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies. The doctrine of indoor management evolved around 150 years ago in the context of the doctrine of constructive notice. The role of doctrine of indoor management is opposed to of the role of doctrine of constructive notice.

Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is a possible safeguard against the possibility of abusing the doctrine of constructive notice.

BASIS FOR DOCTRINE OF INDOOR MANAGEMENT:

1. What happens internal to a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.

2. If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

EXCEPTIONS TO THE DIM:

- **Knowledge of irregularity:** In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.

In the case of *Rama Corporation v. Proved Tin & General Investment Co*., the X who was director in the company entered into a contract with Rama Corporation while purporting to act on behalf of the company and he also took a cheque from them. The articles of the company did provide that the director may delegate their power but Rama Corporation did not have knowledge of this as they did not read the articles and memorandum of the company. Now later on it was found that company had never delegated their power to X. Held- plaintiff cannot take the remedy of the indoor management as they even don't that power could be delegated.

- **Negligence:** If, with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.

In the case of **B. Anand Behari Lal v. Dinshaw & Co**. (Bankers) Ltd.,[9] an accountant of a company in favour of Anand Behari. On an action brought by him for breach of contract, the court held the transfer to be void. It was observed that the power of transferring immoveable property of the company could not be considered within the apparent authority of an accountant.

- **Forgery:** The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.

HOW INDIAN JUDICIARY HAS INTERPRETED THIS DOCTRINE:

In the case of ***Lakshmi Ratan Cotton Mills Co. Ltd, v. J. K. Jute Mitts Co. Ltd***, the company of plaintiff sued defendant's company for the total amount of Rs.1, 50,000. The defendant company raised the argument that no such resolution sanctioning the loan was passed by the board of director, thus it is not binding on the company.

DOES THE DOCTRINE OF INDOOR MANAGEMENT APPLY TO GOVERNMENT AUTHORITIES:

In the case of ***MRF Ltd. v. Manohar Parrikar***, the Supreme Court has first time analyzed the doctrine of indoor management in some detail. The case is related to the public law but a reference was made to the doctrine of indoor management to draw an analogy.

In this case notification issued by State Government for granting rebate of 25 per cent in Tariff in respect of the power supply to the Low Tension and High Tension Industrial Consumers was rescinded by another Notification issued at instance of Ministry of Power – Legality of the notifications challenged on grounds that they were not issued in compliance with the requirements of Article 154 read with Article 166 of the Constitution of India and the Business Rules of the Government of state framed by the Governor. Decision taken at ministers level without submitting it to council of misters or chief minister without obtaining concurrence of finance department, and notifications issued pursuant to ministers decision, so it was held that it is not sustainable in law. A decision can be treated as the decision of the government only when decision satisfies requirements of with Rules of business framed under Art. 116(3) / 77(3). Decision having financial implications, if taken by a minister without seeking concurrence of finance department as provided by with Rules

of business, cannot be treated as decision of state government as a whole under article 154. So notifications issued pursuant to ministers decision so taken, are void *ab initio* and all actions consequent thereto are null and void.

CONCLUSION

Doctrine of indoor management is evolved as a reaction of the doctrine of constructive notice. It puts a Barr on the doctrine of constructive notice and it protects the third party who acted in the act in the good faith. This doctrine protects outsiders dealing or contracting with a company, It was analyzed that the doctrine does not operate in arbitrary manner, there are some restriction imposed on it like forgery, third party having knowledge of irregularity, negligence, where third party don't read memorandum and articles and the doctrine will not apply where the question is regard of to the very existence of the company. Act done by governmental authorities in the course of their activities comes under the doctrine of indoor management. In the case of MRF Ltd. v. Manohar Parrikar, the doctrine of indoor management does not apply on state of Goa because of the fact that there was an internal irregularity which should be taken care of and it is one of the exceptions of the doctrine.

DOCTRINE OF ULTRA VIRES

The object clause of the Memorandum of the company contains the object for which the company is formed. An act of the company must not be beyond the objects clause, otherwise it will be ultra vires and, therefore, void and cannot be ratified even if all the members wish to ratify it. This is called the doctrine of *ultra vires,* which has been firmly established in the case of ***Ashtray Railway Carriage and Iron Company Ltd* v. *Riche***. Thus the expression *ultra vires* means an act beyond the powers. Here the expression *ultra vires* is used to indicate an act of the company which is beyond the powers conferred on the company by the objects clause of its memorandum.

An ultra vires act is void and cannot be ratified even if all the directors wish to ratify it. Sometimes the expression *ultra vires* is used to describe the situation when the directors of a company have exceeded the powers delegated to them. Where a company exceeds its power as conferred on it by the objects clause of its memorandum, it is not bound by it because it lacks legal capacity to incur responsibility for the action, but when the directors of a company have exceeded the powers

delegated to them. This use must be avoided for it is apt to cause confusion between two entirely distinct legal principles. Consequently, here we restrict the meaning of *ultra vires* objects clause of the company's memorandum.

Basic principles included the following:

1. An *ultra vires* transaction cannot be ratified by all the shareholders, even if they wish it to be ratified.
2. The doctrine of estoppel usually precluded reliance on the defense of *ultra vires*where the transaction was fully performed by one party
3. *A fortiori*, a transaction which was fully performed by both parties could not be attacked.
4. If the contract was fully executory, the defense of *ultra vires* might be raised by either party.
5. If the contract was partially performed, and the performance was held to be insufficient to bring the doctrine of estoppel into play, a suit for quasi contract for recovery of benefits conferred was available.

If an agent of the corporation committed a tort within the scope of his or her employment, the corporation could not defend on the ground the act was *ultra vires*.

EFFECT OF ULTRA VIRES TRANSACTIONS:

A contract beyond the objects clause of the company's memorandum is an *ultra vires* contract and cannot be enforced by or against the company as was decided in the cases of In *Re, Jon Beaufore (London) Ltd* ., (1953), *In S. Sivashanmugham And Others* v. *Butterfly Marketing PrivateLtd.*, (2001),

A borrowing beyond the power of the company (i.e. beyond the objects clause of the memorandum of the company) is called ultra vires borrowing.

However, the courts have developed certain principles in the interest of justice to protect such lenders. Thus, even in a case of ultra vires borrowing, the lender may be allowed by the courts the following reliefs:

(1) Injunction — if the money lent to the company has not been spent the lender can get the injunction to prevent the company from parting with it.

(2) Tracing— the lender can recover his money so long as it is found in the hands of the company in its original form.

(3) Subrogation—if the borrowed money is applied in paying off lawful debts of the company, the lender can claim a right of subrogation and consequently, he will stand in the shoes of the creditor who has paid off with his money and can sue the company to the extent the money advanced by him has been so applied but this subrogation does not give the lender the same priority that the original creditor may have or had over the other creditors of the company.

EXCEPTIONS TO THE DOCTRINE OF ULTRA VIRES:

There are, however, certain exceptions to this doctrine, which are as follows:

1. An act, which is *intra vires* the company but outside the authority of the directors may be ratified by the shareholders in proper form.20

2. An act which is *intra vires* the company but done in an irregular manner, may be validated by the consent of the shareholders. The law, however, does not require that the consent of all the shareholders should be obtained at the same place and in the same meeting.

3. If the company has acquired any property through an investment, which is *ultra vires*, the company's right over such a property shall still be secured.

4. While applying doctrine of *ultra vires*, the effects which are incidental or consequential to the act shall not be invalid unless they are expressly prohibited by the Company's Act.

5. There are certain acts under the company law, which though not expressly stated in the memorandum, are deemed impliedly within the authority of the company and therefore they are not deemed *ultra vires*. For example, a business company can raise its capital by borrowing.

6. If an act of the company is *ultra vires* the articles of association, the company can alter its articles in order to validate the act.

***The Directors, &C., of the Ashbury Railway Carriage and Iron Company (Limited)* v *Hector Riche*, (1874-75)**

The objects of this company, as stated in the Memorandum of Association, were to supply and sell the materials required to construct railways, but not to undertake their construction. The contract

here was to construct a railway. That was contrary to the memorandum of association; what was done by the directors in entering into that contract was therefore in direct contravention of the provisions of the Company Act, 1862

It was held that this contract, being of a nature not included in the Memorandum of Association, was ultra vires not only of the directors but of the whole company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. The shareholders might have passed a resolution sanctioning the release, or altering the terms in the articles of association upon which releases might be granted. If they had sanctioned what had been done without the formality of a resolution, that would have been perfectly sufficient. Thus, the contract entered into by the company was not a voidable contract merely, but being in violation of the prohibition contained in the Companies Act, was absolutely void. It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself; but at the utmost it would have amounted to a sanction by the shareholders to the act of the directors, which, if given before the contract was entered into, would not have made it valid, as it does not relate to an object within the scope of the memorandum of association.

Guinness v Land Corporation of Ireland,(1883)

The Land Corporation of Ireland, Limited was incorporated under the Companies Act on the 12th of July, 1882, as a company limited by shares. By the memorandum of association of a company limited by shares it was stated that the objects of the company were, the cultivation of lands in Ireland , and other similar purposes there specified, and to do all such other things as the company might deem incidental or conducive to the attainment of any of those objects.

The 8th clause of the articles of association, provided that the capital produced by the issue of B shares shall, so far as is necessary, be applied in making good to the holders of A shares the preferential dividend of £5 per cent., which they are to receive on the amounts paid up on their shares. This action was brought by one of the B shareholders on behalf of him and the others, to restrain the directors from issuing any A shares on the footing of their being entitled to the benefit of that article, and to restrain the directors from applying in accordance with it the capital arising from the B shares.

It was held that the application of the B capital provided for by the articles is not an application of capital to carrying on the business of the company, but is providing an inducement to people to take shares and subscribe capital to carry on the business and that article 8 was invalid, as it purported to make the B capital applicable to purposes not within the objects of the company as defined by the memorandum of association, and in a way not incidental or conducive to the attainment of those objects, and that the directors must be restrained from acting upon it. The articles of association of a company cannot, except in the cases provided for by sect. 12 of the Companies Act, 1862, modify the memorandum of association in any of the particulars required by the Act to be stated in the memorandum.

DOCTRINE OF CONSTRUCTIVE NOTICE:

The doctrine of 'constructive notice', every person dealing or proposing to enter into a contract with the company is deemed to have constructive notice of the contents of its Memorandum and Articles. Whether he actually reads them or not, it is presumed that he has read these documents and has ascertained the exact powers of the company to enter into contract, the extent to which these powers have been delegated to the directors and the limitations to such powers. He is presumed not only to have read them, but to have understood them properly. Consequently, if a person enters into a contract which is ultra vires the Memorandum, or beyond the authority of the directors conferred by the Articles, then the contract becomes invalid and he cannot enforce it, not-withstanding the fact that he acted in good faith and money was applied for the purposes of the company.

EFFECT OF THE DOCTRINE OF CONSTRUCTIVE NOTICE:

The 'Doctrine of Constructive Notice' is more or less an imaginary doctrine. It does not take notice of the realities of business life. People know a company through its officers and not through its documents. The courts in India do not seem to have taken it seriously though. The Madras High Court, for the first time, held the validity and scope of the rule of constructive liability in *Kotla Venkataswamy v. Rammurthy*. The dispute in this case pivots around the valid execution of mortgage bond as per Article 15 the company's articles of association so as to make the company liable. The Court held that the plaintiff, notwithstanding acted in good faith, could not claim under this deed. The Court further observed that if the plaintiff should have discovered that a deed such as

she entered into, required execution by three specified officers of the company and she would have refrained herself from accepting a deed inadequately signed.

6 MOST IMPORTANT DIFFERENCES BETWEEN DOCTRINE OF INDOOR MANAGEMENT AND DOCTRINE OF CONSTRUCTIVE NOTICE

The Doctrine of Indoor Management:

1. It protects outsider against the company.
2. It is confined to the internal position and affairs of the company.
3. The internal affairs need not be registered They are not open to public and third parties.
4. Third persons, who have no notice to any irregularity or want of authority, will be protected on the principle
5. It mitigates the effects of the "Doctrine of Constrictive Notice".
6. It is based on positive concept.

The Doctrine of Constructive Notice:

1. It protects the company against the outsider.
2. It is confined to the external position and affairs of the company
3. The memorandum and articles of association of the company are public documents. They must be registered with the Registrar of Companies. These are open to public and third parties to access.
4. Third persons, who have no notice of an irregularity or want of authority, if they try they could know about that irregularity or want of authority, will not be protected on the principle of 'constructive notice'
5. It operates as an estoppel against the outsider.
6. It is based on negative concept

UNIT II

CORPORATE FINANCING

PROSPECTUS AND STATEMENT IN LIEU OF PROSPECTUS

A **prospectus** is a legal document issued by companies that are offering securities for sale. Mutual funds also provide a prospectus to potential clients, which includes a description of

the fund's strategies, the manager's background, the fund's fee structure and a fund's financial statements

Prospectus is issued with the following broad objectives:

- It informs the company about the formation of a new company.
- It serves as a written evidence about the terms and conditions of issue of shares or debentures of a company.
- It induces the investors to invest in the shares and debentures of the company.
- It describes the nature, extent and future prospectus of the company.
- It maintains all authentic records on the issue and make the directors liable for the misstatement in the prospectus.

Contents:

The following important matter are included in the prospectus:

- The prospectus contains the main objectives of the company, the name and addresses of the signatories of the memorandum of association and the number of shares held by them.
- The name, addresses and occupation of directors and managing directors.
- The number and classes of shares and debentures issued.
- The qualification share of directors and the interest of directors for the promotion of company.
- The number, description and the document of shares or debentures which within the two preceding years have been agreed to be issed other than cash.
- The name and addresses of the vendors of any property acquired by the company and the amount paid or to be paid.
- Particulars about the directors, secretaries and the treasures and their remuneration.
- The amount for the minimum subscription.
- If the company carrying on business, the length of time of such businesses.
- The estimated amount of preliminary expenses.
- Name and address of the auditors, bankers and solicitors of the company.
- Time and place where copies of balance sheets, profits and loss account and the auditor’s report may be inspected.

- The auditor's report so submitted must deal with the profit and loss of the company for each year of five financial years immediately preceding the issue of prospectus.
- If any profit or reserve has been capitalized, the particulars of such capitalization will be stated in the prospectus

DEFINITION OF STATEMENT OF LIEU OF PROSPECTUS

The Statement in Lieu of Prospectus is a document filed with the Registrar of the Companies (ROC) when the company has not issued prospectus to the public for inviting them to subscribe for shares. The statement must contain the signatures of all the directors or their agents authorised in writing. It is similar to a prospectus but contains brief information.

The Statement in Lieu of Prospectus needs to be filed with the registrar if the company does not issues prospectus or the company issued prospectus but because minimum subscription has not been received the company has not proceeded for the allotment of shares.

BASIS FOR COMPARISION	**PROSPECTUS**	**STATEMENT IN LIEU OF PROSPECTUS**
1.meaning	prospectus refers to a legal document published by a company to invite general public for subscribing its shares and debentures	Statement in lieu of prospectus is a document issued by the company when it does not offer its securities for public subscription.
2.objective	To encourage public subscription.	To be filed with the registrar.
3.used when	Capital is raised from general public.	Capital is raised from known sources.
4. content	It contains details prescribed by the Indian Companies Act.	It contains information similar to a prospectus but in brief.
5.minimum subscription	Required to be stated	Not required to be stated

SHARES AND SHARE CAPITAL

MEANING -

A share is one unit into which the total share capital is divided. Share capital of the company can be explained as a fund or sum with which a company is formed to carry on the business and which is raised by the issue of shares.

The amount collected by the company from the public towards its capital, collectively is known as share capital and individually is known as share.

A share is not a sum of money but is an interest measured by a sum of money and this interest also contains bundle of rights and obligations contained in the contract i.e. Article of Association. Investment in the shares of any company is a basis of ownership in the company and the person who invest in the shares of any company, is known as the shareholder, member and the owner of that company.

DEFINITION-

According to the section 2(46) of the Company's Act 1956, share means a part in the share capital of the company and it also includes stock except where a distinction between stock and share capital is made expressed or implied.

TYPES OF SHARES:

As per the provision of section 85 of the Companies Act, 1956, the share capital of a company consists of two classes of shares, namely:

A. Preference Shares

B. Equity Shares

Preference Shares:

According to Sec 85(1), of the Companies Act, 1956, a preference share is one, which carries the following two preferential rights:

(a) The payment of dividend at fixed rate before paying dividend to equity shareholders.

(b) The return of capital at the time of winding up of the company, before the payment to the equity shareholder.

Both the rights must exist to make any share a preference share and should be clearly mentioned in the Articles of Association.

Preference shareholders do not have any voting rights, but in the following conditions they can enjoy the voting rights:

(1) In case of cumulative preference shares, if dividend is outstanding for more than two years.

(2) In case of non-cumulative preference shares, if dividend is outstanding for more than three

years.

(3) On any resolution of winding up

(4) On any resolution of capital reduction.

Types of preference shares:

In addition to the aforesaid two rights, a preference shares may carry some other rights. On the basis of additional rights, preference shares can be classified as follows:

1. Cumulative Preference Shares: Cumulative preference shares are those shares on which the amount of divided if not paid in any year, due to loss or inadequate profits, then such unpaid divided will accumulate and will be paid in the subsequent years before any divided is paid to the equity share holders. Preference shares are always deemed to be cumulative unless any express provision is mentioned in the Articles.

2. Non-Cumulative Preference Shares: Non-cumulative preference shares are those shares on which arrear of dividend do not accumulate. Therefore if divided is not paid on these shares in any year, the right receive the dividend lapses and as such, the arrear of divided is not paid out of the profits of the subsequent years.

3. Participating Preference Shares: Participation preference shares are those shares, which, in addition to the basic preferential rights, also carry one or more of the following rights:

(a) To receive dividend, out of surplus profit left after paying the dividend to equity shareholders.

(b) To have share in surplus assets, which remains after the entire capital has been paid on winding up of the company.

4. Non-Participating Preference Shares: Non-participation preference shares are those shares, which do not have the following rights:

(a) To receive dividend, out of surplus profit left after paying the dividend to equity shareholders.

(b) To have share in surplus assets, which remains after the entire capital has been paid on winding up of the company. Preference shares are always deemed to be non-participating, if the Article of the company is silent.

5. Convertible Preference Shares: Convertible preference shares are those shares, which can be converted into equity shares on or after the specified date according to terms mentioned in the prospectus.

6. Non-Convertible Preference Shares: Non-convertible preference shares, which cannot be converted into equity shares. Preference shares are always being to be non-convertible, if the Article of the company is silent.

7. Redeemable Preference Shares: Redeemable preference shares are those shares which can be redeemed by the company on or after the certain date after giving the prescribed notice. These shares are redeemed in accordance with the terms and sec. 80 of the Company's Act 1956.

8. Irredeemable Preference Shares: Irredeemable preference shares are those shares, which cannot be redeemed by the company during its life time, in other words it can be said that these shares can only be redeemed by the company at the time of winding up. But according to the sec. 80 (5A) of the Company's (Amendment) Act 1988 no company can issue irredeemable preference shares.

Equity shares:

According to section 85 (2), of Companies Act, 1956, Equity share can be defined as the share, which is not preference shares.

In other words equity shares are those shares, which do not have the following preferential rights:

(a) Preference of dividend over others.

(b) Preference for repayment of capital over others at the time of winding up of the company.

These shares are also known as 'Risk Capital', because they get dividend on the balance of profit if any, left after payment of dividend on preference shares and also at the time of winding up of the company, they are paid from the balance asset left after payment of other liabilities and preference share capital. Apart from this they have to claim dividend only, if the company in its A. G. M. declares the dividend. The rate of dividend on such shares is not pre-determined, but it depends on the profit earned by the company. The equity shareholders have the right to vote on each and every resolution placed before the company and the holders of these shares are the real owners of the company

DEBENTURES AND DEBENTURE BOND

Generally, in the Indian context, you find the word debenture and bonds being used interchangeably.

A debenture is a debt instrument which is not backed by any specific security; instead the credit of the company issuing the same is the underlying security. Corporate treasury use this as a tool to raise medium- to long-term funds. The funds raised become part of the capital structure but not share capital of the company.

Bonds, however, in India are typically issued by financial institutions, government undertakings and large companies. The interest rate is assured and is paid at a fixed interval, i.e. on an annual or semi-annual basis. On maturity, the principal is repaid. Bond is a form of loan. The holder of the bond is the lender and the issuer of the bond is the borrower.

In today's scenario, you see many government undertakings and companies issuing bonds. These are done to fund their long-term capital expenditure needs. In case of a government, raising the same helps in funding its current expenditure.

There are many types of bonds, but only a few types are relevant to the Indian markets.

Deep discount bonds, also known as zero-coupon bonds, are bonds wherein there is no interest or coupon payment and the interest amount is factored in the maturity value. So, the issue price of these bonds is inversely related to their maturity period.

Corporate bonds are issued by companies and offer interest rates higher than bonds issued by public sector units and other financial institutions. The interest rate on these bonds is governed by their credit rating and higher the rating, lower is the interest rate offered by them. Hence, an investor needs to be careful before investing in them—she should take a decision after checking the credit ratings as well and not only the interest being offered.

Sovereign bonds are issued by a government—in India, by the Reserve Bank of India. These can be referred to as low-risk or even risk-free bonds.

Convertible bond is another category wherein the bond holder has an option to convert the bonds into equity after a fixed tenor. These may be fully or partially convertible where only a part is converted and the other part matures.

CLASSIFICATION OF COMPANY SECURITIES

TYPES OF SECURITIES

1. **Shares**

A share is an equity security. Its owner owns one part of the capital of the company which has issued the shares in question. The shares enable the shareholder the right to take part in the decision-making in the company. If the latter operates with profit, the owners of shares may receive dividends. The amount of the dividend is decided upon by the shareholders at a General Meeting of the Shareholders.

2. **Bonds**

A bond is a debt security. When purchasing a bond, you have no right to participate in the company's decision making but are entitled to the reimbursement of the principal and the interest. There are several ways of repayment as the companies may decide that the principal be paid in regular annual installments or on the maturity of bonds. The interest may be refunded in a fixed amount or may be variable (inflation rate or foreign currency). The issuers pay the interest once every year or once every half-year (on the coupon maturity date).

3. **Investment certificates**

Investment certificates are debt securities issued by a bank, and are designed to offer the investor an agreed yield under pre-defined conditions stipulated in the prospectus. Issuers are mainly large banks, and an important criterion in selecting the bank in whose investment certificates you would like to invest is its credit rating. Investment certificates represent an investment directly linked to an index, share price, raw material price, exchange rate, interest, industry, and other publicly available values. The holder of an investment certificate does thereby not become an indirect owner of the assets underlying the certificate. A certificate ensures the investor a guaranteed manner of payment. Investment certificates are predictable and the investor can always anticipate their yield (or loss) in a specific situation, which makes them a successful investment vehicle in times of heavy market losses. There are different types of investment certificates – some guarantee yields no matter what the situation on the market, while others yield profit only when the prices fall, etc.

4. **Warrants**

Warrants are options issued by a joint-stock company, which give holders the right to purchase a certain quantity of the respective company’s shares at a pre-determined price. After a certain period, the right to purchase shares terminates.

5. **Open-end fund**

It stands for a diversified portfolio of securities and similar investments, chosen and professionally managed by a fund management company. Since the fund does not have fixed capital but is rather 'open ended', it grows together with new investors joining and thus funding it. Open-end funds can invest in domestic and international securities, in either shares, bonds or other investment vehicles. Depending on the portfolio, the fund's risk and returns vary accordingly.

CLASS ACTION SUITS

Class action suit, as it goes by name is for a group of people filing a suit against a defendant who has caused common harm to the entire group or class. This is not like a common litigation method where one defendant files a case or charges against another defendant while both the parties are available in court. In the case of class action suit, the class or the group of people filing the case need not be present in the court and can be represented by one petitioner. The benefit of these type of suits is that if several people have been injured by one defendant, each one of the injured people need not file a case separately but all of the people can file one single case together against the defendant, known as class action suit.

Need for Class Action Suits

The need for these types of suits was first felt in the context of securities market during the time of Satyam Scam, where a large group of people were cheated regarding their hard earned money invested in Stock Market. During that time it was felt that it was not at all viable regarding cost effectiveness for a small stakeholder to file a case independently against the defendant. Millions of cheated investors during that time formed a large group and filed the case against the company, but since there was no available legal remedy or law which can actually support this type of litigation of a group filing charges, it became tough for those investors to take a recourse or gain advantage in the Indian Judicial System by this method. Class action suits in India were so far filed under the guise of public interest litigations. Courts were free to dismiss these. These shareholders ran pillar to post right from the National Consumer Disputes Redressal Commission up to the extent of Supreme Court and had their claims rejected. But, ironically, the US shareholders of Satyam were able to claim about Rs 675 crore from the company leaving Indian shareholders rather frustrated without any remedy offered to them by Indian Judicial System.

This gave rise to the concept of class action suits in Indian Judicial System which was introduced formally in companies' act 2013.

Conditions to File a Class Action Suit

Conditions, as mentioned below, are followed as a prerequisite to filing a Class Action Suit.

- For companies having a share capital, or members –
    - 100 members minimum of such company can file the case against that company for any type
    - At least 10% of the total members can file the case against the company/management
    - Member holding 10% of issued share capital can file the case against the company/management
- For companies not having share capital –
    - At least 1/5th of the members can file the complaint against the company under class action suit for any misconduct of management regarding running the company.

In continuation of the same, a class action suit can also be filed in NCLT by minority shareholders against oppression committed by directors of the company OR the company itself. They will seek justice by bringing in people who are seeking remedy for the same cause against defenders, unlike conventional law where the plaintiff is individual. This is largely important in the context of an imperfect legal system or a regulatory not able to handle the genuine cases of proper claims, against the misconduct of powerful management. In this scenario, the feasibility of fighting the case as a group or class becomes more viable.

Based on the recommendation of JJ Irani Committee, several provisions were brought in Companies Act 2013 to protect the interests of the said small & minority shareholder from the powerful controlling majority shareholders. Finally, the class action suits found its way under Section 245 of Companies Act 2013.

The procedure for class action suit is that all the effected parties should participate in a single rejoinder. One lead member may represent the entire class in front of NCLT.

Conclusion

In terms of the viability of class suits in India, initially before the company law 2013 was implemented, it was tough to get a judicial recourse in any such situations like Satyam, but with the implementation of company law 2013, it has become very viable in the context of Indian Judicial Systems. People have started opting for these class suits since they have received an additional ground while fighting against any abuse of powers by the company management, against initial days where the only recourse available was a civil suit, which was not at all viable being highly time & cost consuming.

Even though it is a highly complex scenario, the courts must determine initially that the particular class action suit was brought in good faith, and second, it has a good possibility of success. It should tackle the problem of the aggrieved party in very rational manner. Class Action Suits are still in an emerging stage and for most of the regulators from various Securities and Investments Commissions; Financial Service Authorities & European Union are facing jurisdictional problems. These problems can arise in India as well, and courts have to be very careful during the litigations under this act.

DERIVATIVE ACTIONS

Derivative actions are claims brought by individual shareholders, acting on behalf of a company, against the company's directors. They are brought in respect of wrongs committed against the company that, for whatever reason, the company is not willing to pursue in its own right.

At present, the circumstances in which such actions may be brought are very limited, due to the general rule (known as the rule in Foss v Harbottle) that the proper person to bring them is the company itself. Specifically, the present law is that a derivative action may only be brought where the wrong complained of:

- amounts to a fraud on the minority and the wrongdoers are in control of the company;
- cannot be ratified by ordinary resolution; or

- is outside the company's objects and so cannot be ratified in any event.

Part 11 of the Companies Act 2006 (the Act), due to come into force on 1 October 2007, contains a new derivative action procedure (the Part 11 procedure) that will effectively replace these restrictions. The Part 11 procedure broadens the circumstances in which derivative actions may be brought, extending to actions in respect of any 'actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company'. In particular, the procedure will apply to derivative actions for alleged breaches of any of the new statutory duties of directors in Chapter 2 of Part 10 of the Act, including the duty to exercise reasonable care, skill and diligence.

However, despite this general expansion of the circumstances in which derivative actions may be brought, safeguards against unwarranted shareholder activism have been put in place. First, the Part 11 procedure does not change the current rule that it is only the company, not the shareholder that may obtain damages in a derivative action. Second, the Part 11 procedure contains a requirement that a shareholder will require the court's consent to sue – and must overcome a number of hurdles before this consent can be obtained.

INTER - CORPORATE LOANS

(1) No company shall, directly or indirectly,

(a)	make any loan to any other body corporate;
(b)	give any guarantee, or provide security, in connection with a loan made by any other person to, or to any other person, by anybody corporate; and
(c)	acquire, by way of subscription, purchase or otherwise the securities of any other body corporate,

exceeding sixty per cent of its paid-up share capital and free reserves, or hundred per cent of its free reserves, whichever is more: Provided that where the aggregate of the loans and investments so far made, the amounts for which guarantee or security so far provided to or in all other bodies corporate, along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceeds the aforesaid limits, no investment or loan shall be made or guarantee shall be

given or security shall be provided unless previously authorized by a special resolution passed in a general meeting:

Provided further that the Board may give guarantee, without being previously authorised by a special resolution, if,

(a)	a resolution is passed in the meeting of the Board authorizing to give guarantee in accordance with the provisions of this section;
(b)	there exists exceptional circumstances which prevent the company from obtaining previous authorization by a special resolution passed in a general meeting for giving a guarantee; and
(c)	the resolution of the Board under clause (a) is confirmed within twelve months, in a general meeting of the company or the annual general meeting held immediately after passing of the Board's resolution, whichever is earlier:

Provided also that the notice of such resolution shall indicate clearly the specific limits, the particulars of the body corporate in which the investment is proposed to be made or loan or security or guarantee to be given, the purpose of the investment, loan or security or guarantee, specific sources of funding and such other details.

(2) No loan or investment shall be made or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution referred to in section 4A, where any term loan is subsisting, is obtained: Provided that prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amounts for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit of sixty per cent specified in sub-section (1), if there is no default in repayment of loan installments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(3) No loan to anybody corporate shall be made at a rate of interest lower than the prevailing bank

rate, being the standard rate made public under section 49 of the Reserve Bank of India Act, 1934.

(4) No company, which has defaulted in complying with the provision of section 58A, shall, directly or indirectly,

(a)	make any loan to anybody corporate;
(b)	give any guarantee, or provide security, in connection with a loan made by any other person to, or to any other person by, anybody corporate; and
(c)	acquire, by way of subscription, purchase or otherwise the securities of any other body corporate, till such default is subsisting

(5) (a) Every company shall keep a register showing the following particulars in respect of every investment or loan made, guarantee given or security provided by it in relation to anybody corporate under sub-section (1), namely:

(i)	the name of the body corporate;
(ii)	the amount, terms and purpose of the investment or loan or security or guarantee;
(iii)	the date on which the investment or loan has been made; and
(iv)	the date on which the guarantee has been given or security has been provided in connection with a loan.

(b) The particulars of investment, loan, guarantee or security referred to in clause (a) shall be entered chronologically in the register aforesaid within seven days of the making of such investment or loan, or the giving of such guarantee or the provision of such security.

(6) The register referred to in sub-section (5) shall be kept at the registered office of the company concerned and

(a)	shall be open to inspection at such office; and

(b)	extracts may be taken there from and copies thereof may be required,

by any member of the company to the same extent, in the same manner, and on payment of the same fees as in the case of the register of members of the company; and the provisions of section 163 shall apply accordingly.

(7) The Central Government may, prescribe guidelines for the purposes of this section.

(8) Nothing contained in this section shall apply,

(a)	to any loan made, any guarantee given or any security provided or any investment made by
(i)	a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of financing industrial enterprises, or of providing infrastructural facilities;
(ii)	a company whose principal business is the acquisition of shares, stock, debentures or other securities;
(iii)	a private company, unless it is a subsidiary of a public company;
(b)	to investment made in shares allotted in pursuance of clause (a) of sub-section (1) of section 81;
(c)	to any loan made by a holding company to its wholly owned subsidiary;
(d)	to any guarantee given or any security provided by a holding company in respect of loan made to its wholly owned subsidiary; or
(e)	to acquisition by a holding company, by way of subscription, purchases or otherwise, the securities of its wholly onwed subsidiary.

(9) If default is made in complying with the provisions of this section, other than sub-section (5), the company and every officer of the company who is in default shall be punishable with imprisonment which may extend to two years or with fine which may extend to fifty thousand rupees: Provided that where any such loan or any loan in connection with which any such guarantee or security has been given, or provided by the company, has been repaid in full, no punishment by

way of imprisonment shall be imposed under this sub-section, and where such loan has been repaid in part, the maximum punishment which may be imposed under this sub-section by way of imprisonment shall be appropriately reduced:

(a)	"loan" includes debentures or any deposit of money made by one company with another company, not being a banking company;
(b)	"free reserves" means those reserves which, as per the latest audited balance sheet of the company, are free for distribution as dividend and shall include balance to the credit of the securities premium account but shall not include share application money.]

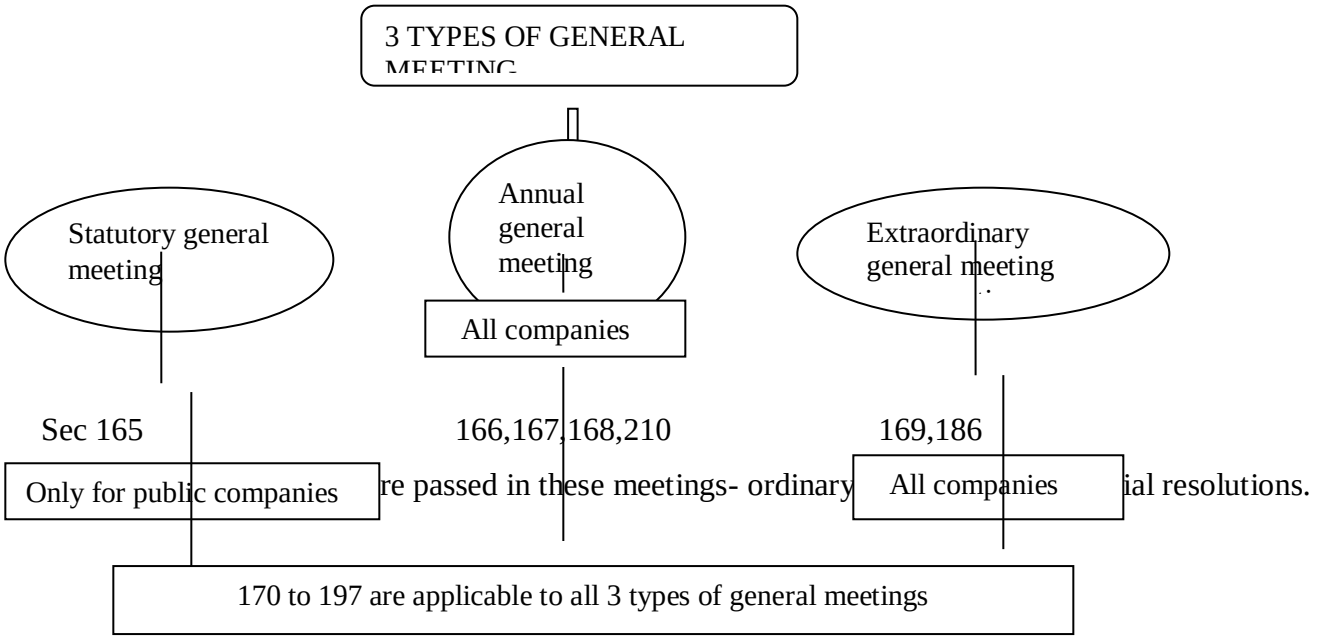
UNIT III

CORPORATE GOVERNANACE

MEETINGS

INTRODUTION:

- A Meeting may be generally defined as a gathering or assembly or getting together of a number of persons for transacting any lawful business.
- There must be at least two persons to constitute a meeting.
- In certain exceptional circumstances, even one person may constitute a meeting.
- Eg-



ESSENTIAL REQUIREMENTS FOR A VALID GENERAL MEETING:

1. Properly called –
    - Proper notice(sec 171, 172, 173)
    - Proper authority shall call the meeting (board of directors/ members)
2. Properly convened-
    - Proper quorum (sec174)
    - Proper chairman (sec 175)
    - Proper proxy(176)
3. Properly conducted-
    - Proper moving and passing of resolutions
    - Proper voting by show of hands (sec 177,179)
    - Proper voting by poll (sec 179 to 185)

- STATUTORY GENERAL MEETING: SEC 165

The first meeting of the share holders of a public company is known as the statutory meeting. It has to be called within six months from the date of commencement of business.

But it cannot be held within one month from that date, as the requirement of the sec 165 is that the meeting should be held " within a period not less than one month or more than six months from the date at which the company is entitled to commence business."

- The purpose of a statutory meeting with its preliminary report is to put the shareholders of the company in possession of all the important facts relating to the new company.
- Facts could be like what shares have been taken up ,what money received, what contracts entered into ,what sums spent on preliminary expenses, etc
- Members are given the liberty to discuss any matter relating to the formation of the company or arising out of the statutory report.

- ANNUAL GENERAL MEETING : SEC 166

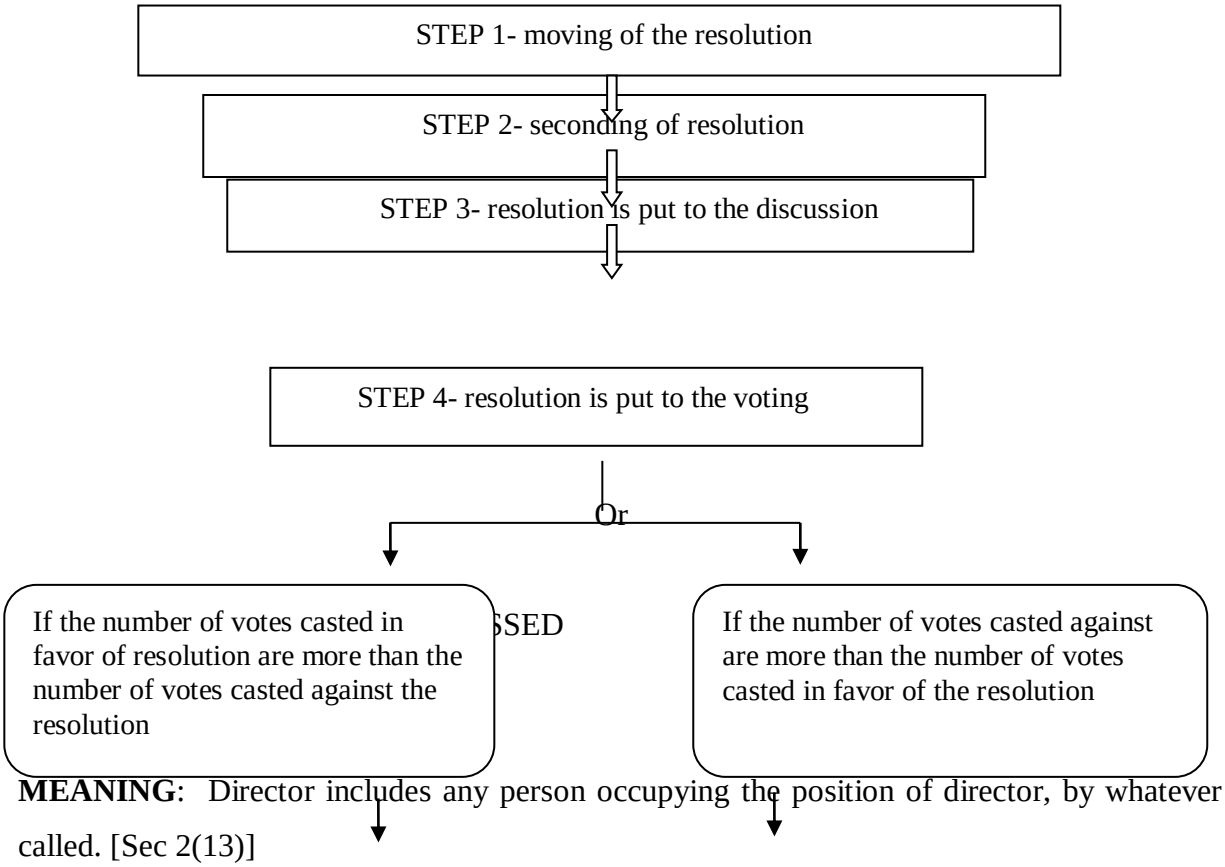
Every company is required to call at least one meeting of its shareholders each year. This meeting is known as the annual general meeting.

The first annual meeting must be held within eighteen months from the date of its incorporation. The gap between first and next meeting should not be less than fifteen months. Eg: suppose that a company is incorporated in Jan 1960, its first annual general meeting should be held within eighteen months, that is up to June 1961 and then no other meeting will be necessary either for 1960 or 1961.

EXTRAORDINARY GENERAL MEETINGS: SEC 169

Clause 47 of Table A provides that all general meetings other than annual general meetings shall be known as extraordinary general meetings. Board may, whenever it thinks fit, call an extraordinary general meeting.

PROCEDURE FOR PASSING RESOLUTION IN GENERAL MEETING:



MEANING: Director includes any person occupying the position of director, by whatever name called. [Sec 2(13)]

A director is not the servant of the company. They are rather the officers of the company.

In general, appointment of directors is done by the members of the company.

Directors are appointed to manage the affairs of the company.

- **Minimum number of directors –Sec 252**

1. Every public company shall have at least 3 directors.

2. Every private company shall have at least 2 directors.
3. Directors of the company are collectively called as " board of directors"

- **Only individuals to be directors –Sec 253**

No body corporate, association or firm shall be appointed as director of a company, and only an individual shall be so appointed.

- Fiduciary relationship towards – 1) company 2) member

POWERS OF THE DIRECTORS:

GENERAL POWERS VESTED IN THE BOARD [SEC 291] – Subject to the provisions of the act, the board of directors of a company shall be entitled to exercise all such powers and to all such acts and things as the company is authorized to exercise and do.

1. Individual directors have such powers only as are vested in them by the memorandum and articles.
2. Power to make calls on shares.
3. Power to allot and issue shares.
4. Power to forfeit shares.
5. Power to inspect books of account.
6. Power to make contract, create negotiable instruments.
7. Power to recommend declaration of dividend.
8. Power to inspect books of account.

POWERS EXCERCISED BY MEANS OF RESOLUTION PASSED [SEC 292] – The power to (1) to make calls;

(2) To authorize buy- back referred to in the first proviso to clause b of sec 77-A(2);

(3) To issue debentures

(4) To borrow money;

(5) To invest the funds of the company and

(6) To make loans

POWERS EXCERCISABLE WITH GENERAL MEETING APPROVAL: [SEC 293]

The following powers can be exercised by the board only with the consent of the company in general meeting:

9. Sale or lease of the company's undertaking;
10. Extension of the time for payment of a debt due by a director
11. Investment of compensation received on compulsory acquisition in securities other than trust securities;
12. Borrowing of money beyond the paid –up capital of the company;
13. Contributions to any charitable or other funds beyond fifty thousand rupees in one financial year or five per cent of the average net profits during the preceding three financial years ,which is greater.

The consent of the general meeting may be expressed by means of a formal resolution or informally through conduct as it happened, for example, in *joint Receivers and managers of Niltan Carson ltd v Hawthorne, 1988* the hotel premises of the company were handed over to a director without the approval of the shareholders. The lessee director had acted with complete honesty and openness and with the agreement of practically all the shareholders who desired that she should run the community home independently of the company. The transaction was held to be not voidable without showing that there was no proper consideration.

POWER TO MAKE POLITICAL CONTRIBUTIONS [SEC 293 A]

Before the companies (amendment) Act, 1985 (35 of 1985) companies were not permitted to make contributions to political purposes. Now this ban has been lifted, except in the case of government companies and companies who have been permitted to contribute money to any political party or to any person for political purposes.

DUTIES OF DIRECTORS:

Section 166 of the new Act provides that a director of a company including a private Company shall act accordingly. His duties are listed in the section as under:

1. DUTY OF GOOD FAITH (FIDUCIARY OBLIGATION) - Good faith requires that all their endeavors must be directed to the benefit of the company. The first and the foremost obligation of persons in fiduciary position are to act with honesty. The law imposes these duties upon the directors so that they are not able to capitalize their own strategic position in the company to serve their own interest.

In COOK V. DEES (1916), the directors of the company diverted a contract opportunity for their

own benefit since they held ¾th majority votes they resolved that the company had no interest in the contract. It was held that the benefit of the contract in equity belonged to the company and the directors had usurped their voting power for their personal gain.

2. He has to act in the best interest of the company, its employees, shareholders, community and for the protection of environment.
3. He has to carry on his duties with due and reasonable care, skill and diligence and exercise independent judgment.
4. He shall not involve in a situation in which he may have a direct or indirect interest that conflicts or likely to conflict with the interest of the company.
5. He shall not achieve or attempt to achieve any undue gain or advantage either to himself, his relatives, partners or associates.
6. He shall not assign his office to any other person.

If he contravenes any of the above provisions of section 166, he shall be punishable with Fine, which shall not be less than 1 lakh rupees and which may extend to 5 lakhs. It is also provided that if he is found guilty of making any undue gain during the course of discharging his duties, he shall be liable to refund an amount equal to such gain to the Company.

KINDS OF DIRECTOR:

1. Full time director
2. Part time director
3. Independent director
4. Women director

WOMEN DIRECTOR:

New Section 149 provides that the minimum number of directors in the case of a public company shall be three and in the case of a private company it shall be two. The maximum number of directors can be 15.

However, a company can provide for maximum number of directors as more than 15 by passing a Special Resolution. The Government can prescribe by Rules that in certain class of companies,

there shall be at least one woman director. It is also provided that at least one of the directors shall be a person who has stayed in India for 182 days or more in the previous calendar year. Draft Rule 11.1 states that in every listed company there should be one Woman Director who should be appointed within one year from the date of this sections coming into force. The Rule also provides that in every other public company where paid up Share Capital is Rs.100 cr. or more or turnover is Rs.300 cr. or more, a Woman Director shall be appointed within 3 years from the date on which this section comes into force.

INDEPENDENT DIRECTORS:

Section 149 recognizes the concept of an "Independent Director".

This term is defined to mean a person –

(i) Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience.

(ii) Who possess such other qualifications as may be prescribed.

(iii)Who is or was not a promoter of the company, or its holding, subsidiary or associate company.

(iv) Who is not related to promoters or directors of the company or any of its group companies.

(v) Who has or had no pecuniary relationship with any of the above persons/companies during the current or two immediately preceding financial years.

(vi) None of his relatives has or had pecuniary relationship or transaction with the above persons amounting to 2% or more of its gross turnover or total income or Rs.50 lacs (or such higher amount Which is prescribed) – whichever is lower during the current or two preceding financial years.

(vii) Who or any of his relatives –

(a) Holds or held the position of key managerial personnel or as employee of the company or any of its group companies in any of the 3 financial years immediately preceding the year of his appointment.

(b) Is or has been an employee, proprietor or partner of the following during any of the 3 preceding financial years.

- A firm of Auditors, Company Secretaries or Cost Auditors of the company or any of its

group of companies.

• Any legal or consulting firm which has or had transaction with the company in or any of its group companies amounting to 10% or more of the gross turnover of the firm.

(c) Holds, together with his relatives, 2% or more of the Voting power of the company.

(d) is a Chief Executive or director of any non-profit organization that receives 25% or more of its receipts from the company, any of its promoters, directors or its group companies or that hold 2% or more of the total voting power of the company.

(viii) Who is not a Managing/Whole Time/Nominee Director.

- An Independent Director shall not be entitled to receive any remuneration other than a fee and reimbursement of expenses, for attending the meetings of the Board or any committee thereof or for any other purpose as decided by the Board.
- An Independent Director can, subject of provisions of section 152, hold office for a term of 5 consecutive years. He can be appointed as such for a further term, not exceeding 5 years, if the members pass a special resolution and disclosure of such appointment is made in the Board Report. After the expiry of 10 years period he cannot be reappointed as an Independent Director.

- The appointment of Independent Director shall be approved by the company in General Meeting as provided in section 152(2)

- The explanatory statement annexed to the notice of General Meeting shall indicate the justification for choosing the Director for such appointment. This notice shall also include a statement that, in the opinion of the Board of Directors, such person fulfils the conditions in the Act for such appointment.

PREVENTION OF OPPRESSION AND MIS MANAGEMENT

The prevention of oppression and mismanagement can be studied under 2 heads:

a. Prevention of oppression and mismanagement by tribunal

b. Prevention of oppression and mismanagement by the central government.

A. PREVENTION OF OPPRESSION AND MISMANAGEMENT BY TRIBUNAL:

Not defined in the Companies Act as such.

It is to be decided by the facts of the each case whether there exists oppression or not.

ELDER V. ELDER & WATSON LTD, 1952

The conduct of the majority shareholders (or minority) shareholders may be treated as oppression if it involves a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every share holders who entrusts money to the company is entitled to rely. Thus the conduct must be unjust, burdensome, harsh and wrongful. But mere lack of confidence springs from oppression or a minority by the majority in the management of the affairs of the company, it may be treated as oppression.

Oppression involves at least an element of lack of probity or fair dealing to a member in the matter of his propriety right as shareholder.

In the case of ***NEEDLE INDUSTRIES (INDIA) LTD V NEEDLE NEWWAY (INDIA) HOLDING LTD.,*** the Supreme Court has held that an unwise, inefficient or careless conduct of a director cannot give rise to a claim for this relief. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks in probity is unfair and causes prejudice to his rights as shareholders.

In *MOHAN LAL CHANDUMAL V. THE PUNJAB CO. LTD,* a company altered its articles in such manner as to deprive its non trading members of their right to vote, call meeting and receive dividends. The court held it to be oppression on minority.

PREVENTION OF MIS MANAGEMENT: SEC 398

An application may be made under this section to the tribunal, by any member or members of a company complaining that-

1. The affairs of the company are being conducted in a manner prejudicial to the public interest or the company or
2. A material change has been introduced in the management or control of the company whereby it is likely that the affairs of the company may be conducted in a manner prejudicial to public interest or the company.

DISTINCTION BETWEEN PREVENTION OF OPPRESSION AND MISMANAGEMENT:

1. There should be facts to justify the making of an order for winding up under sec 397 2. Tribunal acts to prevent injustice being done to the members in capacity of member 3. Tribunal seeks to end the oppression complained of by the petitioner	1. No such facts are necessary in case of claiming relief against mismanagement under sec 398 2. The tribunal acts in order to prevent injustice being done to the interests of the company as a whole. 3. It is preventive in nature.

POWER OF THE CENTRAL GOVERNMENT TO PREVENT OPPRESSION AND MISMANAGEMENT:

Central government also has the power to prevent oppression and mismanagement under section 408 and 409.

Sec 408(1) provides that the central government may appoint such numbers of directors on the board of a company as the tribunal may by order in writing , specify as being necessary to effectively safeguard the interests of the company or its shareholders or the public interest.

In ***PEERLESS GENERAL FINANCE & INVESTMENT CO. LTD V. UOI (1989)***, it has been held that the provisions of section 408 must be construed strictly and it does not extend to regulating schemes of the company.

The powers of the central government are essentially preventive in nature and therefore an order passed under this section may not be able to cure the illegal or prejudicial acts which may have already been performed by the company and its directors.

INVESTOR PROTECTION

Corporate governance and investor protection are key drivers of market development. In fact,

companies around the world share the same imperatives: the ability to raise new capital, the efficiency of resources allocation, the growth of firm value, and the availability of information to all decision-makers…These imperatives should drive countries and firms in advanced economies to adopt the same and the most efficient corporate rules and structures.. In fact, recent managerial misbehavior and corporate scandals; e.g. accounting manipulations, self-dealing behavior, excessive sale of stocks by managers just before a decline of share price draw much attention on corporate governance. Various laws and reports around the world came in response to restore confidence and to reinforce investor protection.

Investment protection is a broad economic term referring to any form of guarantee or insurance that investments made will not be lost, this may be through fraud or otherwise. For example, the *investment protection bureau* is a New York state legal body which is there to protect the public from fraud by monitoring and limiting investment.

INVESTOR PROTECTION MEASURES:

1. **Stricter regulation of the board**-in the wake of increasing corporate scams, the need to for having an accountable and transparent board cannot be overemphasized
   a. There should be increased penalty on defaulting directors
   b. Annual board disclosures must be tightened to present a fair picture

2. **Class action suits to be more strict**
3. **Proper monitoring of frauds-** fraud is a non compoundable, cognizable offence punishable with imprisonment. For implementing fraud related provisions, statutory status is given to serious fraud investigation (SFIO) to conduct investigations assigned by the CG.

INSIDER TRADING

Meaning of "Insider"

An insider is understood as a person having control over the management of affairs of the corporation and who has deep insight into the affairs of the corporate body and holding knowledge about "price sensitive information" relating to the performance of the corporate body that could

have a decided impact on the movement of the price of its equity. Therefore he is at a vantage position with regards to a prospective trading in the shares of the company to the detriment of the common investors.

Taking this fact into account the Regulation prescribes several "do's" and "don'ts" with reference to these "insiders". The effect of the regulatory measure adopted by SEBI is to prevent the insider trading in the shares of the company to earn an unjustified benefit for him and to the disadvantage of the bonafide common shareholders.

Insider definition as amended by SEBI vides its Notification dated 19.11.2008 means any person who,—

(i) is or was connected with the company or is deemed to have been connected with the company and who is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company, or

(ii) has received or has had access to such unpublished price sensitive information.

Insider Trading

Insider Trading generally involves the act of subscribing or buying or selling of the company's securities, when in the possession of any unpublished price sensitive information about the company. It also involves disclosing any unpublished price sensitive information about the company to others who could subscribe or buy or sell the company's securities. Insider Trading invokes severe civil and criminal penalties not only on the Insider but also on the company in certain circumstances under the Regulations issued in India under the Securities and Exchange Board of India (SEBI) Act, 1992.

It is not hard to see that when company insiders trade on the secondary market, they speed up the flow of information and forecasts into prices. Company insiders are in a unique position to make forecasts about the future risk and return of the shares and bonds of their company, hence they might often correctly perceive market prices to be "too low" or "too high". When they trade on the secondary market, they serve to feed their knowledge into prices, thus making markets more efficient.

Insider trading is often equated with market manipulation, yet the two phenomena are completely different. Manipulation is intrinsically about making market prices move away from their fair values; manipulators reduce market efficiency. Insider trading brings prices closer to their fair

values; insiders enhance market efficiency.

Meaning of price sensitive information

Price sensitive information means any information, which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.

The following shall be deemed to be price sensitive information:

i. Periodical financial results of the company;

ii. Intended declaration of dividends (both interim and final);

iii. Issue of securities or buy-back of securities;

iv. Any major expansion plans or execution of new projects;

v. Amalgamation, mergers or takeovers;

vi. Disposal of the whole or substantial part of the undertaking;

vii. Any significant changes in policies, plans or operations of the company

Some Cases of "Insider Trading" (Source: ET)

March,1998

SEBI pulls up Hindustan Lever (now Hindustan Unilever) and its then five directors SM Datta, KB Dadiseth, R Gopalakrishnan, A Lahiri and MK Sharma for alleged insider trading. The case involved HLL purchasing a sizeable chunk of Brooke Bond Lipton shares from UTI, prior to its public announcement related to the merger of the two outfits, which, according to Sebi, was price sensitive information. Both HLL and Brooke Bond were subsidiaries of the same parent - Unilever. It's the first case where Sebi passed an order on insider trading.

Status: Sebi directed HLL to compensate UTI to the extent of Rs 3.04 crore. HLL then approached the finance ministry, which was then the appellate authority on Sebi orders. MoF ruled in favour of HLL. Following this, Sebi filed an appeal in the Bombay HC. **Status:** The final verdict is yet to be pronounced.

June,2001

SEBI CHARGES ABS Industries MD Rakesh Agarwal with insider trading as he had allegedly

purchased his own company's shares from the market prior to the takeover deal between ABS and Bayer.

Status: SEBI directed Agarwal to deposit Rs 34 lakh to compensate ABS investors, besides initiating adjudication proceedings against the former promoter. Agrawal challenged the Sebi order before SAT. SAT partially turned down the Sebi ruling of imposing penalty on Agrawal and declined to issue any order related to adjudication. Sebi later contested the SAT order in SC. **Status:** The case was settled through consent order with Agrawal paying a monetary penalty.

April, 2004

SAMIR ARORA, former Asia-Pacific head of Alliance Capital Mutual Fund, was charged with indulging in unfair trade practices for disposing off a considerable quantity of shares held by the fund under his management which resulted in a sharp decline in the valuation of Alliance. Sebi noted that when the US-based fund decided to sell its Indian interests, Arora was one of the contenders.

Status: Sebi banned Arora from dealing in securities in any manner for a period of five years. SAT comes to the rescue of Arora by setting aside Sebi's order. The regulator later moved the SC. **Status:** Pending.

November, 2006

Rajiv Gandhi, former company secretary and CFO of Wockhardt, along with his immediate family members, was alleged to have traded in the pharma company's shares on the basis of unpublished price-sensitive information (Wockhardt's financial results).

Action Taken: SEBI imposed a monetary penalty of Rs 5 lakh on Gandhi. Though Gandhi moved SAT, the latter upheld SEBI’s order. This is one case where SEBI had an unambiguous victory.

Status: Closed.

CORPORATE FRAUD

DEFINITION:

It is said that fraud vitiates everything.

In the broadest sense, a fraud is an intentional deception made for personal gain or to damage another person/entity

Wrongful or criminal deception intended to result in financial or personal gain

Indian Law:-

- Indian Contract Act, 1872

  Section17 of the act defines "fraud' as means and include any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party therto his agent, or to induce him to enter into a contract.

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

- Indian penal code, 1860

Section 25 of IPC defines "fraud" as a person is said to be doing things fraudulently if he does that thing with intent to defraud but not otherwise.

TYPES OF FRAUDS:

1. Fraudulent Financial Statements
2. Employee Fraud
3. Vendor Fraud
4. Customer Fraud
5. Investment Scams
6. Bankruptcy Frauds
7. Miscellaneous

FINANCIAL STATEMEMENT FRAUDS:

1. East India Company Fraud
2. Mudhra Scam
3. Enron Fiasco

4. Satyam –Enron of India
5. Harshad Mehta Scam

East India Company Fraud

East India Company was first Multinational Corporation in the world and the first company to issue stock. In the late 1700 Edmund Burke , the founder of the empire and Warren hastings, India's first governor general, brought up on impeachment charges laden with corruption issues. Though the trials failed to convict anybody. The company was subsequently wound up under East India Company Stock Redemption act, 1874.

Mundhara Scam: First scam of Independent India

Haridas Mundhara, a industrialist & stock speculator sold fictious shares to LIC and thereby defrauding LIC by Rs 125 crores. It was the first successful trial of a financial scandal in Independent India. A one man commission headed by justice Chagla was set up by Mr. Jawaharlal Nehru to investigate in the case. The matter was concluded by Justice Chagla finding Haridas guilty and awarding him imprisonment for 22 years.

How Management Encourages Fraud:

When the responsibility, accountability and authority not established or documented and there are no goals and objectives are established for success, the management loses its grip onto fraud less scenario. Also when there is low priority for the establishment of internal controls by not having any written policies or procedures, management encourages fraud. Inadequate cash controls, inadequate physical security for assets and records, no independent inventory of assets, Inconsistent application of policies or procedures also result in unfair practices resulting to fraud.

AUDITING CONCEPT

OBJECT OF AUDITING:

The purpose of audit is to protect shareholders. Also the object of the books of account of the company including profit and loss account and balance sheet is to disclose the relevant information for the protection of shareholders and investors. Therefore, should always be some authenticity about these documents. Thus it makes it necessary that the account so prepared or caused to be

prepared by the company through its directors must be subject to check and scrutiny by some independent authority, so that they can be relied upon by those who are concerned with the company's affairs and business.

The auditor is under duty to examine the accounts maintained by the directors so as to inform the shareholders the true financial position of the company.

LEGAL POSITION OF AUDITORS:

The companies act does not contain any comprehensive definition of the term auditors in relation to the company. In a restricted sense it has been explicitly stated that the agents of the company include its auditors, namely in context of investigation by central government under section 240 or assistance to the official liquidator or registrar of companies in criminal proceedings against delinquent officers etc. under section 545 of the act.

In *SPACKMAN V. EVANS, 1968 it* was held that auditors are not agents of the shareholders and therefore constructive notice of facts coming to their knowledge during audit cannot be imputed to the share holders

APPOINTMENT OF AUDITORS: (SEC 224)

1. First auditors are appointed by the board of directors within one month of the incorporation of the company. If the board does not appoint, the general meeting can appoint the auditors. The general meeting may keep or appoint any other auditor in the next general meeting.
2. Subsequent auditor: every company is required to appoint at each general meeting auditor or auditors to hold office till next annual general meeting.
3. At any annual general meeting, a retiring auditor is re appointed unless-

- He is not qualified for re appointment.
- He has given the company notice in writing of his unwillingness to be re appointed.
- A resolution appointing someone else has been passed at the meeting providing that the working auditor shall not be re appointed.
- Where notice has been given of an intended resolution to appoint else by reason of death, incapacity or disqualification, the resolution cannot be proceeded with.

4. They can also be appointed by special resolution under sec 224(A).

RESTRICTIONS AS TO NUMBER OF AUDITORSHIP:

The number is been restricted to 20 where the paid up share capital of each of the company is less than Rs 25 lakh, and others also 20 which has paid up share capital of Rs. 25 lakhs or more.

QUALIFICATION:

The following persons are not qualified to be appointed as auditor of a company:

a. A body corporate
b. An officer or employee of the company
c. A person who is a partner or who is in the employment of an officer or employee of the company.
d. A person who is indebted to the company for an amount exceeding 1000 rupees or who has given any guarantee or provided any security for an amount exceeding 1000 rupees;

A person is also disqualified for such appointment if he is disqualified for appointment as auditor of any other company which is that company's subsidiary or holding company or a subsidiary of that company's holding company.

POWERS OF AUDITORS:

1. To access books , accounts and vouchers
2. To obtain information and explanations
3. To sign audit reports
4. To receive notice of and attend general meetings
5. To visit branch office of the company and have access to books etc
6. To inspect minute books of the board.

DUTIES OF AUDITORS

- To protect the shareholders and investors against any misrepresentation in the financial matters of the company by making disclosures through their report.
- Under section 227 of companies act, an auditor needs to inquire about –

a. Whether loans and advances made by the company on the basis of security have been properly secured
b. Whether book entry transactions are prejudicial to the interests of the company.
c. Where the company is not an investment or a banking company as consist of share, debenture and other securities have been sold at a price less than that at which they were purchased
d. Whether loans and advances made by the company have been shown as deposits.
e. Whether any director is disqualified from being appointed as director
f. Whether the balance sheet and the profit and loss account gives a true picture of the company etc.

SPECIAL AUDIT (SEC 233 A):

Central government can can order special audit of company's account in cases government is of the opinion that affairs of the company are not being managed properly, or can cause serious injury to the interest of the trade, industry or business or if the financial position of the company is endanger to solvency.

UNIT IV

CORPORATE SOCIAL RESPONSIBILTY AND CORPORATE LIQUIDATION

Corporate Social Responsibility

Today's consumers hold companies to a higher standard. They're looking for more than just material products or quality services when choosing a company to work with: Nine in 10 consumers expect companies to not only make a profit, but also operate responsibly to address social and environmental issues, according to a study by Cone Communications. Eighty-four percent of global consumers also said they seek out responsible products whenever possible.

Recognizing how important social responsibility is to their customers, many companies now focus on and practice a few broad categories of corporate social responsibility (CSR).

1. Environmental efforts: One primary focus of corporate social responsibility is the environment. Businesses regardless of size have a large carbon footprint. Any steps they can take to reduce those footprints are considered both good for the company and society as a whole.

"European companies have really led the way on environment efforts, such as green energy usage,

eco-friendly office and travel policies, and ensuring that businesses take a responsibility for controlling if their net impact is positive or negative," said Richard Stevenson, head of corporate communications at ecommerce platform ePages.com.

2. Philanthropy: Businesses also practice social responsibility by donating to national and local charities. Businesses have a lot of resources that can benefit charities and local community programs.

3. Ethical labor practices: By treating employees fairly and ethically, companies can also demonstrate their corporate social responsibility. This is especially true of businesses that operate in international locations with labor laws that differ from those in the United States.

4. Volunteering: Attending volunteer events says a lot about a company's sincerity. By doing good deeds without expecting anything in return, companies are able to express their concern for specific issues and support for certain organizations.

"Ethical labor and volunteering are no-brainers – consumers and partners want to hear that a business is building something more than just revenues. Even modest steps such as 'open door days' can be a great way to build links to your community and reflect that you aim to make valuable, long term impact," Stevenson added. With millennials now holding buying power majority, the face of consumerism has changed completely, according to DeeAnn Sims, founder of creative agency, SPBX. "This new wave of buyers is demanding transparency, and when given the choice, will almost always choose a brand or product tied to a socially conscious cause rather than a corporate big name brand," Sims said. Sims also said that this places CSR at the forefront of modern day business practices.

Why CSR matters?

All stakeholders in a business seek to understand and value the mission of the company, and why they should invest and support in it and that, according to Stevenson, is why CSR matters. "In recent history, the organizations that have achieved remarkable things tend to be the ones that share success with others, instinctively," he said.

Liz Maw, CEO of nonprofit organization Net Impact, noted that CSR is becoming more mainstream as forward-thinking companied embed sustainability into the core of their business operations to create shared value for business and society. "Sustainability isn't just important for people and the planet, but also is vital for business success," said Maw, whose company connects students and professionals who want to use their business skills to do social good. "Communities are grappling

with problems that are global in scope and structurally multifaceted – Ebola, persistent poverty, climate change. The business case for engaging in corporate social responsibility is clear and unmistakable."

"More practically, [CSR] often represents the policies, practices and initiatives a company commits to in order to govern themselves with honesty and transparency and have a positive impact on social and environmental wellbeing," added Susan Hunt Stevens, founder and CEO of employee engagement platform WeSpire. Consumers aren't the only ones who are drawn to businesses that give back. Susan Cooney, head of marketing & partnerships, diversity inclusion at Change Catalyst, said that a company's CSR strategy is a big factor in where today's top talent chooses to work. "The next generation of employees is seeking out employers that are focused on the triple bottom line: people, planet and revenue," Cooney told Business News Daily. "Coming out of the recession, corporate revenue has been getting stronger. Companies are encouraged to put that increased profit into programs that give back."

Examples of corporate social responsibility-

While many companies now practice some form of social responsibility, some are making it a core of their operations. Ben and Jerry's, for instance, uses only fair trade ingredients and had developed a sustainability program for dairy farms in its home state of Vermont. Starbucks has created its C.A.F.E. Practice guidelines, which are designed to ensure the company sources sustainably grown and process coffee by evaluating the economic, social and environmental aspects of coffee production. However, Stevens said that companies need to understand what their core social purpose is a how that aligns with their stated mission, to create a cohesive CSR strategy.

EVOLUTION OF CORPORATE CRIMINAL LIABILITY

The Indian Legal System, being a colonial offshoot of the Common Law, did not recognize corporate criminal liability, till recently. There was a great emphasis on the requirement of mens rea and imprisonment to enforce liability for crimes due to which corporations couldn’t be criminalized. This position was reflected in *A.K. Khosla v. T.S. Venkatesan* . Two companies charged with fraud under the Indian Penal Code escaped liability on this two-fold narrow understanding of criminal law.

In *KalpanathRai v. State*, the Supreme Court held that a company could not be charged under Section 3(4) of the Terrorists and Disruptive Activities Prevention Act since there was an implicit

mensrea requirement, which remained unfulfilled in the case of a corporation. The Court, relying on precedent, determined that the establishment of mens rea is imperative to hold any person liable for an offense unless the requirement explicitly excluded. Thus, the threshold to determine liability implicitly excluded companies from criminal convictions.

The same adjudication could be witnessed in *Zee Tele films Ltd. v. Sahara India Co. Corp. Ltd.* where a company was discharged of any liability for the offense of defamation since mens rea remained unsatisfied and was an implicit requirement under the law. More recently, in Iridium v. Motorola , the Supreme Court of India held that a company could be held liable for statutory as well as common law offenses, including those requiring mens rea. Thus, the company was held liable for cheating and criminal conspiracy on the basis of alleged false representations made by its officers or 'alter ego'. The Court justified its stance based on a contextual analysis by understanding the needs of current times and keeping in lieu, the development of the law in the U.K. and U.S. among other common law nations.

CONCLUSION

The development of corporate criminal liability in the common law could be imagined in the form of a line graph. From not imposing liability on corporations to imposing liability on a large scale to recently, limiting this liability to specific situations, the theory has seen major shifts. As pointed above, the more recent trend in the imposition of corporate criminal liability is involving corporations in mitigating damages and complying with effective programs to reduce these crimes. Thus, corporate criminal liability in the common law has evolved through an organic process of change, based on situational and contextual demands of various regions. The growth of the doctrine may not be uniform in all common law systems, but they seem to follow a similar pattern of imposition of liability as the doctrine evolves. The laws regarding corporate criminal liability allow a great scope for modification, to clarify situations in which this liability will be absolute or imposed to avoid the gaps in the existing law. However, the doctrine does serve the purpose of ensuring liability and providing some form of retribution to the victims of corporate crimes.

WINDING UP OF A COMPANY

The Liquidation or winding up a company is a process through which life of company and it's all affairs are wound up and its property administered for benefits of its creditors and members. An

administrator, who is called liquidator, is appoint to take control of company, collect its assents, pay its debts and finally if any surplus assents are left, they are divided among the members of the company in proportion to their rights under the articles. This being done the company is dissolved on compliance within the requisite formalities prescribed by the companies' ordinance.

Different modes of winding up a Company

According to Section 297 of the Act there are three modes of winding up a company.

1. **Winding up by the Court**

A company formed and registered under the ordinance, may be wound up by the court. This kind of winding up is also called compulsory winding up.

Explanation of winding up a company by Court

Following points are important to explanation

i. Special Resolution

As far as winding up of company by court is concerned, company can wound up only when company has passed special resolution for its winding up and court orders for its winding up on basis of some specific grounds.

ii. Oppression

If it is conducting its business in a manner oppressive to any member or person concerned with the formation or minority share-holders.

iii. Inability to pay debts

When is it's proved that public company is unable to pay its debts, court can order for its winding up.

iv. Unauthorized business

If it is carrying on business not authorized by the memorandum.

v. Non-maintenances of accounts

If company fails to maintain its accounts, court can order for its winding up.

vi. Non-holding of Statutory Meeting

When statutory meeting is not held within prescribed period, court can order for winding up of company.

vii. Non-submission of Statutory Report

When statutory report is not submitted to registrar, court can order for winding up of company.

viii. Failure to commence or suspend business

If the company does not commence its business within a year from its incorporation or suspends the business for a whole years.

ix. Reduction of members

If the number of member is reduced in the case of a public company, below seven and in the case of a private company, below two.

x. Failure to carryout directions

If it is managed by person who fail to carry out the directions of the court or Registrar or commission.

2. Voluntary winding up a Company

The object of a voluntary winding is that the company and its creditors shall be left to settle their affairs without going to Court, but they may apply to the court for any directions and order if and when necessary.

Explanation voluntary winding up a company

Following are the points are important to explanation

i. Expiry of period

When the period if any fixed for the duration of the company expires.

ii. Occurrence of events

When the event occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company has passed a resolution to winding up.

iii. Special Resolution

If the company by a special resolution resolves that the company be wound up voluntarily for any reason whatsoever.

iv. Extraordinary Resolution

When the company has passed an extra-ordinary resolution that it cannot by reason of its liabilities carry on its business, and that it is expedient that the company be wound up.

3. Winding up a company under supervision of court

When company has passed special or extra-ordinary resolution for its liquidation or winding up, court can pass an order on application of creditors, contributors or other persons for conducting of liquidation or winding up of company under supervision of court.

Explanation of winding up a company under supervision of court

As far as winding up a company under supervision of court is concerned, all proceedings for winding up of company are though conducted voluntarily, yet it is necessary that these proceedings should be conducted under supervision of court.

Conclusion

bankruptcy of company is not the same thing as winding up a company. There is difference between bankruptcy of company and winding up of company in bankruptcy of company, court appoints a trustee to sell property to pay the debts of the bankrupt party. Contrary to this, liquidator fulfills prescribed procedure for winding up of company.

'MERGERS AND ACQUISITIONS - M&A'

Mergers and acquisitions (M&A) is a general term that refers to the consolidation of companies or assets. M&A can include a number of different transactions, such as mergers, acquisitions, consolidations, tender offers, purchase of assets and management acquisitions. In all cases, two companies are involved. The term M&A also refers to the department at financial institutions that deals with mergers and acquisitions.

BREAKING DOWN MERGERS & ACQUISITIONS

M&A can include a number of different transactions, detailed below.

Merger: In a merger, the boards of directors for two companies approve the combination and seek shareholders' approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company. For example, in 2007 a merger deal occurred between Digital Computers and Compaq whereby Compaq absorbed Digital Computers.

Acquisition: In a simple acquisition, the acquiring company obtains the majority stake in the acquired firm, which does not change its name or legal structure. An example of this transaction is Manulife Financial Corporation's 2004 acquisition of John Hancock Financial Services, where both companies preserved their names and organizational structures.

Consolidation: A consolidation creates a new company. Stockholders of both companies must approve the consolidation, and subsequent to the approval, they receive common equity shares in

the new firm. For example, in 1998 Citicorp and Traveler's Insurance Group announced a consolidation, which resulted in Citigroup.

Tender Offer: In a tender offer, one company offers to purchase the outstanding stock of the other firm at a specific price. The acquiring company communicates the offer directly to the other company's shareholders, bypassing the management and board of directors. Example: when Johnson & Johnson made a tender offer in 2008 to acquire Omrix Biopharmaceuticals for $438 million. While the acquiring company may continue to exist — especially if there are certain dissenting shareholders — most tender offers result in mergers.

Acquisition of Assets: In a purchase of assets, one company acquires the assets of another company. The company whose assets are being acquired must obtain approval from its shareholders. The purchase of assets is typical during bankruptcy proceedings, where other companies bid for various assets of the bankrupt company, which is liquidated upon the final transfer of assets to the acquiring firm(s).

Management Acquisition: In a management acquisition, also known as a management-led buyout (MBO), the executives of a company purchase a controlling stake in a company, making it private. Often, these former executives partner with a financier or former corporate officers in order to help fund a transaction. Such an M&A transaction is typically financed disproportionately with debt, and the majority of shareholders must approve it. For example, in 2013, Dell Corporation announced that it was acquired by its chief executive manager, Michael Dell.

What's the Difference Between a Merger and an Acquisition?

Although they are often uttered in the same breath and used as though they were synonymous, the terms merger and acquisition mean slightly different things.

A merger occurs when two separate entities (usually of comparable size) combine forces to create a new, joint organization in which – theoretically – both are equal partners. For example, both Daimler-Benz and Chrysler ceased to exist when the two firms merged, and a new company, DaimlerChrysler, was created.

An acquisition refers to the purchase of one entity by another (usually, a smaller firm by a larger one). A new company does not emerge from an acquisition; rather, the acquired company, or target firm, is often consumed and ceases to exist, and its assets become part of the acquiring company. Acquisitions – sometimes called takeovers – generally carry a more negative connotation than mergers, especially if the target firm shows resistance to being bought. For this reason, many acquiring companies refer to an acquisition as a merger even when technically it is not.

Legally speaking, a merger requires two companies to consolidate into a new entity with a new ownership and management structure (ostensibly with members of each firm). An acquisition takes place when one company takes over all of the operational management decisions of another. The more common interpretive distinction rests on whether the transaction is friendly (merger) or hostile (acquisition).

In practice, friendly mergers of equals do not take place very frequently. It's uncommon that two companies would benefit from combining forces and two different CEOs agree to give up some authority to realize those benefits. When this does happen, the stocks of both companies are surrendered and new stocks are issued under the name of the new business identity.

Since mergers are so uncommon and takeovers are viewed in a derogatory light, the two terms have become increasingly conflated and used in conjunction with one another. Contemporary corporate restructurings are usually referred to as merger and acquisition (M&A) transactions rather than simply a merger or acquisition. The practical differences between the two terms are slowly being eroded by the new definition of M&A deals. In other words, the real difference lies in how the purchase is communicated to and received by the target company's board of directors, employees and shareholders. The public relations backlash for hostile takeovers can be damaging to the acquiring company. The victims of hostile acquisitions are often forced to announce a merger to preserve the reputation of the acquiring entity

Varieties of Mergers

From the perspective of business structures, there is a whole host of different mergers. Here are a few types, distinguished by the relationship between the two companies that are merging:

- Horizontal merger - Two companies that are in direct competition and share the same product lines and markets.
- Vertical merger - A customer and company or a supplier and company. Think of a cone supplier merging with an ice cream maker.
- Congeneric mergers - Two businesses that serve the same consumer base in different ways, such as a TV manufacturer and a cable company.
- Market-extension merger - Two companies that sell the same products in different markets.
- Product-extension merger - Two companies selling different but related products in the same market.
- Conglomeration - Two companies that have no common business areas.

  There are two types of mergers that are distinguished by how the merger is financed. Each has certain implications for the companies involved and for investors:

  - Purchase Mergers - As the name suggests, this kind of merger occurs when one company purchases another. The purchase is made with cash or through the issue of some kind of debt instrument; the sale is taxable. Acquiring companies often prefer this type of merger because it can provide them with a tax benefit. Acquired assets can be written-up to the actual purchase price, and the difference between the book value and the purchase price of the assets can depreciate annually, reducing taxes payable by the acquiring company.
  - Consolidation Mergers - With this merger, a brand new company is formed and both companies are bought and combined under the new entity. The tax terms are the same as those of a purchase merger.

Details of Acquisitions

In an acquisition, as in some mergers, a company can buy another company with cash, stock or a combination of the two. Another possibility, which is common in smaller deals, is for one company to acquire all the assets of another company. Company X buys all of Company Y's assets for cash,

which means that Company Y will have only cash (and debt, if any). Of course, Company Y becomes merely a shell and will eventually liquidate or enter another area of business.

Another type of acquisition is a reverse merger, a deal that enables a private company to get publicly-listed in a relatively short time period. A reverse merger occurs when a private company that has strong prospects and is eager to acquire financing buys a publicly-listed shell company, usually one with no business and limited assets. The private company reverse merges into the public company, and together they become an entirely new public corporation with tradable shares.

Valuation Matters

Naturally, both sides of an M&A deal will have different ideas about the worth of a target company: Its seller will tend to value the company at as high of a price as possible, while the buyer will try to get the lowest price that he can.

There are, however, many legitimate ways to value companies. The most common method is to look at comparable companies in an industry, but deal makers employ a variety of other methods and tools when assessing a target company. Here are just a few of them:

1. Comparative Ratios. The following are two examples of the many comparative metrics on which acquiring companies may base their offers:
    - Price-Earnings Ratio (P/E Ratio) - With the use of this ratio, an acquiring company makes an offer that is a multiple of the earnings of the target company. Looking at the P/E for all the stocks within the same industry group will give the acquiring company good guidance for what the target's P/E multiple should be.
    - Enterprise-Value-to-Sales Ratio (EV/Sales) - With this ratio, the acquiring company makes an offer as a multiple of the revenues, again, while being aware of the price-to-sales ratio of other companies in the industry.
2. Replacement Cost – In a few cases, acquisitions are based on the cost of replacing the target company. For simplicity's sake, suppose the value of a company is simply the sum of all its equipment and staffing costs. The acquiring company can literally order the target to sell at that price, or it will create a competitor for the same cost. Naturally, it takes a long time to assemble good management, acquire property and get the right equipment. This method of

establishing a price certainly wouldn't make much sense in a service industry where the key assets – people and ideas – are hard to value and develop.

3. Discounted Cash Flow (DCF) – A key valuation tool in M&A, discounted cash flow analysis determines a company's current value according to its estimated future cash flows. Forecasted free cash flows (net income + depreciation/amortization - capital expenditures - change in working capital) are discounted to a present value using the company's weighted average costs of capital (WACC). Admittedly, DCF is tricky to get right, but few tools can rival this valuation method.

The Premium for Potential Success

For the most part, acquiring companies nearly always pay a substantial premium on the stock market value of the companies they buy. The justification for doing so nearly always boils down to the notion of synergy; a merger benefits shareholders when a company's post-merger share price increases by the value of potential synergy.

Let's face it, it would be highly unlikely for rational owners to sell if they would benefit more by not selling. That means buyers will need to pay a premium if they hope to acquire the company, regardless of what pre-merger valuation tells them. For sellers, that premium represents their company's future prospects. For buyers, the premium represents part

CROSS-BORDER MERGER AND ACQUISITIONS

GENERAL CONCEPT-

In corporate capital scheme, there are two ways for a company to raise its capital, through loan and equity. A company can raise its capital by issuing shares on the stock market as the quickest and easiest ways to finance its operation. With this initial reason and based on economic perspectives (market mechanisms), further, the concept of merger and acquisitions (Abbreviation of M&A's is developed.

M&A's, in the context of corporate strategy, is an integration of two companies with a certain mechanism in particular business area that ultimately result in a large capitalization in the market economy. The goals to be achieved in the implementation of M&A are the availability of financial

aid, other assistances, and to leverage a company's capital in a rapidly growing industry without having to form a new company from scratch, simply combining two entities to increase opportunities in the given market.

Theoretically, there are three primary methods of M&A's; those were merger, sale of assets, and tender offer.

Merger and Acquisition

Merger and Acquisitions are usually simply referred to as merger, the condition or process in which a company buys another (the target). This condition usually can be done in two ways, either friendly or hostile. In the former case, the two companies involved in a negotiation to merger-related matters in terms of the merger itself, in hostile mergers, typically the target company is unwilling to sell its shares to buyer (bidder), or the target's boards are not known the purchases process made by other entity, and this process usually more complex and even involves the proxy which will play a role in purchasing shares or at any even to influence the shareholders.

DEFINITION:

"The merger is the juridical (legal) act of two or more legal persons, whereby one acquires the property, rights and interests and the liabilities of the other by universal succession of title or whereby a new legal person, formed or incorporated by them jointly by such juridical (legal) act, acquires their property, rights and interests and the liabilities by general (universal) title."

According to article above, it says that a merger is the process (universal succession) of transferring assets and liabilities from one company to another and forming a new legal entity by legal framework.

Legal act refers to the process of M&As usually consists of 6 process, namely:

- Meeting of possibly takeover parties,
- Confidentiality agreement and stand-still agreement,
- Letter of Intent,
- due diligence investigation,

- the Shares Purchases Negotiating Agreement (SPA), and Closing meeting.

The term of M&A's sometime used as a pair word (synonymously), however, basically these two words have different meaning and purposes. Pure merger is usually performed between two companies to form a single new company in which both owners have agreed to jointly develop, own, and operate the new company. This is called a merger of equals, in which the two companies generally have the same size, and the existing shares merged into one new share in the same stock market.

For example, the merger between Glaxo Wellcome and SmithKline Beecham, and ultimately the two companies merged and a new company GlaxoSmithKline was formed.

However, in practice, merger of equals is rarely going to happen, and during the process, usually there is a deal between both companies, in which the process of acquiring will be announced as a merger of equals, instead of the process of acquisition, because of the term of an acquisition often refers to as negative connotation.

Acquisition is essentially an acquiring of a company by another, where the buyer, based on the legal point of view, buys shares of the target in a majority amount, as a result the target's shares will be ceased, and consequently, the buyer takes control of the target's business. In general, the shares value of the buyer company would lead to an increase in the market trading (leveraged recapitalizations), even though the process need to be considered with substantial ownership changes.

Consolidation

Merger of equals is an integration of two comparable companies, and the notion of consolidation in the corporate merger means that the two entities will merge into a new company. Further the two companies are dissolved without any prior liquidation process. Consolidation is equated with amalgamation, in which two or more entities are mixed into a new single entity, and the shareholders of both entities are substantially blended into the shareholders of the newly formed entity. Basically, the concept of consolidation and amalgamation relatively the same, in the meaning of the purpose and the entities related, however in practice, the amalgamation concept has mostly

been used for blending process of private entities, while the consolidation usually refers to public entities.

Triangular Merger

Triangular merger is a more complex merger process, whereas a parent company is bought another company and combined with its subsidiary. Further, there are several derivative processes related with considerations, for instance, consideration in term of exchange as shares, usually offered by cash or debt as a result of a freeze-out transaction, in which the ownership of shares in parent company is not affected. But if the shareholders want the ownership of shares in the parent company, then they will become part of the shareholders.

The purpose of this concept is the parent company intended to separate the assets acquired from his existing assets by placing these assets into its subsidiary. It appears because of the different environment of business, so that the separation of assets, liabilities, and incomes become very important. Another possibility is about contingent liabilities, for instance, the possibility of tort liabilities must be maintained to remain separate.

In a triangular merger, the acquisition process is conducted by the subsidiary, in which the shareholders of the subsidiary company is represented by the parent company's boards, thus in decision-making process of the merger, the shareholders have no voting rights.

Reverse Triangular Merger

In essence, a reverse triangular merger is merely the same with a common triangular merger. However, the difference lies in the surviving company (the company exists after the merger process). This condition derived by several reasons, for instance, if the acquired company has intellectual property rights such as copyrights owner, patent rights holder, etc. in which, if the merged company become disappear then the IPR rights cannot survive.

Therefore, the concept of a reverse triangular merger is widely used by large companies (enterprises) to acquire another company that has the IPR embedded to become their subsidiary. As a consequence, the shareholders of the subsidiary (the boards of parent company) will be converted

into shareholders of the new subsidiary, while the initial shareholders would be offered by an exchange of shares or a payment in any other forms of consideration. Thus, the new subsidiary will be wholly owned by parent company.

Sale of Assets

In the M&A's, a company can make an acquisition process of assets from other companies under contract of sale, it is marked by the transfer process of its ownership to acquiring company in share purchase agreement regarding the price, and way of payment of the assets, further, shareholders of the acquired company is entitled to consideration, such as stocks, cash, securities, options, futures, or any other types of consideration. According to article 122 of Indonesian Company Law

(1) Merger and Consolidation shall cause the merging or consolidating Company to legally dissolve.

(2) The dissolution of the Company as referred to in paragraph (1) may occur without any prior liquidation performed.

Further, there are two options related to the existence of the acquired company. First, the company still exists and becomes part of a holding company, in which the prior shareholders still exist. Second, the company is dissolved without any prior liquidation and transfers its ownership to the acquiring company.

Basically, regarding company laws of some countries, the process of buying assets must be approved by the board of directors of both companies, regarding article 123 paragraphs (1) of Indonesian Company Law No. 40/2007 "Both the Board of Directors of the merging Company and the surviving Company shall prepare the Merger plan".

In the process of sale of assets, especially if it is carried out a substantial assets in the purchase agreement, only the shareholders of the acquired company have vote right to decide such a legal action, while the shareholders of the acquiring company only conducts as control function, because the purchase decision is made by the board of directors.

Tender Offer

In terms of M&As, tender offer is usually equated with the takeover bid, in practice, a company (bidder) will make an offer directly to shareholders of another company (target) to buy the shares. Theoretically, the bidder will hold control of the company if the amount of shares exceeds 51%, the control of the company may be held by appointed board of directors, and the company automatically becomes its subsidiary, further if the number of shares purchased up to 100%, then the subsidiary is wholly owned. In the United States, tender offer is regulated by the Williams Act. And SEC Regulation 14E, it covers following matters:

(1) The minimum length of time a tender offer must remain open.

(2) Procedures for modifying a tender offer after it have been issued.

(3) Insider trading, in the context related with of tender offers.

(4) Whether one class of shareholders can receive preferential treatment over another.

Tender offer can be made either at public or private companies. The process of tender offer conducted in a public company, usually hold with a more complex mechanism, regarding the number of shares traded is usually not 100% it will take a second step of the merger, can be a triangular merger, to acquire the remaining shares that are not acquired at first attempt. Second step process might be a freeze-out merger, in which the remaining shareholders equity will be eliminated by the merger, further, the new owner of the company is formed and the fiduciary duties are raised.

Different from the previous tender offer process, in the private companies' scheme, it is a simpler tender offer, whereas the bidder will directly involve in the sale purchase agreement through a negotiation with the shareholders of a private company (the target company). The bidder requires approval from the board of directors, while the target company is not needed, given the offer directly to shareholders and not to the board of directors. On the other hand, shareholders of the bidder usually do not need to have vote for this purpose, whereas for the target company, this offer can be accepted or rejected by the shareholders.

Concept of Cross-Border Merger and Acquisitions

A company in one country can be acquired by an entity (another company) from other countries. The local company can be private, public, or state-owned company. In the event of the merger or acquisition by foreign investors referred to as cross-border merger and acquisitions will result in the transfer of control and authority in operating the merged or acquired company. Assets and liabilities of the two companies from two different countries are combined into a new legal entity in terms of the merger, while in terms of acquisition, there is a transformation process of assets and liabilities of local company to foreign company (foreign investor), and automatically, the local company will be affiliated.

Since the cross border M&As involving two countries, according to the applicable legal terminology, the state where the origin of the companies that make an acquisition (the acquiring company) in other countries refer to as the Home Country, while countries where the target company is situated refers to as the Host Country.

Cross-Border Merger and Acquisition Motives

Underlying motive for Cross Border M&As by large companies today cannot be separated from the current globalization. Based on data from World Investment Report between 2000 - 2009, Cross Border M&A's is increased in the early 1990 till 2005, while in 2008 it was decreasing both in terms of quantity and value, which is caused by the global economy crisis in the years 2007-2008. However, based on the prospectus World Investment Report 2009, Cross Border M&A's in some regions by 2010 tend to be continuously rising, especially in Asia (less impact by the crisis) and this condition also in line with the increasing of global economy. Merger and Acquisitions can be functionally classified as

- Horizontal M&A's (between competing firms in the same industry). They have grown rapidly recently because of the global restructuring of many industries in response to technological change and liberalization. By consolidating their resources, the merging firms aim to achieve synergies (the value of their combined assets exceeds the sum of their assets taken separately) and often greater market power. Typical industries in which such M&A's occur are pharmaceuticals, automobiles, petroleum and, increasingly, several services industries.

- Vertical M&A's (between firms in client supplier or buyer-seller relationships). Typically they seek to reduce uncertainty and transaction costs as regards forward and backward linkages in the production chain, and to benefit from economies of scope. M&A's between parts and components makers and their clients (such as final electronics or automobile manufacturers) are good examples.
- Conglomerate M&A's (between companies in unrelated activities). They seek to diversify risk and deepen economies of scope.

Outlined, motives underlay the cross border M&As is to increase profitability or revenue enhancement, cost reduction, market development, and power and efficiency gains. Some literatures take important note by conducting studies on connection of cross border M&A's with some indicators as discussed.

1. Foreign Direct Investment Motive

Over the past few decades, economic development has become globalised, and some trends indicate progress toward the development of international networks in all spheres. One of the trends is an increasing of Foreign Direct Investment (abbreviation of FDI). FDI is a long-term active participation from foreign country to other countries usually in the form of management participation, joint ventures, or transfer technology and know-how. FDI is divided into two types, namely inward and Outward FDI, both of which will result in net FDI inflow. Basically, the flow of FDI into a country can be done in two ways, through green-field investment, or by making mergers and acquisitions of local companies.

The relation between net FDI inflow with Cross Border M&A's, is reflected by the complexity of companies in adoption with regional strategies and intricate network structures that have facilitated intra-regional economic interdependency. This condition might become one of the region's attractiveness to international investors upon the growth of net FDI inflow. Afterward, it is important to build intergovernmental efforts towards creating the appropriate environment for the companies following the huge net FDI inflow. According to UNCTAD data of inward stock flow 2009, total inward stock is increased across all regions. Thus, the increasing of net FDI inflow could

be followed by several cross border activities, for example, Cross Border M&As in term of investment, and the expansion of operations.

2. Financial Motive

The main motivation of doing Cross Border M&A's is related to financial performance. In most cases, financial motive is more visible than other motives. It is related to the purpose of doing mergers and acquisitions, in which the decision is based on interests of the shareholders and the board of directors. In practice, financial motive is done by private equity, for instance, when they propose management buyouts (MBO) or sell the merged companies in the next couples of years in order to take advantage from the margin of increasing company's value.

There are several activities underlying this motive:

- ***Economy of scale:***

This refers to the fact that the combined company can often reduce its fixed costs by removing duplicate departments or operations, lowering the costs of the company relative to the same revenue stream, thus increasing profit margins.

- ***Increased revenue or market share:***

This assumes that the buyer will be absorbing a major competitor and thus increase its market power (by capturing increased market share) to set prices.

- ***Resource transfer:***

resources are unevenly distributed across firms and the interaction of target and acquiring firm resources can create value through either overcoming information asymmetry or by combining scarce resources.

- ***Geographical or other Diversification:***

This is designed to smooth the earnings results of a company, giving conservative investors more confidence in investing in the company. However, this does not always deliver value to shareholders.

From these perspectives, financial motive arise as efficiency gains increased because Cross Border M&As intensify synergies between firms that in turn leverages economy of scale or scope. Furthermore, the diversification creates an opportunity for investors to develop their business in a larger scale, geographically or by type of business. Thus economically, this circumstance might create gain in value and efficiency.

3. Strategic Motive

Strategic motive is a more complex motive behind Cross Border M&As, it might change the market structure and as such have an impact on companies profits, moreover, it might even be reduced to zero, this is the so-called merger paradox. In general, the aim of this motive is to eliminate double activities in integrated companies due to enlarge economics of scale, for instance, by creating new supply chains or diversity of product, and extending market share.

.**Securities Exchange Board of India (SEBI)**

Overview of SEBI

- Securities Exchange Board of India (SEBI) was established in 1988 to regulate the functions of securities market.
- SEBI promotes orderly development in the stock market.
- SEBI was set up with the main idea to keep a check on malpractices and protect the interest of investors..

Objectives of SEBI

- To regulate activities in stock exchange and ensure safe investments

- To prevent fraudulent practices by striking a balance between business and its statutory regulations

Functions of SEBI

1. Protective function
2. Developmental function
3. Regulatory function

Protective functions are performed by SEBI to protect interest of investors and provide safe investments. This entails:

- **Checks on prices rigging:** Price rigging refers to manipulating the prices of securities.
- **Prevents insider trading:** Insider refers to directors, promoters of the company. These people have sensitive information which they can use to make profit. SEBI keeps a stringent check whether insiders are buying securities of the company.
- **Prohibits fraudulent and unfair practices:** SEBI does not allow companies to make misleading statements.

Developmental functions are performed by the SEBI to develop activities in stock exchange to increase the business in stock exchange. Under this category, following functions are performed by SEBI:

- Promoting training of intermediaries of the securities market
- Promote activities of stock exchange by adopting flexible methods such as internet trading
- Initial public offer of primary market is permitted through stock exchange.

Regulatory functions are performed by SEBI to regulate the business in stock exchange.

- SEBI registers and regulates the working of mutual funds and other investment options.
- SEBI regulates takeover of the companies.
- SEBI conducts inquiries and audit of stock exchanges.

.**Organizational Structure of SEBI**

- SEBI is a corporate sector divided into five departments. Each department is headed by an executive director.
- The current chairman of SEBI is U.K. Sinha.
- The head office of SEBI is in Mumbai and it has branch office in Kolkata, Chennai and Delhi.
- There are two advisory committees to deal with primary and secondary markets.

CODE OF CIVIL PROCEDURE (307)

UNIT-I

Definitions

a) Decree

In a civil suit several facts might be alleged and the court may be required to rule on several claims. In simple terms, a decree is the ruling of the court regarding the claims of the parties of the suit. For example, in a suit between A and B, A may claim that a particular property P belongs A. After hearing all the arguments, the court will rule in the favor of either A or B. The final decision of the court regarding this claim i.e. whether the property belongs to A or B, is a decree. As per **Section 2(2)**, a decree is the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It can be final or preliminary. From the above definition we can see the following essential elements of a decree -

1. There must be adjudication - Adjudication means Judicial Determination of the matter in dispute. In other words, the court must have applied its mind on the facts of the case to resolve the matter in dispute. For example, dismissing a suite because of default in appearance of the plaintiff is not a decree. But dismissing a suite on merits of the case would be a decree.

2. There must be a suit - Decree can only be given in relation to a suit. Although CPC does not define what suit means, in **Hansraj vs Dehradun Mussoorie Tramways Co. Ltd. AIR 1933**, the Privy Council defined the term suit as "a civil proceeding instituted by the presentation of a plaint".

3. Rights of the parties - The adjudication must be about any or all of the matters in controversy in the suit. The word right means substantive rights and not merely procedural rights. For example, an order refusing leave to sue in forma pauperis (i.e. an order rejecting the application of a poor plaintiff to waive court costs) is not a decree because it does not determine the right of the party in regards to the matters alleged in the suit.

4. Conclusive Determination - The determination of the right must be conclusive. This means that the court will not entertain any argument to change the decision. I.e. as far as the court is concerned, the matter in issue stands resolved. For example, an order striking out defense of a tenant under a relevant Rent Act, or an order refusing an adjournment is not a decree as they do not determine the right of a party conclusively. On the other hand, out of several properties in issue in a suit, the court may make a conclusive determination about the ownership of a particular property. Such a conclusive determination would be a decree even though it does not dispose off the suit completely.

5. Formal expression - To be a decree, the court must formally express its decision in the manner provided by law. A mere comment of the judge cannot be a decree.

Examples of decisions which are Decrees - Dismissal of appeal as time barred, Dismissal or a suit or appeal for want of evidence or proof, Order holding appeal to be not maintainable.

Examples of decisions which are not Decrees - Dismissal of appeal for default, order of remand, order granting interim relief.

Kinds of Decree

Preliminary - Where adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit but does not completely dispose of the suit, it is a preliminary decree. It is passed when the court needs to adjudicate upon some matters before proceeding to adjudicate upon the rest.

In **Shankar vs Chandrakant SCC 1995**, SC stated that a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. CPC provides for passing preliminary decrees in several suits such as - suit for possession and mesne profits, administration suit, suits for pre-emption, dissolution of partnership,

suits relating to mortgage. In **Narayanan vs Laxmi Narayan AIR 1953**, it was held that the list given in CPC is not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the code.

Final - When the decree disposes of the suit completely, so far as the court passing it is concerned, it is a final decree. A final decree settles all the issues and controversies in the suit.

Party preliminary and partly final - When a decree resolves some issues but leaves the rest open for further decision, such a decree is partly final and party preliminary. For example, in a suit for possession of immovable property with mesne profits, where the court decrees possession of the property and directs an enquiry into the mesne profits, the former part of the decree is final but the latter part is preliminary.

Deemed Decree - The word "deemed" usually implies a fiction whereby a thing is assumed to be something that it is ordinarily not. In this case, an adjudication that does not fulfill the requisites of S. 2 (2) cannot be said to be a decree. However, certain orders and determinations are deemed to be decrees under the code. For example, rejection of a plaint and the determination of questions under S. 144 (Restitution) are deemed decrees.

b) **Judgment**

Defined u/s 2 (9) of the Civil Procedure Code. It means the **statement given by the Judge on the grounds of a Decree or Order.** Thus a judgment sets out the ground and the reason for the Judge to have arrived at the decision.

Judgment is the decision of a court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination – **State of Tamilnadu V. S. Thangaval.**

Judgment is the statement of the Court on the grounds for having arrived at a decision. A judgment must contain the following components:

1. A crisp statement of facts of the case;
2. The points or issues for determination;
3. The decision on such issues and finally;
4. The reasons for such a decision.

c) Order

As per Section 2 (14), the formal expression of any decision of a civil court which is not a Decree is Order. In a suit, a court may take certain decisions on objective considerations and those decisions must contain a discussion of the matters at issue in the suit and the reasons which led the court to pass the order. However, if those decisions fall short of a decree, they are orders. Thus, there are several common elements between an order and a decree - both related to matter in controversy, both are decisions given by the court, both are adjudications, both are formal expressions. However, there are substantial differences between them –

Decree - S. 2(2)	**Order S. 2(14)**
Can only be passed in a suit originated by the presentation of a plaint.	Can be passed in a suit originated by the presentation of a plaint, application, or petition.
Contains Conclusive Determination of a right	May or may not finally determine a right.
May be final, preliminary, or partly preliminary - partly final.	Cannot be a preliminary order.
In general, there can only be one decree or at the most one preliminary and one final decree in a suit.	There can be any number of orders in a suit.
Every decree is appealable unless an appeal is expressly barred.	Only those orders which are specified as appealable in the code are appealable.

A second appeal may lie against a decree to a High Court on certain grounds.	There is no second appeal for orders.

d) FOREIGN COURT AND FOREIGN JUDGMENT:

With the advent of globalization and with India poised as a major international and global player in the world economy, it is apposite to consider the law concerning enforcement of foreign judgments in India. In law, the enforcement of foreign judgments is the recognition and enforcement rendered in another ("foreign") jurisdiction. Foreign judgments may be recognized based on bilateral or multilateral treaties or understandings, or unilaterally without an express international agreement. The "recognition" of a foreign judgment occurs when the court of one country or jurisdiction accepts a judicial decision made by the courts of another"foreign" country or jurisdiction, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit.

Recognition will be generally denied if the judgment is substantively incompatible with basic legal principles in the recognizing country. However, the Code of Civil Procedure, 1908 has defined Foreign Court and Foreign Judgments as:-

Section 2(5) of the CPC, 1908

"Foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;

Section 2(6) of the CPC, 1908

"Foreign judgment" means the judgment of a foreign Court;

ENFORCING FOREIGN JUDGMENTS IN INDIA

A foreign judgment can be enforced in India in one of two ways:

1. Judgments from Courts in "reciprocating territories" can be enforced directly by filing before an Indian Court an Execution Decree.

2. Judgments from "non-reciprocating territories," such as the United States, can be enforced only by filing a law suit in an Indian Court for a Judgment based on the foreign judgment. The foreign judgment is considered evidentiary. - The time limit to file such a law suit in India is within three years of the foreign judgment.

However, "reciprocating territory" is defined in explanation 1 to Section 44A of India's Civil

Procedure Code as: "Any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare as a reciprocating territory."

44A. Execution of decrees passed by Courts in reciprocating territory.

(1) Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

In case the decree pertains to a country which is not a reciprocating territory then a fresh suit will have to be filed in India on the basis of such a decree or judgment, which may be construed as a cause of action for the said suit. In the fresh suit, the said decree will be treated as another piece of evidence against the defendant. Under Section 44A of the CPC, a decree of any of the Superior Courts of any reciprocating territory is executable as a decree passed by the domestic Court.

Therefore in case the decree does not pertain to a reciprocating territory or a superior Court of a reciprocating territory, as notified by the Central Government in the Official Gazette, the decree is not directly executable in India.

However in both cases the decree has to pass the test of S. 13 CPC which specifies certain exceptions under which the foreign Judgements becomes inconclusive and is therefore not executable or enforceable in India.

Sections 13 and 14 enact a rule of res judicata in case of foreign judgments. These provisions embody the principle of private international law that 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 in the cases mentioned in Section 13. A foreign judgment may operate as res judicata except in the six cases specified in the section 13 and subject to the other conditions mentioned in Sec. 11 of C.P.C.

Sec. 13 of CPC, 1908:- When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where 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;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force in [India].

The awards and decrees of the Indian courts are sacrosanct. However, Section 13 of the Code of Civil Procedure 1908 (CPC) lays down that a foreign judgment shall be conclusive as to any matter directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except in few cases.

E) Mesne profits:

Mesne profits corresponds to the profits which the person in wrongful possession is receiving or might receive with due diligence for the wrongful occupation of property. Mesne profits are defined under Section 2(12) if Code of Civil Procedure.

Section 2 (12) of the Code of Civil Procedure provides that: "Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with the ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvement made by the person in wrongful possession.

Therefore, "Mesne profits" are the profits, which the person in unlawful possession actually earned or might have earned with the ordinary diligence. According to Section 2(12) a person becomes entitled to mesne profits only when he has right to obtain possession but another person whose occupation is unauthorized keeps him deprived of that possession. The first and foremost condition for awarding mesne profits is unlawful possession of the occupant of the property. The section further provides that Mesne profits also include interest on such profits. However it explicitly excludes any profit earned due to improvement in the property made by the person in unlawful possession of such property.

In **Phiraya Lal alias Piara lal v. Jia Rani**, Hon'ble Delhi high Court while defining the term mesne profits observed that, "when damages are claimed in respect of wrongful occupation of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of the immovable property, these damages are called mesne profits".

In **Nataraja Achari v. Balambal Ammal**, taking into consideration the definition of mesne profits provided under Section 2(12) Hon'ble Madras High Court observed that there are three different types of cases in which question of rights of profits arise:

1. Suit for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits.

2. A suit for partition by one or more tenants in common against others with a claim for account of past or past and future profits.

3. Suits for partition by a member of joint Hindu family with a claim for an account from the manager.

The Court observed, "In the first case, the possession of the defendant not being lawful, the plaintiff is entitled to recover mesne profits such profits being really in the nature of damages. In second case the possession and receipt of profits by the defendant not being wrongful the plaintiffs remedy is to have an account of such profits making all jus allowance in the favour of the collecting tenant in common. In the third case the plaintiff must take the joint family property as it exists at the date of the demand for partition and is not entitled to open up past account or claim relief on the ground of past inequality of enjoyment of the profit, except where the

manager has been guilty of fraudulent conduct or misappropriation. The plaintiff would however, be in the position of the tenant in common from the date of severance in status and his right would have to be worked out on that basis.

Interest on Mesne profits

The definition of the term 'Mesne profit' provided under section 2(12) of the Code of civil Procedure, 1908 explicitly provides that interest is an integral part of mesne profits. From the expression 'together with interest on such profits' in Section 2(12) it is apparent that 'mesne profit' includes within its fold an interest component. And the rate of interest to be allowed in regard to mesne profits varies depending upon the facts and circumstances of each case. Since the statute does not fix any rate of interest it is left at the discretion of court to determine the rate of interest. Generally, the rate of interest is awarded at 6 % per annum.

In N. Dasjee v. Tirupathi Devasthanam, Hon'ble Supreme Court observed that, "Under Section 2(12) of the Civil Procedure Code which contains the definition of mesne profits, interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income".

Improvements in the property by unlawful possessor

Latter part of Section 2(12) expressly provides that mesne profits do not include profits due to improvement made in the property by the person in wrongful possession.

In The Hindustan Petroleum Corporation Ltd., Chairman and Managing Director v. Khwaja Asadullah Baig and Ors, while assessing the quantum of mesne profits Hon'ble Andhra Pradesh High Court held that, taking into consideration concept of mesne profits under Section 2(12), the courts have to exclude the profit attributable to the improvements made on the property.

However a person in wrongful possession of the property is not entitled to claim expenses incurred on improvements in such property. In other words, plaintiff in not bound to pay the defendant compensation for improvements as a condition precedent to obtaining possession. The defendant being in the rank of trespasser is not entitled to such compensation.

Assessment of the Mesne profits

One broad principle governing the liability for mesne profits is evident from Section 2(12) of the Code of Civil Procedure, 1908 which defines ‘mesne profits' to mean "those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession". But the Section does not provide any fixed rule for the assessment of such profit. The provision simply states that mesne profits include interest on such profits. And profits due to improvement are excluded from the assessment of the quantum of mesne profits.

In the lights of this broad principle, the determination of quantum mesne profits is left at the discretion of the court. And mesne profits being in the nature of damages even the Court cannot lay down any invariable rule governing award and assessment of mesne profits in every case. The Court may mould award and assessment of mesne profits according to the justice of the case. In other words there is no uniform criterion for the assessment of mesne profits. The quantum of mesne profits depends upon the facts and surrounding circumstances of each case.

Earlier the rental value of the property formed the basis of assessment of mesne profits. The courts used to award mesne profits taking into consideration rental value of the property. This practice of assessing mesne profits on the basis of rent was inappropriate and later on the Courts rightly struck it down. In Kesardeo Baijnath Vs. Nathmal Kisanalal, it was held, “that determination of mesne profits on the basis of rental value of the property would be in correct test in the context of the definition of menses of profits in section 2[12] Rent could be relevant factor, for considering the quantum of mesne profits but not a decisive of the matter”.

While assessing the quantum of mesne profits, the factors such as location of the property, comparative value of the property, condition of property in question, profits that are actually gained or might have been gained from the reasonable use such property are generally taken into consideration by the courts. Moreover it is settled principle of law that the criteria for the calculation of mesne profits is not what the owner loses by the deprivation of possession but profits should be calculated on the basis of what the person in wrongful possession namely, the defendants had actually received or might with ordinary diligence have received therefrom.

Burden of Proof

It is settled principle of law that in case of mesne profits the burden of proof rests on the claimant i.e. the plaintiff. And mesne profits being in the form of compensation, before claiming mesne profits the plaintiff have to establish before the Hon'ble court that he was lawful owner of the property and he was deprived of it by the unlawful possession of the defendant. The plaintiff having proved the aforementioned facts becomes entitled to mesne profits. Further the onus of proving what profits he might have received with the ordinary diligence lies on the claimant.

f) **Affidavit**

An **affidavit** I sa written sworn statement of fact voluntarily made by an *affiant* or *deponent* under an oath or affirmation administered by a person authorized to do so by law. Such statement is witnessed as to the authenticity of the affiant's signature by a taker of oaths, such as a notary public or commissioner of oaths. The name is Medieval Latin for *he/she has declared upon oath*. An affidavit is a type of verified statement or showing, or in other words, it contains verification, meaning it is under oath or penalty of perjury and this serves as evidence to its veracity and is required for court proceedings.

To obtain a declaration on a legal document, such as an application for voter registration, that the information provided by the applicant is truthful to the best of the applicant's knowledge. If, after signing such a declaration, the information is found to be deliberately untrue with the intent to deceive, the applicant may face perjury charges.

Affidavits may be written in the first or third person, depending on who drafted the document. If in the first person, the document's component parts are:

- a commencement which identifies the "affiant of truth", generally stating that everything is true, under penalty of perjury, fine, or imprisonment;
- an attestation clause, usually a jurat, at the end certifying the affiant made oath and the date; and
- Signatures of the author and witness.

If an affidavit is notarized or authenticated, it will also include a caption with a venue and title in reference to judicial proceedings. In some cases, an introductory clause, called a *preamble*, is added attesting that the affiant personally appeared before the authenticating authority.

g) **PLAINT:**

ORDER VII of CPC defines Plaint.

1. Particulars to be contained in plaint

The plaint shall contain the following particulars:-

(a) The name of the Court in which the suit is brought;

(b) The name, description and place of residence of the plaintiff;

(c) The name, description and place of residence of the defendant, so far as they can be ascertained;

(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) The facts constituting the cause of action and when it arose;

(f) The facts showing that the Court has jurisdiction;

(g) The relief which the plaintiff claims;

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

2. In money suits

Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed: But 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 he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for].

3. Where the subject-matter of the suit is immovable property

Where the subject-matter of the suit is immovable property, the plaint shall 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 shall specify such boundaries or numbers.

4. When plaintiff sues as representative

Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

5. Defendant's interest and liability to be shown

The plaint shall show that the defendant is or claims to be interested in subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

6. Grounds of exemption from limitation law

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed :

[Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint.

7. Relief to be specially-

Every Plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent a if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

8. Relief founded on separate grounds

Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

(a) Procedure on admitting plaint- Concise statements-

(a) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, [shall present, within such time as may be fixed by the Court or extended by it from time to time, as many copies] on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint

or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

[(1A) the plaintiff shall, within the time fixed by the Court or extended by it under sub-rule (1), pay the requisite fee for the service of summons on the defendants.]

(d) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(e) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

10. Return of plaint

(1) [Subject to the provisions of rule 10A, the plaint shall] at any stage of the suit be returned to be: presented to the Court in which the suit should have been instituted.

[Explanation. - For the removal oil doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

(2) Procedure on returning plaint- On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

[10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-

(a) Specifying the Court, in which he proposes to present the plaint after its return,

(b) Praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) Requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,-

(a) Fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) Give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearances is given under sub-rule (3),-

(a) It shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise direct, and

(b) The said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

10B. Power of appellate Court to transfer suit to the proper Court

(1) Where, on an appeal against an order for the return of plaint, the Court hearing the appeal confirms such order, the Court of appeal may, if the plaintiff by an application so desires, while

returning the plaint, direct plaintiff to file the plaint, subject to the provisions of the Limitation Act, 1963 (36 of 1963), in the Court in which the suit should have been instituted, (whether such Court is within or without the State in which the Court hearing the appeal is situated), and fix a date for the appearance of the parties in the Court in which the plaint is directed to be filed and when the date is so fixed it shall not be necessary for the Court in which the plaint is filed to serve the defendant with the summons for appearance in the suit, unless that Court in which the plaint is filed, for reasons to be recorded, otherwise directs.

(2) The direction made by the Court under sub-rule (1) shall be without any prejudice to the rights of the parties to question the jurisdiction of the Court, in which the plaint is filed, to try the suit.]

11. Rejection of plaint

The plaint shall be rejected in the following cases :-

(a) Where it does not disclose a cause of action;

(b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) 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;

(d) Where the suit appears from the statement in the plaint to be barred by any law :

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

12. Procedure on rejecting plaint

Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such

order.

13. Where rejection of plaint does not preclude presentation of fresh plaint

The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

h) WRITTEN STATEMENT:

ORDER VIII defines Written statement.

1. Written statement

(1) The defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter. Claim, he shall enter such documents in a list, and shall,-

(a) If a written statement is presented, annex the list to the written statement:

Provided that where the defendant, in his written statement, claims a set-off or makes a counter-claim based on a document in his possession or power, he shall produce it in Court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement; .

(b) If a written statement is not presented, present the list to the Court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is so annexed or presented, the defendant shall be allowed such further period for the purpose as the Court may think fit.

(5) A document which ought to be entered in the list referred to in sub-rule (2), and which is not so entered, shall not, without the leave of the Court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(7) Where a Court grants leave under sub-rule (5), it shall record its reasons for so doing, and no such leave shall be granted unless good cause is shown to the satisfaction of the Court for the non-entry of the document in the list referred to in sub-rule (2).]

2. New facts must be specially pleaded

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction 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.

3. Denial to be specific

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Evasive denial

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Specific denial

[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in it discretion require any fact so admitted to be proved otherwise than by such admission.[(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved..

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]

6. Particulars of set-off to be given in written statement

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits lithe jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiffs suit, the defendant may, at the first heating of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off- The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounced a final judgment in respect both of the original claim and of the set- off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's affects, C pays Rs. 1,000 as surety for D: then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) 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.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sues C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

[6A. Counter-claim by defendant

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not : Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

6B. Counter-claim to be stated

Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

6C. Exclusion of counter-claim

Where a defendant sets up a counterclaims arid the plaintiff contends the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

6D. Effect of discontinuance of suit

If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.

6E. Default of plaintiff to reply to counter-claim

If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.

6F. Relief to defendant where counter claim succeeds

Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

6G. Rules relating to written statement to apply

The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

7. Defence or set-off founded upon separate grounds

Where the defendant relies upon several distinct grounds of defence or set-off[or counter-claim] founded separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. New ground of defence

Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off [or counter-claim] may be raised by the defendant or plaintiff as the case may be, in his written statement.

[8A. Duty of defendant to produce documents upon which relief is claimed by him

(1) Where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement.

(2) A document which ought to be produced in Court by the defendant under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(3) Nothing in this rule shall apply to documents produced,-

(a) For the cross-examination of the plaintiff's witnesses, or

(b) In answer to any case set up by the plaintiff subsequent to the filing of the plaint, or

(c) Handed over to a witness merely to refresh him memory].

i) **CAVEAT:**

Section 148A of CPC deals with the provisions of Caveat.

Right to lodge a caveat.

(1) Where an application is expected to be made, or has been made, in a suit or proceedings instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be, made, under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court, shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.]

Order XL-A

Caveat Rules

1. Every Caveat under Section 148-A shall be signed by the Caveator or his Advocate and shall he in form prescribed.

2. Every Caveat shall be presented by the party in person or by his Advocate to the Court or to the Officer authorised to receive the Caveat. Where the Caveator is represented by an Advocate his Vakalatnama shall accompany the Caveat. When an Advocate instructed by a party to act or appear in a matter has not been able to secure a Vakalatnama in the prescribed form duly signed by the client, he may file a written statement signed by him stating that he has instructions from or on behalf of his client to act or appear in the matter and also undertaking to file within a week a Vakatatnama in the prescribed form duly signed by the party.

3. The Caveat presented under Rule 2 shall be registered in a Caveat Register in Form given below. Before an application for any relief is made to the Court in any proceedings, it shall bear an endorsement from the office of the Court whether a Caveat has or has not been filed.

4. (1) A copy of the Caveat shall be served along With the notice required to be served under Section 148-A (2).

(2) On receipt of the notice of the notice of the Caveat, the applicant or his Advocate shall intimate to the Caveator or his Advocate, the expenses for furnishing the copies and request him to collect the copies on payment of the said expenses. The said expenses should be at the rate of 25 paise per folio of 100 words inclusive of cost of paper.

5. Every application for any relief in a proceeding should be supported by a statement on oath of the applicant stating that no notice under Section 148-A (2) is received by him or if received whether the applicant has furnished the copies of the application together with the copies of the papers or documents which have been filed or may be filed in support of the application of the Caveator as required by Section 148-A (4).

6. A notice under-Section 148-A (3) may be served on the Caveator or his Advocate personally or by post Under Certificate of Posting. The notice sent Under Certificate of Posting at the address furnished by the Caveator shall be deemed to be sufficient service on him.

7. Where it appear to the Court that the object of granting ad interim relief on the application would be defeated by delay, it may record reasons for such opinion and grant ad interim relief of the application of the applicant till further orders after giving the Caveator an opportunity of being heard.

IMPORTANT CONCEPTS

a) Res-subjudice (Stay of Suit)

Section10 of the CPC deals with the concept of 'res subjudice'. The Latin world ' Res ' means ' thing ' and ' sub judice ' meand ' under a judge ' or ' under determination of a court'. Technically the term 'res subjudice' means stay of suit. In other words, a suit is to be stayed the subject matter of which is already a matter of issue in another suit. Section 10 specifies that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and that the court in which the previous suit is pending is competent to grant the relief claimed. **Conditions of Res-subjudice: –** For the application of section 10 following conditions have to be fulfilled

1. Two or more suits
2. All suites are pending
3. Same Parties
4. Same Subject-matters
5. Same Cause of Action
6. All suits are instituted in Bangladesh

b) Res Judicata

Section11 of the CPC deals with the concept of 'res judicata. The term' res judicata ' is Latin in language and has been borrowed from Roman Law. Ballentine in his Law Dictionary defines it as too connote 'a thing settled by judicial decisions'.

Thus 'res judicata' means a final judicial decision of a court of competent jurisdiction, once pronounced between parties/litigant, cannot be contradicted by any one, as against any other of such parties, in any subsequent litigation between the same parties, respecting the same subject – matter. It is founded on the principle that there should be an end to the litigation as to any issue between the same parties when once that issue has been directly and substantially determined between them by a court of competent jurisdiction.

Conditions of Res–Judicata: – Section of the CPC embodies the doctrine of Res judicata and the conditions for its application are as follows:

1. Two or more suits
2. One suit already been decided
3. Same Parties
4. Same Subject-matters
5. Same Cause of Action

Distinction between Res-Subjudice and Res- Judicata

There are some important distention between Res-Subjudice and Res- Judicata. There are Following:-

1. In case of **Res-Subjudice**, there must be two suits; one previously instituted where as in case of **Res- Judicata** there must be an end to litigation.

2. In case of **Res-Subjudice**, the matter in issue in both the suits must be substantially the same. On the other hand, the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit either actually or constructively.

3. In case of **Res-Subjudice**, the previously instituted suit must be pending in the same court in which the subsequent suit was brought or in a different court having jurisdiction to grant the relief claimed. On the contrary, the former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

4. In case, of **Res-Subjudice**, such parties must be litigating in both the suits under the same title. In case of **Res- Judicata**, such parties must have been under the same title in the former suit.

5. In case of **Res-Subjudice**, both the suits must be between the same parties or their representatives. On the other hand, a final decision of a concrete issue between parties.

Constructive res judicata

The rule of direct res judicate is limited to a matter actually in issue alleged by one party and either denied or admitted by the other party expressly or impliedly. But the rule of constructive res judicata, and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject – matter. The clearly is opposed to considerations of public policy on which the doctrine of res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finally of judgments pronounced by courts would also be materially affected.

Thus, it helps in raising the bar of res judicata by suitably construing the general principles of subduing a cantankerous litigant. That is why this rule is called constructive res judicata, which, in reality, is an observed by Somervell, L. J. : " I think that … it would be accurate to say that res judicata ….. is not confined to the issues which the court is actually asked to

decide, but that it covers issues or facts which are so clearly part of the subject – matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

Res judication between co – plaintiffs

Just as a matter may be res judicata between co – defendants, so also it may be res judicata between co – plaintiffs, if there is a conflict of interest between plaintiffs and it is necessary to resolve the same by a court in order to give relief to a defendant, and the matter is in fact decided, it will open as res judicata between co – plaintiffs in the subsequent suit.

Res judicata between co – defendants

As a matter may be res judicata between a plaintiff and a defendant, similarly, it may be res judicata between co – defendants and co – plaintiffs also. Adjudication will operate as res judicata between co – defendants if the following conditions are satisfied.

- There must be a conflict of interest between co – defendants.
- It must be necessary to decide that conflict in order to give relief to the plaintiff.
- The question between co – defendants must have been finally decided, and
- The co – defendants were necessary or proper parties in the former suit.
- If the conditions are satisfied, the adjudication will operate as res judicata between co– defendants.

Res Judicate and Estoppel:

Estoppel is not the same thing as res judicata. The difference lies in the following points:

- Whereas estoppel is a part of the law of evidence and proceeds upon equitable principle of altered situation, the doctrine of res judicata belongs to procedure and is based on the principle that there must be an end to litigation.
- Estoppel prohibits a party from providing anything which contradicts his previous declarations or acts to the prejudice of a party, who, relying upon them, altered his position; res judicata, on the other hand, prohibits the court from enquiring into a matter already adjudicated.
- Estoppel shuts the mouth of a party whereas res judicata ousts the jurisdiction of the court.

Thus, it appears that res judicata precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.

Lis-Pendens

The literal meaning of the maxim lis pendens is a suit under consideration of any court of law. This principle is based on the maxim ‘liti pendete nihil innovetur’ (meaning thereby, nothing can be introduced during the pendency of a suit). Section 52 of the Transfer of Property Act 1882 which lays down the principle runs as followsDuring the pendency in any Court in Bangladesh of any suit or proceedings which is not collusive and in which any right to immoveable property

is directly and specifically in question, the property cannot be transferred or otherwise dealt with any party to the suit or proceeding so as to affect the rights of any other party thereto, under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation : For the purpose of this section, the pendency of a suit or proceeding shall deemed to comments from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit of proceedings has been disposed of by a final decree or order and complete satisfaction or discharge of such order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

1) The conditions for the application of the doctrine are as follows:
2) Pendency of suit or proceeding.
3) Competency of Court to decide suit or proceeding.
4) Suit or proceeding not to be collusive.
5) Some right to immovable property must be directly and specifically involved in that suit or proceeding.
6) One of the parties to the suit must have transferred or disposed of the property.
7) Such transfer or disposal must affect the rights of the other party.

c) Restitution.-

Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified ii any suit instituted for the purpose, the court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are property consequential on such variation; reversal, setting aside or modification of the decree of the decree or order.

Explanation: For the purposes of sub-section (1), the expression "court which passed the decree or order" shall be deemed to include,—

(a) Where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance;

(b) Where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order;

(c) Where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

UNIT-II

INITIAL STEPS IN A SUIT

1. Jurisdiction of courts and venue of suits

Jurisdiction means the authority by which a court has to decide matters that are brought before it for adjudication. The limit of this authority is imposed by charter, statute or commission. If no such limit is imposed or defined that the jurisdiction is said to be unlimited.

Limitation of jurisdiction of civil court is basically four kinds:

1. Jurisdiction over the subject matter- to try certain matters by certain court is limited by statute (Ex. Small cause court- suit for money due under promissory note or a suit for price of work done)
2. Place of suing or territorial jurisdiction – A territorial limit of jurisdiction for each court is fixed by Government.
3. Jurisdiction over persons – All person of whatever nationality are subject to the jurisdiction of the country except foreign state.

4. Pecuniary jurisdiction depending on pecuniary value of suit –There is no pecuniary jurisdiction of high court and district court.

Jurisdiction may be further classified:

- Original jurisdiction
- Appellate jurisdiction

Criminal and appellate jurisdiction- Supreme Court, High Courts and District courts have both original and appellate jurisdiction in various matter.

2. Place of suing (Section 15 to 18)

Every suit shall be instituted in the Court of the lowest grade competent to try it.

Subject to the pecuniary or other limitations prescribed by any law, the following suit shall be institutes in the court with in the local limits of whose jurisdiction the property is situated (Section 16):-

(a) For the **recovery** of immovable property with or without rent or profits,

(b) For the **partition** of immovable property,

(c) For **foreclosure, sale or redemption** in the case of a mortgage of or charge upon immovable property,

(d) For the **determination of any other right to or interest** in immovable property,

(e) For **compensation for wrong** to immovable property,

(f) For the **recovery of movable** property actually under distraint or attachment,

A suit to obtain relief respecting or compensation for wrong to, immovable property be instituted either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of for gain or where the either party actually and voluntarily resides or carries on business or personally works.

Suits for immovable property situate within jurisdiction of different Courts (Section 17)

The suit may be instituted in any Court within the local limits of whose jurisdiction the property is situate. Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.

Place of institution of suit where local limits of jurisdiction of Courts are uncertain (Section 18)

Any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property. Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

Suits for compensation for wrongs to person or to movable (Section 19)

Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides or carries on business or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations

(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

Other suits to be instituted where defendants reside or cause of action arises (Section 20)

Every suit shall be instituted in Court within the local limits of whose jurisdiction:

The defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

The cause of action, wholly or in part, arises.

Provided that the suit is one with respect to which the Court is competent as regards the nature

and value of the suit to exercise jurisdiction.

Explanation: A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) A is a tradesman in Calcutta, B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi A, B and C being together at Banaras, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Banaras, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendants object, the suit cannot proceed without the leave of the Court.

b) INSTITUTION OF SUITS

The institution of the suits is covered under Order IV of CPC.

1**. Suit to be commenced by plaint**

(1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

2. Register of suits

The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

ORDER V: ISSUE AND SERVICE OF SUMMONS

Issue of Summons

1. Summons

(1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified: Provided that no such summons shall be issued when .the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim: Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear-

(a) In person, or

(b) By a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) By a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

2. Copy or statement annexed to summons

Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

3. Court may order defendant or plaintiff to appear in person

(1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

4. No party to be ordered to appear in person unless resident within certain limits

No party shall be ordered to appear in person unless he resides-

(a) Within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

5. Summons to be either to settle issues or for final disposal

The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

6. Fixing day for appearance of defendant

The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

7. Summons to order defendant to produce documents relied on by him

The summons to appeal and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

7. on issue of summons for final disposal, defendant to be directed to produce his witnesses

Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to relay in support of his case.

Service of Summons

9. Delivery or transmission of summons for service

(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

10. Mode of service

Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

11. Service on several defendants

Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

12. Service to be on defendant on person when practicable, or on his agent

Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

13. Service on agent by whom defendant carries on business

(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or chartered.

14. Service on agent in charge in suits for immovable property

Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accent the service, it may be made on any agent of the defendant in charge of the property.

15. Where service may be on an adult member of defendant's family

Where in any suit the defendant is absent Prom his residence at the time when the service of summons is sought to be effected on his at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf service may be made on any adult member of the family, whether male or female, who is residing with him.

Explanation. - A servant is not a member of the family within the meaning of this rule.

16. Person served to sign acknowledgement

Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.

17. Procedure when defendant refuses to accept service, or cannot he found

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on

his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person(if any) by whom the house was identified and in whose presence the copy was affixed.

20. Substituted services

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house(if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Effect of substituted service-Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to he fixed -Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

21. Service of summons where defendant resides within jurisdiction of another Court.

A summons may sent by the Court by which it is issued, whether within or without the State, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

22. Duty of Court to which summons is sent

The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

23. Service where defendant resides out of India and has no agent

Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate :

c) ORDER VI : PLEADINGS GENERALLY

1. Pleading

"Pleading" shall mean plaint or written statement.

2. Pleading to state material facts and not evidence

(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

3. Forms of pleading

The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

4. Particulars to be given where necessary

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 particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

6. Notice

Wherever 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 terms of such notice, or the circumstances from which such notice is to be inferred are material.

7. Pleading to be signed

Every pleading shall be signed by the party and his pleader (if any):

Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

8 Address for service of notice

(1) Every pleading, when filed by a party, shall be accompanied by a statement in the prescribed form, signed as provided in rule 14, regarding the address of the party.

(2) Such address may, from time to time, be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition.

(3) The address furnished in the statement made under sub-rule (1) shall be called the "registered address" of the party, and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good,

subject as aforesaid, for a period of two years after the final determination of the cause or matter.

(4) Service of any process may be affected upon a party at his registered address in all respects as though such party resided thereat.

(5) Where the registered address of a party is discovered by the Court to be incomplete, false or fictitious, the Court may, either on its own motion, or on the application of any party, order -

(a) In the case where such registered address was furnished by a plaintiff, stay of the suit, or

(b) in the case where such registered address was furnished by a defendant, his defence be struck out and he be placed in the same position as if he had not put up any defence.

(6) Where a suit is stayed or a defence is struck out under sub-rule (5), the plaintiff or, as the case may be, the defendant may, after furnishing his true address, apply to the Court for an order to set aside the order of stay or, as the case may be, the order striking out the defence.

(7) The Court, if satisfied that the party was prevented by any sufficient cause from filing the true address at the proper time, shall set aside the order of stay or order striking out the defence, on such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit or defence, as the case may be.

(8) Nothing in this rule shall prevent the Court from directing the service of a process at any other address, if, for any reason, it thinks fit to do so.

9. Verification of pleadings

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be varied at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall 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.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

10. Striking out pleadings

The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-

(a) Which may be unnecessary, scandalous, frivolous or vexatious, or

(b) Which may tend to prejudice, embarrass or delay the fair trail of the suit, or

(c) Which is otherwise an abuse of the process of the Court?

11. Amendment of pleadings

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just or all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

12. Failure to amend after order

If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that 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 as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

d) ORDER VII : PLAINT

1. Particulars to be contained in plaint

The plaint shall contain the following particulars:-

(a) The name of the Court in which the suit is brought;

(b) The name, description and place of residence of the plaintiff;

(c) The name, description and place of residence of the defendant, so far as they can be ascertained;

(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) The facts constituting the cause of action and when it arose;

(f) The facts showing that the Court has jurisdiction;

(g) The relief which the plaintiff claims;

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

2. in money suits

Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed

But 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 he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for.

3. Where the subject-matter of the suit is immovable property

Where the subject-matter of the suit is immovable property, the plaint shall 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 shall specify such boundaries or numbers.

4. When plaintiff sues as representative

Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

5. Defendant's interest and liability to be shown

The plaint shall show that the defendant is or claims to be interested in subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

6. Grounds of exemption from limitation law

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed :

7. Procedure on admitting plaint- Concise statements-

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of

the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(1A) the plaintiff shall, within the time fixed by the Court or extended by it under sub-rule (1), pay the requisite fee for the service of summons on the defendants.]

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or issued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

10. Return of plaint

(1) [Subject to the provisions of rule 10A, the plaint shall] at any stage of the suit be returned to be: presented to the Court in whom the suit should have been instituted.

[Explanation. - For the removal oil doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

(2) Procedure on returning plaint- On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-

(a) Specifying the Court, in which he proposes to present the plaint after its return,

(b) Praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) Requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,-

(a) Fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) Give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearances is given under sub-rule (3),-

(a) It shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise direct, and

(b) The said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

11. Rejection of plaint

The plaint shall be rejected in the following cases:-

(a) Where it does not disclose a cause of action;

(b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) 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;

(d) Where the suit appears from the statement in the plaint to be barred by any law :

12. Procedure on rejecting plaint

Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

13. Where rejection of plaint does not preclude presentation of fresh plaint

The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

ORDER VIII : WRITTEN STATEMENT, SET-OFF AND COUNTER-CLAIM

1. Written statement

1) The defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defense.

(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter. Claim, he shall enter such documents in a list, and shall,-

(a) If a written statement is presented, annex the list to the written statement:

Provided that where the defendant, in his written statement, claims a set-off or makes a counter-claim based on a document in his possession or power, he shall produce it in Court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement; .

(b) if a written statement is not presented, present the list to the Court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is so annexed or presented, the defendant shall be allowed such further period for the purpose as the Court may think fit.

(5) A document which ought to be entered in the list referred to in sub-rule (2), and which is not so entered, shall not, without the leave of the Court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(7) Where a Court grants leave under sub-rule (5), it shall record its reasons for so doing, and no such leave shall be granted unless good cause is shown to the satisfaction of the Court for the non-entry of the document in the list referred to in sub-rule (2).]

2. New facts must be specially pleaded

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction 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.

3. Denial to be specific

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Evasive denial

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Specific denial

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in it discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved..

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

6. Particulars of set-off to be given in written statement

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits lithe jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiffs suit, the defendant may, at the first heating of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off- The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounced a final judgment in respect both of the original claim and of the set-off : but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's affects, C pays Rs. 1,000 as surety for D: then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) 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.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sues C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

6A. Counter-claim by defendant

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not : Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

6B. Counter-claim to be stated

Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

6C. Exclusion of counter-claim

Where a defendant sets up a counterclaims arid the plaintiff contends the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

6D. Effect of discontinuance of suit

If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.

6E. Default of plaintiff to reply to counter-claim

If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.

6F. Relief to defendant where counter claim succeeds

Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

6G. Rules relating to written statement to apply

The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

7. Defence or set-off founded upon separate grounds

Where the defendant relies upon several distinct grounds of defence or set-off [or counter-claim] founded separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. New ground of defence

Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counter-claim may be raised by the defendant or plaintiff as the case may be, in his written statement.

8A. Duty of defendant to produce documents upon which relief is claimed by him

(1) Where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement.

(2) A document which ought to be produced in Court by the defendant under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(3) Nothing In this rule shall apply to documents produced,-

(a) For the cross-examination of the plaintiff's witnesses, or

(b) In answer to any case set up by the plaintiff subsequent to the filing of the plaint, or

(c) Handed over to a witness merely to refresh him memory.

e) <u>ORDER XI : DISCOVERY AND INSPECTION</u>

1. Discovery by interrogatories

In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer : Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose : Provided also that interrogatories which do not relate to any matters in question in the suit be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. Particular interrogatories to be submitted

On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

3. Costs of interrogatories

In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatious, or at improper length, the cost occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. Form of interrogatories

Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

5. Corporations

Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

6. Objections to interrogatories by answer

Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on the ground of privilege or any other ground], may be taken in the affidavit in answer.

7. Setting aside and striking out interrogatories

Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

8. Affidavit in answer, filing

Interrogatories shall be answered by affidavit to be filed within ten days or within such other time as the Court may allow.

9. Form of affidavit in answer

An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

10. No exception to be taken

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

11. Order to answer or answer further

Where any person interrogated omits to answer, or answer insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by viva voce examination as the Court may direct.

12. Application for discovery of documents

Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit :

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saying costs.

13. Affidavit of documents

The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. Production of documents

It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. Inspection of documents referred to in pleadings or affidavits

Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document[or who has entered any document in any list annexed to his pleadings.] or produce such document for the
inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to produce

Notice to any party to produce arty documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. Time for inspection when notice given

The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. Order for inspection

(1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit :

Provided that the order shall not be made when and so far as the Court shall be of opinion that, it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

21. Non-compliance with order for discovery

(1) Where any party fails to comply with any owner to answer interrogatories, or for discovery or inspection of document, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and [an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard.]

(2) Where an order is made under sub-rule (1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action.

22. Using answers to interrogatories at trial

Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer : Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the

last-mentioned answers ought not to be used without them, it may direct them to be put in.

23. Order to apply to minors

This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

f) ORDER IX : APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

1. Parties to appear on day fixed in summons for defendant to appear and answer

On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

2. **Dismissal of suit where summons not served in consequence of plaintiffs failure to pay costs**

Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee of postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed

Provided that no such order shall be made, if, notwithstanding such failure the defendant attends in person (or by agent when he is allowed to appear by agent) on the day fixed for him to appear and answer.

3. Where neither party appears, suit to be dismissed

Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

4. Plaintiff may bring fresh suit or Court may restore suit to file

Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for [such failure as is referred to in rule 2], or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

5. Dismissal of suit where plaintiff after summons returned unserved, fails for one mouth to apply for fresh summons

(1) Where after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of [one month] from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

(a) he has failed after using his best endeavors to discover the residence of the defendant, who has not been served, or

(b) Such defendant is avoiding service of process, or

(c) There is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

6. Procedure when only plaintiff appears

(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

[(a) When summons duly served- if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte;

(b) When summons not duly served- if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time- if it is proved that the summons was served on the defendant, but not in sufficient time to enable him, to appear and answer on the day fixed in the summons,

the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance: Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing. appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed to his appearance.

8. Procedure where defendant only appears

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

10. Procedure in case of non-attendance of one or wore of several plaintiff's

Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

11. Procedure in case of non-attendance of one or more of several defendants

Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively who do not appear.

Setting aside decrees ex parte

13. Setting aside decree ex parte against defendant

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may he set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had

notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

14. No decree to be set aside without notice to opposite party

No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

g) ORDER XIV : SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. Framing of issues

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue.

(4) Issues are of two kinds:

(a) Issues of fact,

(b) Issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issues

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of 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-

(a) The jurisdiction of the Court, or

(b) A bar to the suit created by any law for the time being in force,

And for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.]

3. Materials from which issues may be framed

The Court may frame the issues from all or any of the following materials :-

(a) Allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) Allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) The contents of documents produced by either party.

4. Court may examine witnesses or documents before framing issues

Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. Power to amend and strike out, issues

(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

6. Questions of fact or law may by agreement be stated in form of issues

Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,-

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that are of them be declared entitled to some right or subject some liability specified in the agreement:

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) One or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment

Where the Court is satisfied, after making such inquiry as it deems proper,-

(a) That the agreement was duly executed by the parties;

(b) That they have a substantial interest in the decision of such question as aforesaid, and

(c) That the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced a decree shall follow.

UNIT-III

INTERIM ORDERS

a) ORDER XXVI : COMMISSIONS

Commissions to examine witnesses

1. Cases in which Court may issue commission to examine witness

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it: Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Explanation.-The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical, practitioner as a witness.]

2. Order for commission

An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. Where witness resides within Court's jurisdiction

A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

4. Persons for whose examination commission may issue

(1) Any Court may in any suit issue a commission [for the examination on interrogatories or otherwise of-]

(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) any person in the service of the Government] who cannot in the opinion of the Court, attend without detriment to the public service ;

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. Commission or request to examine witness not within India

Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within [India] is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

6. Court to examine witness pursuant to Commission

Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7. Return of commission with depositions of witnesses

Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the returned thereto and the evidence taken under it shall [(subject to the provisions of rule 8)] from part of the record of the suit.

8. When depositions may be read in evidence

Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless-

6. the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a [person in the service of the Government] who cannot, in the opinion of the Court, attend without detriment to the public service, or

the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a) and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for local investigations

9. Commissions to make local investigations

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elecidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. -

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

10A. Commission for scientific investigations

(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

10B. Commission for performance of a ministerial act

(1) Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the Court, be conveniently performed before the Court, the Court may, if, for reasons to be recorded, it is of opinion that it is necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

10C. Commission for the sale of movable property

(1) Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the Court pending the determination of the suit and which cannot be conveniently preserved, the Court may, if, for reasons to be recorded, it is of opinion that it is necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to conduct such sale and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

(3) Every such sale shall be held, as far as may be, in accordance with the procedure prescribed for the sale of movable property in execution of a decree.

Commissions to examine accounts

11. Commission to examine or adjust accounts

In any suit in which an examination or adjustment of the accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. Court to give Commissioner necessary instructions

(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) Proceedings and report to be evidence. Court may direct further inquiry-The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Commissions to make partitions

13. Commission to make partition of immovable property

Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner

(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directly by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

General provisions

15. Expenses of commission to be paid into Court

Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

16. Powers of Commissioners

Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,-

(a) Examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in, the matter referred to him;

(b) Call for and examine documents and other things relevant to the subject of inquiry;

(c) At any reasonable time enter upon or into any land or building mentioned in the order.

17 Attendance and examination of witnesses before Commissioner

(1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the

commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of [7][India], and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court :

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits or whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. Parties to appear before Commissioner

(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

b) <u>ORDER XL : APPOINTMENT OF RECEIVERS</u>

1. Appointment of receivers

(1) Where it appears to the Court to be just and convenient, the Court may by order-

(a) Appoint a receiver of any property, whether before or after, decree;

(b) Remove any person from the possession or custody of the property;

(c) Commit the same to the possession, custody or management or the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

2. Remuneration

The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

3. Duties

Every receiver so appointed shall

(a) Furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property;

(b) Submit his accounts at such periods and in such form as the Court directs;

(c) Pay the amount due from him as the Court directs; and

(d) Be responsible for any loss occasioned to the property by his wilful default or gross negligence.

4. Enforcement of receiver's duties

Where a receiver-

(a) Fails to submit his accounts at such periods and in such form as the Court directs, or

(b) Fails to pay the amount due from him as the Court directs, or

(c) Occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

5. When Collector may be appointed receiver

Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

c) ORDER XXXVIII : ARREST BEFORE JUDGEMENT

1. Where defendant may be called upon to furnish security for appearance

Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, 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,-

(i) Has absconded or left the local limits of the jurisdiction of the Court, or

(ii) Is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) Has disposed of or removed from the local limit soft the jurisdiction of the Court his property or any part thereof, 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. Provided that 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 plaintiffs claim; and such sum shall be held in deposit by the Court until: the suit is disposed of or until the further order of the Court.

2. Security

(1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3. Procedure on application by surety to be discharged

(1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

4. Procedure where defendant fails to furnish security or find fresh security

Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed a against the defendant, until the decree has been satisfied :

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees: Provided also that no person shall be detained in prison under this rule after he has complied with such order.

d) ORDER XXXVIII - Attachment before judgment

5. Where defendant may be called upon to furnish security for production of property

(1) 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, in 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 why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) if an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.]

6. Attachment where cause not shown or security not furnished

(1) Where the defendant fails to show cause 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.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

7. Mode of making attachment

Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

8. Adjudication of claim to property attached before judgment

Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money.)

9. Removal of attachment when security furnished or suit dismissed

Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the cost of the attachment, or when the suit is dismissed.

10. Attachment before judgment not to affect rights of strangers, nor bar decree -holder from applying for sale

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, or bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

11. Property attached before judgment not to be re-attached in execution of decree

Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favor of the plaintiff, it shall not be necessary upon. an application for execution of such decree to apply, for a re-attachment of the property.

11A. Provisions applicable to attachment

(1) The provisions of this Code applicable to an attachment made in execution of a decree shall so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.

(2) An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal, of the suit for default has been set aside and the suit has been restored.

12. Agriculture produces not attachable before judgment

Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agriculture produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

13. Small Cause Court not to attach immovable property

Nothing in this order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property.

d) <u>ORDER XXXIX : TEMPORARY INJUNCTIONS</u>

1. Cases in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) That the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any properly in dispute in the suit, the Court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until tile disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach

(1) In any suit for restraining the defendant from committing a breach of' contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract, or injury of a like kind arising cut of the same contract or relating to the same property or right.

(2) The Court may be order grant such injunction, on such terms as to the of the durations injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

2A. Consequence of disobedience or breach of injunction

(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, 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 the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.]

3. before granting injunction, Court to direct notice to opposite party

The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be give to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) A copy of the affidavit filed in support of the application;

(ii) A copy of the plaint; and

(iii) Copies of documents oil which the applicant relies, and

(b) To file on the day on which such injunction is granted or on the day immediately following, that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

3A. Court to dispose of application for injunction within thirty days

Where an injunction has been granted without giving notice to the opposite party, the Court shall make an Endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted; and where it is unable so to do, it shall record its reasons for such inability.]

4. Order for injunction may be discharged, varied or set abide

Any order for an injunction may be discharged, or varied, or set aside by the Court, on an

application thereto by any party dissatisfied with such order: Provided that if in an application for temporary injunction or in any affidavit supporting such application a party his knowingly

made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is riot necessary so to do in the interests of justice: Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.]

5. Injunction to corporation binding on its officer

An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

e) ORDER XXXIX :NTERLOCUTORY ORDERS

6. Power to order interim sale

The Court may, on the applicator of any party to a suit, order the sale, by an person named in such order, and in such manner and on such terms as it thinks fit, of any movable property being the subject–matter of such suit or attached before judgment in such suit which is subject to speedy and natural decay, or for any other just and sufficient cause it may be desirable to have sold at once.

7. Detention preservation, inspection, etc., of subject-matter of suit

(1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,-

(a) Make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;

(b) For all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of' any other party to such suit; and

(c) For all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this: rule.

8. Application for such orders to be after notice

(1) An application by the plaintiff for an order under rule 6 or rule 7 may be made [***] at any time after institution of the suit.

(2) An application by the defendant for a like order may be made [***] at any time after appearance.

(3) Before making an order under rule 6 or rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would he defeated by the delay, direct notice thereof to be given to the opposite party.]

9. When party may be put in immediate possession of land the subject-matter of suit

Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure; and the Court in its decree may award against the defaulter the amount. so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. Deposit of money, etc. in Court

Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

f) ORDER XXV : SECURITY FOR COSTS

1. When security for costs may be required front plaintiff

(1) At any stage of a suit,. the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant. Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit.

(2) Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1).

2. Effect of failure to furnish security

(1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw there from.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the. Time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

UNIT-IV

SUITS IN PARTICULAR CASES

a) ORDER XXVII: SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

1. Suits by or against Government

In any suit by or against the Government, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

2. Persons authorized to act for Government

Persons being ex officio or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

3. Plaints in suits by or against Government.

In suits by or against the Government, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name as provided in section 79.

4. Agent for Government to receive process

The Government pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such Court.]

5. Fixing of day for appearance on behalf of Government

The Court, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader] to appear and answer on behalf of the Government, and may extend the time at its discretion but the time so extended shall not exceed two months in the aggregate.

5A. Government to be joined as a party in a suit against a public officer

Where a suit is instituted against a public officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government shall be joined as a party

to the suit.

5B. Duty of Court in suits against the Government or a public officer to assist in arriving at a settlement.

(1) In every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently 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.

(2) If, in any such suit or proceeding, at any stage, it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred under sub-rule (2) is in addition to any other power of the Court to adjourn proceedings.]

6. Attendance of person able to answer questions relating to suit against Government

The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of [the Government] who may be able to answer any material questions relating to the suit, direct the attendance of such a parson.

7. Extension of time to enable public officer to make reference to Government

(1) Where the defended is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. Procedure in suits against public officer

(1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by the [Government pleader] on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties: Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

B) ORDER XXXIII : SUITS BY INDIGENT PERSONS

1. Suits may be instituted by indigent person-

Subject to the following provisions, any suit may be instituted by an indigent person.

(a) If he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) Where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.

Explanation II - Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III - Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity.]

1A. Inquiry into the means of an indigent person

Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the Court, unless the Court otherwise directs, and the

Court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.]

2. Contents of application-

Every application for permission to sue as an [indigent person] shall contain the particulars required in regard to plaints in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

3. Presentation of application-

Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person:

[Provided that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.]

4. Examination of applicants-

(1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) If presented by agent, Court may order applicant to be examined by commission - Where the application is presented by an agent, the Court may. if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

5. Rejection of application-

The Court shall reject an application for permission to sue as [an indigent person]-

(a) Where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) Where the applicant is not an [indigent person], or

(c) Where he has, within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as [an indigent person]:

[Provided that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person,] or

(d) Where his allegations do not show a cause of action, or

(e) Where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter, [or]

[(f) Where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

(g) Where any other person has entered into an agreement with him to finance the litigation].

6. Notice of day for receiving evidence of applicant's indigency-

Where the Court sees no reason to the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten day's clear notice shall be given tohe opposite party and the Government pleader) for receiving such evidence as the application may adduce in proof of his indecency, and for hearing any evidence which may be adduced in disproof thereof.

7. Procedure at hearing-

(1) On the day so fixed or as soon thereafter as may be convenient the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make [a full record of their evidence].

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as an indigent person.

8. Procedure if application admitted-

Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee [or fees payable for service of process] in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

9. Withdrawal of permission to sue as an indigent person-

The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order that the permission granted to the plaintiff to sue as an indigent person be withdrawn-

(a) if he is guilty of vexatious or improper conduct in the course of the suit;

(b) If it appears that his means are such that he ought not to continue to sue as [an indigent person]; or

(c) If he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained. An interest in such subject-matter.

9A.Court to assign a pleader to an unrepresented indigent person-

(1) Where a person, who is permitted to sue as an indigent person, is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) The mode of selecting pleaders to be assigned under sub-rule (1);

(b) The facilities to be provided to such pleaders by the Court;

(c) Any other matter which is required to be or may be provided by the rules for giving effect to the provisions of sub-rule (1).

10. Costs where indigent person succeeds-

Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an [indigent person]; such amount shall be recoverable by the [State Government] from any party ordered by the decree to pay the same and shall be a first charge on the subject–matter of the suit.

11. Procedure where Indigent person fails-

Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-

(a) Because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service [or to present copies of the plaint or concise statement], or

(b) Because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an [indigent person].

12. State Government may apply for payment of court-fees-

The State Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10, rule 11 or rule 11.

13. State Government to be deemed a party-

All matters arising between the State Government and any party to the suit under rule 10, rule 11, rule 11 A or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

14. Recovery of amount of court-fees-

Where an order is made under rule 10, rule 11 or rule 11A, the court shall forthwith cause a copy of the decree or order to be forwarded to the Collector who may, without prejudice to any other mode of recovery, recover the amount of court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue.]

An order refusing to allow the applicant to sue as an indigent person shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right.

16. Costs-

The costs of an application for permission to sue as an indigent person and of an inquiry into indigency shall be costs in the suit.

17. Defence by an indigent person-

Any defendant, who desire to plead a set-off or counter-claim, may be allowed to set up such claim as an indigent person, and the rules contained in this Order shall so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint.

18. Power of Government to provide for free legal services to indigent person-

(1) Subject to the provisions of this Order, the Central or State Government may make such supplementary provisions as it thinks fit for providing free legal services to those who have been permitted to sue as indigent persons.

(2) The High Court may, with the previous approval of the State Government, make rules for carrying out the supplementary provisions made by the Central or State Government for providing

free legal services to indigent persons referred to in sub-rule (1), and such rules may include the nature and extent of such legal services, the conditions under which they may be made available, the matters in respect of which, and the agencies through which, such services may be rendered.]

C) ORDER XXXV : INTERPLEADER

1. Plaint in interpleader-suit-

In every suit of interpleader the plaint shall, in addition to the other statements necessary for plaints, state-

(a) That the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;

(b) The claims made by the defendants severally; and

(c) That there is no collusion between the plaintiff and any of the defendants.

2. Payment of thing claimed into Court-

Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

3. Procedure where defendant is suing plaintiff-

Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

4. Procedure at first hearing-

(1) At the first hearing the Court may-

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct-

(a) That an issue or issues between the parties be framed and tried, and

(b) That any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and

shall proceed to try the suit in the ordinary manner.

5**. Agents and tenants may not institute interpleader suits-**

Nothing in this Order 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.

Illustrations

(a) 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.

(b) 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 afterwards alleges that C s debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute in interpleader-suit against A and C.

6. Charge for plaintiff's costs-

Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

e) ORDER XXXVII: SUMMARY PROCEDURE

1. Court and classes of suits to which the Order is to apply

(1) This Order shall apply to the following Courts, namely :-

(a) High Courts, City Civil Courts and Courts of Small Causes: and

(b) Other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the official Gazette, further restrict, enlarge 6r vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) Suits upon bills of exchange, hundies and Promissory notes:

(b) Suits in which the plaintiff seeks only to recover 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 liquidated demand only.]

2. Institution of summary suits

(1) A suit, to which this Order applies, may if the plaintiff proceed desires to desires hereunder, be instituted by presenting a plaint which shall contain,-

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule; has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely :-

"(Under Order XXXVII of the Code of Civil Procedure, 1908)."

(2) The summons of the suit shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.]

3. Procedure for the appearance of defendant

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if tile plaintiff sues in person, to the plaintiff himself either by. notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an

affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just: Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgement,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.]

4. Power to set aside decree

After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to de, and on such terms as the Court thinks fit.

5. Power to order bill, etc., to be deposited with officer of Court

In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6 Recovery of cost of noting non-acceptance of dishonored bill or note

The holder of every dishonored bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonor, as he has under this Order for the recovery of the amount of such bill or note.

7. Procedure in suits

Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

e) **Public nuisances.-Section-91**

Public nuisance derives support from section 91 of CPC that lays down the procedure for initiation of a civil suit for the offense of public nuisance. Being purely procedural, the section gives the flexibility of seeking parallel remedies in criminal jurisdiction or damages under law of torts. The marginal note of section 91 reads: public nuisance and other wrongful acts affecting the public. Inclusion of ‘other wrongful acts affecting public' besides public nuisance widens the scope of the section to incorporate various situations which although do not fall under the accepted straitjacket definitions of nuisance, yet are a cause of discomfort and inconvenience to the public. For instance, courts have read slaughtering of cattle on a public street or encroachment upon a public street by construction of buildings as legitimate cause of action for a claim for public nuisance by the virtue of it being a wrongful act against public.

Section 91 of CPC states that

(1) In the case of a public nuisance the Advocate General or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has

been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

As per the General Clauses Act 1897, the definition of nuisance for the purpose of section 91, CPC has to be borrowed from section 268 IPC. The definition of nuisance excludes from its ambit the instances of legalized nuisance. Legalized nuisance are cases when the nuisance cause is statutorily approved and in the interest of greater good and social welfare. For instance, the running of railway engines and trains or establishment of the yard, despite being a legitimate cause of nuisance, is not punishable under IPC or a valid ground for invoking Section 91.

Though much hasn't been said about the inclusion of clause 1 in section 91, it is believed that inclusion of the Advocate General as the initiator of the suit for public nuisance was to act as a safety check arrangement to the expansive and broad definition of nuisance and the subjectivity of ‘wrongful acts against the public'. Later, by the 1976 amendment, the provision of two or more persons filing a suit for public nuisance with the consent of the advocate general was added to section 91. Such active involvement of the Advocate General in public nuisance suits was to ensure that suits are not initiated with malicious intentions, with the sole purpose of creating impediments for the party alleged with causing nuisance. This rule however does not extend to representative cases when a member of the community whose rights are being restricted by the act of public nuisance files the claim. In such suits, the leave of the court is not necessary. Even in cases when certain rights are provided to the entire community, but immediate damage by the nuisance occurs to an individual, leave of court is not mandatory.

Clause 2 of Section 91 permits the existence of a parallel suit for the same cause of action in criminal jurisdiction through a PIL or as a civil suit for private claims. It also allows an individual aggravated by the nuisance to file for damages his individual suit. This is primarily so because section 91 in its entirety does not create any rights or deprive anyone of their existing rights. It merely states the procedural guidelines for instituting a civil suit when the cause of action is public nuisance. Consequently, it does not control representative suits under order I, rule 8 or modify the right of a person to sue apart from the provision of this section. This means that if a group initiates a suit for declaration of a particular right, it does not fall under the category of suit for public nuisance and hence mandates the prior approval of the advocate general. However, the existence of such right is a

necessary prerequisite. For instance, a suit against a religious procession is maintainable under Section 91 only if the infringement of some right and even if the consequent damage caused is not proved. Similarly, member of the public can maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proof of special damage.

3. Remedies In Cases Of Public Nuisance

As mentioned above, section 91, clause 2 permits the concomitant existence of individual as well as suits under other laws for relief for public nuisance. Since public nuisance is an offence both in civil and criminal jurisprudence, the reliefs range from punitive to pecuniary (generally in case of private claims). In public nuisance cases, the most common relief is the injunction order for continuing the act causing nuisance or an order for removal of the cause by the magistrate. Therefore, the remedies for public nuisance are:

1. Criminal Prosecution under such section of chapter XIV of the Indian Penal Code as may be applicable to the case.

   Sections 269 to section 291 enlist provisions for punitory remedies with imprisonment, fine or both. For attracting provisions of chapter XIV, it is not necessary that the annoyance should injuriously affect every single member of the public within the range of operation, it is sufficient that nuisance disturbs the people living in the vicinity.

2. Removal of nuisance or stopping the nuisance-causing activity by the orders of the magistrate under section 143 and 133, CrPC.

   Section 133 of CrPC allows the magistrate to order removal of the nuisance causing agent or activity from the locality provided that he is satisfied that the nuisance affects or injures number of people enough to attribute ‘public nature' to the right being violated, the dispute is not of private nature, between two members or groups of public or the dispute is a case of emergency or imminent danger to public interest as in cases of pollution by industries.

3. Action under this section by the Advocate General, or two or more persons with the leave of the Court where a declaration or injunction or some other appropriate relief is desired to put an end to a public nuisance.

This is when the remedy is sought under section 91 of the CPC where a suit is filed either by the advocate general himself or by two or more people in representative capacity with the prior consent of the advocate general or the leave of the court. The reliefs available to the parties in such cases are temporary or intermittent injunction if the injury complained of is either irreparable or continuous .Even if no substantial damage is caused by the act, injunction can be granted if the nature of nuisance-causing act is such that it can obstruct public rights in future. Declaration of can also be sought as a remedy.

4. Action by a private individual, where he has sustained some extraordinary damage by it.

As mentioned in part I(A), the distinction between private and public nuisance collapses in cases where an individual is caused damage by the act of nuisance which prima facie violates a public right. In such a case, invoking clause 2 of section 91, an individual can file a claim for damages or injunctions for violation for some right without prior consent of the Advocate General or the leave of the Court if there is sufficient proof of violation of his some of his or her existing rights. As per the amended provision, no such sanction is required and independent locus is conferred on every person aggrieved by public nuisance or wrongful act to file a suit for declaration or injunction. For instance, if the petitioner's land that is used by everyone in the village(public right) as a passage is dug for making a channel by the authorities, a sufficient cause of action for initiating a suit under clause 2 of article 91 is created. Apart from this section no individual can maintain an action against another for a relief against public nuisance except on proof of special damage.

Besides civil suits and criminal cases, another way of realizing these remedies is through the instrument of public interest litigations or PILs. In the last two and a half decades, PILs have emerged as a striking balance of citizen-consciousness and judicial activism to work for the welfare of all. The next section of this paper aims to trace the history of PILs in India and their use to check public nuisance detrimental to the environment.

ALTERNATIVE DISPUTE RESOLUTION (309)

UNIT--1

A. Alternative dispute resolution

Alternative dispute resolution (**ADR**; known in some countries, such as Australia, **external dispute resolution**) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in the recent years. In fact, some courts now require some parties to resort to ADR of some type, generally mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (20080 expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). Additionally, parties to M&A transactions are increasingly turning to ADR to resolve post-acquisition disputes.

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favour of this (ADR) use of mediation to settle disputes

Salient features

ADR is generally classified into at least four types:negotiation, mediation, conciliation and arbitration .Sometimes a fifth type, good offices , is included as well. ADR can be used alongside existing legal systems such as sharia courts within common law jurisdictions such as the UK.

ADR traditions vary somewhat by country and culture. There are significant common elements which justify a main topic, and each country or region's difference should be delegated to sub-pages.

Alternative Dispute Resolution is of two historic types. First, methods for resolving disputes outside

of the official judicial mechanisms. Second, informal methods attached to or pendant to official judicial mechanisms. There are in addition free-standing and or independent methods, such as mediation programs and ombuds offices within organizations. The methods are similar, whether or not they are pendant, and generally use similar tool or skill sets, which are basically sub-sets of the skills of negotiation.

ADR includes informal tribunals, informal mediative processes, formal tribunals and formal mediative processes. The classic formal tribunal forms of ADR are arbitration (both binding and advisory or non-binding) and private judges (either sitting alone, on panels or over summary jury trials). The classic formal mediative process is referral for mediation before a court appointed mediator or mediation panel. Structured transformative mediation as used by the U.S. Postal Service is a formal process. Classic informal methods include social processes, referrals to non-formal authorities (such as a respected member of a trade or social group) and intercession. The major differences between formal and informal processes are (a) pendency to a court procedure and (b) the possession or lack of a formal structure for the application of the procedure.

For example, freeform negotiation is merely the use of the tools without any process. Negotiation within a labor arbitration setting is the use of the tools within a highly formalized and controlled setting.

Calling upon an organizational ombudsman's office is never, by itself, a formal procedure. (Calling upon an organizational ombudsman is always voluntary; by the International Ombudsman Association Standards of Practice, no one can be compelled to use an ombuds office.)

Organizational ombuds offices refer people to all conflict management options in the organization: formal and informal, rights-based and interest-based. But, in addition, in part because they have no decision-making authority, ombuds offices can, themselves, offer a wide spectrum of informal options.

This spectrum is often overlooked in contemporary discussions of "ADR." "ADR" often refers to external conflict management options that are important, but used only occasionally. An organizational ombuds office typically offers many internal options that are used in hundreds of cases a year. These options include:

- delivering respect, for example, affirming the feelings of a visitor, while staying explicitly neutral on the facts of a case,
- active listening, serving as a sounding board,

- providing and explaining information, one-on-one, for example, about policies and rules, and about the context of a concern,
- receiving vital information, one-on-one, for example, from those reporting unacceptable or illegal behavior,
- reframing issues,
- helping to develop and evaluate new options for the issues at hand,
- offering the option of referrals to other resources, to "key people" in the relevant department, and to managers and compliance offices,
- helping people help themselves to use a direct approach, for example, helping people collect and analyze their own information, helping people to draft a letter about their issues, coaching and role-playing,
- offering shuttle diplomacy, for example, helping employees and managers to think through proposals that may resolve a dispute, facilitating discussions,
- offering mediation inside the organization,
- "looking into" a problem informally,
- facilitating a generic approach to an individual problem, for example instigating or offering training on a given issue, finding ways to promulgate an existing policy,
- identifying and communicating throughout the organization about "new issues,"
- identifying and communicating about patterns of issues,
- working for systems change, for example, suggesting new policies, or procedures,
- following up with a visitor, following up on a system change recommendation. (See Rowe, Mary, Informality — The Fourth Standard of Practice, in JIOA, vol 5, no 1, (2012) pp 8–17.)

Informal referral to a co-worker known to help people work out issues is an informal procedure. Co-worker interventions are usually informal.

Conceptualizing ADR in this way makes it easy to avoid confusing tools and methods (does negotiation once a lawsuit is filed cease to be ADR? If it is a tool, then the question is the wrong question) (is mediation ADR unless a court orders it? If you look at court orders and similar things as formalism, then the answer is clear: court annexed mediation is merely a formal ADR process).

Dividing lines in ADR processes are often provider driven rather than consumer driven. Educated consumers will often choose to use many different options depending on the needs and circumstances that

they face.

Finally, it is important to realize that conflict resolution is one major goal of all the ADR processes. If a process leads to resolution, it is a dispute resolution process.[5]

The salient features of each type are as follows:

1. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB – a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one or both of the parties behind the scene, a process called "Helping People Help Themselves" – see Helping People Help Themselves, in Negotiation Journal July 1990, pp. 239–248, which includes a section on helping someone draft a letter to someone who is perceived to have wronged them.)
2. In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties. In some countries (for example, the United Kingdom), ADR is synonymous with what is generally referred to as mediation in other countries.
3. In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.
4. In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements (e.g., credit card agreements), has drawn scrutiny from courts Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review.

Beyond the basic types of alternative dispute resolutions there are other different forms of ADR:

- Case evaluation: a non-binding process in which parties present the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator.
- Early neutral evaluation: a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement.
- Family group conference: a meeting between members of a family and members of their extended related group. At this meeting (or often a series of meetings) the family becomes involved in learning skills for interaction and in making a plan to stop the abuse or other ill-treatment between its members.
- Neutral fact-finding: a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.
- Ombuds: third party selected by an institution – for example a university, hospital, corporation or government agency – to deal with complaints by employees, clients or constituents. The Standards of Practice for Organizational Ombuds may be found at.

"Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.

In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "**appropriate**" dispute resolution.

That is, some cases and some complaints in fact ought to go to formal grievance or to court or to the police or to a compliance officer or to a government IG. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need mediation or arbitration. Thus "alternative" dispute resolution usually means a method that is not the courts. "Appropriate" dispute resolution considers **all** the possible responsible options for conflict resolution that are relevant for a given issue.

ADR can increasingly be conducted online, which is known as online dispute resolution (ODR, which is mostly a buzzword and an attempt to create a distinctive product). It should be noted, however, that

ODR services can be provided by government entities, and as such may form part of the litigation process. Moreover, they can be provided on a global scale, where no effective domestic remedies are available to disputing parties, as in the case of the UDRP and domain name disputes. In this respect, ODR might not satisfy the "alternative" element of ADR.

Benefits

ADR has been increasingly used internationally, both alongside and integrated formally into legal systems, in order to capitalise on the typical advantages of ADR over litigation:

- Suitability for multi-party disputes
- Flexibility of procedure - the process is determined and controlled by the parties to the dispute
- Lower costs
- Less complexity ("less is more")
- Parties choice of neutral third party (and therefore expertise in area of dispute) to direct negotiations/adjudicate
- Likelihood and speed of settlements
- Practical solutions tailored to parties' interests and needs (not rights and wants,as they may perceive them)
- Durability of agreements
- Confidentiality
- The preservation of relationships and the preservation of reputations

Modern era

Traditional people's mediation has always involved the parties remaining in contact for most or all of the mediation session. The innovation of separating the parties after (or sometimes before) a joint session and conducting the rest of the process without the parties in the same area was a major innovation and one that dramatically improved mediation's success rate.

Traditional arbitration involved heads of trade guilds or other dominant authorities settling disputes. The modern innovation was to have commercial vendors of arbitrators, often ones with little or no social or political dominance over the parties. The advantage was that such persons are much more readily available.

The disadvantage is that it does not involve the community of the parties. When wool contract arbitration was conducted by senior guild officials, the arbitrator combined a seasoned expert on the subject matter with a socially dominant individual whose patronage, good will and opinion were important.

Private judges and summary jury trials are cost- and time-saving processes that have had limited penetration due to the alternatives becoming more robust and accepted.

Latin has a number of terms for mediator that predate the Roman Empire. Any time there are formal adjudicative processes it appears that there are informal ones as well. It is probably fruitless to attempt to determine which group had mediation first.

India

Alternative dispute resolution in India is not new and it was in existence even under the previous Arbitration Act, 1940. The Arbitration and Conciliation Act, 1996 has been enacted to accommodate the harmonisation mandates of UNCITRAL Model. To streamline the Indian legal system the traditional civil law known as Code of Civil Procedure, (CPC) 1908 has also been amended and section 89 has been introduced. Section 89 (1) of CPC provides an option for the settlement of disputes outside the court. It provides that where it appears to the court that there exist elements, which may be acceptable to the parties, the court may formulate the terms of a possible settlement and refer the same for arbitration, conciliation, mediation or judicial settlement.

Due to extremely slow judicial process, there has been a big thrust on Alternate Dispute Resolution mechanisms in India. While Arbitration and Conciliation Act, 1996 is a fairly standard western approach towards ADR, the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach.

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

Conciliation

Conciliation is a less formal form of arbitration. This process does not require an existence of any prior agreement. Any party can request the other party to appoint a conciliator. One conciliator is preferred but two or three are also allowed. In case of multiple conciliators, all must act jointly. If a party rejects an offer to conciliate, there can be no conciliation.

Parties may submit statements to the conciliator describing the general nature of the dispute and the

points at issue. Each party sends a copy of the statement to the other. The conciliator may request further details, may ask to meet the parties, or communicate with the parties orally or in writing. Parties may even submit suggestions for the settlement of the dispute to the conciliator.

When it appears to the conciliator that elements of settlement exist, he may draw up the terms of settlement and send it to the parties for their acceptance. If both the parties sign the settlement document, it shall be final and binding on both.

Note that in USA, this process is similar to Mediation. However, in India, Mediation is different from Conciliation and is a completely informal type of ADR mechanism.t

Lok Adalat

Etymologically, Lok Adalat means "people's court". India has had a long history of resolving disputes through the mediation of village elders. The current system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, whereby mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they thinks fit. These are usually presided by retired judge, social activists, or members of legal profession. It does not have jurisdiction on matters related to non-compoundable offences.

While in regular suits, the plaintiff is required to pay the prescribed court fee, in Lok Adalat, there is no court fee and no rigid procedural requirement (i.e. no need to follow process given by [Indian] Civil Procedure Code or Indian Evidence Act), which makes the process very fast. Parties can directly interact with the judge, which is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after giving an opportunity of being heard to the other party.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and cannot be appealed, not even under Article 226 of the Constitution of India [which empowers the litigants to file Writ Petition

before High Courts] because it is a judgement by consent.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.

Permanent Lok Adalat for public utility services

In order to get over the major drawback in the existing scheme of organisation of Lok Adalats under Chapter VI of the Legal Services Authorities Act 1987, in which if the parties do not arrive at any compromise or settlement, the unsettled case is either returned to the back to the court or the parties are advised to seek remedy in a court of law, which causes unnecessary delay in dispensation of justice, Chapter VI A was introduced in the Legal Services Authorities Act, 1987, by Act No.37/2002 with effect from 11-06-2002 providing for a Permanent Lok Adalat to deal with pre-litigation, conciliation and settlement of disputes relating to Public Utility Services, as defined u/sec.22 A of the Legal Services Authorities Act, 1987, at pre-litigation stage itself, which would result in reducing the work load of the regular courts to a great extent. Permanent Lok Adalat for Public Utility Services, Hyderabad, India

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat. The procedural laws, and the Evidence Act are not strictly followed while assessing the merits of the claim by the Lok Adalat.

Main condition of the Lok Adalat is that both parties in dispute should agree for settlement. The decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat.

Lok Adalat is very effective in settlement of money claims. Disputes like partition suits, damages and matrimonial cases can also be easily settled before Lok Adalat as the scope for compromise through an approach of give and take is high in these cases.

Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

B. LEGAL AID :

CONCEPT,DIMENSIONS AND CONSTITUTIONAL PROVISIONS:

"Legal Aid scheme was first introduced by Justice P.N. Bhagwati under the Legal Aid Committee formed in 1971. ing to him, the legal aid means providing an arrangement in the society so that the missionary of administration of becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to y law" the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be ediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and e. Legal aid as defined, deals with legal aid to poor, illiterate, who don't have access to courts. One need not be a to seek aid by means of legal aid. Legal aid is available to anybody on the road.

39A of the Constitution of India provides that State shall secure that the operation of the legal system promotes on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or isability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge led in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the .}

liest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for ng legal assistance to the indigent. In Britain, the history of the organised efforts on the part of the State to provide rvices to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed Rushcliffe ttee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make nendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the ince 1952, the Govt. of India also started addressing to the question of legal aid for the poor in various conferences Ministers and Law Commissions. In 1960, some guidelines were drawn by the Govt. for legal aid schemes.

rent states legal aid schemes were floated through Legal Aid Boards, Societies and Law Departments. In 1980, a ttee at the national level was constituted to oversee and supervise legal aid programmes throughout the country he Chairmanship of Hon. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India. This Committee o be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid es throughout the country. Expert committees constituted, from 1950 onwards, to advise governments on providing d to the poor have been unanimous that the formal legal system is unsuited to the needs of the poor. The 1977 of the committee of Justices Krishna Iyer and P.N. Bhagwati, both of the Supreme Court, drew up a detailed which envisaged public interest litigation (PIL) as a major tool in bringing about both institutional and law reform

LEGAL LITERACY MISSION

About 70% of the people are living in rural areas and most of them are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even substantial number of the literate people living in the cities and villages do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits, from which the people suffer in the state. The miserable condition in which the people find themselves can be alleviated to some extent by creating legal awareness amongst the people.

Following steps have been taken by Haryana State Legal Services Authority for Legal Awareness Campaign in the State of Haryana :-

Legal Literacy/Legal Awareness Camps/Seminars

On the direction of this Authority, all the District Legal Services Authorities are organizing Legal Literacy/Legal Awareness Camps in the remote rural areas in the State of Haryana at least once in a week i.e. on Sunday/ holidays, on the topics concerning SC/ST, Women and children and general public, so that the common man may be made aware about his legal rights.

Implementation of Legal Literacy Missions

In order to achieve the objective of spreading Legal Literacy, Haryana State Legal Services Authority has implemented special Legal Literacy Missions.

Prisoners Legal Literacy Mission (PLLM)

Haryana State Legal Services Authority is implementing Prisoners Legal Literacy Mission. The main objective of the Prisoners Legal Literacy Mission (PLLM) is to provide access to justice and to eradicate the evils of exploitation, inequality and suffering with the lamp of literacy. The project envisions that legal literacy will reform the mindset of the prisoners and help them become responsible members of the society. The objectives of the mission are to target the prisons and jails in a systematic manner and to hold Legal Awareness

Camps in prisons, prepare and publish Legal Literacy Literature in local language and to circulate the same amongst the prisoners; to organize skits and audio/visual presentations for the prisoners to educate them about their rights; to co-ordinate with the prisons authorities to ensure that freedoms that belong to the prisoners are made available to them and to help improve prison conditions by setting up low cost programmes such as crafts, weaving, workshops etc. which are vacation oriented and self-financed. The project is being implemented and monitored at the district level by the District & Sessions Judge-cum-Chairman of the District Legal Services Authority through Co-ordination Committee and Haryana State Legal Services Authority is periodically reviewing the progress of the mission.

Legal Literacy Mission for empowerment of underprivileged (LLUP)

Haryana State Legal Services Authority has also launched Legal Literacy Mission for empowerment of underprivileged (LLUP). LLUP envisages creating awareness among neglected children, who are forced to take shelter in orphanage centres, helpless girls and women who are forced to take shelter in Nari Niketan or other such institutions, neglected old age people, disabled, mentally ill persons living under helpless situation under the care or control of government-run or non-government-run organizations. Such people have also guaranteed constitutional right to food, clothing and shelter and right to equality and equal access to justice and legal aid for enforcement of the said rights. The Haryana State Legal Services Authority through Legal Aid Panel Advocates or otherwise is coordinating with all such organizations running such homes with a view to ensure the fulfillment of constitutional rights of such persons.

STUDENTS LEGAL LITERACY MISSION

Publicity through print and electronic Media

Haryana State Legal Service Authority through the District Legal Services Authorities and Sub-Divisional Legal Services Committees distributes books, pamphlets, folders amongst the masses and displayed flex banners/calendars/canopies on the different occasions so that they may be made aware about their legal rights and availability of free legal services under

the Legal Services Authorities Act, 1987. Wide publicity is also given in the leading newspapers in the State of Haryana and on cable TV and Doordarshan.

Publicity regarding Lok Adalats, Legal Aid and Legal Literacy Programmes in the State of Haryana is also made by the Public Relations and Cultural Affairs Department, Haryana through electronic and print media by organizing skits and nukkar-nataks, displaying the documentary films "Savera", "Beti" and "Nasha Khori Se Nasha Mukti Ki Aur" through the local cable network and mobile vans of the Department.

Recently, on 9th November, 2011 i.e. Legal Services Day, Hon'ble Executive Chairman of this Authority attended a talk show on TV, highlighting activities of HALSA and explained the various schemes being run by HALSA for downtrodden people which was telecasted in all over Haryana through Doordarshan Kender, Hissar. Similar talk show was broadcasted on All India Radio, Chandiagarh.

PUBLICATION BY HARYANA STATE LEGAL SERVICES AUTHORITY

Exhibiting documentary films through EDUSAT:

The recent advances in telecommunication are also being utilized for achieving the object of spreading legal awareness. Documentary films on socially relevant issues, such as "Beti" (dealing with evils of female foeticide), "Nashakhori Sey Nashamukti Ki Aur" (dealing with evil of drug abuse) and "Savera" (dealing with legal services and Lok Adalats) have been shown to the students through EDUSAT.

STEPS TAKEN FOR LEGAL LITERACY CLASSES FOR WOMEN

Haryana State Legal Services Authority has requested all the Secretaries, District Legal Services Authorities, Director, Social Justice and Empowerment, Director, Women and Child Development Departments, Haryana to organize legal literacy classes for women in small groups like neighborhood groups(NHG) and self-help groups(SHG) with the assistance of District Child Welfare Officers/ District Welfare Officers/Protection Officers and distribute the books published by this Authority on the topics of social and legal issues

concerning women. A set of books has been sent to them with the request to get published sufficient number of theses books for distribution to the women who attend these classes. In this regard legal literacy classes for women are organizing by the District Legal Services Authorities.

STEPS TAKEN FOR STRENGTHENING AND TRAINING OF LEGAL AID LAWYERS.

Workshop for Training of the Empanelled Advocates of District Legal Services Authorities

The advocates were sensitized regarding the need for spreading legal literacy especially amongst the under privileged and regarding need to inform the weaker sections of the society about their rights and also about the mode for enforcing those rights. It was emphasized that HSLSA should become a household word. Everyone should know about it, and should rely upon it. The advocates were also asked to address the Legal Literacy Clubs set up in the schools and colleges, on the topics given in the list prepared for Legal Literacy Camps.

The Field Officer, Social Welfare Office, Protection Officers, Project Officers, MGNREGA also attended the Workshop. The Protection Officer addressed this Workshop on the provisions of 'Protection of Women from Domestic Violence Act, 2005'and shared her experiences while working as a Protection Officer. The Social Welfare Officer disclosed about the various welfare schemes of the Haryana Government, regarding compensation in cases of deaths and injuries from hit and run motor vehicle accidents as well as deaths due to snake bites etc. and also explained the Rajiv Gandhi Parivar Bima Yojna and Rashtriya Parivar Yojna.

Front Office

This Authority vide letter No.6524-6544 dated 18.5.2010 forwarded the Scheme for Free and Competent Legal Services – 2010 to all the District & Sessions Judges/Additional District & Sessions Judge(I)-cum-Chairmen, District Legal Services Authorities in the State of Haryana for taking appropriate action at the earliest. Again this Authority vide letter

No.6028-6048 dated 26.5.2011 requested all the District & Sessions Judges/Additional District & Sessions Judge(I)-cum-Chairmen, District Legal Services Authorities in the State of Haryana to intimate this Authority whether the "Front Office" has been established by their District. They were also requested to send date wise schedule of Advocate/Retainers manning "Front Office".

In response thereto Front Office has been set up by 9 District Legal Services Authorities i.e. Faridabad, Fatehabad, Jhajjar, Kaithal, Karnal, Palwal, Panipat, Narnaul, Rewari and Rohtak. There are 21 Districts in Haryana and DLSAs of other districts have been requested to set up Front Office at the earliest under intimation to this Authority.

Panel of Lawyers

All the District Legal Services Authorities and Sub-Division Legal Committees have prepared panel of Lawyers as per Regulation 8 of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010.

Legal Practitioners to be designated as Retainers

As per Regulation 8 of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has designated ten empanelled advocates of DLSA/five empanelled advocates of SDLSC as Retainer on rotation basis in each District and in each Sub- Division of Haryana. The Retainers are available on rotation basis in the Front Office established in the Court Complexes during office hours for giving free legal aid and advice to any person who approach them with any legal problem.

Scrutinizing Committee

As per Regulation 7(2) of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has constituted a Scrutinizing Committee in each District and in each Sub-Division of Haryana to scrutinize and evaluate the applications for Legal Services under the said scheme.

Monitoring Committee

As per Regulation 10(3) of the National Legal Services Authority (Free Competent Legal Services) Regulations, 2010, Haryana State Legal Services Authority has constituted a Monitoring Committee in each District and in each Sub-Division of Haryana for close monitoring of the court based legal services rendered and the progress of the cases in legal aid matters.

B) Haryana State Legal Services Authority has launched Legal Literacy Mission for empowerment of underprivileged (LLUP). LLUP envisages creating awareness about their rights among neglected children, who are forced to take shelter in orphanage centers, helpless girls and women who are forced to take shelter in Nari Niketan or other such institutions, neglected old age people, disabled, mentally ill persons living under helpless situation under the care or control of government-run or non-government-run organizations.

UNIT-2

TECHNIQUES OF ADR-I

NEGOTIATION

Negotiation can take a wide variety of forms, from a trained negotiator acting on behalf of a particular organization or position in a formal setting, to an informal negotiation between friends. Negotiation can be contrasted with mediation, where a neutral third party listens to each side's arguments and attempts to help craft an agreement between the parties.[1] It can also be compared with arbitration, which resembles a legal proceeding. In arbitration, both sides make an argument as to the merits of their case and the arbitrator decides the outcome. This negotiation is also sometimes called positional or hard-bargaining negotiation.

Negotiation theorists generally distinguish between two types of negotiation. Different theorists use different labels for the two general types and distinguish them in different ways.

One very common distinction concerns the distribution of gains (distributive versus integrative

models):[1]

Distributive negotiation

Distributive negotiation is also sometimes called positional or hard-bargaining negotiation. It tends to approach negotiation on the model of haggling in a market. In a distributive negotiation, each side often adopts an extreme position, knowing that it will not be accepted, and then employs a combination of guile, bluffing, and brinkmanship in order to cede as little as possible before reaching a deal. Distributive bargainers conceive of negotiation as a process of distributing a fixed amount of value. The term distributive implies that there is a finite amount of the thing being distributed or divided among the people involved. Sometimes this type of negotiation is referred to as the distribution of a "fixed pie." There is only so much to go around, but the proportion to be distributed is variable. Distributive negotiation is also sometimes called *win-lose* because of the assumption that one person's gain results in another person's loss. A distributive negotiation often involves people who have never had a previous interactive relationship, nor are they likely to do so again in the near future. Simple everyday examples would be buying a car or a house.

Integrative negotiation

Integrative negotiation is also sometimes called interest-based or principled negotiation. It is a set of techniques that attempts to improve the quality and likelihood of negotiated agreement by providing an alternative to traditional distributive negotiation techniques. While distributive negotiation assumes there is a fixed amount of value (a "fixed pie") to be divided between the parties, integrative negotiation often attempts to create value in the course of the negotiation ("expand the pie"). It focuses on the underlying interests of the parties rather than their arbitrary starting positions, approaches negotiation as a shared problem rather than a personalized battle, and insists upon adherence to objective, principled criteria as the basis for agreement.[3]

Integrative negotiation often involves a higher degree of trust and the forming of a relationship. It can also involve creative problem-solving that aims to achieve mutual gains. It is also sometimes called *win-win* negotiation

Tactics

There are many different ways to categorize the essential elements of negotiation.

One view of negotiation involves three basic elements: *process, behavior* and *substance*. The process refers to how the parties negotiate: the context of the negotiations, the parties to the negotiations, the tactics used by the parties, and the sequence and stages in which all of these play out. Behavior refers to the relationships among these parties, the communication between them and the styles they adopt. The substance refers to what the parties negotiate over: the agenda, the issues (positions and - more helpfully - interests), the options, and the agreement(s) reached at the endAnother view of negotiation comprises four elements: *strategy*, *process*, *tools*, and *tactics*. Strategy comprises the top level goals - typically including relationship and the final outcome. Processes and tools include the steps that will be followed and the roles taken in both preparing for and negotiating with the other parties. Tactics include more detailed statements and actions and responses to others' statements and actions. Some add to this *persuasion and influence*, asserting that these have become integral to modern day negotiation success, and so should not be omitted

Adversary or partner

The two basically different approaches to negotiating will require different tactics. In the distributive approach each negotiator is battling for the largest possible piece of the pie, so it may be quite appropriate - within certain limits - to regard the other side more as an adversary than a partner and to take a somewhat harder line. This would however be less appropriate if the idea were to hammer out an arrangement that is in the best interest of both sides. A good agreement is not one with maximum gain, but optimum gain. This does not by any means suggest that we should give up our own advantage for nothing. But a cooperative attitude will regularly pay dividends. What is gained is not at the expense of the other, but with him.

Employing an advocate

A skilled negotiator may serve as an advocate for one party to the negotiation. The advocate attempts to obtain the most favorable outcomes possible for that party. In this process the negotiator attempts to determine the minimum outcome(s) the other party is (or parties are) willing to accept, then adjusts their demands accordingly. A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes their party desires, but without driving the other party to permanently break off negotiations, unless the best alternative to a negotiated

agreement (BATNA) is acceptable.

Another negotiation tactic is bad guy/good guy. Bad guy/good guy is when one negotiator acts as a bad guy by using anger and threats. The other negotiator acts as a good guy by being considerate and understanding. The good guy blames the bad guy for all the difficulties while trying to get concessions and agreement from the opponent.

Perspective taking for integrative negotiation

Perspective taking can be helpful for two reasons: that it can help self-centered negotiators to seek mutually beneficial solutions, and it increases the likelihood of logrolling (when a favor is traded for another i.e. quid pro quo). Social motivation can increase the chances of a party conceding to a negotiation. While concession is mandatory for negotiations, research shows that people who concede more quickly, are less likely to explore all integrative and mutually beneficial solutions. Therefore, conceding reduces the chance of an integrative negotiation.

Negotiation styles

Kenneth W. Thomas identified 5 styles/responses to negotiation These five strategies have been frequently described in the literature and are based on the dual-concern model. The dual concern model of conflict resolution is a perspective that assumes individuals' preferred method of dealing with conflict is based on two themes or dimensions A concern for self (i.e. assertiveness), and

1. A concern for others (i.e. empathy).

Based on this model, individuals balance the concern for personal needs and interests with the needs and interests of others. The following five styles can be used based on individuals' preferences depending on their pro-self or pro-social goals. These styles can change over time, and individuals can have strong dispositions towards numerous styles. 1. Accommodating: Individuals who enjoy solving the other party's problems and preserving personal relationships. Accommodators are sensitive to the emotional states, body language, and verbal signals of the other parties. They can, however, feel taken advantage of in situations when the other party places little emphasis on the relationship. 2. Avoiding: Individuals who do not like to negotiate and don't do it unless warranted. When negotiating, avoiders tend to defer and dodge the confrontational aspects of negotiating;

however, they may be perceived as tactful and diplomatic. 3. Collaborating: Individuals who enjoy negotiations that involve solving tough problems in creative ways. Collaborators are good at using negotiations to understand the concerns and interests of the other parties. They can, however, create problems by transforming simple situations into more complex ones. 4. Competing: Individuals who enjoy negotiations because they present an opportunity to win something. Competitive negotiators have strong instincts for all aspects of negotiating and are often strategic. Because their style can dominate the bargaining process, competitive negotiators often neglect the importance of relationships. 5. Compromising: Individuals who are eager to close the deal by doing what is fair and equal for all parties involved in the negotiation. Compromisers can be useful when there is limited time to complete the deal; however, compromisers often unnecessarily rush the negotiation process and make concessions too quickly.

Types of negotiators

Three basic kinds of negotiators have been identified by researchers involved in The Harvard Negotiation Project. These types of negotiators are: **Soft bargainers**, **hard bargainers**, and **principled bargainers**.

- **Soft**. These people see negotiation as too close to competition, so they choose a gentle style of bargaining. The offers they make are not in their best interests, they yield to others' demands, avoid confrontation, and they maintain good relations with fellow negotiators. Their perception of others is one of friendship, and their goal is agreement. They do not separate the people from the problem, but are soft on both. They avoid contests of wills and will insist on agreement, offering solutions and easily trusting others and changing their opinions.

- **Hard**. These people use contentious strategies to influence, utilizing phrases such as "this is my final offer" and "take it or leave it." They make threats, are distrustful of others, insist on their position, and apply pressure to negotiate. They see others as adversaries and their ultimate goal is victory. Additionally, they will search for one single answer, and insist you agree on it. They do not separate the people from the problem (as with soft bargainers), but they are hard on both the people involved and the problem.

- **Principled**. Individuals who bargain this way seek integrative solutions, and do so by sidestepping commitment to specific positions. They focus on the problem rather than the intentions, motives, and needs of the people involved. They separate the people from the problem, explore interests, avoid bottom lines, and reach results based on standards (which are independent of personal will). They base their choices on objective criteria rather than power, pressure, self-interest, or an arbitrary decisional procedure. These criteria may be drawn from moral standards, principles of fairness, professional standards, tradition, and so on.

Researchers from The Harvard Negotiation Project recommend that negotiators explore a number of alternatives to the problems they are facing in order to come to the best overall conclusion/solution, but this is often not the case (as when you may be dealing with an individual utilizing soft or hard bargaining tactics) (Forsyth, 2010).

Bad faith negotiation

When a party pretends to negotiate, but secretly has no intention of compromising, the party is considered to be negotiating in bad faith. Bad faith is a concept in negotiation theory whereby parties pretend to reason to reach settlement, but have no intention to do so, for example, one political party may pretend to negotiate, with no intention to compromise, for political effect.

In international relations and political psychology

Bad faith in political science and political psychology refers to negotiating strategies in which there is no real intention to reach compromise, or a model of information processing. The "inherent bad faith model" of information processing is a theory in political psychology that was first put forth by Ole Holsti to explain the relationship between John Foster Dulles' beliefs and his model of information processing. t is the most widely studied model of one's opponent. A state is presumed to be implacably hostile, and contra-indicators of this are ignored. They are dismissed as propaganda ploys or signs of weakness. Examples are John Foster Dulles' position regarding the Soviet Union, or Hamas's position on the state of Israel.

Problems with laboratory studies

Negotiation is a rather complex interaction. Capturing all its complexity is a very difficult task, let alone isolating and controlling only certain aspects of it. For this reason most negotiation studies are done under laboratory conditions, and focus only on some aspects. Although lab studies have their advantages, they do have major drawbacks when studying emotions:

- Emotions in lab studies are usually manipulated and are therefore relatively 'cold' (not intense). Although those 'cold' emotions might be enough to show effects, they are qualitatively different from the 'hot' emotions often experienced during negotiations. In real life there is self-selection to which negotiation one gets into, which affects the emotional commitment, motivation and interests. However this is not the case in lab studies. Lab studies tend to focus on relatively few well defined emotions. Real life scenarios provoke a much wider scale of emotions. Coding the emotions has a double catch: if done by a third side, some emotions might not be detected as the negotiator sublimates them for strategic reasons. Self-report measures might overcome this, but they are usually filled only before or after the process, and if filled during the process might interfere with it

Barriers

- Lack of trust
- Informational vacuums and negotiator's dilemma
- Structural impediments
- Spoilers
- Cultural and gender differences
- Communication problems
- The power of dialogue

- **Tactics**

Tactics are always an important part of the negotiating process. But tactics don't often jump up and down shouting "Here I am, look at me." If they did, the other side would see right through them and

they would not be effective. More often than not they are subtle, difficult to identify and used for multiple purposes. Tactics are more frequently used in distributive negotiations and when the focus in on taking as much value off the table as possible. Many negotiation tactics exist. Below are a few commonly used tactics.

Auction: The bidding process is designed to create competition. When multiple parties want the same thing, pit them against one another. When people know that they may lose out on something, they will want it even more. Not only do they want the thing that is being bid on, they also want to win, just to win. Taking advantage of someone's competitive nature can drive up the price.

Brinksmanship: One party aggressively pursues a set of terms to the point at which the other negotiating party must either agree or walk away. Brinkmanship is a type of "hard nut" approach to bargaining in which one party pushes the other party to the "brink" or edge of what that party is willing to accommodate. Successful brinksmanship convinces the other party they have no choice but to accept the offer and there is no acceptable alternative to the proposed agreement.[37]

Bogey: Negotiators use the bogey tactic to pretend that an issue of little or no importance to him or her is very important Then, later in the negotiation, the issue can be traded for a major concession of actual importance.

Chicken: Negotiators propose extreme measures, often bluffs, to force the other party to chicken out and give them what they want. This tactic can be dangerous when parties are unwilling to back down and go through with the extreme measure.

Defence in Depth: Several layers of decision-making authority is used to allow further concessions each time the agreement goes through a different level of authority In other words, each time the offer goes to a decision maker, that decision maker asks to add another concession in order to close the deal.

Deadlines: Give the other party a deadline forcing them to make a decision. This method uses time to apply pressure to the other party. Deadlines given can be actual or artificial.

Good Guy/Bad Guy: The good guy/bad guy approach is typically used in team negotiations where one member of the team makes extreme or unreasonable demands, and the other offers a more

rational approach This tactic is named after a police interrogation technique often portrayed in the media. The "good guy" will appear more reasonable and understanding, and therefore, easier to work with. In essence, it is using the law of relativity to attract cooperation. The good guy will appear more agreeable relative to the "bad guy." This tactic is easy to spot because of its frequent use.

Highball/Lowball: Depending on whether selling or buying, sellers or buyers use a ridiculously high, or ridiculously low opening offer that will never be achieved. The theory is that the extreme offer will cause the other party to reevaluate his or her own opening offer and move close to the resistance point (as far as you are willing to go to reach an agreement Another advantage is that the person giving the extreme demand appears more flexible he or she makes concessions toward a more reasonable outcome. A danger of this tactic is that the opposite party may think negotiating is a waste of time.

The Nibble: Nibbling is asking for proportionally small concessions that haven't been discussed previously just before closing the deal. This method takes advantage of the other party's desire to close by adding "just one more thing."

Snow Job: Negotiators overwhelm the other party with so much information that he or she has difficulty determining which facts are important, and which facts are diversions.[43] Negotiators may also use technical language or jargon to mask a simple answer to a question asked by a non-expert.

MEDIATION

Mediation is the attempt to help parties in a disagreement to hear one another, to minimise the harm that can come from disagreement (e.g. hostility or 'demonising' of the other parties) to maximize any area of agreement, and to find a way of preventing the areas of disagreement from interfering with the process of seeking a compromise or mutually agreed outcome.

Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

The term "mediation" broadly refers to any instance in which a third party helps others reach

agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process.

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications and licensing followed, producing trained, professional mediators committed to the discipline.

The benefits of mediation include:

Cost

While a mediator may charge a fee comparable to that of an attorney, the mediation process generally takes much less time than moving a case through standard legal channels. While a case in the hands of a lawyer or a court may take months or years to resolve, mediation usually achieves a resolution in a matter of hours. Taking less time means expending less money on hourly fees and costs.

Confidentiality

While court hearings are public, mediation remains strictly confidential. No one but the parties to the dispute and the mediator or mediators know what happened. Confidentiality in mediation has such importance that in most cases the legal system cannot force a mediator to testify in court as to the content or progress of mediation. Many mediators destroy their notes taken during a mediation once that mediation has finished. The only exceptions to such strict confidentiality usually involve child abuse or actual or threatened criminal acts.

Control

Mediation increases the control the parties have over the resolution. In a court case, the parties obtain a resolution, but control resides with the judge or jury. Often, a judge or jury cannot legally provide solutions that emerge in mediation. Thus, mediation is more likely to produce a result that is mutually agreeable for the parties.

Compliance

Because the result is attained by the parties working together and is mutually agreeable, compliance with the mediated agreement is usually high. This further reduces costs, because

the parties do not have to employ an attorney to force compliance with the agreement. The mediated agreement is, however, fully enforceable in a court of law.

Mutuality

Parties to a mediation are typically ready to work mutually toward a resolution. In most circumstances the mere fact that parties are willing to mediate means that they are ready to "move" their position. The parties thus are more amenable to understanding the other party's side and work on underlying issues to the dispute. This has the added benefit of often preserving the relationship the parties had before the dispute.

Support

Mediators are trained in working with difficult situations. The mediator acts as a neutral facilitator and guides the parties through the process. The mediator helps the parties think "outside of the box" for possible solutions to the dispute, broadening the range of possible solutions.

Workplace matters

The implementation of human resource management (HRM) policies and practices has evolved to focus on the individual worker, and rejects all other third parties such as unions and AIRC. HRM together with the political and economic changes undertaken by Australia's Howard government created an environment where private ADR can be fostered in the workplace

The decline of unionism and the rise of the individual encouraged the growth of mediation. This is demonstrated in the industries with the lowest unionization rates such as in the private business sector having the greatest growth of mediation. The 2006 Work Choices Act made further legislative changes to deregulate industrial relations. A key element of the new changes was to weaken the AIRC by encouraging competition with private mediation.

A great variety of disputes occur in the workplace, including disputes between staff members, allegations of harassment, contractual disputes and workers compensation claims At large, workplace disputes are between people who have an ongoing working relationship within a closed system, which indicate that mediation or a workplace investigation would be appropriate as dispute resolution processes. However the complexity of relationships, involving hierarchy, job security and competitiveness can complicate mediation.

Party-Directed Mediation (PDM) is an emerging mediation approach particularly suited for disputes between co-workers, colleagues or peers, especially deep-seated interpersonal conflict, multicultural or multiethnic disputes. The mediator listens to each party separately in a pre-caucus or pre-mediation before ever bringing them into a joint session. Part of the pre-caucus also includes coaching and role plays. The idea is that the parties learn how to converse directly with their adversary in the joint session. Some unique challenges arise when organizational disputes involve supervisors and subordinates. The Negotiated Performance Appraisal (NPA) is a tool for improving communication between supervisors and subordinates and is particularly useful as an alternate mediation model because it preserves the hierarchical power of supervisors while encouraging dialogue and dealing with differences in opinion.

Community mediation

Disputes involving neighbors often have no official resolution mechanism. Community mediation centers generally focus on neighborhood conflict, with trained local volunteers serving as mediators. Such organizations often serve populations that cannot afford to utilize the courts or professional ADR-providers. Community programs typically provide mediation for disputes between landlords and tenants, members of homeowners associations and small businesses and consumers. Many community programs offer their services for free or at a nominal fee.

Experimental community mediation programs using volunteer mediators began in the early 1970s in several major U.S. cities. These proved to be so successful that hundreds of programs were founded throughout the country in the following two decades. In some jurisdictions, such as California, the parties have the option of making their agreement enforceable in court.

Peer Mediation

A peer mediator is one who resembles the disputants, such as being of similar age, attending the same school or having similar status in a business. Purportedly, peers can better relate to the disputants than an outsider

Peer mediation promotes social cohesion and aids development of protective factors that create positive school climates The National Healthy School Standard (Department for Education and Skills, 2004) highlighted the significance of this approach to reducing bullying and promoting pupil

achievement Schools adopting this process recruit and train interested students to prepare them.

Peace Pals is an empirically validated peer mediation program. was studied over a 5-year period and revealed several positive outcomes including a reduction in elementary school violence and enhanced social skills, while creating a more positive, peaceful school climate. Peer mediation helped reduce crime in schools, saved counselor and administrator time, enhanced self-esteem, improved attendance and encouraged development of leadership and problem-solving skills among students. Such conflict resolution programs increased in U.S. schools 40% between 1991 and 1999

Commercial disputes

Mediation was first applied to business and commerce and this domain remains the most common application, as measured by number of mediators and the total exchanged value.[The result of business mediation is typically a bilateral contract.

Commercial mediation includes work in finance, insurance, ship-brokering, procurement and real estate. In some areas, mediators have specialized designations and typically operate under special laws. Generally, mediators cannot themselves practice commerce in markets for goods in which they work as mediators.

Procurement mediation comprises disputes between a public body and a private body. In common law jurisdictions only regulatory stipulations on creation of supply contracts that derive from the fields of State Aids (EU Law and domestic application) or general administrative guidelines extend ordinary laws of commerce. The general law of contract applies in the UK accordingly. Procurement mediation occurs in circumstances after creation of the contract where a dispute arises in regard to the performance or payments. A Procurement mediator in the UK may choose to specialise in this type of contract or a public body may appoint an individual to a specific mediation panel.

Process

Roles

Mediator

The mediator's primary role is to act as a neutral third party who facilitates discussions between the

parties In addition, the mediator can contribute to the process ensuring that all necessary preparations are complete

Finally, the mediator should restrict pressure, aggression and intimidation, demonstrate how to communicate through employing good speaking and listening skills, and paying attention to non-verbal messages and other signals emanating from the context of the mediation and possibly contributing expertise and experience. The mediator should direct the parties to focus on issues and stay away from personal attacks.

Parties

The role of the parties varies according to their motivations and skills, the role of legal advisers, the model of mediation, the style of mediator and the culture in which the mediation takes place. Legal requirements may also affect their roles. Party-Directed Mediation (PDM) is an emerging approach involving a pre-caucus between the mediator and each of the parties before going into the joint session. The idea is to help the parties improve their interpersonal negotiation skills so that in the joint session they can address each other with little mediator interference.

One of the general requirements for successful mediation is that those representing the respective parties have full authority to negotiate and settle the dispute. If this is not the case, then there is what Spencer and Brogan refer to as the "empty chair" phenomenon, that is, the person who ought to be discussing the problem is simply not present.

Preparation

The parties' first role is to consent to mediation, possibly before preparatory activities commence. Parties then prepare in much the same way they would for other varieties of negotiations. Parties may provide position statements, valuation reports and risk assessment analysis. The mediator may supervise/facilitate their preparation and may require certain preparations.

Disclosure

Agreements to mediate, mediation rules, and court-based referral orders may have disclosure requirements. Mediators may have express or implied powers to direct parties to produce documents, reports and other material. In court-referred mediations parties usually exchange with each other all

material which would be available through discovery or disclosure rules were the matter to proceed to hearing, including witness statements, valuations and statement accounts.

Participation

Mediation requires direct input from the parties. Parties must attend and participate in the mediation meeting. Some mediation rules require parties to attend in person. Participation at one stage may compensate for absence at another stage.

Preparation

Choose an appropriate mediator, considering experience, skills, credibility, cost, etc. The criteria for mediator competence is under dispute. Competence certainly includes the ability to remain neutral and to move parties though various impasse-points in a dispute. The dispute is over whether expertise in the subject matter of the dispute should be considered or is actually detrimental to the mediator's objectivity.

Preparatory steps for mediation can vary according to legal and other requirements, not least gaining the willingness of the parties to participate. In some court-connected mediation programs, courts require disputants to prepare for mediation by making a statement or summary of the subject of the dispute and then bringing the summary to the mediation. In other cases, determining the matter(s) at issue can become part of the mediation itself.

Consider having the mediator meet the disputants prior to the mediation meeting. This can reduce anxiety, improve settlement odds and increase satisfaction with the mediation process. Ensure that all participants are ready to discuss the dispute in a reasonably objective fashion. Readiness is improved when disputants consider the viability of various outcomes.

Provide reasonable estimates of loss and/or damage.

Identify other participants. In addition to the disputants and the mediator, the process may benefit from the presence of counsel, subject-matter experts, interpreters, family, etc.

Secure a venue for each mediation session. The venue must foster the discussion, address any special needs, protect privacy and allow ample discussion time.

Ensure that supporting information such as pictures, documents, corporate records, pay-stubs, rent-rolls, receipts, medical reports, bank-statements, etc., are available.

Have parties sign a contract that addresses procedural decisions, including confidentiality, mediator payment, communication technique, etc.

Meeting

The typical mediation has no formal compulsory elements, although some elements usually occur:

- establishment of ground rules framing the boundaries of mediation
- parties detail their stories
- identification of issues
- clarify and detail respective interests and objectives
- search for objective criteria
- identify options
- discuss and analyze solutions
- adjust and refine proposed solutions
- record agreement in writing

Individual mediators vary these steps to match specific circumstances, given that the law does not ordinarily govern mediators' methods.

Criteria

The following are useful criteria for selecting a mediator:

- Personal attributes—patience, empathy, intelligence, optimism and flexibility
- Qualifications—knowledge of the theory and practice of conflict, negotiation and mediation, mediations skills.
- Experience— mediation experience, experience in the substantive area of dispute and personal life experience
- Training
- Professional background
- Certification and its value

- Suitability of the mediation model
- Conflicts of interest
- Cost/fee

Third party nomination

Contracts that specify mediation may also specify a third party to suggest or impose an individual. Some third parties simply maintain a list of approved individuals, while others train mediators. Lists may be “open” (any person willing and suitably qualified can join) or a “closed” panel (invitation only).

In the UK and internationally, lists are generally open, such as The Chartered Institute of Arbitrators, the Centre for Dispute Resolution. Alternatively, private panels co-exist and compete for appointments e.g.,Savills Mediation

Liability

Legal liability may stem from a mediation. For example, a mediator could be liable for misleading the parties or for even inadvertently breaching confidentiality. Despite such risks, follow-on court action is quite uncommon. Only one case reached that stage in Australia as of 2006. Damage awards are generally compensatory in nature. Proper training is mediators' best protection.

Liability can arise for the mediator from Liability in Contract; Liability in Tort; and Liability for Breach of Fiduciary Obligations.

Liability in Contract arises if a mediator breaches (written or verbal) contract with one or more parties. The two forms of breach are *failure to perform* and *anticipatory breach*. Limitations on liability include the requirement to show actual causation.

Liability in Tort arises if a mediator influences a party in any way (compromising the integrity of the decision), defames a party, breaches confidentiality, or most commonly, is negligent. To be awarded damages, the party must show actual damage, and must show that the mediator's actions (and not the party's actions) were the actual cause of the damage.

Liability for Breach of Fiduciary Obligations can occur if parties misconceive their relationship with

a mediator as something other than neutrality. Since such liability relies on a misconception, court action is unlikely to succeed.

Tapoohi v Lewenberg (Australia

As of 2008 Tapoohi v Lewenberg was the only case in Australia that set a precedent for mediators' liability.

The case involved two sisters who settled an estate via mediation. Only one sister attended the mediation in person: the other participated via telephone with her lawyers present. An agreement was executed. At the time it was orally expressed that before the final settlement, taxation advice should be sought as such a large transfer of property would trigger capital gains taxes.

Tapoohi paid Lewenberg $1.4 million in exchange for land. One year later, when Tapoohi realized that taxes were owed, she sued her sister, lawyers and the mediator based on the fact that the agreement was subject to further taxation advice.

The original agreement was verbal, without any formal agreement. Tapoohi, a lawyer herself, alleged that the mediator breached his contractual duty, given the lack of any formal agreement; and further alleged tortious breaches of his duty of care.

Although the court dismissed the summary judgment request, the case established that mediators owe a duty of care to parties and that parties can hold them liable for breaching that duty of care. Habersberger J held it "not beyond argument" that the mediator could be in breach of contractual and tortious duties. Such claims were required to be assessed at a trial court hearing.[*clarification needed*]

This case emphasized the need for formal mediation agreements, including clauses that limit mediators' liability.

Mediation with arbitration

Mediation has sometimes been utilized to good effect when coupled with arbitration, particularly binding arbitration, in a process called 'mediation/arbitration'. The process begins as a standard mediation, but if mediation fails, the mediator becomes an arbiter.

This process is more appropriate in civil matters where rules of evidence or jurisdiction are not in dispute. It resembles, in some respects, criminal plea-bargaining and Confucian judicial procedure, wherein the judge also plays the role of prosecutor—rendering what, in Western European court procedures, would be considered an arbitral (even 'arbitrary') decision.

Mediation/arbitration hybrids can pose significant ethical and process problems for mediators. Many of the options and successes of mediation relate to the mediator's unique role as someone who wields no coercive power over the parties or the outcome. The parties awareness that the mediator might later act in the role of judge could distort the process. Using a different individual as the arbiter addresses this concern.

Alternatives

Mediation is one of several approaches to resolving disputes. It differs from adversarial resolution processes by virtue of its simplicity, informality, flexibility, and economy.

Not all disputes lend themselves well to mediation. Success is unlikely unlessAll parties' are ready and willing to participate.

- All (or no) parties have legal representation. Mediation includes no right to legal counsel.
- All parties are of legal age (although see peer mediation) and are legally competent to make decisions.

Conciliation

Conciliation sometimes serves as an umbrella-term that covers mediation and facilitative and advisory dispute-resolution processes. Neither process determines an outcome, and both share many similarities. For example, both processes involve a neutral third-party who has no enforcing powers.

One significant difference between conciliation and mediation lies in the fact that conciliators possess expert knowledge of the domain in which they conciliate. The conciliator can make suggestions for settlement terms and can give advice on the subject-matter. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute the conciliator has a duty to provide legal information. This helps ensure that agreements comply with relevant statutory frameworks. Therefore, conciliation may include an advisory aspect.

Mediation is purely facilitative: the mediator has no advisory role. Instead, a mediator seeks to help parties to develop a shared understanding of the conflict and to work toward building a practical and lasting resolution

Both mediation and conciliation work to identify the disputed issues and to generate options that help disputants reach a mutually satisfactory resolution. They both offer relatively flexible processes. Any settlement reached generally must have the agreement of all parties. This contrasts with litigation, which normally settles the dispute in favour of the party with the strongest legal argument. In-between the two operates collaborative law, which uses a facilitative process where each party has counsel.

Counselling

A counsellor generally uses therapeutic techniques. Some—such as a particular line of questioning—may be useful in mediation. But the role of the counsellor differs from the role of the mediator. The list below is not exhaustive but it gives an indication of important distinctions:

- A mediator aims for clear agreement between the participants as to how they will deal with specific issues. A counsellor is more concerned with the parties gaining a better self-understanding of their individual behaviour.
- A mediator, while acknowledging a person's feelings, does not explore them in any depth. A counsellor is fundamentally concerned about how people feel about a range of relevant experiences.
- A mediator focuses upon participants' future goals rather than a detailed analysis of past events. A counsellor may find it necessary to explore the past in detail to expose the origins and patterns of beliefs and behaviour.
- A mediator controls the process but does not overtly try to influence the participants or the actual outcome. A counsellor often takes an intentional role in the process, seeking to influence the parties to move in a particular direction or consider specific issues.
- A mediator relies on all parties being present to negotiate, usually face-to-face. A counsellor does not necessarily see all parties at the same time.
- A mediator is required to be neutral. A counsellor may play a more supportive role, where appropriate.

- Mediation requires both parties to be willing to negotiate. Counselling may work with one party even if the other is not ready or willing to participate.
- Mediation is a structured process that typically completes in one or a few sessions. Counselling tends to be ongoing, depending upon participants' needs and progress.

Confidentiality

One of the hallmarks of mediation is that the process is strictly confidential. Two competing principles affect confidentiality. One principle encourages confidentiality to encourage people to participate, while the second principle states that all related facts should be available to courts.

The mediator must inform the parties of their responsibility for confidentiality.

Steps put in place during mediation to help ensure this privacy include:

1. All sessions take place behind closed doors.
2. Outsiders can observe proceedings only with both parties' consent.
3. The meeting is not recorded.
4. Publicity is prohibited.

Confidentiality is a powerful and attractive feature of mediation . lowers the risk to participants of disclosing information and emotions and encourages realism by eliminating the benefits of posturing. In general, information discussed in mediation cannot be used as evidence in the event that the matter proceeds to court, in accord with the mediation agreement and common lawFew mediations succeed unless the parties can communicate fully and openly without fear of compromising a potential court case. The promise of confidentiality mitigates such concerns Organisations often see confidentiality as a reason to use mediation in lieu of litigation, particularly in sensitive areas. This contrasts with the public nature of courts and other tribunals. However mediation need not be private and confidential In some circumstances the parties agree to open the mediation in part or whole. Laws may limit confidentiality. For example, mediators must disclose allegations of physical or other abuse to authorities. The more parties in a mediation, the less likely that perfect confidentiality will be maintained. Some parties may even be required to give an account of the mediation to outside constituents or authorities. Most countries respect mediator confidentiality.

UNIT-3

Techniques of ADR-II

Conciliation is a process through which two or more parties may explore and reach a negotiated solution to their conflict with the help of a third neutral and disinterested party, the conciliator.

The conciliation process finds its most solid foundation and eventual success on the will of the parties to engage in a meaningful dialogue regardless of the depth of their differences. Anyone wishing to explore a negotiated solution to a problem -whatever its nature-should do so with an open mind, for conciliation intends to explore common grounds upon which the parties may build an agreement acceptable to all involved.

Because of his impartiality, independence, and professional experience, the conciliator can help the parties understand the motives and needs of all involved. However, the conciliation process does not seek a solution at any cost, nor may a conciliator impose a solution upon the parties.

The difference between conciliation and mediation lies in that the conciliator may offer an opinion and alternatives with respect to proposals advanced by any one party to the other. The process itself does not vary when compared to the mediation process.

It is notable that the terms mediation and conciliation are often used interchangeably and are accorded the same meaning, mediation. Most Latin American countries, for example, refer to mediation as conciliation; they mean mediation. It is also noteworthy that an increasing number of countries are prohibiting the making of a legal distinction between conciliation and mediation because there have been instances where mutually acceptable agreements were later successfully challenged in court on the bases that the accord was reached through conciliation, not mediation **Conciliation** is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, encouraging parties to explore potential solutions and assisting parties in finding a mutually acceptable outcome.

Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.

Conciliation differs from mediation in that in conciliation, often the parties are in need of restoring or repairing a relationship, either personal or business.

Effectiveness

Recent studies in the processes of negotiation have indicated the effectiveness of a technique that deserves mention here. A conciliator assists each of the parties to independently develop a list of all of their objectives (the outcomes which they desire to obtain from the conciliation). The conciliator then has each of the parties separately prioritize their own list from most to least important. He/She then goes back and forth between the parties and encourages them to "give" on the objectives one at a time, starting with the least important and working toward the most important for each party in turn. The parties rarely place the same priorities on all objectives, and usually have some objectives that are not listed by the other party. Thus the conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop.

Most successful conciliators are highly skilled negotiators. Some conciliators operate under the auspices of any one of several non-governmental entities, and for governmental agencies such as the Federal Mediation and Conciliation Service in the United States

Historical conciliation

Historical conciliation is an applied conflict resolution approach that utilizes historical narratives to positively transform relations between societies in conflicts. Historical conciliation can utilize many different methodologies, including mediation, sustained dialogue, apologies, acknowledgement, support of public commemoration activities, and public diplomacy.

Historical conciliation is not an excavation of objective facts. The point of facilitating historical questions is not to discover all the facts in regard to who was right or wrong. Rather, the objective is to discover the complexity, ambiguity, and emotions surrounding both dominant and non-dominant cultural and individual narratives of history. It is also not a rewriting of history. The goal is not to

create a combined narrative that everyone agrees upon. Instead, the aim is to create room for critical thinking and more inclusive understanding of the past and conceptions of "the other."

Conflicts that are addressed through historical conciliation have their roots in conflicting identities of the people involved. Whether the identity at stake is their ethnicity, religion or culture, it requires a comprehensive approach that takes people's needs, hopes, fears, and concerns into account.

---ARBITRATION: Arbitration agreement/clause

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts. The parties to a dispute refer it to *arbitration* by one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), and agree to be bound by the arbitration decision (the "award"). A third party reviews the evidence in the case and imposes a decision that is legally binding on both sides and enforceable in the courts

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. In certain countries such as the United States, arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration can be either voluntary or mandatory (although mandatory arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur) and can be either binding or non-binding. Non-binding arbitration is similar to mediation in that a decision cannot be imposed on the parties. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable. By one definition arbitration is binding and non-binding arbitration is therefore technically not arbitration.

Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding. There are

limited rights of review and appeal of arbitration awards. Arbitration is not the same as:

- judicial proceedings, although in some jurisdictions, court proceedings are sometimes referred as arbitrations[2]
- alternative dispute resolution (ADR) expert determination
- mediation (a form of settlement negotiation facilitated by a neutral third party)

Advantages and disadvantages

Parties often seek to resolve disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

- In contrast to litigation, where one cannot "choose the judge arbitration allows the parties to choose their own tribunal. This is especially useful when the subject matter of the dispute is highly technical: arbitrators with an appropriate degree of expertise (for example, quantity surveying expertise, in the case of a construction dispute, or expertise in commercial property law, in the case of a real estate dispute) can be chosen.
- Arbitration is often faster than litigation in court. Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied.
- Because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court verdicts.
- In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability.

Some of the disadvantages include:

- Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.

- If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case.
- If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee
- There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.
- Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.
- In some legal systems, arbitration awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect.
- Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavorable ruling.
- Discovery may be more limited in arbitration or entirely nonexistent.
- The potential to generate billings by attorneys may be less than pursuing the dispute through trial.
- Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award.

Arbitrability

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedures cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters were not arbitrable in the United States . Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an

agreement upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.

Arbitration agreement

Arbitration agreements are generally divided into two typesAgreements which provide that, if a dispute should arise, it will be resolved by arbitration. These will generally be normal contracts, but they contain an arbitration clause

- Agreements which are signed after a dispute has arisen, agreeing that the dispute should be resolved by arbitration (sometimes called a "submission agreement")

The former is the far more prevalent type of arbitration agreement. Sometimes, legal significance attaches to the type of arbitration agreement. For example, in certain Commonwealth countries (not including England and Wales), it is possible to provide that each party should bear their own costs in a conventional arbitration clause, but not in a submission agreement.

In keeping with the informality of the arbitration process, the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts. Clauses which have been upheld include:

- "arbitration in London - English law to apply
- "suitable arbitration clause
- "arbitration, if any, by ICC Rules in London"

The courts have also upheld clauses which specify resolution of disputes other than in accordance with a specific legal system. These include provision indicating:

- That the arbitrators "must not necessarily judge according to the strict law but as a general rule ought chiefly to consider the principles of practical business

- "internationally accepted principles of law governing contractual relations"

Agreements to refer disputes to arbitration generally have a special status in the eyes of the law. For example, in disputes on a contract, a common defence is to plead the contract is void and thus any claim based upon it fails. It follows that if a party successfully claims that a contract is void, then each clause contained within the contract, including the arbitration clause, would be void. However, in most countries, the courts have accepted that:

1. A contract can only be declared void by a court or other tribunal; and
2. If the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not, is the arbitration tribunal.
3. Arguably, either position is potentially unfair; if a person is made to sign a contract under duress, and the contract contains an arbitration clause highly favourable to the other party, the dispute may still referred to that arbitration tribunalConversely a court may be persuaded that the arbitration agreement itself is void having been signed under duress. However, most courts will be reluctant to interfere with the general rule which does allow for commercial expediency; any other solution (where one first had to go to court to decide whether one had to go to arbitration) would be self-defeating.

International

History

The United States and Great Britain were pioneers in the use of arbitration to resolve their differences. It was first used in the Jay Treaty of 1795, and played a major role in the Alabama Claims case of 1872 whereby major tensions regarding British support for the Confederacy during the American Civil War were resolved. At the First International Conference of American States in 1890, a plan for systematic arbitration was developed, but not excepted. The Hague Peace Conference of 1899, saw the major world powers agreed to a system of arbitration and the creation of a Permanent Court of Arbitration. President William Howard Taft was a major advocate. One important use came in the Newfoundland fisheries dispute between the United States and Britain in 1910. In 1911 the United States signed arbitration treaties with France and Britain

Arbitration was widely discussed among diplomats and elites in the 1890-1914 era. The 1895 dispute

between the United States and Britain over Venezuela was peacefully resolved through arbitration. Both nations realized that a mechanism was desirable to avoid possible future conflicts. The Olney-Pauncefote Treaty of 1897 was a proposed treaty between the United States and Britain in 1897 that required arbitration of major disputes. The treaty was rejected by the U.S. Senate and never went into effect.[24]

American Secretary of State William Jennings Bryan (1913-1915) worked energetically to promote international arbitration agreements, but his efforts were frustrated by the outbreak of World War I. Bryan negotiated 28 treaties that promised arbitration of disputes before war broke out between the signatory countries and the United States. He made several attempts to negotiate a treaty with Germany, but ultimately was never able to succeed. The agreements, known officially as "Treaties for the Advancement of Peace," set up procedures for conciliation rather than for arbitration. Arbitration treaties were negotiated after the war, but attracted much less attention than the negotiation mechanism created by the League of Nations.

International agreements

By far the most important international instrument on arbitration law[is the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, usually simply referred to as the "New York Convention". Virtually every significant commercial country is a signatory, and only a handful of countries are not parties to the New York Convention.

Some other relevant international instruments are:

- The Geneva Protocol of 1923
- The Geneva Convention of 1927
- The European Convention of 1961
- The Washington Convention of 1965 (governing settlement of international investment disputes)
- The Washington Convention (ICSID) of 1996 for investment arbitration
- The UNCITRAL Model Law on International Commercial Arbitration of 1985, (revised in 2006).[26]
- The UNCITRAL Arbitration Rules (providing a set of rules for an ad hoc arbitration)

International enforcement

It is often easier to enforce arbitration awards in a foreign country than court judgments.[*citation needed*] Under the New York Convention 1958, an award issued in a contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. Only foreign arbitration awards are enforced pursuant to the New York Convention. An arbitral decision is foreign where the award was made in a state other than the state of recognition or where foreign procedural law was used.[27]

Virtually every significant commercial country in the world is a party to the Convention while relatively few countries have a comprehensive network for cross-border enforcement of judgments their courts. Additionally, the awards not limited to damages. Whereas typically only monetary judgments by national courts are enforceable in the cross-border context, it is theoretically possible (although unusual in practice) to obtain an enforceable order for specific performance in an arbitration proceeding under the New York Convention.

Article V of the New York Convention provides an exhaustive list of grounds on which enforcement can be challenged. These are generally narrowly construed to uphold the pro-enforcement bias of the Convention.

Government disputes

Certain international conventions exist in relation to the enforcement of awards against states.

- The Washington Convention 1965 relates to settlement of investment disputes between states and citizens of other countries. The Convention created the International Centre for Settlement of Investment Disputes (or ICSID). Compared to other arbitration institutions, relatively few awards have been rendered under ICSID.[28]
- The Algiers Declaration of 1981 established the Iran-US Claims Tribunal to adjudicate claims of American corporations and individuals in relation to expropriated property during the Islamic revolution in Iran in 1979. The tribunal has not been a notable success, and has even been held by an English court to be void under its own governing law.[29]

Arbitral tribunal

The arbitrators which determine the outcome of the dispute are called the arbitral tribunal. The composition of the arbitral tribunal can vary enormously, with either a sole arbitrator sitting, two or more arbitrators, with or without a chairman or umpire, and various other combinations. In most jurisdictions, an arbitrator enjoys immunity from liability for anything done or omitted whilst acting as arbitrator unless the arbitrator acts in bad faith.

Arbitrations are usually divided into two types: *ad hoc* arbitrations and administered arbitrations.

In *ad hoc* arbitrations, the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties. After the tribunal has been formed, the appointing authority will normally have no other role and the arbitation will be managed by the tribunal.

In administered arbitration, the arbitration will be administered by a professional arbitration institution providing arbitration services, such as the LCIA in London, or the ICC in Paris, or the American Arbitration Association in the United States. Normally the arbitration institution also will be the appointing authority. Arbitration institutions tend to have their own rules and procedures, and may be more formal. They also tend to be more expensive, and, for procedural reasons, slower.

Duties of the tribunal

The duties of a tribunal will be determined by a combination of the provisions of the arbitration agreement and by the procedural laws which apply in the seat of the arbitration. The extent to which the laws of the seat of the arbitration permit "party autonomy" (the ability of the parties to set out their own procedures and regulations) determines the interplay between the two.

However, in almost all countries the tribunal owes several non-derogable duties. These will normally be:

- to act fairly and impartially between the parties, and to allow each party a reasonable opportunity to put their case and to deal with the case of their opponent (sometimes shortened to: complying with the rules of "natural justice"); and
- to adopt procedures suitable to the circumstances of the particular case, so as to provide a fair means for resolution of the dispute.[31]

Arbitral awards[

Although arbitration awards are characteristically an award of damages against a party, in many jurisdictions tribunals have a range of remedies that can form a part of the award. These may include:

1. payment of a sum of money (conventional damages)
2. the making of a "declaration" as to any matter to be determined in the proceedings
3. in somejurisdictions, the tribunal may have the same power as a court to:
    1. order a party to do or refrain from doing something ("injunctive relief")
    2. to order specific performance of a contract
    3. to order the rectification, setting aside or cancellation of a deed or other document.
4. In other jurisdictions, however, unless the parties have expressly granted the arbitrators the right to decide such matters, the tribunal's powers may be limited to deciding whether a party is entitled to damages. It may not have the legal authority to order injunctive relief, issue a declaration, or rectify a contract, such powers being reserved to the exclusive jurisdiction of the courts.

Nomenclature

As methods of dispute resolution, arbitration procedure can be varied to suit the needs of the parties. Certain specific "types" of arbitration procedure have developed, particularly in North America.

- **Judicial Arbitration** is, usually, not arbitration at all, but merely a court process which refers to itself as arbitration, such as small claims arbitration before the County Courts in the United Kingdom
- **Online Arbitration** is, a form of arbitration that occurs exclusively online There is currently an assumption that online arbitration is admissible under the New York Convention and the E-Commerce Directive, but this has not been legally verified Since arbitration is based on a contractual agreement between the parties, an online process without a regulatory framework may generate a significant number of challenges from consumers and other weaker parties if due process cannot be assured.

- **High-Low Arbitration**, or **Bracketed Arbitration**, is an arbitration wherein the parties to the dispute agree in advance the limits within which the arbitral tribunal must render its award. It is only generally useful where liability is not in dispute, and the only issue between the party is the amount of compensation. If the award is lower than the agreed minimum, then

the defendant only need pay the lower limit; if the award is higher than the agreed maximum, the claimant will receive the upper limit. If the award falls within the agreed range, then the parties are bound by the actual award amount. Practice varies as to whether the figures may or may not be revealed to the tribunal, or whether the tribunal is even advised of the parties' agreement.

- **Binding Arbitration** is a form of arbitration where the decision by the arbitrator is legally binding and enforceable, similar to a court order.

- **Non-Binding Arbitration** is a process which is conducted as if it were a conventional arbitration, except that the award issued by the tribunal is not binding on the parties, and they retain their rights to bring a claim before the courts or other arbitration tribunal; the award is in the form of an independent assessment of the merits of the case, designated to facilitate an out-of-court settlement. State law may automatically make a non-binding arbitration binding, if, for example, the non-binding arbitration is court-ordered, and no party requests a trial *de novo* (as if the arbitration had not been held).
- **Pendulum Arbitration** refers to a determination in industrial disputes where an arbitrator has to resolve a claim between a trade union and management by making a determination of which of the two sides has the more reasonable position. The arbitrator must choose only between the two options, and cannot split the difference or select an alternative position. It was initiated in Chile in 1979. This form of arbitration has been increasingly seen in resolving international tax disputes, especially in the context of deciding on the Transfer Pricing margins. This form of arbitration is also known (particularly in the United States) as **Baseball Arbitration**. It takes its name from a practice which arose in relation to salary arbitration in Major League Baseball.

- **Night Baseball Arbitration** is a variation of baseball arbitration where the figures are not revealed to the arbitration tribunal. The arbitrator will determinate the quantum of the claim in the usual way, and the parties agree to accept and be bound by the figure which is closest to the tribunal's award.

Such forms of "Last Offer Arbitration" can also be combined with mediation to create MEDALOA hybrid processes (Mediation followed by Last Offer Arbitration).[42]

----JURISDICTION OF ARBITRAL TRIBUNAL

aa The Judiciary's Role In American Government

Judicial Review was established by the U.S. Supreme Court in Marbury v. Madison(1803) where Chief Justice Marshall wrote:

"It is emphatically the province and duty of the judiciary to say what the law is…."

Basic Judicial Requirements

Jurisdiction:

"Juris" (law) "diction" (to speak) is the power of a court to hear a dispute and to "speak the law" into a controversy and render a verdict that is legally binding on the parties to the dispute.

Jurisdiction over Persons

Power of a court to compel the presence of the parties (including corporations) to a dispute to appear before the court and litigate.

Courts use long-arm statutes for non-resident parties based on "minimum contacts" with state.

Case 2.1: Cole v. Mileti (1998).

Jurisdiction over Property

Also called "in rem" jurisdiction.

Power to decide issues relating to property, whether the property is real, personal, tangible, or intangible.

A court generally has in rem jurisdiction over any property situated within its geographical borders.

Subject Matter Jurisdiction

This is a limitation on the types of cases a court can hear, usually determined by federal or state statutes.

For example, bankruptcy, family or criminal cases.

General (unlimited) jurisdiction.

Limited jurisdiction.

Original and Appellate Jurisdiction

Courts of original jurisdiction is where the case started (trial).

Courts of appellate jurisdiction have the power to hear an appeal from another court.

Federal Court Jurisdiction

"Federal Question" cases in which the rights or obligations of a party are created or defined by some federal law.

"Diversity" cases where:

The parties are not from the same state, and,

The amount in controversy is greater than $75,000.

Exclusive vs. Concurrent Jurisdiction

Exclusive:

only one court (state or federal) has the power (jurisdiction) to hear the case.

Concurrent:

more than one court can hear the case.

Venue

Venue is concerned with the most appropriate location for the trial.

Generally, proper venue is whether the injury occurred.

Standing

In order to bring a lawsuit, a party must have "standing" to sue.

Standing is sufficient "stake" in the controversy; party must have suffered a legal injury.

Case 2.3: High Plains Wireless LP vs. FCC (2002)

Trial Courts

Courts of record-court reporters.

Opening and closing arguments.

Juries are selected.

Evidence, such as witness testimony, physical objects, documents, and pictures, is introduced.

Witnesses are examined and cross-examined.

Verdicts and Judgments are rendered.

Appellate Courts

Middle level of the court systems.

Review proceedings conducted in the trial court to determine whether the trial was according to the procedural and substantive rules of law.

Generally, appellate courts will consider questions of law, but not questions of fact.

Supreme Courts

Also known as courts of last resort.

The two most fundamental ways to have your case heard in a supreme court are:

Appeals of Right.

By Writ of Certiorari.

Alternative Dispute Resolution

Trials are a means of dispute resolution that are very expensive and sometimes take many months to resolve.

There are "alternative dispute resolution" (ADR) methods to resolve disputes that are inexpensive, relatively quick and leave more control with the parties involved.

ADR

ADR describes any procedure or device for resolving disputes other than the traditional judicial process.

Unless court-ordered, there is no record which is an important factor in commercial litigation due to trade secrets.

Most common:

negotiation, mediation, arbitration.

Negotiation

Less than 10% of cases reach trial.

Negotiation is informal discussion of the parties, sometimes without attorneys, where differences are aired with the goal of coming to a "meeting of the minds" in resolving the case.

Successful negotiation involves thorough preparation, from a position of strength.

Assisted Negotiation

Mini-Trial: Attorneys for each side informally present their case before a mutually agreed-upon neutral 3rd party (e.g., a retired judge) who renders a non-binding "verdict." This facilitates further discussion and settlement.

Expert evaluations.

Conciliation:

3rd party assists in reconciling differences.

Mediation

Involves a neutral 3rd party (mediator).

Mediator talks face-to-face with parties (who typically are in different adjoining rooms) to determine "common ground."

Advantages:

few rules, customize process, parties control results (win-win).

Disadvantages:

mediator fees, no sanctions or deadlines.

Arbitration

Many labor contracts have binding arbitration clauses.

Settling of a dispute by a neutral 3rd party (arbitrator) who renders a legally-binding decision; usually an expert or well-respected government official.

Recall the 1997 UPS strike when US. Labor Secretary Alexis Herman helped arbitrate the strike.

Arbitration Disadvantages

Results may be unpredictable because arbitrators do not have to follow precedent or rules of procedure or evidence.

Arbitrators do not have to issue written opinions.

Generally, no discovery available.

Arbitration Process

Case begins with a submission to an arbitrator. Next comes the hearing where parties present evidence and arguments. Finally, the arbitrator renders an award.

Courts are not involved in arbitration unless an arbitration clause in a contract needs enforcement.

Providers of ADR Services

Non-profit organizations:

American Arbitration Association.

Better Business Bureau.

Online Dispute Resolution

Also called ODR

Uses the Internet to resolve disputes.

Still in its infancy but is gaining momentum.

UNCITRAL International agreements

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When parties agree to use UNCITRAL Arbitration Rules in arbitration, they typically specify this in the arbitration clause of their business contract. Below is the model UNCITRAL arbitration clause.

Model UNCITRAL Arbitration Clause

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."

(a) The appointing authority shall be … [name of institution or person];
(b) The number of arbitrators shall be … [one or three];
(c) The place of arbitration shall be … [town and country];
(d) The language(s) to be used in the arbitral proceedings shall be …"
(e) The law governing the proceedings shall be…"

Arbitration and Conciliation Act, 1996

Part I of this act formalizes the process of Arbitration and Part III formalizes the process of Conciliation. (Part II is about Enforcement of Foreign Awards under New York and Geneva Conventions.)

Arbitration

The process of arbitration can start only if there exists a valid Arbitration Agreement between the

parties prior to the emergence of the dispute. As per Section 7, such an agreement must be in writing. The contract regarding which the dispute exists, must either contain an arbitration clause or must refer to a separate document signed by the parties containing the arbitration agreement. The existence of an arbitration agreement can also be inferred by written correspondence such as letters, telex, or telegrams which provide a record of the agreement. An exchange of statement of claim and defense in which existence of an arbitration agreement is alleged by one party and not denied by other is also considered as valid written arbitration agreement.

Any party to the dispute can start the process of appointing arbitrator and if the other party does not cooperate, the party can approach the office of Chief Justice for appointment of an arbitrator. There are only two grounds upon which a party can challenge the appointment of an arbitrator – reasonable doubt in the impartiality of the arbitrator and the lack of proper qualification of the arbitrator as required by the arbitration agreement. A sole arbitrator or a panel of arbitrators so appointed constitute the Arbitration Tribunal.

Except for some interim measures, there is very little scope for judicial intervention in the arbitration process. The arbitration tribunal has jurisdiction over its own jurisdiction. Thus, if a party wants to challenge the jurisdiction of the arbitration tribunal, it can do so only before the tribunal itself. If the tribunal rejects the request, there is little the party can do except to approach a court after the tribunal makes an award. Section 34 provides certain grounds upon which a party can appeal to the principal civil court of original jurisdiction for setting aside the award.

The period for filing an appeal for setting aside an award is over, or if such an appeal is rejected, the award is binding on the parties and is considered as a decree of the court.

UNIT-4

RECOGNITION AND ENFORCEMENT

Globalization has been a great stimulation in the process of integration of economies and societies of different countries across the globe. It has been a great tool for breaking economic barrier and envisioning world as a market for trade.

When economies and societies integrate it indubitably leads to the rise in various types of disputes such as:-

a) Industrial disputes,

b) Commercial disputes,

c) International disputes etc.

The remedy is not in avoidance of these disputes but rather in building mechanisms to resolve these disputes amicably. It is a sine qua non for growth and for maintaining peace and harmony in every society.

ubi jus ibi remedium – This legal maxim rightly laid down the foundation of legal system in every human society. It means whenever any wrong is done to a person, he has a right to approach the court of law. This legal pattern of resolving dispute has resulted in abundance of pending cases, which rightly justifies the cliché "justice delayed is justice denied". The legal proceedings in a court of law get stretched down the years consuming oodles of money and which ultimately leads to disruption in business and career.

These interminable and complex court procedures have propelled jurists and legal personalities to search for an alternate to conventional court system. The search was a great success with the discovery of alternate forum known as Alternate Dispute Resolution, which is commonly called by its generic acronym "ADR".

ADR is being increasingly acknowledged in the field of law and commercial sectors both at national and international levels. Its diverse methods have helped parties to resolve their disputes at their own terms cheaply and expeditiously.

At National Level

Benjamin Franklin once said; “when will mankind be convinced and settle their difficulties by arbitration”. I think Indian community can aptly answer him by providing the example of Panchayat System, which in reality is not very different from modern ADR system. Infact, panchayat system is vogue in India from centuries. It is a process by which a neutral third party usually a person of higher stature and reputation deemed to be unbiased during adjudication will be rendering legally binding decision. Unfortunately, this system has lost its credibility due to intervention of politics and communal hatred among people.

Litigation in India is generally longitudinal and expensive. Hence, there has been considerable amount of efforts by legislature and judiciary to make ADR more prevalent among societies.

Legislative efforts towards ADR in India:

In India credit for springing up ADR goes to East India Company. It gave the statutory recognition to the said forum under various acts such as:

• Bengal Regulation Act of 1772 and Bengal regulation act of 1781 which provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties.

Alternate dispute redressal received legislative recognition in India, after the enactment of Civil Procedure Code, 1859 which provided –

Sec 312 - reference to Arbitration in pending suit.

Sec 312 – 325 – laid down the procedure for arbitration.

Sec 326 – 327 – provided for arbitration without courts intervention.

#Arbitration is also recognized under Indian Contract Act, 1872 as the first exception to Section 28, which envisages that any agreement restraining legal proceedings is void.

The Legal Service Authorities Act, 1987 brought another mechanism under ADR with the establishment of Lok Adalat system.

The Industrial Dispute Act, 1947 statutorily recognized conciliation as an effective method of dispute resolution.

Indian Electricity Act, 1910 and A.P Co-operative Societies Act, 1964 are few more examples in this regard.

The Arbitration Act of 1899 was the first exclusive legislation on arbitration. Subsequently the said act was repealed and was replaced by Arbitration Act 1940. Arbitration Act of 1940 also failed to give desired result and in realizing its objective of enactment. Then various recommendations of successive Law Commissions and policy of liberalization in the field of commerce acted as a catalyst in the growth of ADR mechanism. After the liberalization of Indian economy which opened the gates for inflow of foreign investment; Government of India on the UNCITRAL model enacted the Arbitration and Conciliation Act 1996 which repealed the 1940 Act.

The main objectives of the Act are:-

A) To cover international and domestic arbitration comprehensively.

B) To minimize the role of courts and treat arbitral award as a decree of court.

C) To introduce concept of conciliation.

D) Lastly, to provide speedy and alternative solution to the dispute.

Code of Civil Procedure 1908 carries section 89 which formulates four methods to settle disputes outside the court. These are:-

a) Arbitration (b) Conciliation (c) Lok adalat (d) Mediation.

At the same time the Constitution of India puts arbitration as a Directive Principle of State Policy. Article 52(d) provides that the state should encourage settlement of international disputes by arbitration.

Judicial effort towards ADR in India:

Indian judiciary has also played a substantial role in upgradation of ADR mechanism. The apex court

has recognized the alternate forum in its various decisions.

In In Guru Nanak Foundation V/S Rattan & Sons court observed that "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedure claptrap…"

The realization of concepts like speedy trial and free legal aid by apex court in various cases has also helped in the upgradation of alternate dispute redressal mechanism. One of the biggest step in the lines of development of the said machinery was maintaining the validity of "fastrack courts" scheme as laid down in Brijmohan v/s UOI.

Fastrack court scheme has done wonders in disposing number of pending cases. These courts have disposed of 7.94 lakh cases out of 15.28 lakh cases transferred at the rate of 52.09% and recent statistics show that the number of pending cases has reduced to 6 lakhs.

Another major step in the growth of ADR services in India is the establishment of institutions such as:

• IIAM - Indian Institute of Arbitration and Mediation

• ICA - Indian Council for Arbitration

• ICADR – International Centre for Alternate Dispute Resolution.

These institutions provide services of negotiation, mediation, conciliation, arbitration, settlement conferences etc. They also help in finding lacunae in existing ADR laws and recommended reforms to overcome them.

At INTERNATIONAL LEVEL

The history of Alternate dispute resolution forum at international level can be traced back from the period of Renaissance, when Catholic Popes acted as arbitrators in conflicts between European countries. One of the successful examples of the said mechanism is the international mediation conducted by former U.S President Jimmy Carter in Bosnia. ADR has given fruitful results not only in international political arena but also in international business world in settling commercial

disputes among many corporate houses for e.g. Settlement of a longstanding commercial dispute between General Motors Co. and Johnson Matthey Inc., which was pending in US District Court since past few years.

The biggest stepping stone in the field of International ADR is the adoption of UNCITRAL [United Nation Commission on International Trade Law] model on international commercial arbitration. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application. General Assembly of UN also recommended its member countries to adopt this model in view to have uniform laws for ADR mechanism. Other important international conventions on arbitration are:-

· The Geneva Protocol on Arbitration clauses of 1923.
· The Geneva Convention on the execution of foreign award,1927
· The New York Convention of 1958 on the recognition and enforcement of foreign arbitral award.

In India Part III of Arbitration and Conciliation Act, 1996 provides for International Commercial Arbitration

Another step in strengthening the international commercial arbitration is the establishment of various institutions such as:-

A) ICC – International Court of Arbitration of the International Chamber of Commerce.
B) Arbitration and mediation centre of World Intellectual Property Organization.
C) AAA – International centre for dispute resolution of the American Arbitration Association and others have explored new avenues in the ADR field.

Alternate Dispute Resolution Mechanism

Ø Arbitration – It is one of the cardinal mechanism in alternate dispute machinery. Whereby the dispute is submitted to one or more arbitrators, who is duly appointed by both the parties.

They give their verdict in the form of "Arbitral Award", which is legally binding on disputed parties. Arbitration is very common in business transactions, but unknown to many that it is the oldest method of resolving disputes, which had been enshrined since ancient history.

Ø Mediation – It is a non binding process in which a third party called "Mediator" helps the disputed parties to reach a settlement.

"Mediation is the technical term in international law which signifies the interposition by a neutral and friendly state between two states at war or on the eve of war with each other, of its good offices to restore or to preserve peace"<!--[if !supportFootnotes]-->[1]<!--[endif]-->

Ø Conciliation – This mechanism is also non binding on the parties. It is a process by which a third party called "Conciliator" meets disputed parties separately in order to resolve their differences. He neither gives verdict nor makes any award.

It is also called "Shuttle diplomacy". Most mediators consider it as a specific type of mediation practice. Part III of Arbitration and Conciliation act, 1996 provides for this mechanism.

Ø Lok Adalat – Lok Adalat is also called "people's court". It was established by the Government under Legal Services Authorities act, 1987 to facilitate inexpensive and prompt settlement of pending suits by conciliation and compromise. This forum is very effective in settlement of money claims, partition suits, matrimonial cases etc.

Ø Ombudsman – It is an external agency appointed by government to probe into administrative mishaps. It is a mechanism by which an aggrieved party can claim relief against abuse of discretionary power by government authority. Sweden was the first country to adopt this institution in 1809 A.D followed by Finland, Denmark, Norway, New Zealand, Australia and Scandinavian countries.

Ø Negotiation – It is a non binding process of resolving disputes, by which parties to dispute interact with one another and try to work out a settlement without the intervention of third party. Importance of Negotiation in concise can be aptly put in words of former US President John F. Kennedy – "Let us negotiate with fear but let us not fear to negotiate".

Ø Collaborative Law – It is a voluntary dispute resolution process by which parties to dispute are represented by their own lawyers, to facilitate the discussion in accordance with an agreement. It has been an effective mechanism in the context of divorce and family law. Collaborative law is practiced internationally in countries like USA, UK and the list goes on with the inclusion of countries such as France, Germany, Austria, Australia, Scotland, Switzerland, Hong Kong etc.in number of law school courses, diplomas, seminars, etc. focusing on alternate dispute resolution and rationalizing its effectualness in processing wide range of dispute in society.