CONTRACT MANAGEMENT AND INDUSTRIAL LAWS, COMMERCIAL LAWS & COMPANY LAW

MODULE II

EXECUTIVE DIPLOMA IN COST & MANAGEMENT ACCOUNTING FOR ENGINEERS

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DIRECTORATE OF ADVANCED STUDIES
THE INSTITUTE OF COST ACCOUNTANTS OF INDIA

Statutory Body under an Act of Parliament

Behind every successful business decision, there is always a CMA

MISSION STATEMENT

The CMA Professionals would ethically drive enterprises globally by creating value to stakeholders in the socio-economic context through competencies drawn from the integration of strategy, management and accounting.

VISION STATEMENT

The Institute of Cost Accountants of India would be the preferred source of resources and professionals for the financial leadership of enterprises globally.

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2018

DIRECTORATE OF ADVANCED STUDIES
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ABOUT THE COURSES

01: EXECUTIVE DIPLOMA IN BUSINESS VALUATION

Valuation, particularly financial valuation, is emerging as an important profession, with the growth in the profession of financial analysts due to various factors like increased interest in mergers, acquisitions, demerger and divestiture, increased interest of PE firms in Indian business and implementation of IndAS. The valuation profession is expected to get a boost with the introduction of the concept of Registered Valuers in the Companies Act 2013. Registered Valuers will provide valuation in respect of property, stocks, shares, debentures, securities, goodwill or any other assets or net worth of a company or its assets or liabilities.

This diploma course aims to develop proficiency in Valuing assets and liabilities through a learning process that blends concepts with applications. The course is an advanced knowledge module that presupposes understanding of management accounting and corporate finance. The participants will get extensive exposure through project work on Valuation and by analyzing case studies.

Course Duration: 6 months

02: EXECUTIVE DIPLOMA IN COST & MANAGEMENT ACCOUNTING FOR ENGINEERS

In modern competitive business environment, suitable business decision making is very crucial. All professionals irrespective of their domain expertise need to understand the commercial aspects of the business, contribute effectively and efficiently to the strategic business decisions making.

Engineers being the frontline technocrats, are part of the team for taking various commercial decisions in the interest of the organization, which requires adequate expertise to understand the various facets of the Cost, Finance, Taxation, Laws and other such aspects. This course has been specifically designed for Engineers to synergies their domain expertise with the commercial link in a most practical oriented manner.

Course Duration: 6 months

03: CERTIFICATE COURSE IN ARBITRATION

Arbitration is 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 awards or arbitral Tribunal), and agree to BE bound by the arbitration decision (the award). A third party reviews the evidences in the case and imposes a decision that is legally binding on both sides and enforceable in the courts. In fact Arbitration is a process in which disputants can resolve dispute amicably. This method can bring solutions to disputes as well as among disputants.

The objective of this course is to familiarize the participants with legal framework of arbitration, arbitration procedures, and arbitration practice. It is also designed to cover practical aspects covering case analysis and mock arbitral proceedings.

Course Duration: 3 months

04: CERTIFICATE COURSE IN GOODS AND SERVICES TAX (GST)

Goods & Services Tax (GST) is a major tax reform in the Country and is a game changer. There has been a paradigm shift in the Indirect Tax structure with the GST rollout w.e.f 01st July 2017. As a professional, it is imperative to understand and assimilate the new taxation structure, associated compliances and the changes in business processes emanating there from.

In the above backdrop, a course module on GST has been planned so as to upgrade the knowledge level of our members & professionals in a structured and practical oriented manner. Institute has twin expectations from this course, first the GST concepts and implementation has to be understood in a simple way by our professional colleagues, and second the same can be percolated to the business houses, traders and other such concerns having GST impact in their respective locations. This course is being launched in association with Tax Research Department of the Institute.

Course Duration: 3 months

Email: advstudies@icmai.in

CONTENTS

PART A : Contract Management

PART B : Industrial Laws, Commercial Laws & Company Law

Part-A

CONTRACT MANAGEMENT

THE INSTITUTE OF COST ACCOUNTANTS OF INDIA

EXECUTIVE DIPLOMA IN COST & MANAGEMENT ACCOUNTING FOR ENGINEERS

QUALIFIED ENGINEER

KNOWLEDGE OF ENGINEERING SUBJECTS

Module - I
Costing Principles & Practices and Financial Accounting

Module - III
Indirect Taxation (GST & Customs Law) and Project Management

Tools & Techniques for Decision Making

Tools & Techniques for Decision Making

Module - II
Contract Management and Industrial Laws, Commercial Laws & Company Law

Module - V
Advanced Cost & Financial Management and Management Reporting

Module - IV
Treasury & Financial Services and Insurance & Risk Management

Relevant Experience

Relevant Experience

Synergy Effect

STRATEGIC DECISION MAKER

CMD / MD / CEO / COO / PRESIDENT / VICE-PRESIDENT

CAREER PATH FOR ENGINEERS TO BECOME STRATEGIC DECISION MAKERS

1 DEFINITION OF CONTRACT

Introduction

The law relating to contracts in India is contained in **INDIAN CONTRACT ACT, 1872**. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to all the states of India except the state of Jammu and Kashmir. It determines the circumstances in which promises made by the parties to a contract shall be legally binding on them. All of us enter into a number of contracts everyday knowingly or unknowingly. Each contract creates some rights and duties on the contracting parties. Hence this legislation, Indian Contract Act of 1872, being of skeletal nature, deals with the enforcement of these rights and duties on the parties in India.

Commencement of Act

The Act came into effect from 1st September, 1872 and applies to all contracts in India.

Contract

Section 2(h) of the Act defines the term 'contract' as an agreement enforceable by law. The contract may be void contract and voidable contract.

Void Contract

Void contract is defined under Section 2(j) of the Act as "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable".

Voidable Contract

Section 2(i) defines voidable contract as "An agreement which is enforceable by law at the option of one or more parties but not at the option of the other or others".

Agreement

Section 2(e) defines the term 'agreement' – every promise and every set of promises, forming the consideration for each other is an agreement. An agreement may be void agreement. An agreement not enforceable by law is said to be void agreement.

Promise

Section 2(b) defines the term 'promise' when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

When there is a promise, there shall be a promisor and the promise. The person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee'.

Section 2(f) defines the term 'reciprocal promises' as a promise which forms the consideration or part or more of the consideration for each other, is called reciprocal promises.

Proposal

Section 2(a) defines the term 'proposal'. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the asset of that other to such act or abstinence, he is said to make a proposal.

Consideration

According to Section 2(d), Consideration is defined as: "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

Essentials of a valid contract

The following are the requirements for a valid contract-

- There shall be an offer or proposal by one party and acceptance of the proposal by the other party which results in an agreement;
- There shall be an intention to create legal relations or an intent to legal consequences;
- The agreement shall be supported by lawful consideration;
- The parties to the contract shall be capable of contract;
- There shall be genuine consent between the parties to the contract;
- The object and consideration of the contract shall be legal and the same shall not be opposed to public policy;
- The terms of the consent shall be certain;
- The agreement is capable of being performed i.e., it is not impossible of being performed.

OFFER AND ACCEPTANCE

Offer

The term 'proposal' is otherwise called as 'offer'. An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in return for promise, act or forbearance. Section 2(a) of the Act defines 'proposal' or offer as when one person signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal or offer. The person making the proposal is called as 'offeror' or proposer' and the person the proposal is made is called as 'offeree'.

The offer must be a valid one. The following points are to be taken into account for a valid offer-

- The offer must be in clear, definite, complete and final terms. It should not be vague in terms;
- The offer must be communicated to the offeree. The offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the offer;
- The communication may be in writing or oral;
- The communication may be in expressed terms or in implied terms;
- The offer may be general or specific – if an offer is made to a specific person it is called specific offer. Such offer can be accepted by such specific person; if an offer is made to the world at large, it is a general offer. It can be accepted by any member of the general public by fulfilling the condition laid down in the offer;
- Communication of offer is complete when it comes to the knowledge of the person to whom it is made.

An offer which has been communicated properly continues as such until it lapses or revoked by the offeror or rejected or accepted by the offeree.

Revocation of offer

Section 5 provides that a proposal may be revoked at any time before the communication of acceptance is complete as against the proposer but not afterwards.

Example – A proposes, by a letter sent by post, to sell his house to B; B accepts the proposal by a

letter by sent by post. A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

Section 4 provides that the communication of a revocation is complete-

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

Example – A revokes his proposal by telegram. The revocation is complete as against A when the telegram is dispatched. It is complete as against B when B receives it.

Lapse of offer

Section 6 provides for the method to revoke the offer. An offer may be lapsed if-

- it is not accepted within the specified time or after a reasonable time;
- it is not accepted in the mode prescribed; if no mode is prescribed in some usual and reasonable manner;
- the offeree rejects it by distinct refusal to accept it;
- either the offeror or the offeree dies before its acceptance;
- the acceptor fails to fulfill a condition precedent to an acceptance;
- the offeree makes a counter offer, it amounts to rejection of the offer and an offer by the offeree may be accepted or rejected by the offeror.

Acceptance

To constitute a promise, the intention of the parties must be communicated. One cannot accept an offer which had not been communicated to him. In general, uncommunicated offer cannot result in a promise.

The term 'acceptance' means admitting and agreeing to something to accede to something or to accept to something. An offer to enter into legal relations, upon definite terms, to create legal relations, must be followed by an intention of the offeree to accept that offer.

In 'Thawardar Pherumal V. Union of India' – AIR 1955 SC 468 the Supreme Court held that before an offer can become a binding promise and result in an agreement it must be accepted, either by words or acts. A person cannot be bound by a one sided offer which is never accepted particularly when the parties intended that the contract should be reduced in writing. A promise cannot bind its make unless the promise has assented to it.

Section 4 provides that the communication of an acceptance is complete-

- as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;
- as against the acceptor, when it comes to the knowledge of the proposer.

The following points shall be taken into account in the case of acceptance-

- Acceptance may be in oral or in writing;
- It may be expressed or implied;
- If a particular method of acceptance is prescribed, the offer must be accepted in the prescribed manner;
- It must be unqualified and absolute and must correspond with all terms of the offer;
- The conditional acceptance will amount to rejection of offer;
- A counter offer for acceptance will also amount to reject of offer but the counter offer may be accepted or rejected by the other party;

- It must be communicated to the officer, since acceptance is completed the moment it is communication;
- Mere silence on the part of the offeree does not amount to acceptance;
- The acceptance should be given if there is a time limit is fixed or otherwise at a reasonable time and before he offer lapses or is revoked.

Revocation of acceptance

Section 5 provides that an acceptance may be revoked at any time before the communication of acceptance is complete as against the acceptor but not afterwards.

Example – A proposes, by a letter sent by post, to sell his house to B; B accepts the proposal by a letter sent by post; B may revoke his acceptance at any time before or at the moment when the letter communication it reaches A, but not afterwards.

Section 4 provides that the communication of revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it.

Example – B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched and as against A when it reaches him.

1.2 VOID AND VOIDABLE AGREEMENTS

Void agreement

The following agreements are considered to be void-

- If considerations and objects are unlawful in part – Section – 24;
- Agreements without consideration – Section 25;
- Agreement in restraint of marriage – Section 26;
- Agreement in restraint of trade – Section 27;
- Agreements in restraint of legal proceedings – Section 28;
- Agreements void for uncertainty – Section 29;
- Agreements by way of wager – Section 30;

Considerations and objects unlawful in part

Section 24 provides that if any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

Example – A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles, B promises to pay to A salary of ₹10,000/- a year. The agreement is void, the object of A's promise, and the consideration for B's promise being in part unlawful.

This section has no application to a contract which is a single contract and has no contingent part.

Agreement without consideration

Section 25 provides that an agreement made without consideration is void unless-

(1) it is in writing and registered – It is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) or is a promise to compensate for something done – It is a promise to compensate, wholly or in

part, a person who has already voluntarily done something for the promise, or something which the promise was legally compellable to do; or unless

(3) or is a promise to pay a debt, barred by limitation law – It is a promise, made in writing and signed by the person to be charged herewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1 – to this Section provides that nothing in this section shall affect the validity, as between the donor and done of any gift actually made.

Explanation 2 – to this Section provides that an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account, by the court in determining the question whether the consent of the promise was freely given.

Examples –

- A promises, for no consideration, to give B ₹1,000/-. This is a void agreement;
- A, for the natural love and affection, promises to give his son B, ₹1,000/-. A put his promise to B into writing and registers it. This is a contract.
- A finds B's purse and gives it to him. B promises to give A ₹50/-. This is a contract;
- A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract;
- A owes B ₹1,000/- but the debt is barred by the Limitation Act. A signs written promises to pay B ₹500 on account of the debt. This is a contract;
- A agrees to sell a horse worth of ₹1,000/- for ₹10/-. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration;
- A agrees to sell a horse worth of ₹1,000/- for ₹10/-. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Agreement in restrain of marriage

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

Agreement in restraint of trade

Section 27 provides that every agreement by which any one is restrained from exercising a lawful possession, trade or business of any kind, is to that extend void.

The exception to this section is saving of agreement not to carry on business of which goodwill is sold. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within specified local limits, so long as the buyer, or any person deriving title to the goodwill from his, carries on a like business therein. Such limits appear to the Court reasonable, regard being had to the nature of business.

Agreements in restraint of legal proceedings

Section 28 provides that every agreement-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party, thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict

any party from enforcing his rights, is void to that extent;

Exceptions – The following are the exceptions to this Section-

- **Saving of contract to refer to arbitration dispute that may arise** – This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amounts awarded in such arbitration shall be recoverable in respect of the dispute so referred;
- **Saving of contract to refer questions that have already arisen** – Nor shall this Section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arise, or affect any provision of any law in force for the time being as to references to arbitration.

Agreements void for uncertainty

Section 29 provides that agreements, the meaning of which is not certain, or capable of being made certain are void.

Examples –

(a) A agrees to sell to B, 'a hundred tons of oil'. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty;

(b) A agrees to sell to B, 'One hundred tons of oil of specified description known as an article of commerce. There is on uncertainty here to make to agreement void;

(c) A who is a dealer in coconut oil only, agrees to sell to B 'One hundred tons of oil'. The nature of A's trade affords an indication of the meanings of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

(d) A agrees to sell to B, 'all the grain my granary at Ramnagar'. There is no uncertainty here to make the agreement void;

(e) A agrees to sell to B 'One thousand maunds of rice at a price to be fixed by C'. As the price is capable of being made certain, there is no uncertainty here to make the agreement void;

(f) A agrees to sell to B' 'my white horse for `500/- or `1000/-. There is nothing to show which of the two prices was to be given. The agreement is void.

Agreement by way of wager

Section 30 provides that agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favor of certain prizes for horse-racing – This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of ₹500/- or towards, to be awarded to the winner or winners of any horse-race.

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

1.3 CONSIDERATION

Section 2(d) of the Act defines the term 'consideration' which has been discussed in the early part of this material. Consideration is essential for every contract. The following are the fundamental principles for consideration-

- Consideration must be at the desire of the promisor;
- Consideration may move from the promise or any other person;

In 'Chinnaya V. Ramaya' – (1882) Mad. 137 it was held that a lady by a deed of gift made over certain property to her daughter directing her to pay an annuity to the donors brothers as had been done by the donor herself before she gifted the property. On the same day her daughter executed in writing in favor of the donors' brother agreeing to pay the annuity. Afterwards the done declined to fulfill her promise to pay her uncle saying that no consideration had moved from him. The court held that the uncle could sue even though no part of the consideration received by the niece moved from him. The consideration from her mother was sufficient consideration.

Types of consideration

Consideration may be of the following types-

- Executory or future – it means it makes the form of promise to be performed in the future;

  Example – A makes an engagement with B to marry her in future.
- Executed or present – it is an act or forbearance made or suffered for a promise.
- Past – it means a past act or forbearance, that is to say, an act constituting consideration took place and is complete before the promise is made.

Legal Rules Regarding Consideration:

1. It must move at the desire of the promisor
2. It may move from the promisee or any other person
3. Consideration must be something of value.
4. It may be an act, abstinence or forbearance or a return promise
5. It may be past, present or future which the promisor is already not bound to do.
6. It must not be unlawful.
7. Consideration need not be adequate
8. It must not be illusory
9. It must not be opposed to public policy
10. Pre-existing obligations

NO CONSIDERATION – NO CONTRACT: [Sec. 25]

The general rule *is ex-nudopacto non oritur action* i.e. an agreement made without consideration is void. For example if A promises to pay B ` 1000 without any obligation from B. This is a void agreement for want of consideration. However, the Act itself provides exceptions to this rule in section 25 itself. As per section 25, an agreement made without consideration is not void in the following circumstances:

1. Promise made on account of natural love and affection.
2. Promise to compensate for voluntary services.
3. Promise made to pay a time barred debt.
4. Gift actually made:
5. Creation of agency:
6. Charitable subscription

STRANGER TO CONTRACT / DOCTRINE OF PRIVITY OF CONTRACT:

The doctrine of privityof contract means that a contract is between the parties only and no third person can sue upon it. It means that a stranger to contract cannot sue upon it. The Supreme Court of India recognized this rule in *MC Chacko v State Bank of Travancore*. It is settled law that a person not a party to a contract cannot subject to certain well recognized exceptions, enforce the terms of

the contract. Under the English Common law only a person who is party to a contract can sue upon it. In India the common law doctrine of privity of contract is applicable. In the course of time, the courts have introduced a number of exceptions to rule of privity of contract.

The Indian Contract Act, 1872 is silent about the right of a stranger to contract to sue or not to sue but the Privity Council extended the Principal of English Common law to India in its decision in *Jamna DasV Ram Avtar Pandy* which was affirmed by the Honourable Supreme Court of India in the case of MC Chako v State Bank of Travancore.

Accordingly in the following circumstances a stranger to contract can sue:

1. Beneficiaries under trust or charge
2. Marriage settlement, partition or other family arrangements
3. Acknowledgement or estoppel.
4. Agency
5. Assignee in case of insurance policy

1.4 LEGALITY OF OBJECT

The object of the contract is the ultimate purpose which the contract sub serves. In contract the subject matter or the agreement is its object.

Section 23 discusses about the legality of the object or consideration. The said section provides that the consideration or object of an agreement is lawful, unless-

- it is forbidden by law; or
- is of such nature that, if permitted, it would defeat the provisions of any law; or
- is fraudulent; or
- involves or implies, injury to the person or property of another; or
- the court regards it as immoral, or opposed to public policy, agreement is said to be unlawful. Every agreement of which the objection or consideration is unlawful is void.

Examples –

(a) A agrees to sell his house to B for ₹10,000/-. Here B's promise to pay the sum of ₹10,000/- is the consideration for A's promise to sell the house is the consideration for B's promise to pay ₹10,000/-. These are lawful considerations;

(b) A promises to pay B ₹1,000/- at the end of six months, if C who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promises of each party is the consideration for the promise of the other party, and they are lawful considerations;

(c) A promises for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is the consideration for A's promise, and these are lawful considerations;

(d) A promises to maintain B's child and B promises to pay A ₹1,000/- yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations;

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful;

(f) A promises to obtain for B an employment in the public service, and B promises to pay ₹1,000/- to A. The agreement is void, as the consideration for its unlawful;

(g) A being agent for a landed proprietor, agrees for money, without the knowledge of his principal to obtain for B a lease of land belonging to the principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal;

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful;

(i) A's estate is sold for arrears of revenue under the provisions so an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void as it renders the transaction in effect, a purchase by the defaulter and would so defeat the object of the law;

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favor of C and C promises to pay ₹1000/- to A. The agreement is void, because it is immortal;

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

1.5 E-CONTRACTS

Electronic contracts are paperless contract. It is in electronic form. It is the change of technology and legal requirements lead the contract to be in electronic form. E-contract is a contract modeled, specified, executed and deployed by a software system. They are conceptually very similar to traditional commercial contracts. E-contract also requires the basic elements of a contract. The following are ingredients of the e-contracts-

- An offer is to be made;
- Offer is to be accepted;
- There shall be a lawful consideration;
- There shall an intention to create legal relations;
- The parties must be competent to contract;
- There must be free and genuine consent;
- The object of the contract must be lawful;
- There must be certainty and possibility of performance.

The main feature of this type of contract is speed, accurate and reliable. The parties to the contract have to obtain digital signature from the competent authority and they have to affix the digital signature instead of manual signing. The Information Technology Act, 2000 regulates such e-contracts.

In this type of contract the web site of the offeror acts as a display to the world at large. E-mails are used to negotiate and agree on contract terms and to send and agree to the final contract. An email contract is enforceable if the requirements of the contract are fulfilled. Electronically signed contracts cannot be denied because they are in electronic form and delivered electronically.

1.6 CONTRAINTS TO ENFORCE CONTRACTUAL OBLIGATIONS

CAPACITY OF CONTRACT

Who are Competent to Contract? (Section 11)

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

any law to which he is subject.

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

(a) A person who has not attained the age of majority, i.e. minor.

(b) A person of unsound mind

(c) A person who is disqualified from contracting by some law.

(a) MINOR:

As per section 3 of the Indian Majority Act of 1875, every person in India is a minor if he has not attained the age of 18 years of age. However in case of a minor of whose person or property or both a guardian has been appointed under the Guardian and Wards Act, 1890 or whose property is under the superintendence of any court of wards before he attains 18 years of age is 21 years.

The position of Minor's agreement and effect thereof is as under:

1. An agreement with a minor is void *ab-initio*.
2. The law of estoppels does not apply against a minor. *It means a minor can always his plead his minority despite earlier misrepresenting to be a major.* In other words he cannot be held liable on an agreement on the ground that since earlier he had asserted that he had attained majority.
3. Doctrine of Restitution does not apply against a minor. In India the rules of restitution by minor are similar to those found in English laws. The scope of restitution of contract by minor was examined by the Privy Council in Mohiri Bibi case when it has held that the restitution of money under section 64 of the Indian Contract Act cannot be granted under section 65 because a minor's agreement is not voidable but absolutely void *ab-initio*. Similarly no relief can be granted under section 65 as this section is applicable where the agreement is discovered to be void or the contract becomes void.
4. No Ratification on Attaining Majority - Ratification means approval or confirmation. A minor cannot confirm an agreement made by him during minority on attaining majority. If he wants to ratify the agreement, a fresh agreement and fresh consideration for the new agreement is required.
5. Contract beneficial to Minor - A minor is entitled to enforce a contract which is of some benefit to him. Minority is a personal privilege and a minor can take advantage of it and bind other parties.
6. Minor as an agent - A minor can be appointed an agent, but he is not personally liable for any of his acts.
7. Minor's liability for necessities - If somebody has supplied a minor or his dependents with necessities, minor's property is liable but a minor cannot be held personally liable
8. A minor cannot be adjudged insolvent as he is incapable of entering into a contract.
9. Where a minor and an adult jointly enter into an agreement with another person the minor is not liable and the contract can be enforced against the major person.

(b) SOUND MIND PERSON:

What is a Sound Mind for the Purposes of Contracting? (Section 12)

A person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract

when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations:

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Going by the spirit of the section it is clear that a person is of sound mind if he fulfils the following two conditions.

(i) He/she is capable of understanding the contract.

(ii) He/she is capable of forming a rational judgment about the effects of such contract on his interest.

A person not satisfying any of these two conditions is not treated as a person of sound mind.

(c) OTHER DISQUALIFIED PERSONS:

The persons who are disqualified from entering into contract due to certain other reasons may be from legal status, political status or corporate status. Some of such categories of persons are given below:

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

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

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

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

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

FREE CONSENT

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

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

As per section 14 of the Contract act consent is said to be free when it is not caused by—

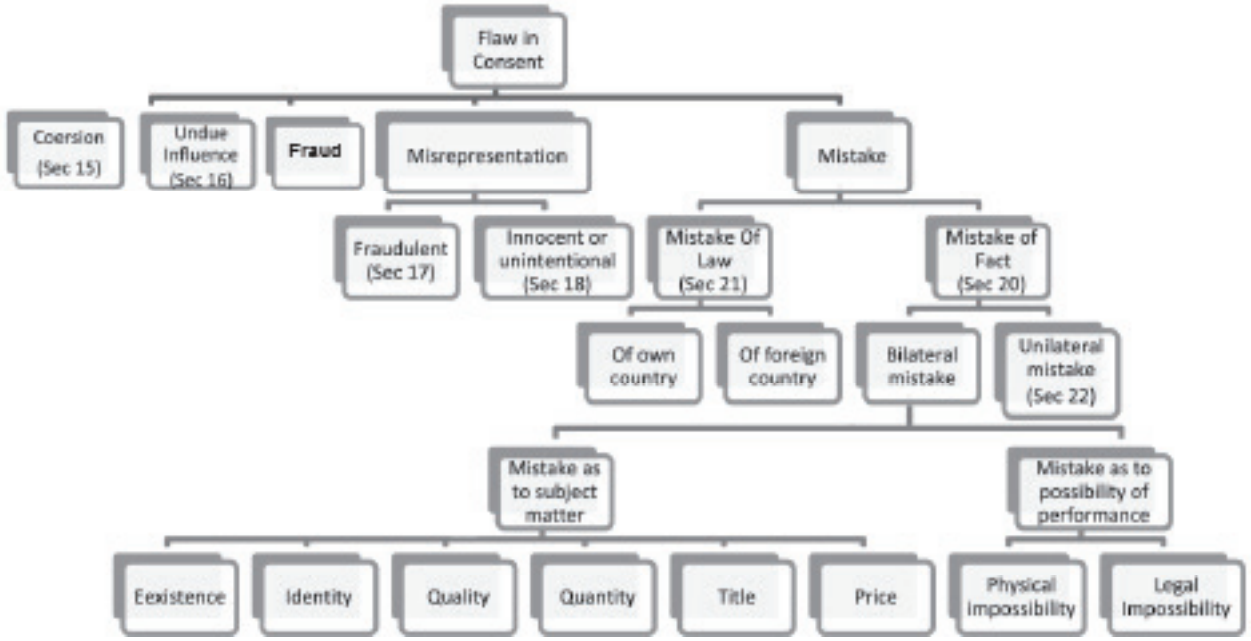
(1) Coercion (Sec 15), or

(2) Undue influence (Sec 16), or

(3) Fraud (Sec 17), or

(4) Misrepresentation (Sec 18), or

(5) Mistake, subject to provisions of Sec 20, 21 and 22.



COERCION: [Sec. 15]

The term 'coercion' has been defined in section 15 of the Act as "Coercion" is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation: It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

From the above definition of coercion given in section 15, consent is said to be caused by coercion when it is obtained by any one of the following;

(i) Committing or threatening to commit any act forbidden by Indian Penal Code;

(ii) Unlawful detaining or threatening to detain the property of another person.

Coercion may come from a person party to the contract or even third person not connected with the contract directly.

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

Effect of coercion:

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

It should be noted that threat to commit suicide also amounts to coercion.

Some special cases which are prone to be construed cases of coercion are discussed as under;

1. **Prosecution**: A mere threat to prosecute a man or file suit against him does not constitute coercion. In the case of *Andhra Sugar Lts V State of AP AIR 1968 SC 599* it was held that compulsion of law is not a coercion, fraud, misrepresentation, mistake or even undue-influence.

2 **High prices and high interest Rates**: Charging high interest rate, high price etc is not coercion as the same is not prohibited under the Indian Penal code.

3. **A threat to commit suicide**: Consent to an agreement may at times be obtained by threatening to commit suicide. The Madras High court has held that threat to commit suicide amounts to coercion. In *Amraju v Seshamma 1917 41 Mad 33* it was argued by Oldfield J one of the judge of the Bench which decided this case, that section 15 of the Contract Act must be construed strictly and that an act which is not punishable under the Indian Penal Code cannot be said to be forbidden by it. Suicide is not punishable by the Indian Penal Code, only the attempt to suicide is punishable.

UNDUE INFLUENCE: [Sec. 16]

Section 16 of the Indian Contract Act defines undue influence as under:

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

(ii) In particular and without prejudice to the generality of the forgoing principle, a person is deemed to be in a position to dominate the will of another—

  (a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

  (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(iii) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872). There is presumption of undue influence in the following relationships:

(i) Parent and child

(ii) Guardian and ward

(iii) Doctor and patient

(iv) Solicitor and client

(v) Trustee and beneficiary

(vi) Religious advisor and disciple

(vii) Fiancé and fiancée

There is however no presumption of undue influence in case of relationship of —

(i) Landlord and tenant

(ii) Debtor and creditor

(iii) Husband and wife.

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

Going through the definition of undue influence in section 16 we find that two elements are found in

undue influence:

(i) The relationship subsisting between the parties is such that one is in a position to dominate the will of other and

(ii) He uses that position to obtain an unfair advantage over the other. The person intending to avoid the contract on the ground of undue influence must prove both the above two elements.

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

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a moneylender, advances ₹100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for ₹ 200 with interest at 6 per cent per month. The Court may set the bond aside; ordering B to repay ₹ 100 with such interest as may seem just.

The court has discretion to direct the aggrieved party for giving back the benefit whether in whole or in part or set aside the contract without any direction for refund of benefit.

In a case for avoiding a contract on the ground of undue influence the plaintiff has to prove that:

(i) the other party was in a position to dominate the will; and

(ii) he actually used his influence to obtain the plaintiff's consent to the contract; it will be then for the defendant to show that the plaintiff freely consented.

The presumption is raised at least in the following cases:

(a) Unconscionable bargains

(b) Contracts with pardanashin women

FRAUD: [Sec. 17]

As per section 17 of the Contract Act:

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

(i) The suggestion, as a fact, of that which is not true by one who does not believe it to be true;

(ii) The active concealment of a fact by one having knowledge or belief of the fact;

(iii) A promise made without any intention of performing it;

(iv) Any other act fitted to deceive;

(v) Any such act or omission as the law specially declares to be fraudulent.

Explanation: Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Does silence amount to fraud?

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

Explanation to section 17 of the Indian Contract Act provides that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of case are such that having regard to them it is the duty of the person keeping silence to speak or unless silence itself is equivalent to speech.

Thus we can say that there is exception to the rule that mere silence does not amount to silence. These two exceptions are provided in explanation to section 17 as under which we have already discussed above.

(i) When there is a duty to speak.

(ii) Where silence is equivalent to speech.

However, in the following two types of cases, silence amounts to fraud, as held by the courts in various cases:

(a) Where there is change in circumstances- A representation may be true when made but with the passage of time or changed circumstances it may become false. Accordingly this must be communicated to other party otherwise it amount to fraud.

(b) When there is half-truth- Thus even when a person is not bound to disclose a fact he may be held guilty of fraud if he volunteers to disclose a state of fact partly. This is so when the undisclosed part renders the disclosed part false.

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

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

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

MISREPRESENTATION: [Sec. 18]

A statement of fact which one party makes in the course of negotiation with a view to inducing the other party to enter into a contract is known as misrepresentation. It must relate to some fact which is material to the contract. It may be expressed by words spoken or written or implied from the acts and conduct of the parties.

A representation when wrongly made either innocently or intentionally is a misrepresentation. When it is made innocently or unintentionally it is misrepresentation and when made intentionally or wilfully it is fraud.

Misrepresentation has been defined in **section 18** of the Act as under:

"Misrepresentation" means and includes—

(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him ;

(3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

From the above definition of the term Misrepresentation, the following two types of misrepresentations are noticed:

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

(b) **Breach of duty:** Any breach of duty which brings advantages to the person committing it by misleading the other to his prejudice is a misrepresentation.

Effect of Misrepresentation:

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

Exception: If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

MISTAKE: [Sec. 20, 21 and 22]

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

Mistake can be -

(A) Mistake of law, or

(B) Mistake of fact

(A) Mistake of law may be:

(i) mistake of law of the country

(ii) mistake of law of a foreign country

(i) Mistake of law of the country:

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

(ii) Mistake of law of foreign country: Such a mistake is treated as mistake of fact and agreement is such case is void.

(B) Mistake of fact may be:

(I) Bilateral mistake, or

(II) Unilateral mistake

(I) Bilateral mistake

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

Explanation: An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

In order to render a contract void due to bilateral mistake the following two conditions must be met.

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

(b) Mistake must relate to a matter of fact essential to the agreement: What is essential fact of an agreement depends upon the nature of promise in each case.

The various types of mistakes falling under bilateral mistakes are as under:

(i) Mistake as to subject matter covers following cases:

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

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

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

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

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

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

(ii) Mistake as to possibility of performance of Contract

Impossibility may be:

(a) Physical impossibility: A contract is void if it is identified to be non-feasible due to physical factors, like time, distance, height, etc.

(b) Legal impossibility: A contract is void if it provides that something shall be done which as a matter of law cannot be done.

(II) Unilateral Mistake as to fact:

As per section 22 a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. A unilateral mistake is not allowed as a defence in avoiding a contract unless the mistakes brought about by another party's fraud or misrepresentation.

1.7 QUASI CONTRACTS, CONTINGENT CONTRACTS, TERMINATION OR DISCHARGE OF CONTRACTS

QUASI CONTRACTS

Sometimes the law implies a promise imposing obligations on one party and conferring the right in favor of the other even when there is no offer, no acceptance, no consensus ad idem, and in fact, there is neither agreement nor promise. Such cases are not contracts but the court recognizes them as relations resembling those of contracts and enforces them as if they were contracts. Such is called as a quasi contract.

This type of contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly in the experience of another. It is obligation which the law creates in the absence of any agreement, when any person is in the possession of one persons money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which in justice and fairness belongs to another. It is the duty and not an agreement or intention which defines it.

In the Act the following type of quasi contracts are discussed-

- Section 68 **– Claim for necessaries supplied to person incapable of contracting, or on his account -** This section provides that if a person, incapable of entering into a contract, or any one whom he

is legally bound to support, is supplied with another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person;

- Section 69 – **Reimbursement of persons paying money due by another, in payment of which he is interested** – This section provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, entitled to be reimbursed by the other;
- Section 70 – **Obligation of person enjoying benefit of non gratuitous act** – This section provides where a person lawfully does anything for another person, or delivers anything to him, to intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered – it is otherwise called as quantum meruit;
- Section 71 – **Responsibility of finder of goods** – This section provides that a person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee;
- Section 72 – **Liability of person to whom money is paid or thing delivered by mistake or under coercion** – This section provides that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

CONTINGENT CONTRACTS

Section 31 defines 'contingent contract' as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. The following are the essentials of contingent contract-

- Uncertainty and futurity of the event to which it is related;
- Uncertain future event must be collateral to the contract.

An agreement to sell unspecified half share in the property is not contingent contract as held in 'Harbakhash Singh Gill V. Ram Rattan' AIR 1988 P&H 60. In 'Bhairon Prasad Chaurasiya V. Smt. Tara Devi' – AIR 1980 All. 36 it was held that an agreement to sell a house is by no means a 'contingent contract'. An agreement to purchase a property is neither a contingent contract nor can it be characterized as a mere possible right or interest. It was contended that the contract is a 'contingent contract' because of either of the parties to the contract may refuse to perform his part on the contract. The Court held that the argument is fallacious. Such a contingency would not be a collateral to a contract. An agreement to purchase a property is neither a 'contingent contract' nor can it be characterized as a mere possible right of interest.

Reciprocal promises are not contingent contracts as they cannot be said to be collateral to each other. The law allows the enforcement of a contingent contract after the event upon which it was contingent has happened. The contingency which is the essence of a condition must be distinguished from mere futurity. An obligation is not to be classified as conditional because its performance is not yet due.

A contingent contract need not necessarily be independent on any external event. It may be conditional on the voluntary act or the future conduct of one of the parties or a third person.

Enforcement of contingent contract

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

Example –

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

(b) A makes a contract with B to sell a horse to B at a specified price if C, to whom the horse has

been offered, refused to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse;

(c) A contract to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Section 33 provides for enforcement of contacts contingent on an event not happening. This section provides that contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.

Explanation – A agrees to pay B a sum of money, if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

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

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

Section 35 provides that the contracts which are contingent on happening of specified event within fixed time, it becomes void. The said section provides that contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event becomes impossible.

Contingent contracts to or not to do anything if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or before the time fixed has expired, if it becomes certain that such event will not happen.

Examples –

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

(b) A promises to pay B a sum of money if a certain ship does not return within an year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Agreements contingent on impossible event void

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

Example –

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

(b) A agrees to pay B ₹1,000/- if B will marry A's daughter C. C, was dead at the time of the agreement, the agreement is void.

DISCHARGE OF CONTRACTS

When the rights and obligations created by a contract comes to an end, the contract is said to be discharged or terminated. In other words, discharge of contract means termination of contractual relationship between the parties.

Modes of discharge of contracts:

The following are the various modes or methods by which a contract is discharged.

1. Discharge by performance

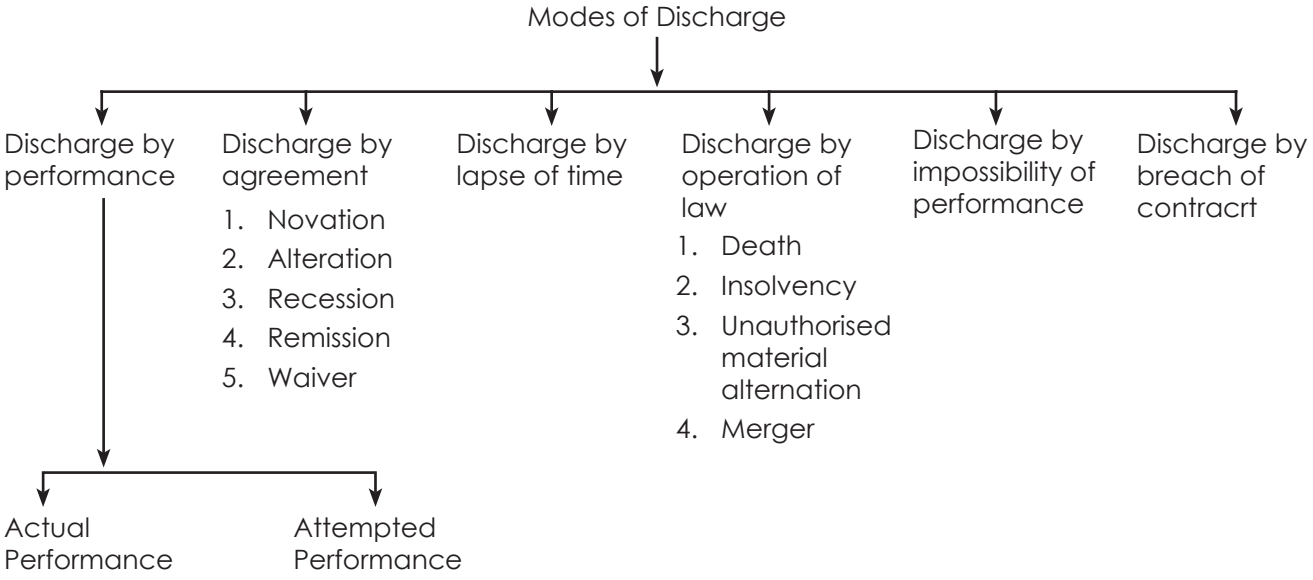
2. Discharge by agreement
3. Discharge by lapse of time
4. Discharge by operation of law
5. Discharge by impossibility of performance
6. Discharge by breach of contract

1. Discharge by performance:

Performance is the usual mode of discharge of a contract. Performance may be (a) actual performance (b) attempted performance.

Actual performance is the fulfilment of the obligations arising from a contract by the parties to it, in accordance with the terms of the contract.

Offer of performance is also known as attempted performance or tender of performance. A valid tender of performance is equivalent to performance.



2. Discharge by agreement:

The parties may agree to terminate the existence of the contract by any of the following ways:

(a) Novation.

(b) Alteration

(c) Rescission

(d) Remission

(e) Waiver

a. Novation:

Substitution of a new contract in place of the existing contract is known as "Novation of Contract". It discharges the original contract. The new contract may be between the same parties or between different parties. Novation can take place only with the consent of all the parties.

Example: A owes money to B under a contract. It is agreed between A, B and C that B should accept C as his debtor, instead of A. The old debt of A and B is at an end and a new debt from C to B has been contracted. There is novation involving change of parties.

b. Alteration:

Alteration means change in one or more of the terms of the contract. In case of novation there may be a change of the parties, while in the case of alteration, the parties remain the same. But there is a change in the terms of the contract.

c. Rescission:

Rescission means "cancellation". All or some of the terms of a contract may be cancelled. Rescission results in the discharge of the contract.

Example: A promises to deliver certain goods to B at a certain date. Before the date of performance A and B mutually agree that the contract need not be performed. The contract stands discharged by rescission.

d. Remission:

Remission means acceptance of a lesser performance that what is actually due under the contract. There is no need of any consideration for remission.

Example: A has borrowed Rs. 500 from B. A agrees to accept Rs. 250 from B in satisfaction of the whole debt. The whole debt is discharged.

e. Waiver:

Waiver means giving up or foregoing certain rights. When a party agrees to give up its rights, the contract is discharged.

Example: A promises to paint a picture of B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

3. Discharge by lapse of time:

Every contract must be performed within a fixed or reasonable period. Lapse of time discharges the contract. The Indian Limitation Act has prescribed the period within which the existing rights can be enforced in courts of law.

Example: If a creditor does not file a suit within three years of debt, the debt becomes time-barred. He is deprived of his legal remedy.

4. Discharge by operation of law:

A contract may be discharged by operation of law in the following cases.

(a) Death

(b) Insolvency

(c) Unauthorized material alteration.

(d) Merger

a. Death:

In contracts involving personal skill or ability, death terminates the contracts. In other cases, the rights and liabilities of the deceased person will pass on to his legal representatives.

b. Insolvency:

The insolvency of the promisor discharges the contract. The promisor is discharged from all liabilities incurred prior to his adjudication.

c. Unauthorized material alteration:

Material alteration in the terms of the contract without the consent of the other party discharges the

contract. Change in the amount of money to be paid, date of payment, place of payment etc. are examples of material alteration.

d. Merger:

When inferior rights of a person under a contract merge with superior rights under a new contract, the contract with inferior rights will come to an end.

Example: Where a part-time lecturer is made full-time lecturer, merger discharges the contract of part-time lecturership.

5. Discharge by impossibility of performance:

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

6. Discharge by breach:

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

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

TERMINATION OF CONTRACT

The proper way, in which the agreement could have been terminated by issuing of a notice to the plaintiff, calling upon to complete the transaction within a particular time, failing which the contract will be treated as cancelled. That this is the proper way of terminating the contract is cleared from what has been observed in ''Narayana Swami PillaiV. Dhanakodi Ammal' – (1971) 1 Mys. L.J., 245 that when the contract is for the sale of immovable property the vendor must given reasonable notice requiring the performance within a definite time.

1.8 SPECIAL CONTRACTS: INDEMNITY AND GUARANTEE; BAILMENT AND PLEDGE; LAWS OF AGENCY

CONTRACT OF INDEMNITY AND GUARANTEE

Chapter VIII of the Act deals with the contract of indemnity and guarantee. Sections 124 and 125 deal with the contract of indemnity. The other provisions deal with the contract of guarantee.

Contract of Indemnity

Section 124 of the Act defines the expression 'contract of indemnity' as a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.

Example – A contracts to indemnify B against the consequences of the proceedings which C may take against B in respect of a certain sum of ₹2 lakhs. This is a contract of indemnity.

This contract constitute indemnifier and indemnity holder. A person who promises to indemnify from losses is called as indemnifier and the person whose loss is made good is called as indemnity holder. To indemnify does not merely means to reimburse in respect of moneys paid, but to save from loss in respect of the liability which the indemnity has been given.

A contract of indemnity may be either expressed or implied. In 'Kuppan Chettiar V. Ramaswami Chettiar' – ILR (1947) Mad.58 it was held that there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty.

In 'The New India Assurance Co. Limited V. State Trading Corporation of India' – AIR 2007 (NOC) 517 (Guj) it was held that almost all insurance other than life and personal accident insurances are contracts of indemnity.

In 'National Overseas V. Export Credit Guarantee Corporation of India Limited' Air 2008 All 18 it was held that where export risk policy issued by Export Credit Guarantee Corporation and exporter had consigned shipments to buyer at his own risk without resorting to terms of policy, the corporation is not liable to indemnify loss caused to exporter.

Rights of indemnity holder when sued

Section 125 provides the rights of indemnity holder when sued. This section provides that the promise, in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-

- all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;
- all the sums which he may have paid under the terms of any compromise of any suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promise to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

This section is not exhaustive and does not set out all the reliefs which an indemnity holder who has been sued may get. It leaves untouched certain equitable reliefs which he may get. The rights of the indemnity holder are not confined to those mentioned in this section. Even before damage is incurred, it is open to him to sue for the specific performance of the contract of indemnity, provided that it is show that an absolute liability has been incurred by him and that the contract of indemnity covers the said liability.

In 'Pepin V. Chandra Seekur' – ILR 5 Cal. 811 it was held that in the case of contract of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of indemnity, but is the very moving cause of that contract and in case of such a nature, the costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered.

Contract of Guarantee

Section 126 defines the expression 'the contract of guarantee' as a contract to perform the promise, or discharge the liability of a third person in case of his default. The components of this contract consist of-

- surety – the person who gives the guarantee is called as the 'surety';
- principal debtor – the person in respect of whose default the guarantee is given is called the 'principal debtor';
- creditor – the person to whom the guarantee is given is called the 'creditor'.

A guarantee may be either oral or written. It is a tripartite agreement which contemplates the principal debtor, the creditor and the surety.

Consideration for guarantee

Section 127 provides that anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving guarantee.

Example –

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise;

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise;

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B, the agreement is void.

This section takes into its fold past consideration also. Like any other contract, a contract of guarantee must be supported by consideration. It is not necessary that the consideration should be received by the surety. Consideration between the principal debtor and the creditor is good consideration for the guarantee given by the surety.

In 'Rajemdra V. Mahila Chandrabai' – 2012 (1) MPLJ 164 the case is within the purview of example ©. Merely because the appellant made promise to the plaintiff that in this case first and second defendants who were required to pay the sale price to her, fail to pay the same, he would pay the sale price, that promise was without consideration and therefore the said agreement between the plaintiff and third defendant was void. Needless to say that a void agreement cannot be enforced by law and therefore, since the status of the appellant (third defendant) is that of a guarantor, his case is covered under the ambit of example © to Section 127 of the Act and he is not liable to pay the sale consideration or any other amount to the plaintiff on account of the failure in making the payment by first and second defendants.

In 'United Breweries (Holding) Limited V. K.S.I.I. & D.C. Limited' – AIR 2012 (NOC) 154 (Cal.) it was held that it is clear that the question as to whether the deed in question is a deed of guarantee or not depends upon the terms under which the guarantor binds himself. Under law, he cannot be made liable for more than what he has undertaken. There is no ambiguity that the appellant has not undertaken that he would repay the loans of respondent No.2, in case if respondent No.2 fails to discharge its liability. Therefore the appellant cannot be made liable for more than what it has undertaken.

Distinction between Indemnity and Guarantee

The contract of indemnity is differing from the contract of guarantee in the aspects shown in the following table:

Sl.No.	Contract of Indemnity	Contract of guarantee
1	In this contract there are two parties – the indemnified and the indemnified	In this contract three parties are involved – principal debtors, surety and creditor
2	The primary liability is on the indemnifier	The principal liability is on the principal debtors. Secondary liability is on the surety.
3	The indemnifier is not acting at the request of the debtor.	The surety gives contract at the request of the principal debtors.
4	The possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.	There is an existing debt for which the surety gives guarantee to the creditor on behalf of the principal debtor.
5	The indemnifier cannot sue the third party in his own unless there is an assignment.	The surety is entitled to proceed against the principal debtor when he is obliged to perform the guarantee
6	The contract is between the indemnifier and indemnified.	The contract is between the principal debtor-creditor; surety – creditor; principal debtor- surety.

Liability of surety

The liability of surety arises only when the principal debtor fails to pay the debt to the creditor. Section 128 provides for the liability of surety. The said section provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

Example – A guarantees B the payment of a bill of exchange by C, the acceptor. The bill is dishonored by C. A is liable, not only for the amount of the bill, but also for any charges which may have become due on it.

The liability of the surety is co-extensive with that of the principal debtor and the surety is liable to pay the entire amount his liability being immediate as held in 'Gouri Prasad V. Rabo India Finance Limited' – 2013 (2) Mh.L.,J. 195. In 'Swaminatha Pillai V. Lakshman Ayya' – AIR 1935 Mad 748 it was held that there is no authority for the general proposition that a creditor cannot proceed against the surety unless he has first exhausted all his remedies against the principal debtor.

Where the letter of guarantee issued by a guarantor, guarantees repayment of only the principal sum and does not guarantee the payment of any interest, he could not be made liable for the payment of interest as held in 'S.N. Prasad V. Monnet Finance Limited' – (2011) SCC 320 .

Continuing Guarantee

Section 129 of the Act defines the expression 'continuing guarantee' as a guarantee which extends to a series of transactions.

Example –

- A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of ₹5,000/- for the due collection and payment by C of those rents. This is a continuing guarantee.
- A guarantees payment to B, a tea-dealer, to the amount of $100, for any tea he may from time to time supply to C, B supplies C with tea to above the value of $ 100 and C pays B for it. Afterwards B supplies C with tea to the value of $ 200. C fails to pay. The guarantee given by A was a continuing guarantee and he is accordingly liable to B to the extent of $100.
- A guarantees payment of B of the price of five sacks of flour to be delivered to B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee and accordingly he is not liable for the price of four sacks.

A guarantee for a future performance may either be restricted to a debtor or liability of a certain amount to be incurred once for all, or it may be continuing. If the liability extends to a single transaction, it is specific. In case it extends to a series of transactions it is continuing. In 'Gopinathan V. Nedungadi Bank Limited' – 2013 (3) KLT 115 it was held that on the strength of continuing guarantee, liability of the guarantors continued not withstanding that the personal remedy against the second respondent stood discharged.

Revocation of continuing guarantee

A continuing guarantee can be revoked by two ways-

- Revocation by surety;
- Revocation on the death of surety.

Revocation of continuing guarantee by surety

Section 130 provides that a continuing guarantee may at any time revoked by the surety, as to future transactions, by notice to the creditor.

Example –

- A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for 12 months, the due payment of all such bills to the extent of ₹5000. B discounts bill for C to the

extent of ₹2000/-. Afterwards at the end of three months, A revokes guarantee. The revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for ₹2000/- on default of C.

- A guarantees to B, to the extent of ₹10,000/- that C shall pay all the bills that B shall draw upon C. C accepts the bill. A gives notice of revocation. C dishonors the bill at maturity. A is liable upon his guarantee.

Revocation of continuing guarantee by surety's death

Section 131 provides that the death of the surety operates, in the absence of any contract to the contrary, as a revocation of continuing guarantee, so far as regards future transactions.

Discharge of surety

The liability of the surety is discharged under the following circumstances-

- By giving notice to the creditor – Section 130;
- By the death of the surety – Section 131;
- By variance in terms of contract – Section 133;
- By release or discharge of principal debtor – Section 134;
- When creditor compounds with the principal debtor by giving time to, or agrees not to sue – Section 135;
- By creditor' act or omission impairing surety's eventual remedy – Section 139;

Which will not discharge the surety?

In the following circumstances the liability of the surety is not considered to be discharged-

- Section 136 – Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged;
- Section 137 - Mere forbearance on the part of the creditor to sue the principal debtor or to enforce the other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety;

Example – B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

Rights of surety

The following are the rights available to the surety under this Act

- Section 140 – **Right of surety on payment or performance** – Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor;
- Section 141 – **Surety's right to benefit of creditor's securities** – A surety is entitled to the benefit of every security which the creditor had against the principal debtor at the time when the contract of surety ship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Example –

- C advances to B, his tenant ₹20000/- on the guarantee of A. C has also a further security for ₹20,000/- by a mortgage of B's vehicle. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the vehicle;
- C, a creditor whose advance to B is secured by a decree, receives also a guarantee for that

advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged;

- A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up further security. A is not discharged.

Section 140 provides for subrogation where the guarantor clears his liability by payment. He is invested with all rights which the creditor had with the principal debtor. The section enacts that in order that the surety may be invested with all the rights which the creditor had against the principal debtor, the following conditions be fulfilled, namely-

- the guaranteed debt must have become due, or the principal debtor must have made default in performing the guaranteed duty; and
- the surety must have paid the debt, that is, the whole debt, or the surety must have performed all that is liable for.

Unless the said two conditions have been fulfilled the surety cannot call upon the creditor to invest him with all the rights which he had against the principal debtor.

Invalid guarantee

The following are considered as invalid guarantee-

- **Guarantee obtained by misrepresentation** – Section 142 provides that any guarantee which has been obtained by means of misrepresentation made by the creditor or with his knowledge and assent, concerning a material part of the transaction is invalid;
- **Guarantee obtained by concealment** – Section 143 provides that any guarantee without the creditor has obtained by means of keeping silence as to a material circumstance is invalid.

Example –

- A engages B as clerk to collect money for him. B fails to account for some of his receipts and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid;
- A guarantee to C payment for iron to be supplied by him to B to the amount of 2000 tons. B and C have privately agreed that B should pay ₹5/- per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as surety.

Co-surety

Section 144 provides that where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Section 146 provides that the co-sureties are liable to contribute equally. This section provides that where two or more persons are co-sureties for the same debt or duty either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Section 147 of the Act provides that co-sureties who are bound in different sums to pay equally as far as the limits of their respective obligations permit.

Implied promise to indemnify surety

Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum has rightfully paid under the guarantee, but no sums which he had paid wrongly.

Example –

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit having reasonable grounds for doing so, but is compelled to pay the amount of the debt, with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A and on A's refusal to pay, sues him upon the bill, A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B and the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action;

(c) A guarantees to C, to the extent of ₹2000/- payment for rice to be supplied by C to B. C supplies B rice to less amount, than ₹2000-, but obtains from B payment of the sum of₹2000/- in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

BAILMENT AND PLEDGE

Chapter IX of the Act deals with bailment, pledge and agency.

Bailment

Section 148 defines the term 'bailment' as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, by returned or otherwise disposed of according to the directions of the person delivering them. The bailment consists of-

- Bailor – the person delivering the goods is called the 'bailor'; and
- Bailee – the person to whom the goods are delivery is called the 'bailee'.

If a person, already in possession of the goods of other contracts to hold them as a bailee, he thereby becomes the bailee and the owner becomes the bailor of such goods, although they may not have been delivery by way of bailment.

The following are ingredients of the bailment-

- There must be a delivery of specific goods by one person to another;
- The delivery must be for some purpose;
- The delivery must be upon a contract that the goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the bailor.

Bailments may be classified into voluntary and involuntary. Voluntary bailments are the outcome of an express contract between the parties. Instances of involuntary bailments are found in cases of finders of good or of goods sent to a wrong place, or in excess of the quantity ordered, or in cases where the bailee dies and the subject of bailment comes into the hands of the bailee's heirs.

Where there is no obligation to return the identical article, either in its original or in an altered form, there is no contract of bailment.

Delivery to bailee how made

Section 149 provides that the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or any persons authorized to hold them on his behalf.

Bailor's duty

Section 150 lays down three duties, namely-

- It is the duty of the bailor to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interference with the use of them, or expose the bailee to extraordinary risk;
- If the bailor does not make such disclosure and some loss or damage results, he is responsible for so much of it as arises to the bailee directly from such faults;
- If the goods are bailed for hire, the bailor is responsible for damage arising to the bailee directly from such faults, whether he was or was not aware of the existence of such goods bailed.

Example –

- A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damages sustained;
- A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

Care to be taken by bailee

Section151 provides that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

In 'Nagalinga Chettiyar V. Kayarebana Chettiyar' –AIR 1915 Mad.80 it was held that where the standard of care prescribed by Section151 is not observed the bailee cannot be exonerated from his liability simply because the bailee's goods were also lost along with the goods bailed.

In 'Sirmour Truck Operators Union V. National Insurance Co. Limited' AIR 2011 (NOC) 389 (HP) it was held that the carrier cannot be exempted from its own negligence or negligence by his agent where goods carried at 'owner's risk' and cannot escape from the liability to make good loss.

Bailee when not liable

Section 152 provides that the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care described in Section 151.

Termination of bailment

Section 153 provides that a contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Example – A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is at the option of A, a termination of the bailment.

In 'Neekram V. Bank of Bengal' – ILR 19 Cal. 322 (PV) it was held that this section is intended for the protection of the bailor whose goods are being used by the bailee in a manner inconsistent with the conditions of the bailment. The bailor may put an end to the bailment although it was created for a specified purpose which has not been accomplished or for a prescribed which has not expired. But merely exercising his rights irregularly by the bailee, e.g., a sub pledge or a premature sale by a pledge will not attract the application of the section.

Liability for unauthorized use of bailed goods

Section 154 provides that if the bailee makes any use of goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Example –

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benaras. A rides with due care but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

In 'Hafizullah V. Montague' – 165 IC 354 it was held that where a car was entrusted to the defendant as a bailee and the evidence establishes that he was using the car for his private purposes in contravention of his agreement with the plaintiff, the bailor, it was held that the defendant was liable for the damages arising from such use.

Mixing of the goods

The goods of the bailor may be mixed with the goods of the bailee. This mixing may be done with or without the consent to the bailor. What would be the effect in such cases? Section 155 provides the solution for the same. The section provides that if the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

What would be the effect if the goods of the bailor are mixed with the goods of the bailee without the consent of the bailor? Section 156 and 157 provides the solution for the same. Section 156 provides the effect of mixture, without bailor's consent when the goods can be separated. Section 157 provides the effect of mixture, without bailor's consent when the goods cannot be separated.

Section 156 provides that if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods and the goods can be separated or divided, the property in the goods remains in the parties, respectively, but the bailee is bound to bear the expenses of separation or division, and any damage arising from the mixture.

Example –

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

Section157 provides that if the bailee, without the consent of the bailor, mixed the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Example –

A bails a barrel of Cap flour worth ₹45 to B. B without A's consent, mixes the flour with country flour of his own, worth only ₹25 a barrel. B must compensate A for the loss of his flour.

Bailor's obligation

Section 158 and 164 impose obligation on the bailor. Section 158 provides that where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Section 164 provides that the bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Restoration of goods

The bailed goods should be returned after the bailment is over. Section 159 provides for the restoration of goods lent gratuitously and Section 160 provides for return of goods bailed on expiration of time or accomplishment of purpose. Section 161 provides for the responsibility of the bailee when goods are not duly returned.

Section 159 provides that the lender of a thing for use may at any time require its return if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Section 160 provides that it is the duty of the bailee to return, or deliver, according to the bailor's directions, the goods bailed without demand, as soon as the time for which they were bailed has expired, or for the purpose for which they were bailed has been accomplished.

Non delivery of the goods would amount to breach of contract. This section is silent as to the remedies open to a bailor when the bailee has failed to return the goods on his demand. In 'Dhian Singh Sobha Singh V. Union of India' – AIR 1958 SC 274 the Supreme Court held that a bailor in the event of non delivery of the goods by the bailee on demand made by him in that behalf was entitled at his election to sue the bailee either for wrongful conversion of the goods or the wrongful detention thereof.

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

Section 163 provides that in the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Example – A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Section 165 provides that if several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Section 166 provides that if the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Termination of gratuitous bailment by death

Section 162 provides that a gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Bailor's responsibility

Section 164 provides the duties and liabilities of the bailor to the bailee. This section provides that the bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Right of third person

Section 167 provides that if a person, other than the bailor, claims goods bailed he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of finder of goods

Section 168 provides that the finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific rewards for the return of goods lost, the finder may sue for such reward and may retain the goods until he receives it.

Section 169 provides that when a thing which is commonly the subject of sale is lost, if the owner cannot, with reasonable diligence, be found or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it-

- when the thing is in danger of perishing by or of losing the greater part of its value; or
- when the lawful charges of the finder, in respect of the thing found, amount to two thirds of its value.

In 'MJR Steels (P) Limited V. Chrisomar Corporation' –AIR 2007 (NOC) 234 (Cal.) it was held that it is not always necessary that sale should be by owner himself; sale by agent or anyone with the consent of owner is valid. Finder of asset can also sale and give good title. There can also sale by estoppels.

Bailee's lien

Section 170 provides that when the bailee has in accordance with the purpose of the bailment, rendered any service involving the exercise of labor or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration or the service he has rendered in respect of them.

PLEDGE

Section 172 of the Act provides that the bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The pledge constitutes-

- 'Pawner' – The bailor in this case is called as pawner;
- Pawnee – the bailee in this is case as pawnee.

A pledge is a bailment of moveable property by way of security. The concept of pledge under this Act is dealt with Sections 172 to 179. In 'Maharastra State Co-operative Bank Limited V. Assistant Provident Fund Commissioner' – (2009) 10 SCC 123 it was held that in a pledge the pledge is in possession of and has a special property in the goods which he is entitled to detain to secure repayment. Unlike a mortgage, a pledge does not have the effect of transferring any interest in the property in favor of the pledge. Delivery of goods is necessary to complete a pledge.

Difference between pledge and bailment

Section 172 of the Act define s a pledge to be the bailment of goods as security for payment of debt or performance of a promise whereas Section 148 provides that a bailment is the delivery of goods by one person to another person for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them.

Rights of pawnee

The rights of the pawnee are described in Section 173, 175 and 176. Section173 provides that the pawnee may retain the goods pledged, not only for the payment of the debt or the performance of the promise, but for the interest, the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Section175 provides that the pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Section 176 provides that if the pawnor makes default in payment of the debt, or performance at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawner upon the debt or promise and retain the goods pledged as a collateral security, or he may sell the things pledged, on giving the pawner a reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawner is still liable to pay the balance. If the proceeds of the sale are greater than the amounts so due, the pawnee shall pay over the surplus to the pawner.

Retaining of the goods by pawnee

Section174 provides that the pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pledge by Mercantile Agent

Section 178 provides that where a mercantile agent is, with the consent of the owner, in possession or goods or the documents of the title of goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same, provided the pawnee acts in good faith and has not at the time of the pledge notice that the pawner has no authority to pledge.

The term 'mercantile agent' is defined under Section 2(2) of Sale of Goods Act as an agent having in the course of ordinary business having authority, either to sell goods or to consign goods for the purposes of sale or to buy goods or to raise money on the security of the money.

Pledge in a voidable contract

Section178A provides that when the pawner has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section19A, but the contract has not been rescinded at the time of pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawner's defect of title.

Limited interest of pawner

Section 179 provides that where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suit against wrong doers

Section 180 provides that if a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailer or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief

Section 181 provides that whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and bailee, be dealt with according to their respective interests.

AGENCY

Section 182 provides that an 'agent' is a person employed to do any act for another or to represent another in dealing with the third person.

Principal

The person for whom such act is done, or who is so represented is called the 'principal'.

Provisions regarding to Agent

- A person may become an agent-
- if he is of the age of majority according to the law to which he is subject;
- he is of sound mind;
- no consideration is necessary for the appointment of agent;
- the authority of an agent may be expressed or implied;

Section187 defines the terms 'expressed authority' and implied authority. An authority is said to be express, when it is given by words or spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Example – A owns a shop in Serampur, himself living in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for purposes of the shop.

Section 184 provides that as between the principal and third persons any person may become agent, but no person who is not of the age of the majority and of sound mind become an agent, so as to be responsible to his principal according to the provisions in that behalf.

Section 185 provides that no consideration is necessary to create an agency

Section 188 provides that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such businesses.

Example –

(a) A is employed by B, residing in London to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same;

(b) A constitutes B his agent to carry on his business of a ship builder. B may purchase and other materials, and hire workmen, for the purposes of carrying on his business.

Section 189 provides the agent's authority in an emergency nature. According to this section an agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Example –

(a) An agent for sale may have goods repaired if it be necessary;

(b) A consigns provisions to B at Calcutta, with direction to send the immediately to C at Cuttack. B may sell the provisions at Calcutta if they will not bear the journey to Cuttack without spoiling.

Section 190 provides that when agent cannot delegate his authority. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by ordinary custom of a trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

Sub agent

Section 191 defines the term 'sub-agent' as a person employed by, and acting under the control of, the original agent in the business of the agency.

Section 192 provides that where a sub agent is properly appointed, the principal is, so far as regard third persons, represented by the sub agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

The agent is responsible to the principal for the act of the sub agent. The sub agent is responsible for his act to the agent, but not the principal except in cases of fraud wilful wrong.

Section 193 provides for the responsibility of the agent for sub agent appointed without authority. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by, or responsible for, the acts of the person so employed, nor is that person responsible to the principal.

Section 194 provides that where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub agent but agent of the principal for such part of the business of the agency

as is entrusted to him.

Example –

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the money due to A from C & Co., B instructs D, a solicitor, to take legal proceedings against C & Co for the recovery of the money. D is not a sub agent, but is a solicitor for A.

Agent's duty

Section 195 provides that in selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Example –

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for. A surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A;

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Ratification

Section 196 provides for right of person as to acts done for him without his authority. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts, if he ratifies them, the same effects will follow as if they had been performed by the authority.

Section 197 provides that the ratification may be expressed or implied in the conduct of the person on whose behalf the acts are done.

Example –

(a) A, without the authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification on the purchase made for him by A;

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

Section 198 provides that no valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Section 199 prescribes the effect of ratifying any unauthorized act forming part of a transaction. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Section 200 provides that ratification of unauthorized act cannot injure third person. An act done by one person on behalf of another, without such other person's authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Example –

(a) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver;

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Termination of Agency

Section 201 provides for the termination of agency. An agency is terminated by the principle-

- revoking his authority; or
- by the agent renouncing the business of the agency; or'
- by the business of the agency being completed; or
- by either the principal or agent dying or becoming of unsound mind; or
- by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Section 202 provides that where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express, be terminated to the prejudice of such interest.

Example –

(a) A gives authority to B to sell A's land and to pay himself, out of the proceeds, the debts due to him. A cannot revoke his authority, nor can it be terminated by his insanity or death;

(b) A consigns 1000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton and to repay himself out the price, the amount of his own advances. A cannot revoke the authority nor is it terminated by his insanity or death.

Section 208 provides as to the time at which the agent's authority is terminated as to agent and as to third person. The termination of the authority of an agent does not, so for as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to him.

Example –

(a) A directs B to sell goods for him and agrees to give B 5% commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for ₹100/-. The sale is binding on A and is entitled to ₹ 5/- as his commission;

(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Revocation of agent's authority

Section 203 provides for the revocation of agent's authority. The principal may, save as is otherwise provided by Section 202, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. Section 204 provides that the principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Compensation

Section 205 provides for the provision of compensation for revocation by principal or renunciation by

agent. When there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Notice of revocation

Section 206 provides that reasonable notice must be given before revocation or renunciation of the agency. Otherwise the damage thereby resulting to the principal or the agent must be made good to the one by the other.

Section 207 provides that revocation and renunciation may be expressed or implied in the conduct of the principal or agent respectively.

Example – A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

Agent's duty on termination of agency

Section 209 provides that when an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and reservation of interests entrusted to him.

Termination of sub-agent's authority

Section 210 provides that the termination of the authority of an agent causes the termination of the authority of all sub agents appointed by him.

Agent's duty

- Section 211 provides that an agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conduct such business. When the agent acts otherwise, if any loss be sustained, be must make it good to his principal and if any profit accrues, he must account for it.

Example –

(a) A, an agent engaged in carrying on for B a business, in which it is the customs to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments;

(b) B, a broker in whose business it is not the custom to sell on credit, sell goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

- Section 212 provides that an agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Example –

(a) A, a merchant in Calcutta, has an agent. B in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a consideration time. A, in consequence of not receiving the money, becomes insolvent, B is liable for the money and interest, from the day on which it ought to have been paid, according to the usual rate, and any further direct loss – as e.g., by variation of rate of exchange – but not further;

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without

making the proper and usual enquiries as to the solvency of B. B at the time of such sale is insolvent. A must make compensation to his principal in respect of any thereby sustained;

(c) A, an insurance broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

- Section 213 provides that an agent is bound to render proper accounts to his principal on demand.
- Section 214 provides that it is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions;
- Section 218 provides that subject to such deductions, the agent is bound to pay to his principal all sums received on his account;

Right of principal

The rights of principal are described in Sections 215 and 216.

- Section 215 provides that if an agent deals on his own account in the business of the agency, without first obtaining the consent of the principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the Principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Example –

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material act, or that the sale has been disadvantageous to him;

(b) A directs B, to sell A's estate. B on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate of adopt the sale at his option.

- Section 216 provides that if an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Example – A direct B, his agent, to buy a certain house for him. B tells A that it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Agent's right

The rights of agents are prescribed in Section 217 and 219.

- Section 217 provides that an agent may, retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and also such remuneration as may be payable to him for acting as agent;

- Section 219 provides that in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act, but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Misconduct of agent

Section 220 provides that an agent, who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has been misconducted.

Example –

(a) A employs B to recover ₹ 1 lakh from C, and to lay it out on good security. B recovers ₹ 1 lakh and lays out ₹90,000/- on good security, but lays out ₹10,000/- on security which he ought to have known to be bad, whereby A loses ₹2,000/-. B is entitled to remuneration for recovering ₹1,00,000/- and for investing ₹90,000/- . He is not entitled to any remuneration for investing ₹10,000/- and he must make good the ₹2000/- to A;

(b) A employs B to recover ₹1,000/- from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

Agent's lien

Section 221 provides that in the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or account for to him.

Obligation of principal to agent

- Section 222 provides that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agents in exercise of the authority conferred upon him.

Example –

(a) B, at Singapur, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit and A authorizes him to defend the suit. B defends the suit and is compelled to pay damages and costs and incur expenses. A is liable to B for such damages, costs and expenses;

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purpose of 10 casks of oil for A. Afterwards A refuses to receive the oil and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, as to pay damages and costs and incur expenses. A is liable to B for such damages, costs and expenses.

- Section 223 provides that where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons

Example –

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The Officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions;

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

- Section 225 provides that the principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Example – A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

Non liability of principal to agent

Section 224 provides that where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or implied promise to indemnify him against the consequences of that act.

Example –

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the Act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those losses.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

Agency with third persons

Section 226 provides for the enforcement and consequences of agent's contracts. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into, the acts done by the principal in person.

Example –

(a) A, buys goods from B, knowing that he is an agent for the sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B;

(b) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Section 227 provides that when an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

Example – A being owner of a ship and cargo, authorizes B to procure an insurance for ₹4,000/- on the ship. B procures a policy for ₹4,000/- on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Section 228 provides that principal is not bound when excess of agent's authority is not separable. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Example – A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of ₹6000/-. A may repudiate the whole transaction.

Notice to agent

Section 229 provides that any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Example –

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C, against the price of the goods;

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

Enforcement of contract by agent on behalf of principal

Section 230 provides that in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by him. Such a contract shall be presumed to exist in the following cases-

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Right of parties to a contract made by agent

Section 231 provides the right of parties to a contract made by agent not disclosed. If an agent makes a contract with person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Section 232 provides that where one man makes a contract with another, neither he knowing, nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Example – A, who owes ₹500/- to B, sells ₹1000/- worth of rice to B. A is acting as agent for C in the transaction, but B has neither knowledge, nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

Section 233 provides that in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

Example – A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Section 234 provides that when a person who has made a contract with an gent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterward hold liable the agent or principal respectively.

Liability of a pretended agent

Section 235 provides that a person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer

does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Section 236 provides that a person, with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his account.

Section 237 provides that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts of obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Example –

(a) A consigns goods for B for sale and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments in blank. B sells them to C in violation of private orders from A. The sale is good.

Effect of misrepresentation or fraud by agent

Section 238 provides that misrepresentation made or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents in matters which do not fall within their authority, do not affect their principals.

Example –

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills-of-lading without having received on board the goods mentioned therein. The bills-of-lading are void as between B and pretended consignor.

Part-B

INDUSTRIAL LAWS, COMMERCIAL LAWS AND COMPANY LAWS

THE INSTITUTE OF COST ACCOUNTANTS OF INDIA

EXECUTIVE DIPLOMA IN COST & MANAGEMENT ACCOUNTING FOR ENGINEERS

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Module - III
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Tools & Techniques for Decision Making

Tools & Techniques for Decision Making

Module - II
Contract Management and Industrial Laws, Commercial Laws & Company Law

Module - V
Advanced Cost & Financial Management and Management Reporting

Module - IV
Treasury & Financial Services and Insurance & Risk Management

Relevant Experience

Relevant Experience

Synergy Effect

STRATEGIC DECISION MAKER

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CAREER PATH FOR ENGINEERS TO BECOME STRATEGIC DECISION MAKERS

1 INDUSTRIAL LAWS

FACTORIES ACT, 1948 – OBJECT, SCOPE AND APPLICABILITY

Introduction

There are several legislations which regulate the conditions of employment, work environment and other welfare requirements of certain specific industries. The Factories Act, 1948 enacted to regulate the working conditions in factories.

In the case of Ravi Shankar Sharma v. State of Rajasthan, AIR 1993 Raj 117, and Court held that Factories Act is a social legislation and it provides for the health, safety, welfare and other aspects of the workers in the factories. In short, the Act is meant to provide protection to the workers from being exploited by the greedy business establishments and it also provides for the improvement of working conditions within the factory premises.

The main object of the Factories Act, 1948 is to ensure adequate safety measures and to promote the health and welfare of the workers employed in factories. The Act also makes provisions regarding employment of women and young persons (including children and adolescents), annual leave with wages etc.

The Act extends to whole of India including Jammu & Kashmir and covers all manufacturing processes and establishments falling within the definition of 'factory' as defined under Section 2(m) of the Act. Unless otherwise provided it is also applicable to factories belonging to Central/State Governments. (Section 116)

The Factories Act, 1948 extend to whole of India and came into effect from 01.04.1949.

IMPORTANT DEFINITIONS

Competent person

Section 2(ca) defines the expression 'competent person' in relation to any provision of this Act, means a person or an institution recognized as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to-

- the qualifications and experience of the person and facilities available at his disposal; or
- the qualifications and experience of the persons employed in such institution and facilities available therein,

with regard to the conduct of such tests, examinations and inspections, and more than one person or institution can be recognized as a competent person in relation to a factory;

Hazardous Process

Section 2(cb) defines the expression 'hazardous process' as any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes, or effluents thereof would-

- cause material impairment to the health of the persons engaged in or connected therewith, or
- result in the pollution of the general environment.

The State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry, specified in the said Schedule;

Manufacturing process

Section 2(k) defines the expression 'manufacturing process' as any process for-

- making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
- pumping oil, water, sewage or any other substance; or
- generating, transforming or transmitting power; or
- composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or
- constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
- preserving or storing any article in cold storage.

In 'M/s Qazi Noorul Hasan Hamid Hussain Petrol Pump V. Deputy Director, Employees' State Insurance Corporation' – 2003 LLR 476 it was held that the definition 'manufacturing process' does not depend upon and is not correlated with any end product being manufactured out of a manufacturing process. It includes even repair, finishing, oiling or cleaning process with view to its use, sale, transport, delivery or disposal. It cannot be restricted an activity which may result into manufacturing something or production of a commercially different article.The 'manufacturing process' cannot be interpreted in a narrow sense in respect of an act which is meant for the purpose connected with the social welfare.

Worker

Section 2(l) defines the term 'worker' as a person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process but does not include any member of the armed forces of the Union.

In 'Lal Mohammed V. Indian Railway Construction Co. Limited' – AIR 1999 SC 355 it was held that all the workers employed by a construction company would squarely attract the definition of the term 'workman' as found in Section 2(l) of the Act as they are working for remuneration in a manufacturing process carried out by the project.

Factory

Section 2(m) defines the term 'factory' as any premises including the precincts thereof-

- whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

- whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,-

but does not include a mine subject to the operation of the Mines Act, 1952 or a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place.

- For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account;
- For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof.

In 'Seelan Raj V. Presiding Officer, I Additional Labor Court, Chennai' – 2001 LLR 418 it was held that under Section 2(m), 'Factory' means any premises including the precints thereof in which a manufacturing process is carried on Explanation II of Section 2(m) sets out that the mere fact that an electronic data processing unit or a computer unit is installed in any premises or part thereof would not render a unit into a factory if no manufacturing process is carried on in such premises or part thereof.

Occupier

Section 2(n) defines the term 'occupier' of a factory as the person who has **ultimate control** over the affairs of the factory.

- in the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;
- in the case of a company, any one of the directors shall be deemed to be the occupier;
- in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier;
- in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire,-
    - the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under-
        - section 6, section 7, section 7A, section 7B, section 11 or section 12;
        - section 17, in so far as it relates to the providing and maintenance of sufficient and suitable lighting in or around the dock;
        - section 18, section 19, section 42, section 46, section 47 or section 49, in relation to the workers employed on such repair or maintenance;
    - the owner of the ship or his agent or master or other office-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be the occupier for the purposes of any matter provided for by or under section 13, section 14, section 16 or section 17 (save as otherwise provided in this proviso) or Chapter IV (except section 27) or section 43, section 44, or section 45, Chapter VI, Chapter VII, Chapter VIII or Chapter IX or section 108, section 109 or section 110, in relation to-
        - the workers employed directly by him, or by or through any agency; and
        - the machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person.

In 'Container Corporation of India Limited v. Lt. Governor, Delhi' – 2002 LLR 1068 it was held that in the

case of a company, which owns a factory, it is only one of the directors of the company who can be notified as the occupier of the factory for the purpose of the Act and the company cannot nominate any other employee to be the occupier of the factory.

In 'Indian Oil Corporation V. Labor Commissioner' –AIR 1998 SC 2456 it was held that for the purpose of Section 2(n) what is to be seen is who has the 'ultimate control' over the affairs of the factory. Relevant provisions regarding establishment of the Indian Oil Corporation Limited and its working, leave no doubt that the ultimate control over all the affairs of the Corporation, including opening and running of the factories, is with the Central Government.Acting through the Corporation is only a method employed by the Central Government for running its petroleum industry. In the context of Section 2(n) it will have to be held that the all the activities of the Corporation are really carried on by the Central Government with a corporate mask.

Notice by occupier

Section 7 provides that the occupier shall, at least 15 days before he begins to occupy or use any premises as a factory, send to the Chief Inspector, a written notice containing the name and situation of the factory, the name and address of the occupier, the nature of manufacturing process, the details of workers etc., Whenever a new manager is appointed, the occupier shall send to the Inspector a written notice and to the Chief Inspector a copy thereof within seven days from the date on which such person takes over charge.

Duties of occupier

Section 7A prescribes the general duties of occupier.Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

Inspector

Section 8 provides that the State Government may appoint such persons as posses the prescribed qualification to be Inspectors for the purpose of this Act and may assign to them such local limits as it may think fit. Section 9 prescribes the powers of the Inspector as detailed below-

- to enter into any place which is used, or which he has reason to believe is used as a factory;
- make examination of the premises, plant, machinery, article or substance;
- inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not and take on the sport statements of any person which he may consider necessary for such inquiry;
- require the production of any document relating to factory;
- seize or take copies of any register, record or other documents of any portion thereof as he may consider necessary;
- to take possession of any article or substance or part thereof and detain it for so long as is necessary for such examination;
- to exercise such other powers as may be prescribed.

Certified surgeons

Section 10 provides that the State Government may appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act within such local limits or for such factory or class or description of factories as it may assign to them respectively.The duties of certified surgeons are as follows-

- the examination and certification of young persons;
- the examination of person engaged in factories in such dangerous occupations or processes as may be prescribed;
- the exercising of such medical supervision as may be prescribed for any factory or class or description of factories, where-

- cases of illness have occurred which it is reasonable to believe are due to the nature of the manufacturing process carried on, or other conditions of work prevailing, therein;
- by reason of any change in the manufacturing process carried on or in the substances used therein or by reason of the adoption of any new manufacturing process or of any new substance for use in a manufacturing process, there is a likelihood of injury to the health of workers employed in that manufacturing process;
- young persons are, or are about to be, employed in any work which is likely to cause injury to their health.

Welfare measures

The Factories Act takes care of the workers in the following aspects-

- health of the workers in the working environment;
- safety of the workers including in the hazardous process;
- welfare of the workers;
- working hours of adults;
- employment of young persons;
- Annual leave with wages;

Health

Chapter III of the Act deals with measures to be taken considering the health aspects of the workers. The following are to be taken care of by the occupier of the factory:

- cleanliness;
- disposal of waste and effluents;
- ventilation and temperature;
- dust and fume;
- artificial humidification;
- overcrowding;
- lighting;
- drinking water;
- latrines and urinals;
- spittoons

Cleanliness

Section 11 of the Act provides every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance, and in particular-

- removal of accumulated dirt and refuse on floors, benches of workroom, stair cases and passages and effective disposal of the same;
- cleaning of the floor of every workroom – once in every week by washing with disinfectant or by some other effective method;
- providing effective drainage for removing water to the extent possible;
- to ensure that interior walls and roofs etc., are kept clean the following is to be complied with-
  - white wash or color wash should be carried out at least once in every period of 14 months;
  - where surface has been painted or varnished, repair or revarnish should be carried out once in every five years, if washable then once in every period of six months;
  - where they are painted or varnished or where they have smooth impervious surface, it should be cleaned once in e very period of 14 months by such method as may be prescribed.

- all doors, windows and other framework which are of wooden or metallic shall be kept painted or varnished at least once in every period of five years;

The dates on which such processes are carried out shall be entered in the prescribed register.

Disposal of wastes and effluents

Section 12 provides that effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein, so as to render them innocuous, and for their disposal.

Ventilation and temperature

Section 13 provides that effective and suitable provision shall be made in every factory for securing and maintaining every workroom with adequate ventilation by the circulation of fresh air and such a temperature as will secure to workers therein reasonable conditions of comfort and prevent to health. In case of the work involves the production excessively high temperatures, adequate measures shall be taken to protect the workers by separating their process which produces such high temperatures from the workroom by insulating the hot parts or by other effective means.

Dust and fume

Section 14 provides that in every factory if there is given off any dust or fume or other impurity of such nature in the process of manufacturing and it is likely to be injurious or offensive to the workers employed, any dust in substantial quantities, offensive to the workers, effective measures shall be taken to prevent its inhalation and accumulation in any work room.Exhaust appliance shall be applied as near as possible to the point of origin of dust, fume or other impurity and such points shall be enclosed so far as possible.

Artificial humidification

Section15 provides that if the humidity of the air is artificially increased, the State Government may make rules-

- prescribing standards of humidification;
- regulating the methods used for artificially increasing the humidity of the air;
- directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded;
- prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the workrooms.

Overcrowding

Section16 provides that no room in any factory shall be overcrowded to an extent injurious to the health of the workers employed therein.There shall be in every workroom in a factory at least14.2 cubic meters of space for every worker employed therein.

Lighting

Section 17 provides that in every part of a factory where workers are working or passing there shall be provided and maintained sufficient and suitable lighting, nature or artificial or both.All glazed windows and skylights used for the lighting shall be kept clean on both the inner and outer surfaces and free from obstruction.Effective provisions shall be made for the prevention of glare, either directly from a source of light or by reflection from a smooth or polished surface and the formation of shadows to such an extent as to cause eye strain or the risk of accident to any worker.

Drinking water

Section 18 provides that effective arrangements shall be made to provide and maintain at suitable points conveniently situated for all workers employed a sufficient supply of wholesome drinking water.Where more than 250 workers are employed provision shall be made for cool drinking water

during hot weather.The water points shall be away six meters from any washing place, urinal, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination.

Latrines and urinals

Section 19 provides that in every factory-

- sufficient latrine and urinal accommodation of prescribed types shall be provided conveniently situated and accessible to workers at all times while they are at factory;
- separate enclosed accommodation shall be provided for male and female workers;
- they shall be adequately lighted and ventilated;
- they shall be maintained in a clear and sanitary conditions at all times;
- sweepers shall be employed to keep clean latrines, urinals and washing places.

If there are more than 250 workers are employed all latrine and urinal accommodation shall be of prescribed types.The flows and internal walls andthe sanitary blocks shall be laid in glazed tiles to provide a smooth polished impervious surface.The latrines and urinals shall be washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.

Spittoons

Section 20 provides that there shall be provided a sufficient number of spittoons in convenient places and they shall be maintained in a clean and hygienic condition.

Safety

Chapter IV of the Act prescribes the procedures to be adopted on the safety of the working place in a factory.The factory is to take safety measures in respect of the following-

- Fencing of machinery;
- Work on or near machinery in motion;
- Employment of young persons on dangerous machines;
- Striking gear and devices for cutting off power;
- Self acting machines;
- Casing of a new machinery;
- Prohibition of employment of women and children near cotton openers;
- Lifting machines, chains, ropes and lifting tackles;
- Revolving machinery;
- Floors, stairs and means of access;
- Pits, sumps openings in floors etc.,;
- Excessive weights;
- Protection of eyes;
- Precaution against dangerous fumes, gases, etc.,
- Precautions regarding the use of portable electric light;
- Explosive or inflammable dust, gas etc.,
- Precaution in case of fire;
- Safety on buildings and machinery;
- Maintenance of buildings;
- Appointment of safety officers.

Hazardous Processes

Chapter IVA provides for making provisions relating to hazardous process.The State Government may, for purposes of advising it to consider applications for grant of permission for the initial location of a factory involving a hazardous process or for the expansion of any such factory, appoint a Site Appraisal Committee. The Site Appraisal Committee shall examine an application for the establishment of a factory involving hazardous process and make its recommendation to the State Government within 90 days of the receipt of such application. The Committee has the power to call for any information from the person making an application.When the application is got approved by the State Government, it shall not be necessary to obtain a further approval from the Central Board of the State Board of pollution authorities.

Responsibility of the occupier

The occupier has to follow the procedure-

- to lay down a detailed policy with respect to the health and safety of the workers;
- to disclose all the information regarding dangers including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes to the workers employed in the factory;
- to draw up an onsite emergency plan and detailed disaster control measures for the factory and make known to the workers and to the general public living in the vicinity of the factory, the safety measures required to be taken in the event of accident taking place.
- to lay down measures for the handling usage, transportation and storage of hazardous substances inside the factory premises and the disposal of such substances outside the factory premises and publicize them in the manner prescribed among the workers and the general public living in the vicinity.

Section 41C provides that the occupier is having specific responsibilities in relation to hazardous processes. He has to maintain the health records of the employees. He is to appoint experienced persons who possess specified qualifications in handling hazardous substances and competent to supervise such handling within the factory.

Powers of the Central Government

Section 41D provides that the Central Government is having power to inquire to the standards of health and safety observed in a factory. Section 41E provides to provide emergency standards in respect of a factory. Section 41F provides for fixing the maximum permissible threshold limits of exposure of chemical and toxic substances in manufacturing process in any factory. Section 41G provides that the occupier shall set up a Safety Committee consisting of equal number of representations of workers and management to promote co-operation between the workers and the management in maintaining proper safety and health at work and to review periodically the measures taken in that effect. Section 41H provides that the workers have reasonable apprehension that there is a likelihood of imminent danger to their lives or health due to accident, they may bring the same to the notice of his occupier, agent, manager or any other person who is in charge of the factory or the process. Immediate action shall be taken and a report to the Inspector having jurisdiction.

Welfare

Chapter V provides the welfare measures to be taken in a factory for the workmen employed in the factory.The following are the welfare measures prescribed in the Act to be provided by the factory to their workmen-

- washing facilities;
- facilities for storing and drying clothing;
- facilities for sitting;

- first aid appliances;
- canteens;
- shelters, rest rooms and lunch rooms;
- crèches;
- appointment of welfare officers.

Washing facilities

Section 42 provides that in every factory adequate and suitable facilities for washing shall be provided and maintained for the use of the workers.Separate and adequately screened facilities shall be provided for the use of male and female workers.The washing facility shall be conveniently accessible and shall be kept clean.

Facilities for storing and drying clothing

Section 43 provides that the State Government may, in respect of any factory or class or description of factories, make rules requiring the provision therein of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing.

Facilities for sitting

Section 44 provides that suitable arrangements for sitting shall be provided and maintained for all workers obliged to work in a standing position, in order that they make take advantage of any opportunities for rest which may occur in the course of their work.

First aid appliances

Section 45 provides that first aid appliances shall be provided and maintained so as to be readily accessible during all working hours or cupboards equipped with the prescribed contents and the number of such boxes or cupboards to be provided and maintained shall not be less than for every 150 workers at any one time in the factory.Each first aid box or cupboard shall be kept in charge of a separate reasonable person who holds a certificate in the first aid treatment recognized by the State Government and he should always be readily available during the working hours of the factor.

In a factory where more than 500 workers are employed an ambulance of the prescribed size containing the prescribed equipment, nursing staff etc., shall be provided and made readily available at all times.

Canteens

Section 46 provides that if more than 250 workers are employed in a factory a canteen or canteens shall be provided and maintained by the occupier for the user of the workers.The items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs shall be borne by the employer.

In 'Ferro Alloys Corporation Limited V. Government of Andhra Pradesh Labor Employment and Technical Education (Labor II) Department' – 2003 (96) FLR 160 it was held that there is nothing in Section 46 of the Factories Act, which provides for the mode in which the specified establishment must set up a canteen where it is left to the discretion of the concerned establishment to discharge its obligation of setting up a canteen either by way of direct equipment or by employment of contractor, it cannot be postulated that in the latter event, the persons working in the canteen would be the employees of the establishment.

Shelters, rest rooms and lunch rooms

Section 47 provides that if more than 150 workers are employed adequate and suitable shelters or rest rooms and a suitable lunch room with provision for drinking water shall be provided and maintained for the use of the workers.The same shall be sufficiently lighted and ventilated and shall be maintained in a cool and clean condition.

Crèches

Section 48 provides that if more than 30 women workers are employed there shall be provided and maintained a suitable room for the use of children under the age of 6 years of such women.The same shall be adequately ventilated and shall be maintained in clear and sanitary conditions and under the charge of women trained in the care of children and infants.

Welfare Officers

Section 49 provides that if 500 or more than workers are employed in a factory, the occupier shall employ in the factory such number of welfare officers as may be prescribed. In 'Shyam Vinyals Limited V. T. Prasad' – (1993) 83 FJR 18 (SC) it was held that an Assistant Personnel Officer cannot be held that he was in fact appointed asa Labor Welfare Officer simply because as a Assistant and Personnel Officer he was looking after the problems of the laborers and the welfare of the laborers.

Working hours of adults

Working hours

Chapter VI of the Act provides for the working hours of adults.This chapter provides for working hours in a day, weekly working hours,weekly holidays, intervals for rest. Spread over of duty, night shift etc.,

Section 54 provides that no adult worker shall be required or allowed to work in factory for more than nine hours in any day.

Section 55 provides that the periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that the worker shall work for more than five hours before he has had an interval for rest of at least half an hour.

Section 56 provides that the periods of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest, they shall not spread over more than ten and half hours in any day.

Section 51 provides that no adult worker shall be required or allowed to work in a factory for more than 48 hours in any week.In 'Richa & Company V. Shri Suresh Chand' – 2009 LLR 333 (SN) (Del HC) it was held that increase of 15 minutes working will not be violative of Section 51 of the Act.

Weekly holidays

Section 52 provides that no adult worker shall be required or allowed to work in a factory on the first day of the week unless-

- he has or will have a holiday for a whole day on one of the three days immediately before or after the said day; and
- the manager of the factory, has, before the said day or the substituted day whichever is earlier-
    - delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted; and
    - displayed a notice to that effect in the factory.

In 'Motor and Machinery Manufacturers Limited V. State of West Bengal' – 1964 (2) LLJ 562 it was held that the primary object of the Section 52 is to provide weekly holiday for the workers and such day was fixed to be the first day of the week i.e., Sunday. But for any special reasons, it becomes necessary to make Sunday the working day, a substitutional holiday is made compulsory. But the intendment of the section is not that the employers will at their sweet convert successive on all the Sundays primarily intended to be holidays as working days and make any other working day of the week a holiday instead of Sunday.

Compensatory holidays

Section 53 provides that if a worker is deprived of any of the weekly holidays he shall be allowed within the month in which the holidays were due to him or within two months immediately following that month, compensatory holidays of equal number to the holidays so lost shall be given.

Shift duty

Section 57 provides that where a worker in a factory works on a shift which extends beyond midnight-

- for the purposes of Section 52 and 53, a holiday for a whole day shall mean in his case a period of 24 consecutive hours beginning when his shift ends;
- the following day for him shall be deemed to be the period of 24 hours beginning when such shift ends, and the hours he has worked after midnight shall be counted in the previous day.

Section 58 provides that the work shall not be carried on in any factory by means of a system of shifts so arranged that more than one relay of workers is engaged in work of the same kind at the same time.

Overtime

Section 59 provides that where a worker works in a factory for more than 9 hours in any day or for more than 48 hours in any week, he shall, in respect of the overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

The term 'ordinary rate of wages' is defined as the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work.Where any workers are paid on a piece rate basis, the time rate shall be deemed to be equivalent to the daily average of their full time earnings for the days on which they actually worked on the same or identical job during the month immediately preceding the calendar month during which the overtime work was done and such time rates shall be deemed to be ordinary rate of wages of those workers.

In 'National Textiles Corporation (D.P.&R) Limited Unit- Mahalakshmi Mills, Beawar V. Labor Court, Jaipur' – 1997 LLR 518 it was held that Section 59 creates an obligation on the employer to pay extra wages for overtime if a worker works for more than 9 hours in any day or for more than 48 hours in any week.

Double employment

Section 60 imposes restriction that no adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, savein such circumstances as may be prescribed.

Register of adult workers

Section 62 provides that a register of adult workers shall be maintained, showing-

- the name of each adult worker in the factory;
- the nature of the work;
- the group, if any, in which he is included;
- where his group works on shifts, the relay to which he is allotted;
- such other particulars as may be prescribed.

Employment of women

Section 66 provides that the provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions-

- no exemption from the provisions of Section 54 may be granted in respect of any woman;
- no woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M.;
- the State Government may authorize the employment of any women between the hours of 10 PM and 5 A.M.;

- there shall be no change of shifts except after a weekly holiday or any other holiday.

Employment of young persons

Chapter VII of the Act deals with the employment of young persons.

Prohibition of employment of young children

Section 67 provides that no child who has not completed his 14th year shall be required or allowed to work in any factory.

Adolescent worker

Section 68 provides that a child who has completed his 14th year or an adolescent shall not be allowed to work in any factory unless-

- a certificate of fitness granted is in the custody of the manager of the factory; and
- such child or adolescent carries while he is at work a token giving a reference to such certificate.

Certificate of fitness

Section 69(1) provides that a certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the Manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the Manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory.

Section 69(2) provides that the certifying surgeon, after examination, may grant to such young person, in the prescribed form or may renew-

- a certificate of fitness to work in a factory as a child, if he is satisfied that the young person has completed his 14th year, that he has attained the prescribed physical standards and that he is fit for such work;
- a certificate of fitness to work in a factory as an adult, if he is satisfied that the young person has completed his 15th year and is fit for a full day's work in a factory.

The certificate granted by the certifying surgeon shall be valid for a period 12 months from the date thereof.He shall revoke any certificate granted or renewed if in his opinion the holder of it is no longer fit to work in capacity stated therein in a factory.In case the certifying surgeon refuses to give certificate he has to give reasons for the same. If a certificate is given under certain conditions, the young person shall not be allowed in any factory except in accordance with those conditions.The occupier is to pay the fee for getting the certificate from the certifying surgeon and the same shall not be recovered from the young person, his parents or guardian.

Working hours for children

Section 71 provide that no child shall be employed or permitted to work in any factory for more than four and a half hours in any day and during night.The period of work of all children employed in a factory shall be limited to two shifts which shall not overlap or spread over more than five hours each.Each child shall be employed in only one of the relays which shall not, except with the previous permission.No female child shall be allowed to work in any factory except between 8 A.M. and 7 P.M.,

Register of child workers

Section 73 provides that the Manager of every factor in which children are employed shall maintain a register of child workers showing-

- the name of each child worker in the factory;
- the nature of his work;
- the group, if any, in which he is included;

- where his group works on shifts, the relay to which he is allotted; and
- the number of his certificate of fitness granted under Section 69.

Annual Leave with wages

Chapter VIII of the Act deals with annual leave granted workers with wages.

Annual leave

Section 79 provides that every worker who has worked for a period 240 days or more in a factory during a calendar year shall be allowedleave with wages for a number days calculated at the rate of-

- if an adult, one day for every 20 days of work performed by him during the previous calendar year;
- if a child, one day for every 15 days of work performed by him during the previous calendar year.

The following shall be deemed to be days on which the worker has worked for the purpose of computation of the period of 240 days or more-

- any days of lay off, by agreement or contract or as permissible under the standing orders;
- in the case of a female worker, maternity leave for any number of days not exceeding 12 weeks; and
- the leave earned in the year prior to that in which the leave is enjoyed

but the above shall not be entitled for a worker to earn leave. The leave admissible shall be exclusive of all holidays whether occurring during or at either end of the period of leave.

In calculating the leave fraction of leave of half a day or more shall be treated as one full day's leave and fraction of less than half a day shall be omitted.

Carry forward of leave

If a worker does not in any calendar year take the whole of the lave allowed to him any leave not taken by him shallbe carried over to the succeeding year. The total number of leave that may be carried forward shall not exceed 30 days in the case of an adult or 40 in the case of a child. A worker, who has applied for leave with wages but has not been granted, shall be entitled to carry forward the leave refused without any limit.

Availing of leave

A worker may, at any time, apply in writing to the Manager not less than 15 days before the date on which he wishes his leave to begin, to take all the leave or any portion thereof allowable to him during the calendar year. Such application shall be made not less than 30 days before the date on which he wishes his leave to begin, if he is employed in a public utility service. An application for leave shall not be refused unless refusal is in accordance with the scheme for the time being in operation.

Wages during leave period

Section 80 provides that a worker shall be entitled to wages at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the month immediately preceding his leave, exclusive of any over time and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the worker of food grains and other articles. In case of a worker who has not worked on any day during the calendar month immediately preceding his leave, he shall be paid at a rate equal to the daily average of the total full time earnings for the days on which he actually worked during the last calendar month preceding his leave, in which he actually worked.

Advance payment

Section 81 provides that a worker who has been allowed leave for not less than four days, in case of an adult, and five days, in the case of a child, shall, before his leave begins be paid the wages due for the period of the leave allowed.

Encashment of leave

Section 79(3) provides that if a worker is discharged or dismissed from services or quits his employment or is superannuated or dies while in service, during the course of the calendar year, he or his heir or nominee, shall be entitled to the wages in lieu of the quantum of leave to which he was entitled immediately before such termination of his services. Such payment shall be made before the expiry of the second working day from the date of discharge, dismissal or quitting and where the worker is superannuated or dies while in service, before the expiry of two months from the date of such superannuation or death.

Penalties

Section 92 provides that there is any contravention of any of the provisions of this Act or of any rules made there under or of any order in writing given, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to 2 years or with fine which may extend to ₹1 lakh or with both. If the contravention is continued after conviction, with a further fine which may extend to ₹1000/- for each day on which the contravention so continued.

If the contravention resulted in an accident causing death or serious bodily injury, the fine shall not be less than ₹25,000/- in the case of an accident causing death, and ₹5000/- in the case of accident causing serious bodily injury.

In 'General Manager, Wheel and Axle Plant, Bangalore V. State of Karnataka' – 1996 (1) FLR 23 (Kar) it was held that where an offence, which is punishable under Section 92 of the Act, has been committed by an officer of the Railways and he is a public servant within the meaning of Section 21 of the Indian Penal Code, the requirement of obtaining sanction to prosecute him is mandatory and taking cognizance of an offence in the absence of sanction cannot be allowed to stand.

Liability of owners

Section 93 provides that where in any premises separate buildings are leased to different occupiers for use as separate factories, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services, such as approach roads, drainage, water supply, lighting and sanitation. The owners of the premises shall be liable as if they were the occupier or manager of a factory for any contravention of the provisions of this Act.

Enhanced penalty

Section 94 provides that if any person who has been convicted of any offence punishable under Section 92 of the Act is again guilty of an offence involving a contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to 3 years or with fine which shall not be less than ₹10,000/- but which may extend to ₹ 2 lakhs or with both. The Court may, for any adequate and special reasons recorded in writing, impose of a fine of less than ₹10,000/-. No cognizance shall be taken of any conviction made more than 2 years before the commission of the offence for which the person is subsequently convicted.

Penalty for obstructing Inspector

Section 95 provides that whoever-

- willfully obstructs an Inspector in exercise of any power conferred on him; or
- fails to produce on demand any registers or other documents in his custody before the Inspectoror conceals or prevents any worker in a factory from appearing before; or
- being examined by, an Inspector

shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ₹10,000/- or with both.

Penalty for contravention of the provisions relating to hazardous process

Section 96A provides that whoever fails to comply with or contraventions any of the provisions of Section 41B, 41C or 41H or the rules made there under, shall, in respect of such failure or contravention, be punishable with imprisonment for a term which may extend to seven years and with fine which

may extend to ₹2 lakhs and in case of the failure or contravention continues, with additional fine which may extend to ₹5000/- for every day during which such failure or contravention continues after the conviction for the first such failure or contravention. If the failure or contravention continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to ten years.

Offences by workers

Section 97 provides that if any worker employed in a factory contravenes any provision of this Act or any rules or by order made there under, imposing any duty or liability on workers, he shall be punishable with fine which may extend to ₹ 500/-

Penalty for using false certificate of fitness

Section 98 provides that whoever knowingly uses or attempts to use, as a certificate of fitness granted to himself a certificate granted to another person or who, having procured such a certificate, knowingly allows it to be used, or an attempt to use it to be made, by another person, shall be punishable with imprisonment for a term which may extend to 2 months or with fine which may extend to ₹1,000/- or with both.

Penalty for permitting double employment of child

Section 99 provides that if a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him or obtaining any director benefit from his wages, shall be punishable with fine which may extend to ₹1000/- unless it appears to the Court that the child so worked without the consent or connivance of the parent, guardian or person.

PAYMENT OF GRATUITY ACT, 1972 – Object, Scope and Applicability

Introduction

The term 'gratuity' is derived from the Latin word 'gratuitous'. 'Gratuity' is the payment made by the employer to the employee at the time of termination of his service either by retirement on superannuation or on resignation or on termination of the service. This is the old age retiral social security benefit. A lump sum is payable in consideration of the past services rendered by the employee. The payment of gratuity will be a relief to the retired employee or to the family members of the employee who dies during his service. For this purpose the Payment of Gratuity Act, 1972 was enacted. The Act was amended from time to time. To carry out the provisions of the Act the Central Government made 'The Payment of Gratuity Rules, 1972 which came into force with effect from 16th September, 1972.

The Supreme Court in 'Burhanpur Tapti Mills Limited V. Burhanpur Tapti Mills Mazdoor Sangh' – 1964 (11) TMI 79 - SUPREME COURT **–** it was held that it is a gratuitous payment extended to an employee on retirement or discharge, in addition to the retrial benefits payable to the employee.

Object

An Act to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto.

Effect

The Act came into effect from 16th September, 1972.

Important Definitions:

Appropriate Government

Section 2(a) defines the term 'appropriate Government' as-

- in relation to an establishment-
  - belonging to, or under the control of, the Central Government,
  - having branches in more than one State,
  - of a factory belonging to, or under the control of, the Central Government,
  - of a major port, mine, oilfield or railway company - the Central Government,
- in any other case - the State Government;

Employee

Section 2(e) of the Act defines the term 'employee' as any person, other than an apprentice, who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

In 'Ahmedabad Private Primary Teachers Association V. Administrative Officer' – AIR 2004 SC 1426 it was held that teacher was held to be not an employee under the Act. The teachers are clearly not intended to be covered by the definition of employee. But the Payment of Gratuity (Amendment) Act, 2009 has amended the definition of 'employee, including teachers in educational institutions within the purview of the Act.

Employer

Section 2(f) defines the term 'employer', in relation to any establishment, factory, mine, oilfield, port, Railway Company or shop-

- belonging to, or under the control of, the Central Government or a State Government, a person or authority appointed by appropriate Government for the supervision or control of employees, or where no person or authority has been so appointed, the head of the Ministry or the Department concerned;
- belonging to, or under the control of, any local authority, the person appointed by such authority for supervision and control of employees or where no person has been so appointed, the Chief Executive Officer of the local authority;
- in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oil field, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person.

Family

Section 2(h) defines the term 'family' in relation to an employee, shall be deemed to consist of-

(i) in case of a male employee, himself, his wife, his children, whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son, if any;

(ii) in the case of a female employee, herself, her husband, her children, whether married or unmarried, her dependent parents and the dependent parents of her husband and the widow and children of her predeceased son, if any.

The explanation to this section provides that where the personal law of an employee permits the adoption by him of a child, any lawfully adopted by him shall be deemed to be included in his family, and where a child of an employee has been adopted by another person and such adoption is, under the personal law of the person making such adoption lawful such child shall be deemed to be excluded from the family of the employees.

Rule 5 provides that a notice under the proviso to sub clause (ii) of clause (h) of section 2 shall be in Form D and sent in triplicate by the employee to the employer, who shall, after recording its receipt on one copy thereof, return the copy to the employee and send the second copy to the controlling authority of the area.

Rule 5(2) provides that an employee may withdraw the notice referred to in sub-rule (1) by giving another notice in triplicate in Form 'E' to the employer, who shall follow the same procedure as in sub-rule (1).

Retirement

Section 2(q) of the Act defines the term 'retirement' as termination of the service of an employee otherwise than on superannuation.

Superannuation

Section 2(r) defines the term 'superannuation' as in relation to an employee, the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment.

Wages

Section 2(s) defines the term 'wages' as all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, over time wages and any other allowance.

Continuous service

Section 2A deals with the continuous service. According to this section-

1. an employee shall be said to be in 'continuous service' for a period if he has, for that period been in un-interrupted service, including service which may be interrupted on account of sickness, accident leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay off, strike or a lock out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of the Act;
2. where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1) for any period of one year or six month, he shall be deemed to be in continuous service under the employer:
   (a) for the said period of one year, if the employee during the period of 12 calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
      (i) 190 days in the case of an employee employed below the ground in mine or in an establishment which works for less than 6 days a week; and
      (ii) 240 days in any other case;
   (b) for the period of 6 months, if the employee during the period of 6 calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than-
      (i) 95 days, in the case of an employee below the ground in a mine or in an establishment which works for less than 6 days in a week; and
      (ii) 120 days in any other case.

The explanation to this section provide that for the purpose of clause (2), the number of days on which the employee has actually worked under an employer shall include the days on which-

- he has been laid off under an agreement or as permitted by the standing orders made under the Industrial Establishment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment;
- he has been on leave with full wages, earned in the previous year;
- he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and
- in the case of a female, she has been on maternity leave, so however, that the total period of such maternity leave does not exceed 12 weeks.

3. Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1) for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than 75%, of the number of days on which the establishment was in operation during such period.

Disablement

Disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

Exemption

Section 5 of the Act gives powers to the appropriate Government to give exemption to any establishment from the purview of this Act, if it is satisfied that the employees in such establishment

are in receipt of gratuity or pensionary benefits not less favorable than the benefits covered under this Act.

Notice of openings, change and closure of the establishment

Rule 3 provides that within thirty days of the rules becoming applicable to an establishment, a notice in Form A shall be submitted by the employer to the Controlling Authority of the area.

A notice in Form B shall be submitted by the employer to the controlling authority of the area within thirty days of any change in the name, address, employer or nature of business.

Where an employer intends to close down the business he shall submit a notice in Form C to the controlling authority of the area at least sixty days before the intended closure.

Display of notice

Rule 4 provides that the employer shall display conspicuously a notice at or near the main entrance of the establishment in bold letters in English and in a language understood by the majority of the employees specifying the name of officer with designation authorized by the employer to receive on his behalf notices under the Act or the rules.

Payment of Gratuity

Section 4(1) provides that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

- on his superannuation, or
- on his retirement; or
- resignation, or
- on his death or disablement due to accident or disease;

The completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement. In the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to the heirs.

Section 4(2) provides that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. In the case of piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account. In the case of an employee employed in a seasonal establishment, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Section 4(3) provides that the amount of gratuity payable to an employee shall not exceed twenty months' wages.

Section 4(4) provides that for the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

Section 4(5) provides that nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

Forfeiture of Gratuity

Section 4(6) provides that notwithstanding anything contained in sub-section (1),-

- the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer,

shall be forfeited to the extent of the damage or loss so caused;

- the gratuity payable to an employee may be wholly or partially forfeited,-
  - if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or
  - if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

The right of receiving the gratuity by the employee is the statutory right. Once it is eligible to receive the gratuity the employee is entitled to receive the same unless otherwise restricted by the provisions of law. The Court in 'KSRTC, Bangalore V. Deputy Labor Commissioner and the Appellate Authority, Bangalore and others' – 2014 (2) TMI 629 - KARNATAKA HIGH COURT held that right to gratuity is a statutory right and cannot be withheld under any circumstances but for the exception enumerated in Section 4(6) of the Act.

In 'D.S. Nakara V. Union of India' – 1982 (12) TMI 151 - SUPREME COURT the Supreme Court held that gratuity is a social welfare measure rendering socio-economic justice by providing economic security in the fall of life when physical and mental prowess is ebbing, corresponding to ageing process and when, one falls, back on savings. Such payment cannot be withheld unless specifically permitted by any statutory provision.

In 'D.V. Kapoor V. Union of India' – 1990 (8) TMI 390 - SUPREME COURT OF INDIA it was held that the right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that this gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction.

If circumstances require forfeiting either partially or fully a specific order shall be passed by the employer in this regard. For this purpose the employer shall issue a show cause notice to the employee indicating the grounds for forfeiture of gratuity and he shall be given a reasonable opportunity of being heard. The final decision will be taken on the basis of reply, if any, given by the employer and the order of forfeiture shall be passed and intimated to the employee.

In 'Karnataka State Road Transport Corporation, Bangalore V. Deputy Labor Commissioner and the Appellate Authority, Bangalore and others' – 2012-III-LLJ-384 (Kant) the Court held that having regard to the mandate of Section 4(6) of the Act before forfeiting the gratuity amount, the petitioner employer ought to have extended an opportunity of hearing to the employee over the proposal to forfeit the amount of gratuity. Even otherwise, the statutory provision for forfeiture of gratuity when construed strict the petitioner corporation was required to prove before the Controlling Authority the extent of damage or loss cause by the employee for the acts of alleged misconduct by reason of which the employer is disentitled to gratuity.

Amount of gratuity payable

Gratuity is calculated on the basis of the continuous service rendered by the employee, for every completed year of service or part in excess of six months at the rate of fifteen days wages last drawn. The maximum amount of gratuity allowed under the Act is ₹10 lakhs with effect from 08.04.2010. This has been increased from ₹ 3,50,000/- which was the maximum amount payable as gratuity from 24.09.1997 to 07.04.2010.

Formula for calculation of gratuity = Last wage drawn x 15/26 x completed years of service

In calculation of gratuity one month is taken as 26 days.

Nomination

Section 6 provides for filing nomination for receiving the gratuity after the death of the employee. The following are the points to be noted in respect of nomination-

- Each employee, who has completed one year of service, shall make nomination in Form – F;
- He may distribute the amount of gratuity payable to him under this Act amongst more than one nominee;
- If an employee has a family at the time of making a nomination, the nomination shall be made in favor of one or more members of his family, and any nomination made by such employee in favor of a person who is not a member of his family shall be void.;
- If at the time of making a nomination the employee has no family, the nomination may be made in favor of any person or persons but if the employee subsequently acquires a family, such nomination shall forthwith become invalid and the employee shall make, within such time as may be prescribed, a fresh nomination in favor of one or more members of his family;
- A nomination may, subject to above, be modified by an employee at any time, after giving to his employer a written notice in such form and in such manner as may be prescribed, of his intention to do so;
- If a nominee predeceases the employee, the interest of the nominee shall revert to the employee who shall make a fresh nomination, in the prescribed form, in respect of such interest;
- Every nomination, fresh nomination or alteration of nomination, as the case may be, shall be sent by the employee to his employer, who shall keep the same in his safe custody.

Rule 6 (1) provides that a nomination shall be submitted in duplicate by personal service by the employee, after taking proper receipt or by sending through registered post acknowledgement due to the employer,

- in the case of an employee who is already in employment for a year or more on the date of commencement of these rules, ordinarily, within ninety days from such date, and
- in the case of an employee who completes one year of service after the date of commencement of these rules, ordinarily within thirty days of the completion of one year of service.

Nomination in Form 'F' shall be accepted by the employer after the specified period, if filed with reasonable grounds for delay, and no nomination so accepted shall be invalid merely because it was filed after the specified period.

Rule 6(2) provides that within thirty days of the receipt of nomination in Form 'F' under sub-rule (1), the employer shall get the service particulars of the employee, as mentioned in the form of nomination, verified with reference to the records of the establishment and return to the employee, after obtaining a receipt thereof, the duplicate copy of the nomination in form 'F' duly attested either by the employer or an officer authorized in this behalf by him, as a token of recording of the nomination by the employer and the other copy of the nomination shall be recorded.

Rule 6(3) provides that an employee who has no family at the time of making a nomination shall, within ninety days of acquiring a family submit in the manner specified in sub-rule (1), a fresh nomination, as required under sub-section (4) of section 6, duplicate in Form 'G' to the employer and thereafter the provisions of sub-rule (2) shall apply mutatis mutandis as if it was made under sub-rule (1).

Rule 6(4) provides that a notice of modification of a nomination, including cases where a nominee predeceases an employee, shall be submitted in duplicate in Form 'H' to the employer in the manner specified in sub-rule (1), and thereafter the provisions of sub-rule (2) shall apply *mutatis mutandis*.

Rule 6(5) provides that a nomination or a fresh nomination or a notice of modification of nomination shall be signed by the employee or, if illiterate, shall bear his thumb impression, in the presence of two witnesses, who shall also sign a declaration to that effect in the nomination, fresh nomination or notice of modification of nomination, as the case may be.

Rule 6(6) provides that a nomination, fresh nomination or notice of modification of nomination shall take effect from the date of receipt thereof by the employer.

Determination of the amount of gratuity

Section 7 prescribes the procedure for determination of the amount of gratuity. As soon as the gratuity becomes payable, the employer shall, whether the employee has made application or not, determine the amount of gratuity. Then he is to give notice to the person to whom the gratuity is payable and also to the Controlling Authority, specifying the amount of gratuity so determined. The notice shall be in Form L.

The employer shall arrange to pay the amount of gratuity within 30 days from the date of its becoming payable to the person to whom it is payable. If it is not paid within the stipulated period the employer is liable to pay interest at the rate of 10% per annum. If the delay in payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment, on this ground, no interest is payable.

If the claim for gratuity is not found admissible, issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible. In either case a copy of the notice shall be endorsed to the controlling authority.

Dispute

Section 7(4) provides that if there is a dispute as to the amount of gratuity payable to the employee, the employer shall deposit the gratuity with the Controlling Authority. The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the amount of gratuity payable to an employee. If as a result of such inquiry any amount in excess of the amount deposited by the employer is found to be payable, the controlling authority shall direct the employer to pay such amount as is in excess of the amount deposited by him.

Then the Controlling Authority shall pay the amount of the deposit-

- to the applicant where he is the employee; or
- where the applicant is not the employee, to the nominee or heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

Application for gratuity

Rule 7(1) provides that an employee who is eligible for payment of gratuity under the Act, or any person authorized, in writing, to act on his behalf, shall apply, ordinarily within thirty days from the date the gratuity became payable, in Form 'I' to the employer. Where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before thirty days of the date of superannuation or retirement.

Rule 7(2) provides that a nominee of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4 shall apply, ordinarily within thirty days from the date of gratuity became payable to him, in Form 'J' to the employer. An application in plain paper with relevant particulars shall also be accepted. The employer may obtain such other particulars as may be deemed necessary by him.

Rule 7(3) provides that a legal heir of an employee who is eligible for payment of gratuity under the second proviso to sub-section (1) of section 4 shall apply, ordinarily within one year from the date of gratuity became payable to him, in Form 'K' to the employer.

Rule 7(4) provides that where gratuity becomes payable under the Act before the commencement of these rules, the periods of limitation specified in sub-rules (1), (2) and (3) shall be deemed to be operative from the date of such commencement.

Rule 7(6) provides that an application under this rule shall be presented to the employer either by personal service or by registered post acknowledgement due.

Belated application

Rule 7(5) provides that an application for payment of gratuity filed after the expiry of the periods specified in this rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring his claim, and no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period. Any dispute in this regard shall be referred to the controlling authority for his decision.

Notice for payment of gratuity

(1) Within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the employer shall-

(i) if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof, or

(ii) if the claim for gratuity is not found admissible, issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible. In either case a copy of the notice shall be endorsed to the controlling authority.

(2) In case payment of gratuity is due to be made in the employer's office, the date fixed for the purpose in the notice in Form 'L' under clause (1) of sub-rule (1) shall be re fixed by the employer, if a written application in this behalf is made by the payee explaining why it is not possible for him to be present in person on the date specified.

(3) If the claimant for gratuity is a nominee or a legal heir, the employer may ask for such witness or evidence as may be deemed relevant for establishing his identity or maintainability of his claim, as the case may be. In that 'case, the time limit specified for issuance of notices under sub-rule (1) shall be operative with effect from the date such witness or evidence, as the case may be, called for by the employer is furnished to the employer.

(4) A notice in Form 'L' or Form 'M' shall be served on the applicant either by personal service after taking receipt or by registered post with acknowledgement due.

(5) A notice under sub-section (2) of section 7 shall in Form 'L

Mode of service of notice

Rule 8(5) provides that a notice in Form 'L' or Form 'M' shall be served on the applicant either by personal service after taking receipt or by registered post with acknowledgement due.

Mode of payment

Rule 9 provides that the gratuity payable under the Act shall be paid in cash or, if so desired by the payee, in Demand Draft or bank Cheque to the eligible employee, nominee or legal heir, as the case may be. In case the eligible employee, nominee or legal heir, as the case may be, so desires and the amount of gratuity payable is less than one thousand rupees, payment may be made by postal money order after deducting the postal money order commission there for from the amount payable.

Intimation about the details of payment shall also be given by the employer to the controlling authority of the area.

In the case of nominee, or an heir, who is minor, the controlling authority shall invest the gratuity amount deposited with him for the benefit of such minor in term deposit with the State Bank of India or any of its subsidiaries or any Nationalized Bank.

Application for direction

Rule 10 provides that if the employer-

- refuses to accept nomination; or
- to entertain an application for gratuity; or
- rejects the eligibility of gratuity; or
- indicates less amount than the eligible amount of gratuity in the notice; or
- fails to issue notice

the eligible person to receive the gratuity may file an application in Form – N within 90 days from the date of occurrence of the cause, to the Controlling authority for the issue of directions to the employer. Additional copies are to be sent along with the application for the purpose of issuing the same to the opposite parties.

If the said application is filed after the limitation period of 90 days, the Controlling Authority may admit the application if the applicant shows sufficient cause for the delay in filing the application.

The said application may be submitted to the Controlling authority in person or it may be sent through registered post with acknowledgment due.

Directions issued by Authority

On receipt of an application under rule 10 the controlling authority shall, by issuing a notice in Form 'O', call upon the applicant as well as the employer to appear before him on a specified date, time and place, either by himself or through his authorized representative together with all relevant documents and witnesses, if any.

Any person desiring to act on behalf of an employer or employee, nominee or legal heir, as the cases may be, shall present to the controlling authority a letter of authority from the employer or the person concerned, as the case may be, on whose behalf he seeks to act together with a written statement explaining his interest in the matter and praying for permission so to act. The controlling authority shall record thereon an order either according his approval or specifying, in the case of refusal to grant the permission prayed for, the reasons for the refusal.

A party appearing by an authorized representative shall be bound by the acts of the representative.

After completion of hearing on the date fixed under sub-rule (1), or after such further evidence, examination of documents, witnesses, hearing and enquiry, as may be deemed necessary, the controlling authority shall record his finding as to whether any amount is payable to the applicant under the Act. A copy of the finding shall be given to each of the parties.

If the employer concerned fails to appear on the specified date of hearing after due service of notice without sufficient cause, the controlling authority may proceed to hear and determine the application *ex parte*. If the applicant fails to appear on the specified date of hearing without sufficient cause, the controlling authority may dismiss the application. Such an order may, on good cause being shown within thirty days of the said order, be reviewed and the application re-heard after giving not less than fourteen days' notice to the opposite party of the date fixed for rehearing of the application.

The sittings of the controlling authority shall be held at such times and at such places as he may fix and he shall inform the parties of the same in such manner as he thinks fit.

The controlling authority may authorize a clerk of his office to administer oaths for the purpose of making affidavits.

The controlling authority may, at any stage of the proceedings before him, either upon or without

an application by any of the parties involved in the proceedings before him, and on such terms as may appear to the controlling authority just, issue summons to any person in Form 'P' either to give evidence or to produce documents or for both purposes on a specified date, time and place.

Any notice, summons, process or order issued by the controlling authority may be served either personally or by registered post acknowledgement due or in any other manner as prescribed under the Code of Civil Procedure, 1908.

Where there are numerous persons as parties to any proceeding before the controlling authority and such persons are members of any trade union or association or are represented by an authorized person, the service of notice on the Secretary, or where there is no Secretary, on the principal officer of the trade union or association, or on the authorized person shall be deemed to be service on such persons.

If a finding is recorded that the applicant is entitled to payment of gratuity under the Act, the controlling authority shall issue a notice to the employer concerned in Form 'R' specifying the amount payable and directing payment thereof to the applicant under intimation to the controlling authority within thirty days from the date of the receipt of the notice by the employer. A copy of the notice shall be endorsed to the applicant employee, nominee or legal heir, as the case may be.

Powers of the Controlling Authority

For the purpose of conducting an inquiry the controlling authority shall have the same powers as are vested in a court, while trying a suit, under the Code of Civil Procedure, 1908, in respect of the following matters, namely :-

- enforcing the attendance of any person or examining him on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavits;
- issuing commission for the examination of witnesses.

Appeal

Any person aggrieved by an order may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf. The appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days. The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority.

Recovery of gratuity

Section 8 provides that if the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon at the rate of nine per cent per annum, from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto.

Penalties

Section 9(1) provides that whoever, for the purpose of avoiding any payment to be made by himself under this Act or enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Section 9(2) provides that an employer who contravenes, or makes default in complying with, any of the provisions of this Act or any rule or order made there under shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Where the offence relates to non-payment of any gratuity payable under this Act, the employer shall be punishable with imprisonment for a term which shall not be less than three months unless the court trying the offence, for reasons to be recorded by it in writing is of opinion that a lesser term of imprisonment or the imprisonment of a fine would meet the ends of justice.

Exemption of employer from liability in certain cases

Section 10 provides that where an employer is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the complainant not less than three clear days' notice in writing of his intention to do so, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the employer proves to the satisfaction of the court-

- that he has used due diligence to enforce the execution of this Act, and
- that the said other person committed the offence in question without his knowledge, consent or connivance, that other person shall be convicted of the offence and shall be liable to the like punishment as if he were the employer and the employer shall be discharged from any liability under this Act in respect of such offence;

In seeking to prove as aforesaid, the employer may be examined on oath and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of the person he charges as the actual offender and by the prosecutor. If the person charged as the actual offender by the employer cannot be brought before the court at the time appointed for hearing the charge, the court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the court, the court shall proceed to hear the charge against the employer and shall, if the offence be proved, convict the employer.

Cognizance of offence

Section 11 provides that no court shall take cognizance of any offence punishable under this Act save on a complaint made by or under the authority of the appropriate Government. Where the amount of gratuity has not been paid, or recovered, within six months from the expiry of the prescribed time, the appropriate Government shall authorize the controlling authority to make a complaint against the employer, whereupon the controlling authority shall, within fifteen days from the date of such authorization, make such complaint to a magistrate having jurisdiction to try the offence. No court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

Protection of gratuity

Section 13 provides that no gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.

Section 13A provides that notwithstanding anything contained in any judgment, decree or order of any court, for the period commencing on and from the 3rd day of April 1997 and ending on the day on which the Payment of Gratuity (Amendment) Act 2009 receives the assent of the president, the gratuity shall be payable to an employee in pursuance of this notification of the Government of India in the Ministry of Labor and Employment vide SO 1080 dated the 3rd day of April 1997 and the said notification shall be valid and shall be deemed always to have been valid as if the payment of gratuity (Amendment) Act 2009 had been in force at all material times and the gratuity shall be payable accordingly.

Nothing contained in this section shall extend or be construed to extend to affect any person with any punishment or penalty whatsoever by reason of the non employment by him of the gratuity during the period specified in this section which shall become due in pursuance of the said notification.

Act to override other enactments etc.,

Section 14 provides that the provisions of this Act or any rule made there under shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

In 'Jaswant Sing Gill V. Bharat Coking Coal Limited and others' – 2006 (11) TMI 550 - SUPREME COURT OF INDIA the Supreme Court held that the rules framed under the Coal India Executives' Conduct Discipline and Appeal Rules, 1978 which provided for a forfeiture of gratuity were not statutory rules and the provisions of Gratuity Act must therefore prevail over the rules.

But in 'Rajan Shanthi P. V. Union of India' – 2010-IV-LLJ-600, the Supreme Court considered a seeming conflict between the provisions of Gratuity act, 1972 with reference to the provisions which have been extracted, namely, Section 4(6) and Section 5 of the Working Journalists and Other Newspaper Employees (Condition of Service) and Miscellaneous Provisions Act, 1955. Section 5 of the latter Act is very similar to Clause 5 of the Regulations, 1964. Section 5(1)(a)(i) extends the benefit of gratuity to an employee whose services are terminated by the employer for any reason whatever, otherwise than a punishment inflicted by way of disciplinary act. The Supreme Court reasoned that the Payment of Gratuity Act was a general act and the Working Journalists and Other Newspaper Employees (Conditions of service) and Misc. Provisions of Act, 1955 was a special enactment will prevail when there is a conflict between a general act and a special act. Thus if the service of an employee has been terminated by way of disciplinary action under the Working Journalists and other Newspaper Employees (Conditions of Service) and Misc. Provisions of Act,1955, he is not entitled to gratuity.

Display of abstract of the Acts and Rules

The employer shall display an abstract of the Act and the rules made there under as given in Form 'U' in English and in the language understood by the majority of the employees at conspicuous place at or near the main entrance of the establishment.

PAYMENT OF WAGES ACT

Introduction

The Payment of Waves Act, 1936 regulates the payment of wages to certain classes of persons employed in industry. It was enacted to ensure that the wages payable to employees covered by the Act are disbursed by the employers within the prescribed time limit and that no deductions other than authorized by law are made by the employers. The Act applies *proprio vigore* to the payment of wages to persons employed in any factory or to persons employed in a railway by a railway administration either directly or through a sub contractor. Further the State Governments are empowered to extend the provisions of the Act to cover persons employed in any industrial establishment or any class or group of industrial establishments as defined in the Act.

Note:

With effect from 11.09.2012 the employees drawing wages upto ₹18,000 per month is covered under this Act.

Applicability of the Act

The Act extends to the whole of India.

Effect

The Act came into effect from 28th March, 1937.

Important definitions

Employed person

Section 2(i) defines the expression 'employed person' as including the legal representative of a deceased employed person;

Employer

Section 2(ia) defines the term 'employer' as including the legal representative of a deceased employer;

Industrial establishment

Section 2(ii) defines the expression 'industrial establishment' as any-

- tramway service, or motor transport service engaged in carrying passengers or goods or both by road, for hire or reward;
- air transport service other than such service belonging to or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;
- Dock, wharf or jetty;
- inland vessel, mechanically propelled;
- mine, quarry or oil-field;
- plantation;
- workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale;
- establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or to the supply of water or relating to the generation transmission and distribution of electricity or any other form of power is being carried on;
- any other establishment or class of establishments which the Central Government or a State Government may having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification, in the Official Gazette.

Wages

Section 2(vi) defines the term 'wages' as all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would if the terms of employment, express or implied, were fulfilled, by payable to a person employed in respect of his employment or of work done in such employment and includes –

- any remuneration payable under any award or settlement between the parties or order of a court;
- any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;
- any additional remuneration payable under the terms of employment (whether called a bonus or by any other name)
- any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum whether with or without deductions, but does not provide for the time within which the payment is to be made;
- any sum to which the person employed is entitled under any scheme framed under any law for the time being in force,

but does not include

- any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;
- the value of any house-accommodation or of the supply of light water medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate Government;
- any contribution paid by the employer to any pension or provident fund and the interest which may have accrued thereon;
- any travelling allowance or the value of any travelling concession;
- any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or
- any gratuity payable on the termination of employment.

Responsibility for payment of wages (Section 3)

Every employer shall be responsible for the payment of all wages required to be paid under this Act to persons employed by him and in case of persons employed,—

(a) in factories, if a person has been named as the manager of the factory under clause (f) of sub-section (1) of section 7 of the Factories Act, 1948 (63 of 1948);

(b) in industrial or other establishments, if there is a person responsible to the employer for the supervision and control of the industrial or other establishment;

(c) upon railways (other than in factories), if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned;

(d) in the case of contractor, a person designated by such contractor who is directly under his charge; and

(e) in any other case, a person designated by the employer as a person responsible for complying with the provisions of the Act; the person so named, the person responsible to the employer, the person so nominated or the person so designated, as the case may be, shall be responsible for such payment.

Fixation of wage period (Section 4)

In payment of the wages it is important to fix the wage period. Section 4 of the Act provides that every responsible for the payment of wages shall fix periods in respect o f which wages shall be paid. This section further provides that no wage period shall exceed one month. The wage period may be daily, weekly or fortnightly or for any period but the period should not exceed one month.

Time of payment of wages

Section 5 provides the date on which the payment of wages are to be done.

The wages of every person employed upon or in any railway, factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before the expiry of the **seventh day;**

The wages of every person employed upon or in any other railway, factory or industrial or other establishment, shall be paid before the expiry of the **tenth day**, after the last day of the wage-period in respect of which the wages are payable.

in the case of persons employed on a dock, wharf or jetty or in a mine, the balance of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid **before the expiry of the seventh day** from the day of such completion;

Where the employment of any person is terminated by or on behalf of the employer, the wages earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated;

where the employment of any person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or other recognized holiday, the wages earned by him shall be paid before the expiry of the second day from the day on which his employment is so terminated.

All payments of wages shall be made on a working day.

Exemption

Section 5(3) provides that the appropriate Government may by general or special order, exempt to such extent and subject to such conditions as may be specified in the order, the person responsible for the payment of wages to persons employed upon any railway (otherwise than in a factory) or to persons employed as daily-rated workers in the Public Works Department of the appropriate Government from the operation of this section in respect of wages of any such persons or class of such persons.

Provided that in the case of persons employed as daily-rated workers as aforesaid, no such order shall be except in consultation with the Central Government.

Mode of payment

Section 6 provides that, 'All wages shall be paid in currency coins or currency notes or by cheque crediting the wages in the bank account of an employee'.

Provided that the Appropriate Government may by notification in the Official Gazette, specify the industrial or other establishment, the employer of which shall pay to every person employed in such industrial or other establishment, the wages only by cheque or by crediting the wages in his bank account.

Deduction from wages

Section 7 gives the details of deduction from wages. The wages of an employed person shall be paid to him without deductions of any kind except those authorized by or under this Act. Every payment made by the employed person to the employer or his agent shall for the purposes of this

Act, be deemed to be a deduction from wages.

Any loss of wages resulting from the imposition, for good and sufficient cause upon a person employed of any of the following penalties, namely:-

- the withholding of increment or promotion (including the stoppage of increment at an efficiency bar);
- the reduction to a lower post or time scale or to a lower stage in a time scale; or
- suspension;

shall not be deemed to be a deduction from wages in any case where the rules framed by the employer for the imposition of any such penalty are in conformity with the requirements if any which may be specified in this behalf by the Appropriate Government by notification in the Official Gazette.

Section 7(2) provides that Deductions from the wages of an employed person shall be made only in accordance with the provisions of this Act and may be of the following kinds only namely:

- fines;
- deductions for absence from duty;
- deductions for damage to or loss of goods expressly entrusted to the employed person for custody, or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default;
- deductions for house-accommodation supplied by the employer or by government or any housing board set up under any law for the time being in force (whether the government or the board is the employer or not) or any other authority engaged in the business of subsidizing house-accommodation which may be specified in this behalf by the appropriate Government by notification in the Official Gazette;
- deductions for such amenities services supplied by the employer as the Appropriate Government or any officer specified by it in this behalf may by general or special order authorize;
- deductions for recovery of advances of whatever nature (including advances for travelling allowance or conveyance allowance), and the interest due in respect thereof, or for adjustment of over-payments of wages;
- deductions for recovery of loans made from any fund constituted for the welfare of labor in accordance with the rules approved by the appropriate Government and the interest due in respect thereof;
- deductions for recovery of loans granted for house-building or other purposes approved by the appropriate Government and the interest due in respect thereof;
- deductions of income-tax payable by the employed person;
- deductions required to be made by order of a court or other authority competent to make such order;
- deductions for subscriptions to and for repayment of advances from any provident fund to which the Provident Funds Act 1952 applies or any recognized provident funds as defined in section 2(38) of the Indian Income Tax Act 1961 or any provident fund approved in this behalf by the appropriate Government during the continuance of such approval;
- deductions for payments to co-operative societies approved by the appropriate Government or any officer specified by it in this behalf or to a scheme of insurance maintained by the Indian Post Office and
- deductions, made with the written authorisation of the person employed for payment of any premium on his life insurance policy to the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 or for the purchase of securities of the Government

of India or of any State Government or for being deposited in any Post Office Saving Bank in furtherance of any savings scheme of any such government.

- deductions made with the written authorization of the employed person, for the payment of his contribution to any fund constituted by the employer or a trade union registered under the Trade Unions Act, 1926 for the welfare of the employed persons or the members of their families, or both, and approved by the appropriate Government or any officer specified by it in this behalf, during the continuance of such approval;
- deductions made, with the written authorisation of the employed person, for payment of the fees payable by him for the membership of any trade union registered under the Trade Unions Act, 1926;
- deductions, for payment of insurance premium on Fidelity Guarantee Bonds;
- deductions for recovery of losses sustained by a railway administration on account of acceptance by the employed person of counterfeit or base coins or mutilated or forged currency notes;
- deductions for recovery of losses sustained by a railway administration on account of the failure of the employed person to invoice, to bill, to collect or to account for the appropriate charges due to that administration, whether in respect of fares, freight, demurrage wharfage and cranage or in respect of sale of food in catering, establishments or in respect of sale of commodities in grain shops or otherwise;
- deductions for recovery of losses sustained by a railway administration on account of any rebates or refunds incorrectly granted by the employed person where such loss is directly attributable to his neglect or default;
- deductions, made with the written authorization of the employed person, for contribution to the Prime Minister's National Relief Fund or to such other Fund as the Central Government may, by notification in the Official Gazette specify;
- deductions for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.

Nothing contained in this section shall be construed as precluding the employer from recovering from the wages of the employed person or otherwise any amount payable by such person under any law for the time being in force other than the Indian Railways Act 1890.

Limit of deductions

Section 7(3) provides up to which limit of the wage, the deductions may be made from the wages of the employees. Notwithstanding anything contained in this Act the total amount of deductions which may be made in any wage-period from the wages of any employed person shall not exceed –

- in cases where such deductions are wholly or partly made for payments to co-operative societies - 75% of such wages and
- in any other case – 50% of such wages.

Where the total deductions authorized under sub-section (2) exceed seventy five per cent or as the case may be, fifty per cent of the wages the excess may be recovered in such manner as may be prescribed.

Fines

Section 8 of the Act provides imposing of fines by the employer on the employees. The procedure of imposition of fine is detailed as below:

- No fine shall be imposed on any employed person who is under the age of fifteen years;
- No fine shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer, with the previous approval of the appropriate Government or of the prescribed authority, may have specified by notice;

- A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment carried on or in the case of persons employed upon a railway (otherwise than in a factory), at the prescribed place or places.
- No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.
- The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to three per cent of the wages payable to him in respect of that wage-period.
- No fine imposed on any employed person shall be recovered from him by instalments or after the expiry of 90 days from the day on which it was imposed.
- Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.
- All fines and all realizations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed; and all such realizations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as are approved by the prescribed authority.

Deductions for absence of duty (Section 9)

Section 9 provides for the deductions from wages of the employed person for his absence from duty. Deductions may be only on account of the absence of an employed person from the place or places where, by the terms of his employment, he is required to work, such absence being for the whole or any part of the period during which he is so required to work. The amount of such deduction shall in no case bear to the wages payable to the employed person in respect of the wage-period for which the deduction is made in a larger proportion than the period for which he was absent bears to the total period, within such wage-period during which by the terms of his employment, he was required to work.

Subject to any rules made in this behalf by the Appropriate Government, if ten or more employed persons acting in concert absent themselves without due notice (that is to say without giving the notice which is required under the terms of their contracts of employment) and without reasonable cause, such deduction from any such person may include such amount not exceeding his wages for eight days as may by any such terms be due to the employer in lieu of due notice.

For the purposes of this section an employed person shall be deemed to be absent from the place where he is required to work if although present in such place, he refuses, in pursuance of a stay-in strike or for any other cause which is not reasonable in the circumstances, to carry out his work.

In 'United Commercial Bank V. Gujarat Bank Workers Union' – (2003) 1 Lab.L.J. 1046 (Guj) the High Court held that the bank had already issued a notice and also a public notice stating that if any employee of the bank does not report for work or does not work for any part of his working hours, it will be in breach of his service contract and will not earn any salary for that and subsequently need not report for the work for rest of the hours of the day but despite this, the employees resorted to strike and did not work during the banking hours, during which the Bank transacts public business. In such circumstances the bank was justified in deducting the wages for the whole day.

Deductions for damage or loss

Section 10 provides for the deductions to be made from the wages of the employee for the damage or loss caused to the employer by the employee in the course of his work. A deduction shall not exceed the amount of the damage or loss caused to the employer by the neglect or default of the employed person. A deduction shall not be made until the employed person has been given an opportunity of showing cause against the deduction or otherwise than in accordance with such procedure as may be prescribed for the making of such deductions.

Register for deductions

Section 10(2) provides all deductions and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed.

Deduction for services rendered

A deduction under clause (d) or clause (e) of sub-Section (2) of Section 7 shall not be made from the wages of an employed person, unless the house-accommodation, amenity or service has been accepted by him, as a term of employment or otherwise, and such deduction shall not exceed an amount equivalent to the value of the house-accommodation amenity or service supplied and, in the case of deduction under the said clause shall be subject to such conditions as the Appropriate Government may impose.

Deductions for recovery of advances

Section 12 provides that deductions for the recovery of advances shall be subject to the following conditions namely:

- recovery of an advance of money given before employment began shall be made from the first payment of wages in respect of a complete wage-period, but no recovery shall be made of such advances given for travelling-expenses;
- recovery of an advance of money given after employment began shall be subject to such conditions as the appropriate Government may impose;
- recovery of advances of wages not already earned shall be subject to any rules made by the approproate Government regulating the extent to which such advances may be given and the installments by which they may be recovered.

Deductions for recovery of loans

Section 12A provides that deductions for recovery of loans granted shall be subject to any rules made by the appropriate Government regulating the extent to which such loans may be granted and the rate of interest payable thereon.

Deductions for payments to Co-operative Societies and Insurance Schemes

Section 13 provides that deductions shall be subject to such conditions as the approproate Government may impose.

Maintenance of Registers and records

Section 13A provides that every employer shall maintain such registers and records giving such particulars of persons employed by him, the work performed by them the wages paid to them, the deductions made from their wages, the receipts given by them and such other particulars and in such form as may be prescribed.

Every register and record required to be maintained under this section shall for the purposes of this Act, be preserved for a period of three years after the date of the last entry made therein.

Inspectors

Section 14 provides for the appointment of Inspector for the purposes of this act. An Inspector of Factories appointed under sub-section (1) of section 8 of the Factories Act 1948 shall be an Inspector for the purposes of this Act in respect of all factories within the local limits assigned to him. The appropriate Government may appoint Inspectors for the purposes of this Act in respect of all persons employed upon a railway (otherwise than in a factory) to whom this Act applies. The appropriate Government may, by notification in the Official Gazette, appoint such other persons as it thinks fit to be Inspectors for the purposes of this Act, and may define the local limits within which and the class of factories and industrial or other establishments in respect of which they shall exercise their functions.

Powers of Inspectors

Inspector may,-

- make such examination and inquiry as he thinks fit in order to ascertain whether the provisions of this Act or rules made there under are being observed;
- with such assistance, if any, as he thinks fit, enter inspect and search any premises of any railway, factory or industrial or other establishment at any reasonable time for the purpose of carrying out the objects of this Act;
- supervise the payment of wages to persons employed upon any railway or in any factory or industrial or other establishment;
- require by a written order the production at such place, as may be prescribed, of any register maintained in pursuance of this Act and taken on the spot or otherwise statements of any persons which he may consider necessary for carrying out the purposes of this Act;
- seize or take copies of such registers or documents or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by an employer;
- exercise such other powers as may be prescribed:

No person shall be compelled under this sub-section to answer any question or make any statement tending to incriminate himself.

Every employer shall afford an Inspector all reasonable facilities for making any entry inspection supervision examination or inquiry under this Act.

Claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims

Section 15 deals with claims arising out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims. It provides that the appropriate Government may, by notification in the Official Gazette, appoint-

(a) any Commissioner for Workmen's Compensation; or

(b) Any officer of the Central Government exercising functions as,-

  (i) Regional Labour Commissioner; or

  (ii) Assistant Labour Commissioner with at least two years' experience; or

(c) Any officer of the State Government not below the rank of Assistant Labour Commissioner with at least two years' experience; or

(d) a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947 or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State; or

(e) any other officer with experience as a Judge of a Civil Court or a Judicial Magistrate, as the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages, of persons employed or paid in that area, including all matters incidental to such claims.

Provided that where the appropriate Government considers it necessary so to do, it may appoint more than one authority for any specified area and may, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

Sub-section (2) of section 15 provides that where contrary to the provisions of the Act any deduction has been made from the wages of an employed person or any payment of wages has been delayed such person himself or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act or any other person acting with the permission of the authority appointed under subsection(1) may apply to such authority for a direction under sub-section (3)

However, every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was

due to be made as the case may be. Any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

As per sub-section (3) when any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other person responsible for the payment of wages under section 3, or give the man opportunity of being heard, and, after such further enquiry, if any, as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding three thousand rupees but not less than one thousand five hundred rupees in the latter, and even if the amount deducted or delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the authority may think fit, not exceeding two thousand rupees.

A claim under the Act shall be disposed of as far as practicable within a period of three months from the date of registration of the claim by the authority. It may be noted that the period of three months may be extended if both parties to the dispute agree for any bona fide reason to be recorded by the authority that the said period of three months may be extended to such period as may be necessary to dispose of the application in a just manner.

No direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to-

(a) a bona fide error or bona fide dispute as to the amount payable to the employed person; or

(b) the occurrence of an emergency, or the existence of exceptional circumstances, the person responsible for the payment of the wages was unable, in spite of exercising reasonable diligence; or

(c) the failure of the employed person to apply for or accept payment.

As per sub-section (4) if the authority hearing an application under this section is satisfied that the application was either malicious or vexatious the authority may direct that a penalty not exceeding three hundred seventy-five Rupees be paid to the employer or other person responsible for the payment of wages by the person presenting the application; or in any case in which compensation is directed to be paid under sub-section (3) the applicant ought not to have been compelled to seek redress under this section the authority may direct that a penalty not exceeding three hundred seventy five Rupees be paid to the State Government by the employer or other person responsible for the payment of wages.

Single application in respect of claims from an unpaid group

Section 16 provides that employed persons are said to belong to the same unpaid group if they are borne on the same establishment and if deductions have been made from their wages in contravention of this Act for the same cause and during the same wage-period or periods or if their wages for the same wage-period or periods have remained unpaid after the day fixed by section 5.

A single application may be presented under section 15 on behalf or in respect of any number of employed persons belonging to the same unpaid group and in such case every person on whose behalf such application is presented may be awarded maximum compensation to the extent specified in sub-section (2) of section 15.

The authority may deal with any number of separate pending applications presented under section 15 in respect of persons belonging to the same unpaid group as a single application presented under sub-section (2) of this section and the provisions of that sub-section shall apply accordingly.

Appeal

Section17 provides that an appeal against an order dismissing either wholly or in part an application made under section 15(2) or against a direction made under sub-section (3) or sub-section (4) of that

section may be preferred within thirty days of the date on which the order or direction was made in a Presidency-town before the Court of Small Causes and elsewhere before the District Court –

- by the employer or other person responsible for the payment of wages under section 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees or such direction has the effect of imposing on the employer or the other person a financial liability exceeding one thousand rupees or
- by an employed person or any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf or any Inspector under this Act or any other person permitted by the authority to make an application under section 15(2) if the total amount of wages claimed to have been withheld from the employed person exceeds twenty rupees or from the unpaid group to which the employed person belongs or belonged exceeds fifty rupees or
- by any person directed to pay a penalty under section 15(4).

No appeal shall lie unless the memorandum of appeal is accompanied by a certificate by the authority to the effect that the appellant has deposited the amount payable under the direction appealed against. Any order dismissing either wholly or in part an application made under section 15(2) or a direction made under sub-section (3) or sub-section (4) of that section shall be final.

Where an employer prefers an appeal under this section the authority against whose decision the appeal has been preferred may, and if so directed by the Court shall, pending the decision of the appeal withhold payment of any sum in deposit with it.

The Court may if it thinks fit submit any question of law for the decision of the High Court and if it so does shall decide the question in conformity with such decision.

Attachment of property of the employer or other person responsible for payment of wages

Section 17A provides that where at any time after an application has been made section 15(2) the authority, or where at any time after an appeal has been filed under section 17 by an employed person or any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf or any Inspector under this Act or any other person permitted by the authority to make an application under section 15(2) the Court referred to in that section, is satisfied that the employer or other person responsible for the payment of wages under section 3 is likely to evade payment of any amount that may be directed to be paid under section 15 or section 17 the authority or the Court, as the case may be, except in cases where the authority or court is of opinion that the ends of justice would be defeated by the delay, after giving the employer or other person an opportunity of being heard, may direct the attachment of so much of the property of the employer or other person responsible for the payment of wages as is in the opinion of the authority or Court, sufficient to satisfy the amount which may be payable under the direction.

Penalties

Section 20 provides for the penalties that are imposable under this Act. Section 20(1) provides that Whoever being responsible for the payment of wages to an employed person contravenes any of the provisions of any of the following sections, namely section 5 except sub-section (4) thereof section 7 section 8 except sub-section (8) thereof, section 9 section 10 except sub-section (2) thereof and section 11 to 13 both inclusive shall be punishable with fine which shall not be less than two hundred rupees but which may extend to ₹1,000.

Section 20(2) provides that whoever contravenes the provisions of section 4 sub-section (4) of section 5 section 6 sub-section (8) of section 8 sub-section (2) of section 10 or section 25 shall be punishable with fine which may extend to ₹3,750/-.

Section 20(3) provides that whoever being required under this Act to maintain any records or registers or to furnish any information or return –

- fails to maintain such register or record; or

- willfully refuses or without lawful excuse neglects to furnish such information or return; or
- willfully furnishes or causes to be furnished any information or return which he knows to be false; or
- refuses to answer or willfully gives a false answer to any question necessary for obtaining any information required to be furnished under this Act

shall for each such offence be punishable with fine which shall not be less than ₹1,500/- but which may extend to ₹7,500/-.

Section 20(4) provides that whoever –

- willfully obstructs an Inspector in the discharge of his duties under this Act; or
- refuses or willfully neglects to afford an Inspector any reasonable facility for making any entry, inspection, examination, supervision or inquiry authorized by or under this Act in relation to any railway, factory or industrial or other establishment; or
- willfully refuses to produce on the demand of an Inspector any register or other document kept in pursuance of this Act; or
- prevents or attempts to prevent or does anything which he has any reason to believe is likely to prevent any person from appearing before or being examined by an Inspector acting in pursuance of his duties under this Act;

shall be punishable with fine which shall not be less than ₹1,500 but which may extend to ₹7,500.

Section 20(5) provides that If any person who has been convicted of any office punishable under this Act is again guilty of an offence involving contravention of the same provision he shall be punishable on a subsequent conviction with imprisonment for a term which shall not be less than one month but which may extend to six months and with fine which shall not be less than ₹3,750 but which may extend to ₹22,000. No cognizance shall be taken of any conviction made more than two years before the date on which the commission of the offence which is being punished came to the knowledge of the Inspector.

Section 20(6) provides that if any person fails or willfully neglects to pay the wages of any employed person by the date fixed by the authority in this behalf, he shall, without prejudice to any other action that may be taken against him be punishable with an additional fine which may extend to ₹750 for each day for which such failure or neglect continues.

In 'Divisional Superintendent, Northern Railway, Lucknow V. Ram Prasad, Material Checker, Northern Railway, Varanasi, Lucknow' – (2003) 1 Lab. L.J. 93 (All) it was held that against order rejecting the application under Section 20(6) of the Payment of Wages Act, no appeal lies.

Bar of suits

Section 22 provides that no Court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed –

- forms the subject of an application under section 15 which has been presented by the plaintiff and which is pending before the authority appointed under that section or of an appeal under section 17; or
- has formed the subject of a direction under section 15 in favor of the plaintiff; or
- has been adjudged in any proceeding under section 15 not to be owned to the plaintiff; or
- could have been recovered by an application under section 15.

Contracting out

Section 23 of the Act provides that any contract or agreement whether made before or after the

commencement of this Act whereby an employed person relinquishes any right conferred by this Act shall be null and void in so far as it purports to deprive him of such right.

Display of the Act

Section 25 provides that the person responsible for the payment of wages of persons employed in a factory or an industrial or other establishment shall cause to be displayed in such factory or industrial or other establishment a notice containing such abstracts of this Act and of the rules made there under in English and in the language of the majority of the persons employed in the factory, or industrial or other establishment as may be prescribed.

Payment of undisbursed wage in case of death of employed person

Section 25A provides that subject to the other provisions of the Act all amounts payable to an employed person as wages shall if such amounts could not or cannot be paid on account of his death before payment or on account of his whereabouts not being known –

- be paid to the person nominated by him in this behalf in accordance with the rules made under this Act; or
- where no such nomination has been made or where for any reasons such amounts cannot be paid to the person so nominated, be deposited with the prescribed authority who shall deal with the amounts so deposited in such manner as may be prescribed.

Where, in accordance with the provisions of sub-section (1), all amounts payable to an employed person as wages –

- are paid by the employer to the person nominated by the employer person; or
- are deposited by the employer with the prescribed authority, the employer shall be discharged of his liability to pay those wages.

MINIMUM WAGES ACT, 1948 – Object, Scope and Applicability

Introduction

The concept of minimum wages first evolved with reference to remuneration of workers in those industries where the level of wages was substantially low as compared to the wages for similar types of labor in other industries. The International Labor Conference of International Labor Organization (ILO) adopted a draft convention on minimum wages. It was required the member countries to create and maintain a machinery whereby minimum wages can be fixed for workers employed in industries in which no arrangements exist for the effective regulation of wages and where wages are exceptionally low.

The Indian Government appointed a committee called as Labor Investigation Committee to look into the conditions of labor, in terms of their wages, housing, social conditions, employment etc., This committee was appointed on the basis of the recommendations of the ILO. The Committee recommended for a separate legislation for the fixation of minimum wages, working hours etc., especially on unorganized sectors. The bill on minimum wage was introduced in the Lok Sabha. A Standing Committee was appointed which set definitions and guidelines for formulating a wage structure in India. The Committee defined minimum wages as – "The minimum wages must be provided not merely for the bare subsistence of life but also for the preservation of efficiency of the workers by providing for some measures of education, medical requirement and amenities".

The Central Government also made 'The Minimum Wages (Central) Rules, 1950 for the purposes of the Act. The rules came into effect form 14.10.1950.

Object of the Act

The object of this Act is to provide for fixing minimum rates of wages in certain employments.

In 'Bakshish Singh V. Darshan Engineering Works' – 1994 LLR 61 SC the Supreme Court held that there is one principle which admits of no exception. No industry has right to exist unless it is able to pay its workmen at least a bare minimum wage. If an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence or minimum wage, he would have no right to conduct his enterprise on such terms.

Applicability

This Act extends to whole of India. The Act provides the list of employments for which this Act applicable in the schedule to this Act.

Effect

This Act came into effect from 15.03.1948.

Important definitions

Adolescent

Section 2(a) defines the term 'adolescent' as a person who has completed his fourteenth year of age but has not completed his eighteenth year.

Adult

Section 2(aa) defines the term 'adult' as a person who has completed his eighteenth year of age.

Appropriate Government

Section 2(b) defines the term 'appropriate Government' as-

- in relation to any scheduled employment carried on by or under the authority of the Central Government or a railway administration or in relation to a mine oilfield or major port or any corporation established by a Central Act - the Central Government; and
- in relation to any other scheduled employment the State Government;

Child

Section 2(bb) defines the term 'child' as in relation to any other scheduled employment of the State Government .

Cost of living index

Section 2(d) defines the expression 'cost of living index number' in relation to employees in any scheduled employment in respect of which minimum rates of wages have been fixed as the index number ascertained and declared by the competent authority by notification in the Official Gazette to be the cost of living index number applicable to employee in such employment.

Employer

Section 2(e) defines the term 'employer' as any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act and includes except in sub-section (3) of section 26 –

(i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person named under clause (f) of sub-section (1) of section 7 of the Factories Act 1948 (63 of 1948) as manager of the factory;

(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such government for the supervision and control of employees or where no person or authority is so appointed the head of the department;

(iii) in any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act, the persons appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local authority;

(iv) in any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act any person responsible to the owner for the supervision and control of the employees or for the payment of wages;

In 'Shiv Prasad Ghosh V. District Judge' – 1963 (6) FJR 447 it was held that under the definition of the word 'employer' in Section 2(e) (iv) of the Act any person responsible to the owner for the supervision and control of the employees or for the payment of wages them is also an employer.

In 'A.V. Prakash V. Senior Labour Inspector' – 1994 LLR 304 (Karn) it was held by the High Court that the definition of 'employer' is a restrictive definition and only a person who employs one or more employees in any scheduled employment would be employer within the meaning of the Act and no doubt it includes the employees as detailed in the various sub clauses of Section 2(e).

Wages

Section 2(h) defines the term 'wages' as all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes house rent allowance, but does not include –

- the value of –
  - any house accommodation, supply of light, water, medical attendance; or
  - any other amenity or any service excluded by general or special order of the appropriate government;
- any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;

- any traveling allowance or the value of any traveling concession;
- any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
- any gratuity payable on discharge;

Section 2(h) defines the term 'wages' and not 'minimum wages'. It is up to the appropriate Government to fix the minimum wages considering into the various aspects of the employment, sectoral organization etc., In many a case the Courts declare who are eligible to receive minimum wages apart from the decisions of the appropriate Governments.

In 'Bandhua Mukti Morcha V. Union of India' – (1984) SCC (L&S) 389 the Supreme Court held that a piece rated worker is also entitled to receive the minimum wages irrespective of his output.

In 'Patel Ishwerbhai Pramod Bhai V. Taluka Development Officer' – 1983 Lab IC 321 it was held that where certain tube well operators were working in the District and Taluka Panchayats they would be in the scheduled employment as contemplated by Section 2(g), employment under any local authority being item 6 in the schedule to the Act, and as such would be entitled to minimum wages under the Act.

Employee

Section 2(i) defines the term 'employee' as any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an out-worker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person; and also includes an employee declared to be an employee by the appropriate government; but does not include any member of the Armed Forces of the Union.

In 'Athni Municipality V. Shettappa Laxman Pattan' – (1965) II LLJ 307 it was held that having regard to the context and object of the Act, a discharged employee must also be held to be an employee within the meaning of the Act.

Scheduled employment

Section 2(g) of the Act defines the terms 'scheduled employment' as an employment specified in the Schedule, or any process or branch of working forming part of such employment.

The Schedule is divided into two parts – Part I and Part II. Part I of the schedule has 18 entries. It was realized that it would be necessary to fix minimum wages in many more employments to be identified in course of time. Accordingly, powers were given to appropriate Government to add employments to the Schedule by following the procedure laid down in Section 21 of the Act. As a result the State Government and Central Government have made several additions to the Schedule and it differs from State to State.

Part II relates to employment in agriculture. Employment in agriculture, that is to say, in any form of farming, including the cultivation and tillage of the soil, dairy farming, the production, cultivation, growing and harvesting of any agricultural or horticultural commodity, the raising of live-stock, bees or poultry and any practice performed by a farmer on a farm as incidental to or in conjunction with farm operations (including any forestry or timbering operations and the preparation for market and delivery to storage or to market or to carriage for transportation to market from produce).

Act – not violative of fundamental rights

In 'T.G. Lakshmaiah Setty Sons, Adoni V. State of Andhra Pradesh,' – 1981 Lab IC 690 it was held that the Minimum Wages Act does not violate any of the fundamental rights. On the other hand, it fulfills, in part, at least, the obligations of the State under the Directive Principles of State Policy.

Fixing of minimum rates of wages

Section 3 provides that the appropriate Government shall fix the minimum rates of wages payable to employees employed in an employment specified in Part I or Part II of the Schedule and in an employment added to either Party by notification under section 27. The appropriate government may in respect of employees employed in an employment specified in Part II of the Schedule instead of fixing minimum rates of wages under this clause for the whole State fix such rates for a part of the State or for any specified class or classes of such employment in the whole State or part thereof.

The appropriate government may refrain from fixing minimum rates of wages in respect of any scheduled employment in which there are in the whole State less than one thousand employees engaged in such employment but if at any time the appropriate government comes to a finding after such inquiry as it may make or cause to be made in this behalf that the number of employees in any scheduled employment in respect of which it has refrained from fixing minimum rates of wages has risen to one thousand or more it shall fix minimum rates of wages payable to employees in such employment as soon as may be after such finding.

The appropriate Government may fix minimum rate of wages for-

time work, known as a Minimum Time Rate;

piece work, known as a Minimum Piece Rate;

a guaranteed time rate;

overtime rate.

Different minimum wages

Section 3(3) (a) provides that different minimum rates of wages may be fixed for-

different scheduled employments;

different classes of work in the same scheduled employment;

adults, adolescents, children and apprentices;

different localities;

Minimum wages on wage period

Section 3(3) (b) provides that minimum of wages may be fixed by any one or more of the following wage periods-

by the hour;

by the day;

by the month or

by such other larger wage-period as may be prescribed

and where such rates are fixed by the day or by the month, the manner of calculating wages for a month or for a day as the case may be may be indicated. Where any wage-periods have been fixed under section 4 of the Payment of Wages Act 1936, minimum wages shall be fixed in accordance therewith.

Review of Minimum wages

Section 3(1)(b) provides that the appropriate Government may review at such intervals, as it may think fit, such intervals not exceeding five years and revise the minimum rate of wages, if necessary. Where for any reason the appropriate Government has not reviewed the minimum rates of wages fixed by it in respect or any scheduled employment within any interval of five years, nothing contained in this clause shall be deemed to prevent it from reviewing the minimum rates after the expiry of the said period of five years and revising them, if necessary, and until they are so revised the minimum rates in force immediately before the expiry of the said period of five years shall continue in force.

Minimum wages when a dispute is pending

Section 3(2A) provides that where in respect of an industrial dispute relating to the rate of wages payable to any employees employed in a schedule employed is pending before-

A Tribunal or National Tribunal under the Industrial Disputes Act, 1947; or

Before any like authority under any other law for the time being force; or

An award made by any Tribunal, National Tribunal or such authority is in operation

and a notification is issued by the appropriate Government for fixing the minimum wages or revision of minimum wages, during the pendency of the above proceedings, no minimum wage cannot be fixed by the appropriate Government during the said period.

Minimum Rate of wages

Section 4(1) provides that any minimum rate of wages fixed or revised by the appropriate government in respect of scheduled employments may consist of –

a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers; or

a basic rate of wages with or without the cost of living allowance and the cash value of the concessions in respect of suppliers of essential commodities at concession rates, where so authorized; or

an all-inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.

Section 4(2) provides that the cost of living allowance and the cash value of the concessions in respect of supplied of essential commodities at concession rate shall be computed by the competent authority at such intervals and in accordance with such directions as may be specified or given by the appropriate government.

In 'Karnataka Film Chamber of Commerce, Bangalore V. State of Karnataka' – 1986 Lab IC 1890 it was held that Section 4 is a definite indication that basic wage is an integral part of the minimum wage. It is not correct to say that a minimum wage under Section 4(1) necessarily should consist of basic wage and dearness allowance. The language of Section 4 does not lend itself to such an interpretation. On the plain terms of Section 4(1) it is clear that that the payment of dearness allowance would arise only if the basic wage fixed for a category of workmen fell short of the minimum wage which the State Government has to fix taking into consideration the needs of the workers' family consisting of three consumption units.

Example

Revised minimum rates of wages in Delhi with effect from 01.04.2016 are as follows:

Unskilled employees – ₹ 9568 per month;

Semi skilled employees – ₹ 10,582/- per month;

Skilled categories – ₹ 11,622/- per month; and

Graduate & Above – ₹ 12,662/- per month

Procedure for fixing and revising minimum wages

Section 5 (1) provides that In fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act or in revising minimum rates of wages so fixed, the appropriate government shall, either –

appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision as the case may be; or

by notification in the Official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date not less than two months from the date of the notification on which the proposals will be taken into consideration.

Section 5(2) provides that after considering the advice of the committee or committees all representations received by it before the date specified in the notification, the appropriate government shall by notification in the Official Gazette, fix, or, as the case may be revise the minimum rates of wages in respect of each scheduled employment and unless such notification otherwise provides it shall come into force on the expiry of three months from the date of its issue. Where the appropriate government proposes to revise the minimum rates of wages by the mode specified in clause (b) of sub-section (1) the appropriate government shall consult the Advisory Board also.

In 'Bijay Unchana Paul V. State of Assam' – 1969 (19) FLR 11 it was held that it is necessary that the appropriate Government in issuing notifications for prescribing the rates of minimum wages under the Minimum Wages Act, 1948, punctiliously follows the letter of law and strictly complies with all the procedures laid down in the Act.

In 'T.G. Lakshmaiah Setty & Sons, Adoni V. State of Andhra Pradesh' – 1981 Lab IC 690 it was held that what is contemplated by the Act to be notified under Section 5(1)(b) is no doubt draft proposals. The objection to draft proposals can be made both by employers and employees as well. Thus, if the employees had exercised their privilege to represent and ask for higher wages and if eventually the State authorities had adopted higher rates of minimum wages.

Correction of errors

Section 10 of the Act provides that if there is any clerical or arithmetical mistake in any order fixing or revising minimum rates of wages or errors arising therein from any accidental slip or omission, the appropriate Government may, at any time, by notification correct the same. Every such Notification shall, as soon as may be after it is issued, be placed before the Advisory Board for information.

Advisory Board

Section 7 of the Act provides that the purpose of co-coordinating work of committees and sub-committees appointed under section 5 and advising the appropriate government generally in the matter of fixing and revising minimum rates of wages the appropriate government shall appoint an Advisory Board.

The Advisory body has no functioning of quasi judicial nature. Their recommendation/decision is not binding on the State Government but the same remains only a recommendation and nothing more than that. Merely because one member of the Board was extra, the recommendation of the Advisory Board would not be vitiated as held in 'Charadharpur Bidi and Tobacco Merchants Association V. State of Bihar' – 1997 (77) FLR 339.

Central Advisory Board

Section 8 of the Act provides that for the purpose of advising the Central and State Governments in the matters of the fixation and revision of minimum rates of wages and other matters under this Act and for co-coordinating the work of the Advisory Board, the Central Government shall appoint a Central Advisory Board. The Central Advisory Board shall consist of persons to be nominated by the Central Government representing employers and employees in the scheduled employments who shall be equal in number and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman of the Board by the Central Government.

Composition of Committee

Section 9 of the Act provides that each of the committees sub-committees and the Advisory Board shall consist of persons to be nominated by the appropriate government representing employers and employees in the scheduled employments who shall be equal in number and independent persons not exceeding one-third of its total number of members; one of such independent persons

shall be appointed the Chairman by the appropriate government.

Wages in kind

Section 11(1) of the Act provides that Minimum wages payable under this Act shall be paid in cash. Section 11(2) provides that where it has been the custom to pay wages wholly or partly in kind, the appropriate government being of the opinion that it is necessary in the circumstances of the case may, by notification in the Official Gazette, authorize the payment of minimum wages either wholly or partly in kind.

Section 11(3) of the Act provides that if appropriate government is of the opinion that provision should be made for the supply of essential commodities at concession rates, the appropriate government may, by notification in the Official Gazette, authorize the provision of such supplies at concessional rates. Section 11(4) of the Act provides that the cash value of wages in kind and of concessions in respect of supplies of essential commodities at concession rates shall be estimated in the prescribed manner.

Payment of minimum rate of wages

Section 12 of the Act provides that where in respect of any scheduled employment a notification under section 5 is in force, the employer shall pay to every employee engaged in a scheduled employment under him wages at a rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorized within such time and subject to such conditions as may be prescribed. This provision will not affect the provisions of the Payment of Wages Act, 1936.

In 'Militant Security Bureau Private Limited V. B.R. Hehar' – (1991) 2 CLR 245 (Bom) it was held that once a contractor's establishment is covered under the Minimum Wages Act the employees engaged through the contractor shall be entitled to the wages as fixed under the Act.

Forced Labor

In 'Union for Democratic Rights V. Union of India' – 1982 Lab IC 1646 it was held that where a person provides labor or service to another for remuneration which is less than the minimum wages, such labor is 'forced labor' within the meaning of Article 23 of the Constitution.

Fixing hours for a normal working day

Section 13(1) of the Act provides that in regard to any scheduled employment minimum rates of wages in respect of which have been fixed under this Act the appropriate government may –

fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals. Rule 24 provides that the number of hours which shall constitute a normal working day shall be-

in the case of an adult – 9 hours; the working day of an adult worker shall be so arranged that inclusive of the intervals of rest, if any, shall not spread over more than 12 hours on any day;

in case of a child – 4.5 hours. No child shall be permitted to work for more than 4.5 hours on any day.

provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest;

provide for payment for work on a day of rest at a rate not less than the overtime rate.

Section 13(2) provides that the provisions of sub-section (1) shall in relation to the following classes of employees apply only to such extent and subject to such conditions as may be prescribed :-

employees engaged on urgent work, or in any emergency which could not have been foreseen or prevented;

employees engaged in work in the nature of preparatory or complementary work which must

necessarily be carried on outside the limits laid down for the general working in the employment concerned;

employees whose employment is essentially intermittent;

employees engaged in any work which for technical reasons has to be completed before the duty is over;

employees engaged in a work which could not be carried on except at times dependent on the irregular action of natural forces.

Section 13(3) provides that for the purposes of sub-section (2), employment of an employee is essentially intermittent when it is declared to be so by the appropriate government on the ground that the daily hours of duty of the employee or if there be no daily hours of duty as such for the employee the hours of duty normally include periods of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention.

Overtime

Section 14(1) provides that where an employee whose minimum rate of wages is fixed under this Act by the hour, by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess at the overtime rate fixed under this Act or under any law of the appropriate government for the time being in force whichever is higher.

Rule 25 provides that when a worker works more than 9 hours on any day or more than 48 hours in a week, he shall be entitled to Overtime wages-

in case of employment in agriculture - one and a half times the ordinary rate of wages;

in case of any other scheduled employment – double the ordinary rate of wages.

A register in this regard shall be maintained. If no over time wage is paid for a particular month a NIL entry should be made.

Section 14(2) provides that this Act shall not prejudice the operation of the provisions of Section 59 of the Factories Act in any case where those provisions are applicable.

In 'Municipal Council, Hatta V. Bhagat Singh' – 1998 LLR 298 it was held that Section 14 provides for payment of overtime only to those employees who are getting minimum rate of wages under the Act. It does not apply to those getting better wages under other statutory rules.

Wages of worker who works less than normal working day

Section 15 of the Act provides that if an employee whose minimum rate of wages has been fixed under this Act by the day works on any day on which he was employed for a period of less than the requisite number of hours constituting a normal working day, he shall, save as otherwise hereinafter provided, be entitled to receive wages in respect of work done by him on that day as if he had worked for a full normal working day. However that he shall not be entitled to receive wages for a full normal working day –

in any case where his failure to work is caused by his unwillingness to work and not by the omission of the employer to provide him with work; and

in such other cases and circumstances as may be prescribed.

Wages for two or more classes of work

Section 16 of the Act provides that where an employee does two or more classes of work to each of which a different minimum rate of wages is applicable, the employer shall pay to such employee in respect of the time respectively occupied in each such class of work, wages at not less than the minimum rate in force in respect of each such class.

Minimum time rate wages for piece work

Section 17 of the Act provides that where an employee is employed on piece work for which minimum

time rate and not a minimum piece rate has been fixed under this Act the employer shall pay to such employee wages at not less than the minimum time rate.

Cash value of wages

Rule 20 provides that the retail prices at the nearest market shall be taken into account in computing cash value of wages paid in kind and of essential commodities supplied at concessional rates. The computation shall be made in accordance with such directions as may be issued by the Central Government from time to time.

Time of payment of wages

Rule 21(1) provides that the wages of a worker in any scheduled employment shall be paid on a working day-

in the establishment for which less than 1000 persons are employed – before the expiry of 7th day;

in other establishments – before the expiry of 10th day

after the last wage period in respect of which the wages are payable.

Where the employment of any person is terminated by or on behalf of the employer, the wages earned by him shall be paid before the expiry of the second working day after the day on which his employment is terminated.

Condition for payment of wages

The wages of an employed person shall be paid to him without deduction of any kind except those authorized by or under the rules.

Deductions

Every payment made by the employed person to the employer or his agent shall be deemed to be a deduction of wages. Deductions from the wages shall be one of or more of the following-

fines;

absence from duty;

damage or loss of goods entrusted to the employed person for custody where the damage is directly attributable to his neglect or default;

loss of money for which he is required to account where such loss is directly attributable to his neglect or default;

house accommodation supplied by the employer;

such amenities and services supplied by the employer;

advances or for adjustment of over payment of wages;

income tax payable by the employed person;

by order of a Court or other competent authority;

repayment of advances from any provident fund;

payment to co-operative societies;

loans advanced by the employer;

payment of insurance premium;

adjustment of amounts, other than wages paid in error in excess of what is due to him;

with the written authorization of the employed person;

with the written authorization for contributions to National Defence Fund or the Prime Minister's National Relief Fund or to any Defence Savings Scheme approved by the Central Government;

loans granted for house building.

The prior approval of the Inspector or any other officer authorized is obtained in writing before making such deductions, unless the employee given his consent in writing to such deductions.

The total amount of deductions from the wages shall not exceed-

75% of such wages where such deductions are wholly or partly made for payments to Consumer Co-operative Stores run by any Co-operative Society; and

50% of such wages in any other case.

If the total amount of deductions that have to be made in wage period from the wages exceeds the limit, the excess shall be carried forward and recovered from the wages of succeeding wage period or wager periods in such number of installments as may be necessary.

Fines

Fine may be imposed on an employed person for damage or loss caused by him. The act or omission or the damage or loss in respect of which the find is proposed, the employed persons shall be explained personally and also in writing about the same. The employed person shall be given an opportunity to offer any explanation in the presence of another person. The amount of fine that is imposed on him shall also be intimated to him. The fine imposed shall be subject to such limits imposed by the Central Government. All fines imposed and deductions made shall be recorded in the register.

Weekly day of rest

Rule 23 provides that an employee to whom this Act is applicable shall be allowed a day of rest every week which shall ordinarily be Sunday, but the employer may fix any other day of the week as the rest day for any employee in his employment. The employee should be informed about his weekly day of rest. To get the weekly day of rest the employee has to work for a continuous period of not less than six days in a week.

Night shift

Rule 24A provides that where a worker in a scheduled employment works on shift which extends beyond midnight-

a holiday for the whole day for the purposes of week day rest shall, in his case mean a period of 24 consecutive hours beginning from the time when his shift ends; and

the following day in such a case shall be deemed to be the period of 24 hours beginning from the time when such shift ends and the hours after midnight during which such worker was engaged in work shall be counted towards the previous day.

Claims

If there is any short payment of wages or wages at the over time etc., may be claimed by the employee himself or through any legal practitioner or any official of a registered trade union authorized by him or any Inspection or any person acting with the permission of the Authority by applying to the concerned authority. For this purpose the appropriate Government may appoint-

any Commissioner for Workmen's Compensation; or

any Officer of the Central Government exercising functions as a Labor Commissioner for any region; or

any Officer of the State Government not below the rank of Labor Commissioner; or

any other Officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate

to be the authority to hear and decide for any specified area all claims.

The claim shall be presented to the authority by the employee within six months from the date on which the minimum wages or other amount became payable. The Authority may a claim beyond the six months if he is satisfied that the applicant had sufficient cause for not making the application

within the prescribed period. Rule 27 provides that a single application in respect of a number of employees may be filed before the authority. The application shall be made in duplicate in Forms VI, VIA or VII, one copy of which shall bear the prescribed court fee. The authorization shall be given in Form VIII.

The Authority shall serve the copy of the application to the employer by registered post a notice in Form IX to appear before him on a specified date. He shall hear the applicant and the employer and after such further inquiry, if any, as it may consider necessary may, without prejudice of any other penalty to the employer, direct-

the payment to the employee of the amount by which the minimum wages payable to him exceed the amount actually paid, together with compensation as the authority may think fit, not exceeding 10 times the amount of such excess;

in any other case, the payment of the amount together with the payment of such compensation as the Authority may think fit, not exceeding ₹10.

If the employer fails to appear on the specified date the Authority may hear and determine the application ex-parte. If the applicant fails to appear on the specified date the application will be dismissed. Any such order may be set aside on sufficient cause being shown by the defaulting party within one month of the date of the said order and the application shall be re-heard.

If the Authority finds the application is a vexatious one he may impose penalty on the employees not exceeding ₹50/- to the employer.

The amount due may be recovered as if it were a fine imposed by the Authority as a Magistrate. Every direction of the Authority shall be final.

In 'Awadh Lal Sah V. State of Bihar' – 1984 Lab IC 169 (Pat HC) it was held that the minimum wages becoming payable can be claimed by an application presented within six months from the date on which it became payable and if presented after the expiry of the period of limitation, the applicant has to satisfy the authority that he had sufficient cause for not making the application within such period.

In 'B. Ramdas V. The Authority under the Minimum Wages Act, Guntur Region, Guntur' – 1987 Lab IC 1493 it was held that while making the enquiry into the claim petition under Section 20 of the Act, the authority acts in quasi judicial capacity and *ipso facto* should ensure that no prejudice is caused to the employer by failure to follow the rules of natural justice.

In 'Premier Tobacco Packers (P) Limited V. Assistant Labor Officer' – 1988 Lab IC 283 it was held that an order imposing a monetary liability caused by violation of provisions of a statute cannot be upheld except in the presence of strict proof.

In 'Executive Engineer, Rural Works Division, Mayurbhanj V. Additional District Magistrate' – 2005 LLR 121 it was held that the claim of arrears of differential wages made by employee. There was delay in filing application beyond limitation period. Claimant submitted that they were pursuing their grievance before Labor Officer. Only when they failed, they approached the authority. It was held that delay has been rightly condoned.

Exemption to employer

Section 23 provides that where an employer is charged with an offence against this Act, he shall be entitled, upon complaint duly made by him, to have any other person whom he charges as the actual offender, brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved the employer proves to the satisfaction of the Court-

that he has used due diligence to enforce the execution of this Act; and

that the said other person committed the offence in question without his knowledge, consent or connivance,

that the other person shall be convicted of the offence and shall be liable to the like punishment as if he were the employer and the employer shall be discharged. For this purpose the employer may be examined on oath, and the evidence of the employer or his witness, if any, shall be subject to cross examination by or on behalf of the person whom the employer charges as the actual offender and by the prosecution.

Obligation of employer

Section 18 imposes some obligations on the employer in keeping and maintenance of registers and records. Section 18(1) provides that every employer shall maintain such registers and records giving such particulars of employees employed by him, the work performed by them, the wages paid to them, the receipts given by them and such other particulars and in such Form as may be prescribed.

Section 18(2) provides that every employer shall keep exhibited, in such manner as may be prescribed, in the factory, workshop or place where the employees in the scheduled employment may be employed, or in the case of outworkers, in such factory, workshop or place as may be used for giving out-work to them, notices in the prescribed form containing the prescribed particulars.

Section 18(3) provides that the appropriate Government may, by rules made under the Act, provide for issue of wage books or wage slips to employees employed in any scheduled employment in respect of which minimum rates of wages have been fixed and prescribe the manner in which the entries shall be made and authenticated in such wage books or wage slips by the employer or his agent.

Maintaining such registers and records are mandatory. There is no exemption to this mandatory obligation of the employer including any contractor. Therefore every employer, including a contractor who engaged laborers for others who owns the establishment/factory etc., is bound by the provisions of this Act, to comply with the requirements of maintaining registers etc.,

The following are the forms prescribed for registers and records-

Form – I : Register of Fines;

Form – II : Register of deductions for damage or loss caused to the employer,

By the neglect or default of the employed persons;

Form III : Unified Annual Return;

Form IV ; Overtime Register for workers;

Form V : Muster Roll;

Form IX-A : Notice

Form X : Register of Wages;

Form XI : Wage slip.

A wage slip shall be issued by every employer to every person employed by him at least a day prior to the disbursement of wages. Entries in the Register of Wages and wage slips shall be authenticated by the employer or any person authorized by him in this behalf. The registers shall be kept at the work spot and maintained up-to-date. If no fine is imposed for any wage period a NIL entry is to be made. The above documents shall be preserved for a period of three years after the date of last entry made therein.

All registers and records shall be produced on demand before the Inspector during the course of inspection of the establishment. Any infringement of the provisions as noticed and communicated by the Inspector shall be rectified by the employer and compliance report shall be submitted to the Inspector on or before the date specified by him.

Every employer, including a contractor who engages laborers for others who owns the establishment/ factory etc., is bound by the provisions of this Act, to comply with the requirement of maintaining

registers etc., There is no exemption to this mandatory obligation of the employer including any contractor as held in 'V.V. Surya Rau V. Surendra Ramakrishna Tendulkar' – 1977 (77) FLR 280..

Annual Return

Rule 21 (4A) provides for filing of annual returns by employer. The Annual Return shall be filed by the employer on or before 1st of February in each year by uploading the same in Form III on the web portal of the Ministry of Labor and Employment and also filed with the Inspector.

Publicity of notice

Rule 22 provides that notices in Form IXA containing the minimum rates of wages fixed together with the extracts of the Act, the rules made there under and the name and address of the Inspector shall be displayed in English and in a language understood by the majority of the workers in the employment at the main entrances to the establishment and at its office and shall be maintained in a clean and eligible condition. Such notices shall also be displayed on the notice boards of all sub divisional and district officers.

Unpaid amount

Section 22D provides that if the employer could not able to pay the amount due to the employee on account of his death before payment or on account of his whereabout is not known, the same should be deposited with the prescribed authority who shall deal with the money so deposited in such manner as may be prescribed.

Contracting out

Section 25 of the Act provides that any contract or agreement, whether made before or after the commencement of this Act, whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accruing to him under this Act shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under this Act.

The right of minimum wages under this Act is a definite one. In 'Yadav Stores, Nagpur V. Presiding Officer, Labor Court – III' – 1984 Lab IC 756 it was held that in a compromise or a settlement between the employer and employee resulting in the employee relinquishing or reducing his claim with regard to wages under the Minimum wages act is shall be null and void.

Penalties

Section 22 provides punishment for certain offences. The section provides that any employer who-

pays to an employee less than the minimum rates of wages fixed for that employee's class of work, or less than the amount due to him under the provisions of this Act; or

contravenes any rule or order made under Section 13 (fixing hours for normal working days etc.,)

shall be punishable with imprisonment for a term which may extend to 6 months, or with fine which may extend to ₹500/- or with both. In imposing any fine for an offence the court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings under Section 20.

Section 22A provides general provision for punishment of other offences. This section provides that any employer who contravenes any provision of this Act or of any rule or order made there under shall, if no other penalty is provided for such contravention by this Act, be punishable with fine which may extend to ₹500.

Offences of by companies

Section 22C provides that if the person coming any offence is a company, every person who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

If the concerned person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. If it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be proceeded against and punished accordingly.

Cognizance of offences

Section 22B provides that no court shall take cognizance of a complaint against any person for an offence-

under Section 22(a) unless an application in respect of the facts constituting such offence has been presented under Section 20 and has been granted wholly or in part, and the appropriate Government or an officer authorized by it in this behalf has sanctioned the making of the complaint;

under Section 22(b) or under Section 22A, except on a complaint made by, or with the sanction of an Inspector.

No Court shall take cognizance of an offence under Section 22, unless a complaint is made within one month of the grant of sanction and under Section 22A, unless a complaint is made within six months of the date on which the offence is alleged to have been committed.

Bar of suits

Section 24 provides that no Court shall entertain any suit for the recovery of wages for the sum claimed-

forms the subject of an application under Section 20 which has been presented by or on behalf of the plaintiff; or

has formed the subject of a direction under that section in favor of the plaintiff; or

has been adjudged in any proceeding under that shall not be due to the plaintiff; or

could have been recovered by an application under that that Act.

Powers of appropriate Government

The following are the powers of the appropriate Government-

Section 26provides that the appropriate Government may, subject to such conditions, direct that the provisions of this Act shall not apply in relation to the wages payable to disabled employees or all or any class of employees employed in the scheduled employment;

Section 27 gives power to State Government to add any employment in either part of the schedule;

Section 28 gives power to the Central Government to directions to a State Government as to carrying into execution of this Act in the State;

Section 29 gives power to the Central Government to make rules;

Section 30 gives power to appropriate Government to make Rules.

EMPLOYEES PROVIDENT FUND AND MISCELLANEOUS PROVISIONS ACT, 1952 – Object, Scope and Applicability

Introduction

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is a social welfare legislation to provide for the institution of Provident Fund, Pension Fund and Deposit Linked Insurance Fund for employees working in factories and other establishments. The Act aims at providing social security and timely monetary assistance to industrial employees and their families when they are in distress.

The following three schemes have been framed under the Act by the Central Government:

(a) The Employees' Provident Fund Schemes, 1952;

(b) The Employees' Pension Scheme, 1995; and

(c) The Employees' Deposit-Linked Insurance Scheme; 1976.

The three schemes mentioned above confer significant social security benefits on workers and their dependents.

These schemes taken together provide to the employees an old age and survivorship benefits, a long term protection and security to the employee and after his death to his family members, and timely advances including advances during sickness and for the purchase/ construction of a dwelling house during the period of membership.

The Act is now applicable to employees drawing pay not exceeding ₹15,000/- per month. The Act extends to whole of India except Jammu and Kashmir. The term pay includes basic wages with dearness allowance, retaining allowance (if any), and cash value of food concession.

APPLICABILITY

Section 1(3) provides that subject to Section 16, this Act applies-

- To every establishment which is a factory engaged in any industry specified in Schedule I and in which 20 or more persons are employed; and
- To any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.
- The Central Government may apply the provisions of this Act to any establishment employing such number of persons less than 20 as may be specified in the notification. Not less than 2 months' notice is to be given by the Central Government to such establishments;
- Where it appears to the Central Provident Fund Commissioner, that the employer and the majority of the employees have agreed that the provisions of this Act should be made applicable to their establishment, he may, by notification, apply the provisions of this Act to that establishment on and from the date of such agreement or from any subsequent date specified in such agreement;
- Once the Act is covered to any establishment it shall continue to apply notwithstanding the number of the persons employed therein shall at any time falls below 20.

In 'Goods Shepherd Public School V. EPF organization' – 2014 LLR 611 (Del HC) it was held that a school rightly covered under PF when the principal has affirmed about employment of 20 employees.

In 'M/s Nasiruddin Beedi Merchant Limited V. CPF Commissioner' – AIR 2001 SC 850, the Supreme Court held that this Act would apply even in respect of home workers engaged through contractors and cannot be objected any more.

In 'Annamma Iype V. Regional Provident Fund Commissioner' – 1993 LLR 287 it was held that wherein an establishment the strength of the employees at a particular time is below 20, it cannot be contended by the employer that the establishment is no longer within the purview of the Act.

Non applicability of the Act

Section 16(1) of the Act provides that this Act is not applicable to the following-

- To any establishment registered under the Co-operative Societies Act, 1912 or under any other law for time being in force in any State relating to co-operative Societies, employing less than 50 persons and working without the aid of the power; or
- To any other establishment belong to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or
- To any other establishment set up under the Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

IMPORTANT DEFINITIONS

Appropriate Government

Section 2(a) defines the term 'appropriate Government'

- in relation to an establishment belonging to, or under the control of, the Central Government or in relation to an establishment connected with-
  - a railway company;
  - a major port;
  - a mine or an oil field; or
  - a controlled industry; or
  - in relation to an establishment having departments or branches in more than one State,the appropriate Government is the 'Central Government';
- in relation to any other establishment, the appropriate Government is the 'State Government'.

Authorized Officer

Section 2(aa) defines the term 'authorized officer' as-

- the Central Provident Fund Commissioner;
- Additional Central Provident Fund Commissioner;
- Deputy Provident Fund Commissioner;
- Regional Provident Fund Commissioner; or

such other officer as may be authorized by the Central Government, by Notification in the Official Gazette.

Basic wages

Section 2(b) defines the term 'basic wages' as all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case, in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-

- the cash value of any consideration;
- any dearness allowance (that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living) house rent allowance, over time allowance, bonus, commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;
- any presents made by the employer.

Contribution

Section 2(c) defines the term 'contribution' as a contribution payable in respect of a member under a scheme or the contribution payable in respect of an employee to whom the Insurance scheme applies.

Fund

It means Provident Fund established under the Scheme. [Section 2(h)]

Employer

Section 2(e) defines the term 'employer' as-

- in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory, the person so named; and
- in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

Employee

Section 2(f) defines the term 'employee' as any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person-

- employed by or through a contractor in or in connection with the work of the establishment;
- engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 or under the Standing orders of the establishment.

In 'Prakash D. Shah V. Union of India'- 2004 LLR 218 (Bom) the High Court held that a partner of a firm having a status of beneficiary will not be employee either to be covered or counted under the Act.

Factory

Section 2(g) defines the term 'factory' as any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid or power.

Occupier of a factory

Section 2(k) defines the term 'occupier of a factory' as the person who has ultimate control over the affairs of a factory, and, where the said affairs are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory.

In 'Srikanta Dutta Narasimharava Wodiyar V. Enforcement Officer, Mysore'- 1993 LLR 497 it was held that the person who is in charge or responsible for the management or ultimate control over the affairs of the factory or establishment, in the event of entrustment to a managing agent, such managing agent shall also be deemed to be the occupier of the factory.

In 'B.K. Basu V. Regional Provident Fund Commissioner' – 2002 LLJ 512 (Cal) the High Court held that the clear meaning of the 'occupier' indicates a person, who is in actual possession and control. It may be an individual or a firm. Unless a notice is given, notifying the individual of a firm, all the members of the firm are to be liable.

Schemes

The Act provides three types of schemes for the benefit of the employees as detailed below-

- Section 5 –Employees' Provident Fund Schemes;
- Section 6A – Employees' Pension Scheme;
- Section 6C – Employees' Deposit Linked Insurance Scheme.

The details of the schemes will be seen. Section 7 gives powers to the Central Government to amend or vary, either prospectively or retrospectively, the Scheme, the Pension Scheme or the Insurance scheme, as the case may be.

Employees' Provident Fund Schemes

Section 5 provides that the Central Government framed a scheme called the Employees' Provident Fund Scheme ('Scheme' for short) for the establishment of provident funds for employees. The Central Government framed 'The Employees' Provident Fund Scheme, 1952 which came into effect from 2nd September, 1952. The fund shall vest in and be administered by the Central Board constituted under Section 5A of the Act. The scheme framed may provide for all or any of the matters specified in Schedule II. The scheme may provide that any of the provisions shall take effect either prospectively or retrospectively on such date as may be specified in the scheme.

Central Board

Section 5A provides for the establishment of Central Board by the Central Government. The Board consists of a Chairman and a Vice Chairman to be appointed by the Central Government. The Central Provident Fund Commissioner is ex officio. Members to this Board are being appointed by the Central Government as per the provisions contained in Section 5A.

Section 5AA provides for the appointment an Executive Committee by the Central Government to assist the Central Board in the performance of its functions. The members of the Executive Committee are appointed by the Central Government.

State Board

Section 5B gives powers to the Central Government, in consultation with the Government of any State, constitutes for that State, a Board of Trustees to exercise such powers and perform such duties as the Central Government may assign to it from time to time.

Contributions

As per Section 6, the contribution which shall be paid by the employer to the Fund shall be 10%, of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees whether employed by him directly or through a contractor and the employees contribution shall be equal to the contribution payable by the employer. Employees, if they desire, may make contribution exceeding the prescribed rate but subject to the condition that employer shall not be under any obligation to contribute over and above the contribution payable as prescribed by the Government from time to time under the Act. The Government has raised the rate of Provident Fund Contribution from the current 8.33% to 10% in general and in cases of establishments specially notified by the Government, from 10% to 12% with effect from September 22, 1997.

Each contribution shall be calculated to the nearest rupee, fifty paise or more to be counted as the next higher rupee and fraction of a rupee less than fifty paise to be ignored.

Dearness allowance shall include the cash value of any food concession allowed to an employee. Retaining allowance is the allowance payable to an employee for retaining his services, when the establishment is not working.

The Provident Fund Scheme has made the payment of contribution mandatory and the Act provides for no exceptionunder which a specified employer can avoid his mandatory liability.

Wage limit

Contribution is paid up to a maximum of ₹15,000 by employer and employee with effect from 01.09.2014. To pay a contribution on higher wages, a joint request from employee and employer is required. In such case the employer has to pay administrative charges on the higher wages. For the international worker wage ceiling of ₹15,000 is not applicable.

Applicability of the scheme

This scheme shall apply to all factories and other establishments to which the Act applies. This scheme shall not applicable to the tea factories in the State of Assam.

Withdrawal from the fund

Withdrawal from the fund is allowed for the following purposes-

- For the purchase of a dwelling house/flat or for the construction of a dwelling house including the acquisition of a suitable site for this purpose;
- For repayment of loans in special cases;
- Withdrawal within one year before the retirement;

Such withdrawals are not required to be repaid.

Advances from the fund

Advances from the fund are paid for the following purposes-

- For illness in certain cases;
- For marriages or post matriculation education of children;
- In abnormal conditions such as calamity of exceptional nature such as flood, earthquakes or riots – (non-refundable)
- Granted to members affected by cut in the supply of electricity; (non-refundable)
- Grant of advance to members who are physically handicapped; (non-refundable)

Employees' Pension Scheme- Section 6A

The Central Government framed Employees' Pension Scheme for the purpose of providing for-

- Superannuation pension;
- Retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies; and
- Widow or widower's pension;
- Children pension or orphan pension payable to the beneficiaries of such employees.

The Pension Scheme may provide for all or any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in that behalf in that scheme.

Contribution

There is no contribution from the employee. The employer is to contribute 8.33% of the basic wages, dearness allowance and retaining allowance, if any of the concerned employees as may be specified in the pension scheme. Contribution is not payable when the employee crosses 58 years of age since the scheme ceases on completion of 58 years

Pension Fund

A pension fund has been created for the purpose of this scheme. The Pension Fund shall vest in and administered by the Central Board. The pension scheme may provide for all or any of the matters in Schedule II, as detailed below-

- The employees or class of employees to whom the Pension scheme shall apply;
- The portion of employers' contribution to the Provident Fund which shall be entitled to the Pension Fund and the manner in which it is credited;
- The minimum qualifying service for being eligible for pension and the manner in which the employees may be granted the benefits of their past service;
- The regulation of the manner in which and the period of service, for which no contribution is

received;

- The manner in which the employees' interest will be protected against default in payment of contribution by the employer;
- The manner in which the accounts of the Pension fund shall be kept and investment of moneys belonging to Pension Fund to be made subject to such pattern of investment as may be determined by Central Government;
- The form in which an employee shall furnish particulars about himself and the members of his family whenever required;
- The forms, registers and records to be maintained in respect of employees, required for the administration of the Pension Scheme;
- The scale of pension and pensionary benefits and the conditions relating to the grant of such benefits to the employees;
- The manner in which the exempted establishments have to pay contribution towards the pension scheme and the submission of returns relating thereto;
- The mode of disbursement of pension and arrangements to be entered into with such disbursing agencies as may be specified for the purpose;
- The manner in which the expenses for administering the Pension Scheme will be met from the income of the Pension Fund;
- Any other matter which is to be provided for in the Pension Scheme or which may be necessary for the purpose of implementation of the Pension Scheme.

Employees' Deposit linked Insurance Scheme- Section 6C

The Central Government made the Employees' Deposit Linked Insurance Scheme, 1976 which came into effect from 01.09.1976. It applies to all factories and other establishments to which the Act applies except tea factories in State of Assam.

The wage ceiling limit under Employees Deposit linked Insurance Scheme has been increased from ₹6,500 to ₹15,000.

The insurance benefit under the scheme has also been increased by 20% in addition to the existing admissible benefits.

Contribution

The Deposit Linked Insurance Fund has been created for this purpose. In this Fund the employer shall pay such amount not being more than 1% of the aggregate of basic wages, dearness allowance and retaining allowance of every such employee in relation to whom he is the employer. The employer shall pay into the Insurance Fund such further amount of money not exceeding one fourth of the contribution which is required to make as the Central Government may from time to time determine to meet all the expenses in connection with the administration of the scheme other than the expenses towards the cost of any benefits provided by or under that scheme.

Where the monthly pay of an employee exceeds ₹ 15,000 the contribution payable is restricted to the amounts payable on a monthly pay of ₹15,000, dearness allowance, retaining allowance and cash value of food concession.

Determination of moneys due from employers

Section 7A provides that in case where a dispute arises regarding the applicability of this Act to an establishment, the Authority concerned may conduct such enquiry as he may deem necessary decide such dispute and determine the amount due from any employer under the provision of this Act, the scheme or the Pension Scheme or the Insurance Scheme as the case may be. Before passing such order the employer concerned shall be given a reasonable opportunity of representing

his case.

For the purpose of conducting inquiry the Authority shall have the same powers as are vested in a court under CPC for trying a suit in respect of the following matters-

- enforcing the attendance of any person or examining him on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavit;
- Issuing commissions for the examination of witnesses.

Where the employer, employee or any other person required to attend the inquiry, fails to attend such inquiry, the Authority shall decide the case ex-parte and pass orders based on the available documents put forth before him. The employer, within three months from the date of communication of such order, may apply to the Authority to set aside the ex-parte order showing that there are sufficient causes for not enabling him to attend the hearing on the prescribed date. If the Authority is satisfied, he may set aside the ex-parte order and shall appoint a date for proceeding with the inquiry.

In 'S.K. Nasiruddin Beedi Merchant Limited V. Central Provident Fund Commissioner' – AIR 2001 SC 850 it was held that the applicability of the Act to any class of employees is not determined and decided by any proceeding under Section 7A of the Act but under the provisions of the Act itself. When the Act became applicable to the employees in question, the liability arises. What is done under Section 7A of the Act is only determination of quantification of the same.

Review of order under Section 7A

Section 7B provides that any person aggrieved by an order under Section 7A may apply for a review of that order to the Officer who passed the order, if he-

- discovered new and important matter of evidence which after the exercise of due diligence was not within his knowledge; or
- could not be produced by him at the time when the order was made; or
- on account of some mistake; or
- error apparent on the face of the record; or
- for any other sufficient reason.

Such officer may also on his own motion review his order if he is satisfied that it is necessary so to don any such ground.

Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application. Where the officer is of opinion that the application for review should be granted, he shall grant the same.

In 'Balu Fire Clay Mines V. Union of India' – 2003 LLR 578 it was held that review is a statutory remedy. A review petitioner should also be disposed of by a speaking order.

Determination of escaped amount

Section 7C provides that the officer can re-open the case within five years from the date of order passed under Section 7A or Section 7B if he has reason to believe that by reason of omission or failure on the part of the employer to make any document or report available, or to disclose fully and truly all material facts any amount so due from such employer for any period has escaped his notice. The Officer may pass appropriate orders re-determining the amount due from the employer in accordance with the provisions of this Act.

EPF Appellate Tribunal

Section 7D provides for the appointment of EPF Appellate Tribunal to hear the appeal against the order passed by the Central Government or any authority under Section 7A or 7B or 7C. The Appellate Tribunal may, after giving reasonable opportunities to the parties decided the appeal

either confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such directions as the Tribunal may think fit. The Tribunal may rectify any mistake apparent from the record within five years from the date of its appeal order. No appeal by the employer shall be entertained unless he has deposited with it 75% o the amount due from him. The Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

Protection against attachment

Section 10 provides that the amount standing to the credit of any member of the Fund shall not in any way be capable of being assigned or charged and shall not be liable to attachment under any decree or any court in respect of any debt or liability incurred by the member and neither the Official assignee nor any receiver shall be entitled to, or have any claim on, any such amount.

Employer not to reduce wages

Section 12 provides that no employer in relation to an establishment to which any scheme or the insurance scheme applies shall, by reason only of his liability for the payment of any contribution to the fund or any charges or the scheme or the insurance scheme, reduce, whether directly or indirectly, the wages of any employee to whom they apply.

Transfer of Accounts

Section 17A provides that where an employee employed in an establishment to which the Act applies, leaves his employment and obtains re-employment in other establishment to which this Act does not apply, the amount of accumulations to the credit of such employee shall be transferred to the credit of his account in the provident fund of the establishment in which he is re-employed, if the employee so desires and the rules, in relation, to that provident fund permit such transfer.

Penalties

Section 14(1) provides that for the purpose of avoiding any payment whoever knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to one year, or with fine of ₹ 5000 or with both.

Section 14(1A) provides that an employer, who contravenes or makes default in complying with the provisions of Section 6 as it relates to the payment of inspection charges, administrative charges shall be punishable with imprisonment for a term which may extend to three years but-

- Which shall not be less than one year and fine of ₹10000/- in case of default of payment of the employees' contribution ;
- Which shall not be less than six months and a fine of ₹ 5000/- in any other case.

Section 14(1B) provides that an employer who contravenes or makes default in complying with the provisions of Section 6C in so far as it relates to the payment of inspection charges, shall be punishable with imprisonment for a term which may extend to one year but which shall not be less than six months and shall also be liable to fine which may extend to ₹5000.

Section 14(2) provides that subject to the provisions of this Act, the Scheme, the Pension Scheme or the Insurance scheme may provide that any person who contravenes or makes default in complying with, any of the provisions thereof shall be punishable with imprisonment for a term which may extend to one year or with fine which may extend to ₹ 4000 or with both.

Section 14(3) provides that whoever, contravenes or makes default in complying with any provision of this Act or of any condition subject to which exemption was granted shall, if no other penalty is elsewhere provided by or under this Act for such contravention or non compliance, be punishable with imprisonment which may extend to six months but which shall not be less than one month and shall be liable to fine which may extend to ₹ 5000.

Offences by companies

Section 14A (1) provides that if the person committing an offence under this Act, the Scheme etc.,

is a company, every person who at the time of the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Nothing contained in this section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

Section 14A(2) provides that where an offence under the Act, the scheme or the pension scheme or the Insurance scheme has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

PAYMENT OF BONUS ACT, 1965 – Object, Scope and Applicability

Introduction

In the early periods the payment of bonus to the employees was made voluntarily by the business organizations. The Payment of Bonus Act, 1965 has been enacted to provide for payment of bonus to persons employed in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work for hire or reward and drawing salary not exceeding the prescribed amount. Now it has been made as statutory obligation of an employer. It is one of the ways of sharing the profits of the industry or an establishment. It is an incentive to increase the production. The purpose of payment of bonus is to bridge the gap between the wages paid and the idea of living wage.

Object of the Act

The object of Payment of Bonus Act is to provide for the payment of bonus to persons employed in certain establishments on the basis of profits or on the basis of production or productivity and for matters connected therewith.

What is Bonus?

The term 'Bonus' has not been defined in this Act. The Bonus Commission has observed that it is difficult to define in rigid terms the concept of bonus, but it is possible to urge that once profits exceed a certain base, labor should legitimately have a share in them. In other words, it is proper to construe the concept of bonus as sharing by the workers in the prosperity of the concern in which they are employed.

In 'Muir Mills Company V. Muir Mills Mazdoor Union, Kanpur' – AIR 1955 SC 170 the Supreme Court held that the bonus was neither gratuitous nor deferred payment of wages and that where wages fell short of the living standard and the industry made profits, part of which was due to the contribution of the labor, a claim for bonus might be made legitimately by the workmen.

In 'State of Tamil Nadu V. K. Sabanayagam' – (1998) 1 SCC 318 the Supreme Court held that the Bonus Act is a piece of welfare legislation enacted for the benefit of a large category of workmen seeking a living wage to make their lives more meaningful and for fructifying the benevolent guarantee of Article 21 of the Constitution.

The bonus may be also customary bonus. Such bonus is not covered under the Bonus Act and therefore it is payable over and above the bonus payable under the Act. In 'Baidyanath Ayurveda Bhawan Mazdoor Union V. Management' – (1984) 1 SCC 279 the following tests have been laid by the Supreme Court to determine whether a particular payment is customary or festival bonus:

- that the payment has been made over an unbroken series of years;
- that it has been paid for a sufficiently long period – the period has to be longer in the case of an implied term of employment;
- that it did not depend on the earning of profits; and
- that the payment has been made at a uniform rate throughout.

Applicability of the Act

Territorial wise this act is applicable to the whole of India. This Act shall apply to the following:

- every factory; and
- every other establishment in which twenty or more persons are employed on any day during an accounting year;
- any establishment or class of establishments as notified by the appropriate Government, employing such number of persons less than twenty as may be specified in the notification, that

the number of persons so specified shall in no case be less than ten.

- an establishment to which this act applies shall continue to be governed by the Act notwithstanding that the number of persons employed falls below twenty or the number specified in the notification.

In deciding the number of persons employed in an establishment all employees, even those drawing more than the threshold limit must be taken into consideration. The strength of the employees of an establishment would be taken into consideration, irrespective of their place of work.

What is establishment?

The term 'establishment' is of two types – establishment in private sector and establishment in public sector.

The term 'establishment in private sector' is defined under Section 2(15) of the Act as any establishment other than an establishment in public sector.

The term 'establishment in public sector' is defined as an establishment owned controlled or managed by-

- A Government company;
- A corporation in which not less than 40% of its capital is held, either singly or taken together by the Government or Reserve Bank of India or a Corporation owned by the Government or the Reserve Bank of India.

Section 3 provides that where an establishment consists of different departments or undertakings or has branches, whether situated in the same place or in different places, all such departments or undertakings or branches shall be treated as parts of the same establishment.

What is Appropriate Government?

Section 2(5) defines the term 'appropriate Government' as-

- in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947, is the Central Government, the Central Government;
- in relation to any other establishment, the Government of the State in which that other establishment is situate.

Exempted establishments

The Act will not apply to the following classes of employees-

- Employees employed by the Life Insurance Corporation of India;
- Seaman as defined in Section 3(42) of the Merchant Shipping Act, 1958;
- Employees registered or listed under any scheme made under the Dock Workers (Regulation of Employment) Act, 1948 and employed by registered or listed employers;
- Employees employed by an establishment engaged in any industry carried on by or under the authority of any department of the Central Government or a State Government or a local authority;
- Employees employed by-
  - The Indian Red Cross Society or any other institution of like nature;
  - Universities and other educational institutions;
  - Institutions (including hospitals, Chambers of Commerce and Social Institutions) established not for the purpose of profit;
- Employees employed through contractors on building operations;
- Employees of the Reserve Bank of India;

- Employees of-
  - The Industrial Finance Corporation of India;
  - Any financial corporation established unde4r Section 3 or Section 3A of the State Financial Corporation Act, 1951;
  - The Deposit Insurance Corporation;
  - The Agriculture Refinance Corporation;
  - The Unit Trust of India;
  - The Industrial Development Bank of India;
  - Any other financial institution, being an establishment in public sector which the Central Government notifies in the Official Gazette with regard to the capital structure, its objects, its extent of financial assistance and any other relevant factor.
- Employees of inland water transport establishments operating on routes passing through any other country.

Besides the appropriate Government is empowered to exempt any establishment or class of establishments from the applicability of this Act, if it is of the opinion that in regard to the financial position and other relevant circumstances, it would not be in the public interest to apply all or any of the provisions of the Act.

Award

Section 2(7) defines the term 'award' as an interim or a final determination by an industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 or by any other authority constituted under any corresponding law relating to investigation and settlement of industrial disputes in force in a State and includes an arbitration award made under Section 10A of Arbitration and Conciliation Act, 1996.

Banking Company

Section 2(8) defines the term 'banking company' as a banking company as defined in Section 5 of the Banking Companies Act, 1949 and includes-

- State bank of India and any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959;
- Any corresponding new bank as specified in the I Schedule to the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970;
- Any corresponding new bank constituted under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980;
- Any co-operative bank as defined in Section 2(bii) of the Reserve Bank of India Act; and
- Any other banking institution which may be notified in this behalf by the Central Government.

Employee

Section 2(13) defines the term 'employee' as any person employed on a salary or wage not exceeding ₹21,000/- per mensem (with effect from 01.04.2014) in any industry to do any skilled or unskilled manual, supervisory, managerial, administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied. Apprentice will not be treated as an employee.

The following case laws illustrate the eligibility of type of employees eligible for bonus-

- A temporary workman is entitled to bonus on the basis of the total number of days worked by him – 'Cooper Allen & Co. Limited V. Their Workmen' – 1951 (2) LLJ 576;
- A part time employee as a sweeper engaged on regular basis is entitled to bonus – 'Automobile Karmachari Sangh V. Industrial Tribunal' – 1970 (38) FJR 268;

- A dismissed employee, reinstated with back wages, is entitled to bonus – 'Gannon India Limited V. Niranjan Das'- 1984 (40 LLJ 223;
- A retrenched employee is eligible to get bonus provided he has worked for minimum qualifying period – 'Bank of Madura Limited V. Bank of Madura Employees' Union' – 1961 (1) LLJ 720;
- A piece rated worked is entitled to bonus – 'Malabar Tile Works V. Industrial Tribunal' – 1970 (I) LLJ 79.

Employer

Section 2(14) defines the term 'employer' including-

- in respect of factory –
  - the owner or occupier of the factory including the agent of such owner or occupier;
  - the legal representative of a deceased owner or occupier and
  - the manager of the factory;
- in relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

Salary or wage

Section 2(21) of the Act defines 'salary or wage'. According to this definition 'salary or wage' includes all remuneration except over time allowance payable to an employee in respect of his employment. Salary includes dearness allowance. Salary does not include-

- any other allowance which the employee is for the time being entitled;
- the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles;
- any travelling concession;
- any bonus, including incentive, production and attendance bonus;
- any contribution to provident fund or pension fund under any law for the time being in force;
- any retrenchment compensation or gratuity or other retirement benefits payable to the employee or any *ex-gratia* payment made to him;
- any commission payable to the employee.

Where an employee is given in lieu of the whole or part of the salary or wage payable to him, free food allowance or free food by his employer, such food allowance or the value of such food shall be deemed to form part of the salary or wage of such employee.

Allocable Surplus [Section 2(4)]

It means –

(a) in relation to an employer, being a company (other than a banking company) which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of Section 194 of that Act, sixty-seven per cent of the available surplus in an accounting year;

(b) in any other case sixty per cent of such available surplus.

Available Surplus [Section 2(6)]

It means the available surplus under Section 5. [Section 2(6)]

Eligibility for bonus

Section 8 provides that every employee shall be entitled to receive bonus from his employer in an accounting year. For this he has to work in the establishment for not less thirty workings days in that accounting year.

An employee suspended but subsequently reinstated with full back wages cannot be treated to be ineligible for bonus for the period of suspension as held in 'Project Manager, Ahmadabad Project, ONGC V. Sham Kumar Senegal' – (1995) 1 LLJ 863.

Computation of working days

Section 14 provides that an employee shall be deemed to have worked in an establishment in any accounting year on the days on which-

- he has been laid off under an agreement or as permitted by the Standing orders under the Industrial Employment (Standing Orders) Act, 1946 or under the Industrial Disputes Act, 1947 or under any other law applicable to the establishment;
- he has been on leave with salary or wage;
- he has been absent due to temporary disablement caused by accident arising out of an in the course of his employment; and
- the employee has been on maternity leave with salary or wage during the accounting year.

Disqualification for bonus

Section 9 provides that an employee shall be disqualified from receiving bonus, if he is dismissed from service for fraud or riotous or violent behavior while on the premises of the establishment or theft, misappropriation or sabotage of any property of the establishment.

In 'Pandian Roadways Corporation Limited Madurai V. Presiding Officer, Labor Court'- 1977 LLR 83 (Mad HC) the High Court held that the right of the management to forfeit bonus on the ground that the workman was dismissed from service for misconduct, would be only with reference to the accounting year in which the said Act of misconduct was committed and not with reference to any year or years preceding or succeeding the accounting in question.

Minimum and Maximum Bonus

Section 10 provides that the employer shall be bound to pay every employee in respect of the accounting year a minimum bonus which shall be 8.33 % of the salary or wage earned by the employee during the accounting year or ₹100/- whichever is higher, whether or not the employer has any available surplus in the accounting year.

Section 11 provides that if the allocable surplus exceeds the amount of minimum bonus payable to the employee, the employer shall be bound to pay to every employee in that year in proportion to the salary or wage earned by the employee during the accounting year subject to the maximum of 20% of such salary or wage.

In absence of any allocable surplus in the concerned accounting year, only the minimum bonus is payable. However, in view of the settlement entered into by the employer before the Conciliation Officer for paying bonus at a higher rate the bonus was held accordingly payable for that year as held in 'Dishergarh Power Supply Co., Limited V. Workmen' – (1986) 3 SCC 450.

Calculation of Bonus with Respect to certain employees

Section 12 states that, where the salary or wage of an employee exceeds seven thousand rupees per mensem, the bonus payable to such employee under section 10 or, as the case may be under section 11, shall be calculated as if his salary or wage were seven thousand rupees per mensem.

Computation of bonus

The following are the steps required to be done for the computation of bonus:

- Computation of gross profits;
- Sums deductible from gross profits;
- Computation of available surplus ;
- Computation of allocable surplus

Computation of gross profit

Section 16 of the Act provides that the gross profit derived by an employer from an establishment in respect of the accounting year shall-

- in the case of banking company, be calculated in the manner as specified in the First Schedule;
- in any other case, be calculated in the manner as specified in the Second Schedule.

Sums deductible from gross profit

Section 6 of the Act provides the following to be deductible from the gross profit-

- depreciation admissible under Section 32 of the Income Tax Act, 1961;
- development rebate or investment allowance or development allowance which the employer is entitled to deduct from his income under the Income Tax Act, 1961;
- any direct tax payable for the accounting year by the employer;
- such other sums as specified in Third Schedule-
  - Company other than banking company – the following are deductible-
    - Dividends payable on preference share capital;
    - 8.5% of its paid up equity share capital as the commencement of the accounting year;
    - 6% of its reserves shown in the balance sheet at the commencement of the accounting year;
  - Foreign company – 8.5% on the aggregate of the value of net fixed assets and the current assets of the company in India after deducting the amount of its current liabilities in India;
  - Banking companies – the following are deductible-
    - Dividends payable on preference share capital;
    - 7.5% of its paid up equity share capital as at the commencement of the accounting year;
    - 5% of its reserves shown in the balance sheet as at the commencement of the accounting year;
    - Any sum transferred to a reserve fund under Section 17(1) of the Banking Regulation Act, 1949 or to any reserves in India in pursuance of any direction or advice given by RBI;
  - Foreign banking company – the following are deductible-
    - Dividends payable to its preference shareholders;
    - 7.5% of its total paid up equity share capital as its total working funds in India bears to its total working funds;
    - 5% of such amount as bears the same proportion to its total disclosed reserves as its total working funds in India bear to its total working funds;
    - Any sum deposited with RBI under Section 11(2)(b)(ii) of the Banking Regulation Act, 1949 not exceeding the amount required to be deposited;
  - Corporation – the following are deductible-
    - 8.5% of its paid up capital as at the commencement of the accounting year;
    - 6% of its reserves, if any, shown in its balance sheet as at the commencement of the

accounting year;

- Co-operative society – the following are deductible-
  - 8.5% of the capital invested by such society in its establishment;
  - Such sum as has been carried forwarded to a reserve fund under any relating to co-operative societies;
- Any other employer not falling under any of the aforesaid categories – the following are deductible-
  - 8.5% of the capital invested at the commencement of the accounting year;

Computation of available surplus

Section 5 provides that the available surplus in respect of any accounting year shall be the gross profit for that year after deducting there from the eligible sums. The available surplus shall be the aggregate of-

- The gross profits for that accounting year after deducting the sums;
- An amount equal to the difference between-
  - The direct tax, calculated under Section 7, in respect of an amount equal to gross profits of the employer for the immediately preceding accounting year; and
  - The direct tax, calculated under Section 7, in respect of an amount equal to the gross profits of the employer for such preceding accounting year after deducting the bonus which the employer has paid or is liable to pay to his employee in accordance with the provisions of the Act for that year.

Set on and set off of allocable surplus

Section 15(1) provides that if the allocable surplus, in any accounting year, exceeds the amount of maximum bonus payable then the excess shall subject to a limit of 20% of the total salary or wave of the employees be carried forward for being set on in the succeeding accounting year and so on up to and inclusive of the fourth accounting year to be utilized for the purpose of bonus.

Section 15(2) provides that where for any accounting year, there is no available surplus or allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees and there is no amount or sufficient amount carried forward and set on which could be utilized for the purpose of payment of the minimum bonus, then such minimum amount or the deficiency, as the case may be, shall be carried forward for being set off in the succeeding accounting year and so on up to and inclusive of the fourth accounting year in the manner illustrated in Fourth Schedule.

Section 15(4) provides that where in any accounting year any amount has been carried forward and set on or set off, then, in calculating bonus for the succeeding accounting year, the amount of set on or set off carried forward from the earliest account year, shall first be taken into account.

Illustration:

In ₹

Year	Amount equal to 60% or 65% as the case may be, or available surplus allocable as bonus (₹)	Amount payable as bonus (₹)	Set on or set off of the year carried forward (₹)	Total set on or set off carried forward (₹) of year
(1)	(2)	(3)	(4)	(5)
1	104167	104167**	NIL	NIL
2	635000	250000*	Set on ₹250000	Set on 250000 (2)
3	220000	250000 * (inclusive of 30000 from year 2)	NIL	Set on 225000 (2)

Year	Amount equal to 60% or 65% as the case may be, or available surplus allocable as bonus (₹)	Amount payable as bonus (₹)	Set on or set off of the year carried forward (₹)	Total set on or set off carried forward (₹) of year
4	375000	250000*	Set on125000	Set on 220000(2) 125000 (4)
5	140000	250000 *(inclusive of 110000 from year 2)	NIL	Set on 110000(2) 125000 (4)
6	310000	250000*	Set on 60000	Set on NIL + (2) 125000 (4) 60000 (6)
7	100000	250000* (inclusive of 125000 from year 4 and 25000 from year 6)	NIL	Set on 35,000 (6)
8	NIL (due to loss)	1046167** (inclusive of 35,000 from year 6)	Set off 69167	Set off 69167 (8)
9	10000	104167**	Set Off 94167	Set off 69176(8) 94167 (9)
10	215000	104167**	NIL	Set off 52501 (9)

* Maximum bonus payable

+ The balance of ₹1,10,000 set on from year (2) lapses;

** Minimum bonus

Bonus limit

Section 12 provides that where the salary or wage of an employee exceeds ₹10,000/- per month, the bonus payable to such employee shall be calculated as if his salary or wage were ₹10,000/- per month.

Proportionate reduction

Section 13 provides that where an employee has not worked for all the working days in an accounting year, the minimum bonus of ₹100/- or as the case may be, of ₹60/- if such bonus is higher than 8.33% of his salary or wage for the days he has worked in that accounting year, shall be proportionately reduced.

Adjustment of customary bonus or interim bonus

Section 17 provides that where in any accounting year an employer has paid any puja bonus or other customary bonus to an employee or an employer has paid a part of the bonus payable, then the employer shall be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him to the employee in respect of that accounting year and the employee shall be entitled to receive only the balance.

Deduction from bonus

Section 18 provides that where in any accounting year, an employee is found guilty of misconduct causing financial loss to the employer, then, it shall be lawful for the employer to deduct the amount of loss from the amount of bonus payable by him to the employee in respect of that accounting year only and the employee shall be entitled to receive the balance, if any.

In 'Wheel & Rim Company of India Limited V. Government of Tamil Nadu' – 19971 II LLJ 299 (Mad HC) the High Court held that Section 18 provides for what should be done in case of a misconduct of an employee causing financial loss to employer. The employer can deduct any of the loss from the

bonus payable under the Act for that Accounting year only. The section deals with minor misconduct causing financial loss to the employer.

Time limit

Section 19 provides that all amount payable to an employee by way of bonus shall be paid in cash by his employer. The time limit for making payment of bonus is-

- If there is a dispute regarding the payment of bonus is pending before any authority, then the payment shall be made within a month on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute;
- In any other case, within a period of 8 months from the close of the accounting year.

The appropriate Government or such authority as the appropriate Government may specify, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of 8 months to such further period or periods as it thinks fit; so however that the total period so extended shall not in any case exceed 2 years.

Recovery of bonus due from an employer

Section 21 of the Act provides the procedure for the recovery of bonus in case the employer has not paid under a settlement or an award or agreement. In such cases-

- the employee himself; or
- any other person authorized by him in writing in this behalf; or
- in the case of death of the employee, his assignee or heirs

may make an application to the appropriate Government for the recovery of the money due to him. If the appropriate Government or such authority authorized is satisfied that any money is due, it shall issue a certificate to the Collector for that amount to the Collector who shall proceed to recover the said amount in the same manner as an arrear of land revenue.

It may be noted that every such application shall be made within one year from the date on which the money become due to the employee from the employer. As such application may be entertained after the expiry of the said preiod of one years; if the Appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

Reference of dispute

Section 22 provides that where any dispute arises between an employer and his employee-

- in regard to the bonus payable; or
- with respect to the application of this Act to an establishment in public sector

then such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act or of any corresponding law relating to investigation and settlement of industrial disputes in force in a State and the provisions of that Act apply accordingly.

Presumption about accuracy of balance sheet

Section 23 deals with the presumption about accuracy of balance sheet and profit and loss account of corporations and companies. Section 23(1) provides that where, during the course of proceedings before any arbitrator or Tribunal, the balance sheet and the profit and loss account of an employer, being a corporation or a company other than a banking company, duly audited by the Comptroller and Auditor General of India or by auditors, the authority may presume the statements and particulars contained in such balance sheet and profit and loss account to be accurate. It shall not be necessary to prove the accuracy of such statements and particulars by the filing of an affidavit or by any other mode. If the said authority is satisfied that the particulars contained in the balance sheet or the profit and loss account of the corporation or the company are not accurate, it may take such steps as it thinks necessary to find out the accuracy of such statements and particulars.

Section 23(2) provides that when an application is made to the said authority by the trade union or a party to the dispute requires any clarification regarding to any item in the balance sheet or the profit

and loss account, the authority may, after satisfying itself that it is necessary to provide, order the company to furnish to them such clarification within such time as may be specified. The corporation or the company shall comply with the said direction.

Audit of accounts

Section 24 provides that in the course of dispute the banking company is to submit the duly audited accounts of the banking company to the authority. The authority shall not permit any trade union or employees to question the correctness of such accounts. The trade union or the employees may be permitted to obtain from such company such information as is necessary for verifying the amount of bonus due under the Act. The trade union or the employees cannot obtain any information which the banking company is not compelled to furnish under the provisions of Section 34A of the Banking Regulation Act, 1949.

The employer other than a corporation or a company is to submit the duly audited accounts before the authority. The authority shall not permit any trade unions or employees to question the correct of such accounts. When the authority finds that the accounts of such employer have not been audited by any such auditor and it is of opinion that an audit of the accounts of such employer is necessary it may direct the employer to get his accounts audited within such time specified or within such further time as it may allow by such auditor as it thinks fit. The employer shall comply with such direction. If an employer fails to get the accounts audited, the said authority may get the accounts audited by such auditor as it thinks fit. The expenses incurred in this regard shall be met by the employer. If default of such payment the same shall be recoverable from the employer through Collector as arrears of land revenue.

Obligations of the employer

Section 26 requires that every employer shall prepare and maintain such registers, records and other documents in such form and in such manner as may be prescribed. Rule 4 of the Payment of Bonus Rules, 1975 provides that every employer shall prepare and maintain the following registers-

- a register showing the computation of the allocable surplus in Form A;
- a register showing the set on and set off of the allocable surplus in Form B;
- a register showing the details of the amount of bonus due to each of the employee, the deduction and the amount actually disbursed in Form C.

Annual Return

Rule 5 provides that every employer shall on or before the 1st day of February in each year upload annual report in Form D on the web portal of the Ministry of Labor and Employment giving information as to the particulars specified in respect of the preceding year. Annual return may also be filed to Inspector on or before 1st day of February in each year.

Inspectors

Section 27 provides that the appropriate Government may appoint such persons as Inspectors for the purposes of this Act. The Government may define the limits within which they shall exercise jurisdiction. This section gives the Inspectors the following powers:

- to require an employer to furnish such information as he may consider necessary;
- to enter any establishment or any premises at any reasonable time and with such assistance require any one found in charge to produce before him for examination any accounts, books, registers and other documents relating to the employment of persons or the payment of salary or wage or bonus in the establishment;
- to examine the employer, his agent or servant or any other person found in charge of the establishment or any person whom the Inspector has reasonable cause to be or have been an employee in the establishment;
- to make copies of, or take extracts from any book, register or other document maintained in relation to the establishment.

Any person required producing any accounts, books, register or other documents or to give information by an Inspector shall be legally found to do so.

Penalty

If any person contravenes any of the provisions of this Act or any rule made thereunder; he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Likewise if any person, to whom a direction is given or a requisition is made under this Act, fails to comply with the direction or requisition, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both (Section 28).

Offences by companies

Section 29 provides that if any offence is committed by a company, every person, who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, and the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. If such person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of offence he will not be punished.

Where an offence has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, then such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Cognizance of Offences

Section 30 provides that no court shall take cognizance of any offence punishable unless a complaint is made by the authority of the appropriate Government or an offence not below the rank of a Regional Labor Commissioner in the case of Central Government and not below the rank of a Labor Commissioner in the case of State Government. No court inferior to that of a Presidency Magistrate or a magistrate of the I class shall try any offence punishable under this Act.

Productivity Linked Bonus

Section 31A provides that-

- where an agreement or a settlement has been entered into by the employee with their employer before the commencement of the Payment of Bonus (Amendment) Act, 1976 or
- where the employees enter into any agreement or settlement with their employer after such commencement,

for payment of annual bonus linked with production or productivity in lieu of bonus based on profits payable then such employees shall be entitled to receive bonus due to them under such agreement or settlement. Any such agreement or settlement whereby the employees relinquish their right to receive the minimum bonus shall be null and void in so far as it purports to deprive them of such right. Such employees shall not be entitled to be paid in excess of 20% of the salary or wage earned by them during the relevant accounting year.

EMPLOYEES STATE INSURANCE ACT, 1948 – Object, Scope and Applicability

Introduction

The Employees' State Insurance Act, 1948 is the first major legislation on social security for the employees in India. It is devised to provide social protection to employees in contingencies such as illness, long term sickness or any other health risks due to exposure to employment injury or occupational hazards. The medical facilities are also made available to legal dependents of the employees who are insured person. This facility is also extended to retired persons also.

Object of the Act

The object of the Act is to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto.

Applicability

This Act extends to whole of India. This Act applies to-

- in the first instance applicable to all factories, including factories belonging to the Government, other than season factories;
- the appropriate Government may, in consultation with the corporation and where the appropriate Government is a State Government, with the approval of Central Government, after giving one month's notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or classes of establishments, industrial, commercial, agricultural or otherwise;
- a factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.

The Central Government has since prescribed the wage limit for coverage of an employee under Section 2(9) of the Act, as ₹ 21,000 per month. Further it is provided that an employee whose wages (excluding remuneration for overtime work) exceeds ₹ 21,000 a month at any time after and not before the beginning of the contribution period, shall continue to be an employee until the end of the said period.

In 'Employees' State Insurance Corporation V. Premlal' – 2009 LLR 282 (Ker HC) it was held that ESI scheme will be applicable to establishment preparing sweets with the aid of LPG.

In 'Employees State Insurance Corporation, Orissa Region V. Gujarat Co-operative Milk Marketing Federation Limited' – 2009 LLR 615 (Ori.HC) it was held that in the absence of required number of employees in Milk Federation, ESI Act could not be extended upon it.

In 'Kuriacose V. Employees' State Insurance Corporation' – (1988) 2 CLR 301 (Ker) it was held that once the Act has become applicable to a factory or an establishment, its application will be continuous.

Important Definitions:

Appropriate Government

Section 2(1) defines the term 'appropriate Government', in respect of establishments under the control of the Central Government or a railway administration or a major port or a mine or oilfield, the Central Government, and in all other cases, the State Government.

Confinement

Section 2(3) defines the term 'confinement' as labour resulting in the issue of a living child or labour after 26 weeks of pregnancy resulting in the issue of a child, whether alive or dead.

Dependant

Section 2(6A) defines the term 'dependant' as any of the following of a deceased insured person:

- a widow, a legitimate or adopted son who has not attained the age of 25 years, an unmarried legitimate or adopted daughter;
- a widowed mother;
- if wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of 25 years and is infirm;
- if wholly or in part dependant on the earnings of the insured person at the time of his death-
  - a parent other a widowed mother;
  - a minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor;
- a minor brother or an unmarried sister or a widowed sister if a minor;
- a widowed daughter-in-law;
- a minor child of a pre-deceased son;
- a minor child of a pre-deceased daughter where no parent of the child is alive; or
- a paternal grand-parent if no parent of the insured person is alive.

Employment injury

Section 2(8) defines the term 'employment injury' as a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of employment, being an insurable employment, whether the accident occurs or the occupation disease is contracted within or outside the territorial limits of India.

Employee

Section 2(9) defines the term 'employee' as any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies and-

- who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
- who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
- whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the productions of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 and includes such person engaged as apprentice whose training period is extended to any length of time but does not include-

- any member of the Indian naval, military or air forces; or
- any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government provided that an employee whose wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.

In 'Director, Hassan Co-operative Milk Producer's Society Union Limited V. Assistant Regional Director, Employees' State Insurance Corporation' AIR 2010 SC 2109 it was held that merely being employed in connection with the work of an establishment, in itself, does not entitle a person to be an 'employee'; he must not only be employed in connection with the work of the establishment but also be shown to be employed in or other of the three categories mentioned in Section 2(9) of the Act.

In 'Employees' State Insurance Corporation V. Tata Engineering & Locomotive Co., Limited' – AIR 1976

SC 66 it was held that an apprentice who is mere trainee for a distinct purpose is not an employee.

In 'Regional Director, Employees' State Insurance Corporation V. Ramanuja Match Industries' – AIR 1985 SC 278 it was held that a partner is not an employee.

The following categories are coming under the purview of the term 'employee'-

- Canteen workers – Employees State Insurance Corporation V. Shri Ram Chemical Industries' – (1978) 2 LLN 227 (Raj);
- Employees who are working in a show room or sales office – 'Bhopal Motors Private Limited V. Employees' State Insurance Corporation' – (1982) 2 LLN 827 (MP);
- Workers rendering services outside the place of establishment or shop – 'Hindu Jea Band V. Regional Director, Employees' State Insurance Corporation' – 1986 LLR 95;
- Part time employees employed on daily rate basis – 'Hindu Jea Band' (supra);
- Casual workers – 'Regional Director, Employees' State Insurance Corporation V. South India Flour Mill (Pvt) Limited' – AIR 1986 SC 1686;

Family

Section 2(11) defines the term 'family' as all or any of the following relatives of an insured person-

- a spouse;
- a minor legitimate or adopted child dependent upon the insured person;
- a child who is wholly dependent on the earnings of the insured person and who is-
  - receiving education, till he or she attains the age of 21 years;
  - an unmarried daughter;
- a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues;
- dependent parents, whose income from all sources does not exceed such income as may be prescribed by the Central Government;
- in case the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependent upon the earnings of the insured person.

Factory

Section 2(12) defines the term 'factory' as any premises including the precincts thereof whereon ten or more persons are employed or were employed on any day of the preceding 12 months and in any part of which a manufacturing process is being carried on or is ordinarily so carried on, but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

Immediate employer

Section 2(13) defines the terms 'immediate employer' in relation to employees employed by or through him, as a person who has undertaken the execution, on the premises of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent on hire to the principal employer and includes a contractor.

In 'Employees' State Insurance Corporation V. T. Shankar Singh T. Byali' – (1988) 92 FJR 645 (Kar) it was held that a person will be the immediate employer and not the principal employer even if the employees have been employed by him, if he supplied services to a factory or establishment.

Insured Person

Section 2(14) defines the term 'insured person' as a person who is or was an employee in respect of whom contributions are or were payable under the Act and who is by reason thereof, entitled to any of the benefits provided by this Act.

Permanent partial disablement

Section 2(15A) defines the expression 'permanent partial disablement' as such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement. Every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement.

Permanent total disablement

Section 2(15B) defines the expression 'permanent total disablement' as such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident in such disablement. The permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to 100% or more.

Principal Employer

Section 2(17) defines the term 'principal employer' as-

- in a factory, the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named;
- in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed, the head of the Department;
- in any other establishment, any person responsible for the supervision and control of the establishment.

Seasonal factory

Section 2(19A) defines the term 'Seasonal factory' as a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortications of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year-

- in any process of blending, packing or repacking of tea or coffee; or
- in such other manufacturing process as the Central Government may, by notification in the Official Gazette, specify.

Temporary disablement

Section 2(21) defines the term 'temporary disablement' as a condition resulting from an employment which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of doing the work which he was doing prior to or at the time of the injury.

Wages

Section 2(22) defines the term 'wages' as all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorized leave, lock out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but not include-

- any contribution paid by the employer to any pension fund or provident fund, or under this Act;
- any travelling allowance or the value of any travelling concession;
- any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or

- any gratuity payable on discharge.

In 'Regional Director, Employees' State Insurance Corporation' – 1994 LLR 1 (SC) it was held that bonus or ex-gratia amount is not 'wages'. The following are treated as wages-

- LIC Premium subsidy;
- House rent allowance, heat, gas and dust allowance and incentive allowance;
- Incentive bonus;
- Over time allowance;

Employees' State Insurance Incorporation

Section 3 provides for the establishment of Employees' State Insurance Corporation with effect from 01.10.1948. The Corporation is a body corporate having perpetual succession and a common seal and shall by the said name sue and be sued.

Constitution of Corporation

Section 4 provides that the Corporation shall consist of a Chairman, a Vice Chairman and other members representing the interests of employers, employees, state governments, union territories and medical professions. Three members of the Parliament and the Director General of the Corporation are its ex-officio members. Section 5 provides for the term of office of members of Corporation. Section 6 provides for the eligibility for re-nomination or re-election.

All orders and decisions of the Corporation shall be authenticated by the signature of the Director General.

Regional Boards

Section 25 provides that the Corporation may appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner and delegate to them such powers and functions, as may be provided by the regulations.

Other bodies of Corporation

Standing Committee

Section 8 of the Act provides for the constitution of Standing Committee which shall be constituted form among its members consisting of-

- a Chairman;
- three members of the Corporation;
- three members of the Corporation representing such three State Governments;
- eight members elected by Corporation –
    - three members from among the members of the Corporation representing employers;
    - three members from among the members of the Corporation representing employees;
    - one member from among the members of the Corporation representing medical profession; and
    - one member from among the members of the Corporation elected by Parliament.
    - the Director General of the Corporation, ex-officio.

Term of office

Section 9 provides that the term of office of a member of the Standing Committee shall be two years from the date on which his election is notified. A member of the Standing Committee shall cease to hold office when he ceases to be a member of the Corporation.

Powers of the Standing Committee

Section 18 provides that subject to the general superintendence and control of the Corporation, the Standing Committee shall administer the affairs of the Corporation and may exercise any of the powers and perform any of the functions of the Corporation. The Standing Committee shall submit for the consideration and decision of the Corporation all such cases and matters as may be specified in the regulations made in this behalf. The Standing Committee may, in its discretion, submit any other case or matter for the decision of the Corporation.

Meetings of Standing Committee, Corporation and Medical Benefit Council

Section 20 of the Act provides that the Standing Committee shall meet at such times and places and shall observe such rules or procedure in regard to transaction of business at their meetings as may be specified in the regulations made in this behalf.

Supersession of the Corporation and Standing Committee

Section 21 of the Act provides that if in the opinion of the Central Government, the Corporation or the Standing Committee persistently makes default in performing the duties imposed on it by or under this Act or abuses its powers, that Government may, by notification in the Official Gazette, supersede the Standing Committee in consultation with the Standing Committee. Before issuing a notification the Standing Committee shall be given a reasonable opportunity to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Standing Committee. On such superseding all the members shall be deemed to vacate their office. A new Standing Committee shall be immediately constituted.

Medical Benefit Council

Section 10 provides for the constitution of Medical Benefit Council consisting of-

- the Director General of ESI, ex-officio – Chairman;
- the Director General, Health Services, ex-officio – Co-Chairman;
- the Medical Commissioner of the Corporation – ex-officio;
- one member each representing each state other than Union territories;
- three members representing employers;
- three members representing employees;
- three members representing the medical profession; among them one shall be a woman.

Term of office

The term of the office of the members of Medical Benefit Council (last three categories) shall be four years from the date on which the appointment is notified.

Duties of Medical Benefit Council

Section 22 provides the duties of the Medical Benefit Council as to-

- advise the Corporation and the Standing Committee on matters relating to the administration of medical benefit, the certification for purposes of the grant of benefits and other connected matters;
- have such powers and duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with the medical treatment and attendance; and
- perform such other duties in connection with the medical treatment and attendance as may be specified in the regulations.

Disqualification

Section 13 provides that a person shall be disqualified as a member of the Corporation, the Standing Committee or the Medical Benefit Council-

- if he is declared to be of unsound mind by a competent court; or
- if he is an undischarged insolvent; or
- if he has directly or indirectly by himself or by his partner any interest in a subsisting contract with, or any work being done for, the Corporation except as a medical practitioner or as a share holder of a company; or
- if before or after commencement of this Act, he has been convicted of an offence involving moral turpitude.

Resignation

Section 11 provides that a member of the Corporation, the Standing Committee or the Medical Benefit Council may resign his office by notice in writing to the Central Government and his seat fall vacant on the acceptance of the resignation by Government.

Cessation

Section 12 provides that a member of the Corporation, the Standing Committee or the Medical Benefit Council shall cease to be a member if he fails to attend three consecutive meeting. The Corporation, the Standing Committee or the Medical Benefit Council may restore the membership subject to the rules made by the Government.

Registration of employees

Every employee is to register himself under the provisions of the Act. Registration is the process of obtaining and recording information about his employment which is insurable employment. This process also identifies to provide the benefits available under the Act that are related to the contributions paid by the employer on behalf of insured employees. The employee is required to give his details and his family details to his employer. A family photo is also to be provided so that the employer can register the employee.

Registration is the process of obtaining and recording information about the entry of an employee into 'insurable employment', for the purpose of his identification under the Act. Registration of employee is the process of identification to provide the benefits under the Act which are related to the contributions paid by the employer on behalf of each of the insured persons. At the time of joining the insurable employment, an employee is required to provide his and his family details to the employer along with a family photo so that the employer can register the employee online. This exercise of registering an employee has to be a onetime exercise in life time of an employee. The insurance number generated on the first occasion of registration is to be used throughout his life time irrespective of change of employment including change of place.

Employees' State Insurance Fund

Section 26 of the Act provides for the creation of Employees' State Insurance Fund held and administered by the Corporation. All contributions paid under this Act and all other moneys received on behalf of the corporation shall be paid into this fund. The grants, donations and gifts received from the Central Government or any State Government, local authority or any individual or body whether incorporated or not, are also paid into this Fund.

Purposes for which the fund may be expended

Section 28 of the Act provides the Central Government may utilize the State Insurance Fund only for the following purposes:

- payment of benefits and provision of medical treatment and attendance to insured persons and, where the medical benefit is extended to their families, the provision of such medical benefit to their families in accordance with the provisions of this Act and defraying the charges and costs in connection therewith;
- payment of fees and allowances to members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;
- payment of salaries, leave and joining time allowances, travelling and compensatory allowances,

gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the provisions of this Act;

- establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families;
- payment of contributions to any State Government, local authority or any private body or individual, towards the cost of medical treatment and attendance provided to insured persons and, where the medical benefit is extended to their families, including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;
- defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of its assets and liabilities;
- defraying the cost (including all expenses) of the Employees' Insurance Courts set up under this Act;
- payment of any sums under any contract entered into for the purpose of this Act by the Corporation or the Standing Committee or by any officer duly authorized by the Corporation or the Standing Committee in that behalf;
- payment of sums under any decree, order or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceeding or claim instituted or made against the Corporation;
- defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act;
- defraying expenditure, within the limits prescribed, on measures for the improvement of the health, welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured; and
- such other purposes as may be authorized by the Corporation with the previous approval of the Central Government.

Contributions

The contribution payable under this Act is of two types – one is the contribution of the employer and the other is the contribution of the employee which is recovered from his wages and remitted to the Fund. The present rate contribution is 4.75% and 1.75% of workers' wages by employers and employees respectively.

The contribution shall be paid in a bank duly authorized corporation within 21 days of the last day of the calendar month in which the contribution falls due for any wage period.

The employer is required to file monthly contributions online through ESIC portal on a monthly basis in respect of all its employees after duly registering them. Through this, the employer has to file employee wise number of days for which wages paid and the amount of the wages paid respectively to ascertain the amount of contributions payable. The total amount of contribution, both by the employer and the employee, for each month is to be deposited in any branch of SBI in cash or by cheque or demand draft on generation of such a challan through ESIC portal using credentials. The contributions can also be paid through SBI internet banking.

Principal employer to pay contribution in the first instance

Section 40 (1) provides that the principal employer shall pay in respect of all employer, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

Section 40(4) provides that any sum deducted by the principal employer from wages shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted. The principal employer shall bear the expenses of remitting the contributions to the corporation.

Recovery of contribution from immediate employer

Section 41 provides that a principal employer, who has paid contribution in respect of an employee employed through an immediate employer, shall be entitled to recover the amount of the contribution so paid from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract or as a debt payable by the immediate employer.

The immediate employer shall maintain a register of employees employed by or through him and submit the same to the principal employer before the settlement of any amount payable by him.

Method of payment of contribution

Section 43 provides that the Corporation may make regulations for payment and collection of contributions payable. Such regulations may provide for-

- the manner and time of payment of contributions;
- the payment of contributions by means of adhesive or other stamps affixed to or impressed upon books, card or otherwise and regulating the manner, times and conditions, in, at and under which, such stamps are to be affixed or impressed;
- the date of which evidence of contributions have been paid is to be received by the Corporation;
- the entry in or upon books or cards of particulars of contributions paid and benefits distributed in the case of the insured persons to whom such books or cards relate; and
- the issue, sale, custody, production, inspection and delivery of books or card and the replacement of books or cards which have been lost, destroyed or defaced.

Recovery of contributions

Section 45B provides that any contribution payable under this Act may be recovered as an arrear of land revenue.

Section 45C provides that the authorized officer may issue certificate to Recovery Officer, who in turn proceed to recover the amount by one or more of the modes mentioned below-

- attachment and sale of moveable or immovable property of the factory or establishment or, as the case may be, the principal, or immediate employer;
- arrest of the employer and his detention in prison;
- approving a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer.

The attachment shall first be effected against the properties of the factory or the establishment and such attachment and sale is insufficient for recovering the whole of the amount of arrears, the Recovery Officer may take such proceedings against the property of the employer.

Benefits

Section 46 provides that the insured persons , their dependents shall be entitled to the following benefits-

- periodical payments to any insured person in case of his sickness;
- periodical payments to an insured woman in case of confinement or mis-carriage or sickness arising out of the pregnancy, confinement, premature birth of child or miscarriage;
- periodical payments to an insured person suffering from a disablement as a result of an employment injury sustained as an employee;
- periodical payments to such dependants of an insured person who dies as a result of an employment injury sustained as an employee;
- medical treatment for and attendance on insured persons;
- payment to the eldest surviving member of the family of an insured person, who has died, towards the expenditure on the funeral of the deceased insured person; if the injured person at the time of his death does not have a family, the funeral payment will be paid to the person who actually incurs the expenditure.

The amount of such payment shall not exceed such amount as may be prescribed by the Central Government. The claim for such payments shall be made within 3 months of the death of the insured person or within such extended period as the Corporation allow in this behalf.

Bar against receiving compensation under any other law

Section 53 provides that an insured person or his dependants shall not be entitled to receive or recover, whether from the employer or from any other person, any compensation or damages under the Workmen Compensation Act, 1923 or any other law for the time being in force or otherwise in respect of an employment injury sustained by the insured person as an employee.

Medical benefit

Section 56 provides that an insured person or a member of his family whose condition requires medical treatment and attendance shall be entitled to receive medical benefits. Such medical benefit may be given either in the form of out-patient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as in-patient in a hospital or other institution. A person shall be entitled to medical benefit during any period for which contributions are payable in respect of him or which he is qualified to claim sickness benefit or maternity benefit or is in receipt of such disablement benefit as does not disentitle him to medical benefit under the regulations.

Establishment of hospital by Corporation

Section 59 provides that the Corporation may, with the approval of the State Government, establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of insured persons and their families.

Benefits not assignable

Section 60 provides that the right to receive any payment or any benefit under this Act shall not be transferable or assignable.

Benefits not to be combined

Section 65 provides that an insured person shall not be entitled to receive for the same period-

- both sickness benefit and maternity benefit; or
- both sickness benefit and disablement benefit for temporary disablement; or
- both maternity benefit and disablement benefit for temporary disablement.

Where a person is entitled to more than one of the benefits he shall be entitled to choose which benefit he shall receive.

Repayment of benefit improperly received

Section 70 provides that where any person has received any benefit or payment under this Act when he is now lawfully entitled to receive the same, he shall be liable to the Corporation the value of the benefit or the amount of such payment, or in the case of his death his representative shall be liable to repay the same from the assets of the deceased, if any, in his hands. The amount recoverable may be recovered as if it were an arrear of land revenue or by the Recovery Officer.

Employer not to reduce wages etc.,

Section 72 provides that no employer by reason only of his liability for any contributions payable under this Act shall, directly or indirectly reduce the wages of any employee, or except as provided by the regulations discontinue or reduce benefits payable to him under the conditions of his service, which are similar to the benefits conferred by this Act.

Employer not to dismiss or punish the employee during sickness etc.,

Section 73 provides that no employee shall dismiss, discharge or reduce or otherwise punish an employee during the period the employee is in receipt of sickness benefit or maternity benefit,

nor shall be, except as provided under the regulations, dismiss, discharge or reduce or otherwise punish an employee during the period which he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulars to arise out of the pregnancy or confinement rendering the employee unfit for work.

Adjudication of disputes and claims

Section 74 provides that the State Government shall constitute an ESI Court for such local area as may be specified in the notification. Section 75 provides that ESI Court may decide any question or dispute arises as to-

- whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution; or
- the rate of wages or average daily wages of an employee for the purposes of this Act; or
- the rate of contribution payable by a principal employer in respect of any employee;
- the person who is or was the principal employer in respect of any employee; or
- the right of any person to any benefit and as to the amount and duration thereof; or
- any direction issued by the Corporation on a review of any payment of dependants' benefit; or
- any other matter which is in dispute between-
    - a principal employer and the Corporation; or
    - a principal employer and an immediate employer; or
    - a person and the Corporation; or
    - an employee and a principal or immediate employer,

The following claims shall be decided by ESI Court-

- claim for the recovery of contributions from the principal employer;
- claim by a principal employer to recover contributions from any immediate employer;
- claim against a principal employer;
- claim for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto; and
- any claim for the recovery of any benefit admissible under the Act.

An appeal shall lie to the High Court from an order of ESI Court if it involves a substantial question of law. The appeal shall be filed within 60 days from the date of the order of ESI Court.

Jurisdiction of Civil Court

Section 75(3) provides that no Civil Court have jurisdiction to decide or deal with any question or dispute as aforesaid or to adjudicate on any liability which is to be decided by a medical board or a medical appeal tribunal or ESI Court.

In 'ESI Corporation V. Jalandhar Gymkhana Club'- 1972 LLR 733 (P&H) it was held that a civil court cannot determine whether this Act is applicable to an establishment or not.

PENAL PROVISIONS UNDER SECTIONS 84 TO 86 OF ESI ACT, 1948:

Sections 84 to 86 of the Act provide for penalties for certain offences. These penalties were substantially increased by the Employee's State Insurance (Amendment) Act, 1975. The amended Act introduced three new sections namely, Section 85-A, 85-B and 85-C.

The following are the penalties as per the Act:

Section - 84: This section deals with penalties for making wrong / false statements made by the

Insured Persons with a view to take any benefit which is not admissible to him under the Act. Such Act is an offence punishable under Act with imprisonment for a term which may extend to six months or with fine which may extend to Two thousand rupees or with both.

It is also provided under this section that if an insured person is convicted by the Court for an offence committed by him under this section, he shall not be entitled to any cash benefits available under the Act for such a period as may be prescribed by the Central Government.

Section - 85: This section deals with penalties for non – compliance with the various provisions of the ESI Act and Regulations made there under. Such non- compliance with any of the provisions of the Act constitutes an offence committed by the employer of a covered Factory / Establishment which is punishable under Section 85(a) to 85(g) of the Act.

Section - 85(a): Envisages that if an employer fails to pay any contribution payable under the Act within the prescribed time-limit, he thus commits an offence u/s 85(a) of the Act, which is punishable with imprisonment for a term which may extend to three years u/s 85(i) of the Act, provided it shall not be less than One year and fine of Ten thousand rupees u/s 85(i) (a) of the Act where employees' share of contribution is deducted by the employer from their wages but not paid. In other case where term of imprisonment shall not be less than 6 months and fine of Five thousand rupees u/s 85(i) (b).

Section 85(b) to 85(g): Says that if an employer commits an offence under this section for noncompliance with any other provisions of the Act, which is punishable with imprisonment for a term which may extends to One year or with fine up to Four thousand rupees or with both.

Section 85 - A: This section deals with enhanced punishment in certain cases after previous conviction. If any employer convicted by a Court for an offence punishable under the Act, committing the same offence, shall, for every such subsequent offence, be punished with imprisonment for a term which may extend to Two years and with fine of Five thousand rupees.

It is provided that if such subsequent offence is for failure to pay contribution payable under the Act, the employer shall, for every such subsequent offence, be punished with imprisonment for a term which may extend to Five years but which shall not be less than Two years and shall be liable to pay fine of Twenty Five Thousand rupees.

Section 85 - B: Provides that the corporation may recover damages from the employer by way of penalty under this section if any employer fails to pay contribution payable under the Act within the specified time-limit or pays contribution belatedly provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.

The amount of damages may not exceed the amount of contribution paid / payable.

There is also a provision to reduce or waive damages recoverable under this section in respect of a Factory/Establishment which is a Sick Industrial Unit and in respect of which Rehabilitation Scheme has been sanctioned by BIFR, under Regulation 31-C, of ESI (General) Regulations, 1950.

a. In case of change of Management including transfer of undertaking to worker's Co-operative or in case of merger or amalgamation of Sick Industrial Unit with a healthy company, damages levied/leviable can be waived completely.

b. In other cases, depending on merits, damages levied/leviable can be waived upto 50%.

c. In exceptional hard cases, the damages levied/leviable can be waived either partially/totally.

Section-85-C: Provides that where an employer is convicted for an offence of non-payment of contribution under this Act, the Court in addition to giving any punishment by order, direct him to pay the amount of contribution for which he was convicted within a time period. The Court can also extend the time given periodically.

If the employer still fails to pay the contribution and submit returns within the time given by the court or within the extended time period given, the employer is deemed to have committed a further offence and shall be punishable with imprisonment under Section-85 and is also liable to pay a fine which may extend to one thousand rupees for every day of default.

Section-86: Provides that no prosecution under this Act shall be instituted without previous sanction of the Insurance Commissioner or of such other officer of the corporation as may be authorized in this behalf by the Director General of the Corporation.

It is also provided that No Court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act.

And No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof.

Section-75: Deals with provisions for Adjudication of Disputes & claims:

If any employer or employee under the Act has any disputes/questions that may be settled by E.I. Court after adjudicating the matter if made before it, subject to the condition that 50 % security deposit is required to be made u/s.75 (2B) (unless it is waived/reduced for the reasons recorded by the Ld. Court).

Penal Action u/s 138 of N.I. Act:

If employer submits a cheque to the corporation towards payment of contribution, interest, damages or any other amount due, which is bounced subsequently by the Bank for the reasons of Insufficient Fund he thereby commits an offence under this section and shall be punished with imprisonment for a term upto One year or with fine which may extend to twice the amount of cheque or with both.

Penal Action u/s 405/406/409 of I.P.C:

If an employer deducts employees' share of contribution from their wages but does not pay the said contribution, he thereby commits an offence of criminal Breach of Trust which is punishable under this section with imprisonment which may extend to 3 years or with fine or with both.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

An Act to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.

Whereas sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment;

And whereas the protection against sexual harassment and the right to work with dignity are universally recognised human rights by international conventions and instruments such as Convention on the Elimination of all Forms of Discrimination against Women, which has been ratified on the 25th June, 1993 by the Government of India;

And whereas it is expedient to make provisions for giving effect to the said Convention for protection of women against sexual harassment at workplace.

Be it enacted by Parliament in the Sixty-fourth Year of the Republic of India as follows:

PRELIMINARY

1. Short title, extent and commencement-(1) This Act may be called the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

   (2) It extends to the whole of India

   (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions-In this Act, unless the context otherwise requires,-

   (a) "aggrieved woman" means-

      i. in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;

      ii. in relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house;

   (b) "appropriate Government" means-

      i. in relation to a workplace which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly-

         (A) by the Central Government or the Union territory administration, the Central Government;

         (B) by the State Government, the State Government;

      ii. in relation to any workplace not covered under sub-clause (I) and falling within its territory, the State Government;

   (c) "Chairperson" means the Chairperson of the Local Complaints Committee nominated under sub-section (1) of section 7;

   (d) "District Officer" means an officer notified under section 5;

   (e) "domestic worker" means a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer;

(f) "employee" means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis, either directly or through an agent, including a contractor, with or, without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name;

(g) "employer" means-

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;

(ii) in any workplace not covered under sub-clause (i) any person responsible for the management, supervision and control of the workplace.

Explanation-For the purposes of this sub-clause "management" includes the person or board or committee responsible for formulation and administration of policies for such organisation;

(iii) in relation to workplace covered under sub-clauses (i) and (ii), the person discharging contractual obligations with respect to his or her employees:

(iv) in relation to a dwelling place or house, a person or a household who employs or benefits from the employment of domestic worker, irrespective of the number, time period or type of such worker employed, or the nature of the employment or activities performed by the domestic worker;

(h) "Internal Committee" means an Internal Complaints Committee constituted under section 4;

(i) "Local Committee" means the Local Complaints Committee constituted under section 6;

(j) "Member" means a Member of the Internal Committee or the Local Committee, as the case may be;

(k) "prescribed" means prescribed by rules made under this Act;

(l) "Presiding Officer" means the Presiding Officer of the Internal Complaints Committee nominated under sub-section (2) of section 4;

(m) "respondent" means a person against whom the aggrieved woman has made a complaint under section 9:

(n) "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely-

(i) physical contact and advances; or

(ii) a demand or request for sexual favours; or

(iii) making sexually coloured remarks; or

(iv) showing pornography; or

(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

(o) "workplace" includes-

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;

(vi) a dwelling place or a house;

(p) "unorganised sector" in relation to a workplace means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.

3. Prevention of sexual harassment-

(1) No woman shall be subjected to sexual harassment at any workplace.

(2) The following circumstances, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment-

(i) implied or explicit promise of preferential treatment in her employment; or

(ii) implied or explicit threat of detrimental treatment in her employment; or

(iii) implied or explicit threat about her present or future employment status; or

(iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or

(vi) humiliating treatment likely to affect her health or safety.

CONSTITUTION OF INTERNAL COMPLAINTS COMMITTEE

4. Constitution of Internal Complaints Committee-

(1) Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the "Internal Complaints Committee": Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Internal Committee shall be constituted at all administrative units or offices.

(2) The Internal Committee shall consist of the following members to be nominated by the employer, namely-

a) a Presiding Officer who shall be a woman employed at a senior level at workplace from amongst the employees: Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section (1): Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organisation;

(b) not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge;

(c) one member from amongst non-governmental organisations or associations

committed to the cause of women or a person familiar with the issues relating to sexual harassment: Provided that at least one-half of the total Members so nominated shall be women.

(3) The Presiding Officer and every Member of the Internal Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified by the employer.

(4) The Member appointed from amongst the non-governmental organisations or associations shall be paid such fees or allowances for holding the proceedings of the Internal Committee, by the employer, as may be prescribed.

(5) Where the Presiding Officer or any Member of the Internal Committee,-

(a) contravenes the provisions of section 16; or

(b) has been convicted for an offence or an inquiry into an offence under any law for the time being in force is pending against him; or

(c) he has been found guilty in any disciplinary proceedings or a disciplinary proceeding is pending against him; or

(d) has so abused his position as to render his continuance in office prejudicial to the public interest, such Presiding Officer or Member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of this section.

CONSTITUTION OF LOCAL COMPLAINTS COMMITTEE

5. Notification of District Officer-The appropriate Government may notify a District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as a District Officer for every District to exercise powers or discharge functions under this Act.

6. Constitution and jurisdiction of Local Complaints Committee-

(1) Every District Officer shall constitute in the district concerned, a committee to be known as the "Local Complaints Committee: to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been constituted due to having less than ten workers or if the complaint is against the employer himself.

(2) The District Officer shall designate one nodal officer in every block, taluka and tehsil in rural or tribal area and ward or municipality in the urban area, to receive complaints and forward the same to the concerned Local Complaints Committee within a period of seven days.

(3) The jurisdiction of the Local Complaints Committee shall extend to the areas of the district where it is constituted.

7. Composition, tenure and other terms and conditions of Local Complaints Committee-

(1) The Local Complaints Committee shall consist of the following members to be nominated by the District Officer, namely-

(a) a Chairperson to be nominated from amongst the eminent women in the field of social work and committed to the cause of women;

(b) one Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district;

(c) two Members, of whom at least one shall be a woman, to be nominated from amongst such non-governmental organisations or associations committed to the cause of women or a person familiar with the issue relating to sexual harassment, which may be prescribed: Provided that at least one of the nominees should, preferably, have

a background in law or legal knowledge: Provided further that at least one of the nominees shall be a Tribes or the Other Backward Classes or minority community notified by the Central Government, from time to time;

(d) the concerned officer dealing with the social welfare or women and child development in the district, shall be a member ex officio.

(2) The Chairperson and every Member of the Local Committee shall hold office for such period, not exceeding three years, from the date of their appointment as may be specified by the District Officer.

(3) Where the Chairperson or any Member of the Local Complaints Committee-

(a) contravenes the provisions of section 16; or

(b) has been convicted for an offence or an inquiry into an offence under any law for the time being in force is pending against him; or

(c) has been found guilty in any disciplinary proceedings or a disciplinary proceeding is pending against him; or

(d) has so abused his position as to render his continuance in office pre-judicial to the public interest, Such Chairperson or Member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of this section.

(4) The Chairperson and Members of the Local Committee other than the Members nominated under clauses (b) and (d) of sub-section (1) shall be entitled to such fees or allowances for holding the proceedings of the Local Committee as may be prescribed.

8. Grants and audit-

(1) The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the State Government grants of such sums of money as the Central Government may think fit, for being utilised for the payment of fees or allowances referred to in sub–section (4) of section 7.

(2) The State Government may set up an agency and transfer the grants made under sub-section (1) to that agency.

(3) The agency shall pay to the District Officer, such sums as may be required for the payment of fees or allowances referred to in sub-section (4) of section 7.

(4) The accounts of the agency referred to in sub-section (2) shall be maintained and audited in such manner as may, in consultation with the Accountant-General of the State, be prescribed and the person holding the custody of the accounts of the agency shall furnish, to the State Government, before such date, as may be prescribed, its audited copy of accounts together with auditor's report thereon.

COMPLAINT

9. Complaint of sexual harassment-

(1) Any aggrieved woman may make, in writing, a complaint of sexual harassment at workplace to the Internal Committee if so constituted, or the Local Committee, in case it is not so constituted, within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident:

Provided that where such complaint cannot be made in writing, the Presiding Officer or any Member of the Internal Committee or the Chairperson or any Member of the Local Committee, as the case may be, shall render all reasonable assistance to the woman for making the complaint in writing: Provided further that the Internal Committee or, as the case may be, the Local Committee may, for the reasons to be recorded in writing, extend

the time limit not exceeding three months, if it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the said period.

(2) Where the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death or otherwise, her legal heir or such other person as may be prescribed may make a complaint under this section.

10. Conciliation-

(1) The Internal Committee or, as the case may be, the Local Committee, may, before initiating an inquiry under section 11 and at the request of the aggrieved woman take steps to settle the matter between her and the respondent through conciliation: Provided that no monetary settlement shall be made as a basis of conciliation.

(2) Where a settlement has been arrived at under sub-section (1), the Internal Committee or the Local Committee, as the case may be, shall record the settlement so arrived and forward the same to the employer or the District Officer to take action as specified in the recommendation.

(3) The Internal Committee or the Local Committee, as the case may be shall provide the copies of the settlement s recorded under sub-section (2) to the aggrieved woman and the respondent.

(4) Where a settlement is arrived at under sub-section (1), no further inquiry shall be conducted by the Internal Committee or the Local Committee, as the case may be.

11. Inquiry into complaint-

(1) Subject to the provisions of section 10, the Internal Committee or the Local Committee, as the case may be, shall, where the respondent is an employee, proceed to make inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent and where no such rules exist, in such manner as may be prescribed or in case of a domestic worker, the Local Committee shall, if prima facie case exist, forward the complaint to the police, within a period of seven days for registering the case under section 509 of the India Penal Code (45 of 1860), and any other relevant provisions of the said Code where applicable.

Provided that where the aggrieved woman informs the Internal Committee or the Local Committee, as the case may be, that any term or condition of the settlement arrived at under sub-section (2) of section 10 has not been complied with by the respondent, the Internal Committee or the Local Committee shall proceed to make an inquiry into the complaint or, as the case may be, forward the complaint to the police:

Provided further that where both the parties are employees, the parties shall, during the course of inquiry, be given an opportunity of being heard and a copy of the findings shall be made available to both the parties enabling them to make representation against the findings before the Committee.

(2) Notwithstanding anything contained in section 509 of the Indian Penal Code (45 of 1860), the court may, when the respondent is convicted of the offence, order payment of such sums as it may consider appropriate, to the aggrieved woman by the respondent, having regard to the provisions of section 15.

(3) For the purpose of making an inquiry under sub-section (1), the Internal Committee or the Local Committee, as the case may be, shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents; and

(c) any other matter which may be prescribed.

(4) The inquiry under sub-section (1) shall be completed within a period of ninety days.

INQUIRY INTO COMPLAINT

12. Action during pendency of inquiry-

(1) During the pendency of an inquiry, on a written request made by the aggrieved woman, the Internal Committee or the Local Committee, as the case may be, may recommend to the employer to–

(a) transfer the aggrieved woman or the respondent to any other workplace; or

(b) grant leave to the aggrieved woman up to a period of three months; or

(c) grant such other relief to the aggrieved woman as may be prescribed.

(2) The leave granted to the aggrieved woman under this section shall be in addition to the leave she would be otherwise entitled.

(3) On the recommendation of the Internal Committee or the Local Committee, as the case may be, under sub-section (1), the employer shall implement the recommendations made under sub-section (1) and send the report of such implementation to the Internal Committee or the Local Committee, as the case may be.

13. Inquiry report-

(1) On the completion of an inquiry under this Act, the Internal Committee or the Local Committee, as the case may be, shall provide a report of its findings to the employer, or as the case may be, the District Officer within a period of ten days from the date of completion of the inquiry and such report be made available to the concerned parties.

(2) Where the Internal Committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has not been proved, it shall recommend to the employer and the District Officer, as the case may be-

(3) Where the Internal Committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be-

(i) to take action for sexual harassment as a misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed;

(ii) to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs, as it may determine, in accordance with the provisions of section 15:

Provided that in case the employer is unable to make such deduction from the salary of the respondent due to his being absent from duty or cessation of employment it may direct to the respondent to pay such sum to the aggrieved woman:

Provided further that in case the respondent fails to pay the sum referred to in clause

(ii) the Internal Committee or, as the case may be, the Local Committee may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

(4) The employer or the District Officer shall act upon the recommendation within sixty days of its receipt by him.

14. Punishment for false or malicious complaint and false evidence-(1) Where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that the allegation against

the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or the District Officer, as the case may be, to take action against the woman or the person who has made the complaint under sub-section (1) or sub-section (2) of section 9, as the case may be, in accordance with the provisions of the service rules applicable to her or him or where no such service rules exist, in such manner as may be prescribed:

Provided that a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant under this section:

Provided further that the malicious intent on part of the complainant shall be established after an inquiry in accordance with the procedure prescribed, before any action is recommended.

(2) Where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that during the inquiry any witness has given false evidence or produced any forged or misleading document, it may recommend to the employer of the witness or the District Officer, as the case may be, to take action in accordance with the provisions of the service rules applicable tot he said witness or where no such service rules exist, in such manner as may be prescribed.

15. Determination of compensation-For the purpose of determining the sums to be paid to the aggrieved woman under clause (ii) of sub-section (3) of section 13, the Internal Committee or the Local Committee, as the case may be, shall have regard to –

    (a) the mental trauma, pain and suffering and emotional distress caused to the aggrieved woman;

    (b) the loss in the career opportunity due to the incident of sexual harassment;

    (c) medical expenses incurred by the victim for physical or psychiatric treatment;

    (d) the income and financial status of the respondent;

    (e) feasibility of such payment in lump sum or in instalments.

16. Prohibition of publication or making known contents of complaint and inquiry proceeding – Notwithstanding anything contained in the Right to Information Act, 2005 (22 of 2005), the contents of the complaint made under section 9, the identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the Internal Committee or the Local Committee, as the case may be, and the action taken by the employer or the District Officer under the provisions of the this Act shall not be published, communicated or made known to the public, press and media in any manner:

    Provided that information may be disseminated regarding the justice secured to any victim of sexual harassment under this Act without disclosing the name, address, identity or any other particulars calculated to lead to the identification of the aggrieved woman and witnesses.

17. Penalty for publication or making known contents of complaint and inquiry proceedings-Where any person entrusted with the duty to handle or deal with the complaint, inquiry or any recommendations or action to be taken under the provisions of this Act, contravenes the provisions of section 16, he shall be liable for penalty in accordance with the provisions of the service rules, applicable to the said person or where no such service rules exist, in such manner as may be prescribed.

18. Appeal-(1) Any person aggrieved from the recommendation made under sub-section (2) of section 13 or under clause (i) or clause (ii) of sub-section (3) of section 13 or sub-section (1) or sub-section (2) of section 14 or section 17 or non-implementation of such recommendations

may prefer an appeal to the court or tribunal in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist then, without prejudice to provisions contained in any other law for the time being in force, the person aggrieved may prefer an appeal in such manner as may be prescribed.

(2) The appeal under sub-section (1) shall be preferred within a period of ninety days of the recommendations.

DUTIES OF EMPLOYER

19. Duties of employer-Every employer shall-

(a) provide a safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace;

(b) display at any conspicuous place in the workplace, the penal consequences of sexual harassments; and the order constituting, the Internal Committee under sub-section (1) of section 4;

(c) organise workshops and awareness programmes at regular intervals for sensitising the employees with the provisions of the Act and orientation programme for the members of the Internal Committee in the manner as may be prescribed;

(d) provide necessary facilities to the Internal Committee or the Local Committee, as the case may be, for dealing with the complaint and conducting an inquiry;

(e) assist in securing the attendance of respondent and witnesses before the Internal Committee or the Local Committee, as the case may be;

(f) make available such information to the Internal Committee or the Local Committee as the case may be, as it may require having regard to the complaint made under sub-section (1) of section 9;

(g) provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the Indian Penal Code (45 of 1860) or any other law for the time being in force;

(h) cause to initiate action, under the Indian Penal Code (45 of 1860) or any other law for the time being in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;

(i) treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct;

(j) monitor the timely submission of reports by the Internal Committee.

DUTIES AND POWERS OF DISTRICT OFFICER

20. Duties and powers of District Officer-The District Officer shall,-

(a) monitor the timely submission of reports furnished by the Local Committee;

(b) take such measures as may be necessary for engaging non-governmental organizations for creation of awareness on sexual harassment and the rights of the women.

MISCELLANEOUS

21. Committee to submit annual report-

(1) The Internal Committee or the Local Committee, as the case may be, shall in each calendar year prepare, in such form and at such time as may be prescribed, an annual report and submit the same to the employer and the District Officer.

(2) The District Officer shall forward a brief report on the annual reports received under sub-

section (1) to the State Government.

22. Employer to include information in annual report-The employer shall include in its report the number of cases filed, if any, and their disposal under this Act in the annual report of his organisation or where no such report is required to be prepared, intimate such number of cases, if any, to the District Officer.

23. Appropriate Government to monitor implementation and maintain data-The appropriate Government shall monitor the implementation of this Act and maintain data on the number of cases filed and disposed of in respect of all cases of sexual harassment at workplace.

24. Appropriate Government to take measures to publicise the Act.-The appropriate Government may, subject to the availability of financial and other resources-

    (a) develop relevant information, education, communication and training materials, and organise awareness programmes, to advance the understanding of the public of the provisions of this Act providing for protection against sexual harassment of woman at workplace;

    (b) formulate orientation and training programmes for the members of the Local Complaints Committee.

25. Power to call for information and inspection of records-

    (1) The appropriate Government, on being satisfied that it is necessary in the public interest or in the interest of women employees at a workplace to do so, by order in writing,-

        (a) call upon any employer or District Officer to furnish in writing such information relating to sexual harassment as it may require;

        (b) authorise any officer to make inspection of the records and workplace in relation to sexual harassment, who shall submit a report of such inspection to it within such period as may be specified in the order.

    (2) Every employer and District Officer shall produce on demand before the officer making the inspection all information, records and other documents in his custody having a bearing on the subject-matter of such inspection.

26. Penalty for non-compliance with provisions of Act-

    (1) Where the employer fails to-

        (a) constitute an Internal Committee under sub-section (1) of section 4;

        (b) take action under sections 13, 14 and 22; and

        (c) contravenes or attempts to contravene or abets contravention of other provisions of this Act or any rules made there under, he shall be punishable with fine which may extend to fifty thousand rupees.

    (2) If any employer, after having been previously convicted of an offence punishable under this Act subsequently commits and is convicted of the same offence, he shall be liable to-

        (i) twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence: Provided that in case a higher punishment is prescribed under any other law for the time being in force, for the offence for which the accused is being prosecuted, the court shall take due cognizance of the same while awarding the punishment;

        (ii) cancellation, of his licence or withdrawal, or non-renewal, or approval, or cancellation of the registration, as the case may be, by the Government or local authority required for carrying on his business or activity.

27. Cognizance of offence by courts-

(1) No court shall take cognizance of any offence punishable under this Act or any rules made there under, save on a complaint made by the aggrieved woman or any person authorised by the Internal Committee or Local Committee in this behalf.

(2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Every offence under this Act shall be non-cognizable.

28. Act not in derogation of any other law-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

29. Power of appropriate Government to make rules-

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely-

(a) the fees or allowances to be paid to the Members under sub-section (4) of section 4;

(b) nomination of members under clause (c) of sub-section (1) of section 7;

(c) the fees or allowances to be paid to the Chairperson, and Members under sub- section (4) of section 7;

(d) the person who may make complaint under sub-section (2) of section 9;

(e) the manner of inquiry under sub-section (1) of section 11;

(f) the powers for making an inquiry under clause (c) of sub-section (2) of section 11;

(g) the relief to be recommended under clause (c) of sub-section (1) of section 12;

(h) the manner of action to be taken under clause (i) of sub-section (3) of section 13;

(i) the manner of action to be taken under sub-sections (1) and (2) of section 14;

(j) the manner of action to be taken under section 17;

(k) the manner of appeal under sub-section (1) of section 18;

(l) the manner of organising workshops, awareness programmes for sensitising the employees and orientation programmes for the members of the Internal Committee under clause (c) of section 19; and

(m) the form and time for preparation of annual report by Internal Committee and the Local Committee under sub-section (1) of section 21.

(3) Every rule made by the Central Government under this Act shall be laid as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(4) Any rule made under sub-section (4) of section 8 by the State Government shall be laid, as soon as may after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

30. Power to remove difficulties-

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to it to be necessary for removing the difficulty: Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) RULES, 2013

Notification No. GSR 769(E), dated 9.12.2013-In exercise of the powers conferred by section 29 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013), the Central Government hereby makes the following rules, namely:

1. Short title and commencement-

(1) These rules may be called the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions-In these rules, unless the context otherwise requires,-

(a) "Act" means the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013);

(b) "complaint" means the complaint made under section 9;

(c) "Complaints Committee" means the Internal Committee or the Local Committee, as the case may be;

(d) "Incident" means an incident of sexual harassment as defined in clause (n) of section 2;

(e) "section" means a section of the Act;

(f) "special educator" means a person trained in communication with people with special needs in a way that address their individual differences and needs;

(g) words and expressions used herein and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. Fees or allowances for Member of Internal Committee-(1) The Member appointed from amongst non-government organisations shall be entitled to an allowance of two hundred rupees per day for holding the proceedings of the Internal Committee and also the reimbursement of travel cost incurred in travelling by train in three tier air condition or air conditioned bus and auto rickshaw or taxi, or the actual amount spent by him on travel, whichever is less.

The employer shall be responsible for the payment of allowances referred to in sub-rule (1).

4. Person familiar with issues relating to sexual harassment-Person familiar with the issues relating to sexual harassment for the purpose of clause (c) of sub-section (1) of section 7 shall be a person who has expertise on issues relating to sexual harassment and may include any of the following:-

(a) a social worker with at least 'five years' experience in the field of social work which leads to creation of societal conditions favourable towards empowerment of women and in particular in addressing workplace sexual harassment,

(b) a person who is familiar with labour, service, civil or criminal law.

5. Fees or allowances for Chairperson and Members of Local Committee-

(1) The Chairperson of the Local Committee shall be entitled to an allowance of two hundred

and fifty rupees per day for holding the proceedings of the said Committee.

(2) The Members of the Local Committee other than the Members nominated under clauses (b) and (d) of sub-section (1) of section 7 shall be entitled to an allowance of two hundred rupees per day for holding the proceedings of the said Committee and also the reimbursement of travel cost incurred in travelling by train in three tier air condition or air conditioned bus and auto rickshaw or taxi, or the actual amount spent by him on travel, whichever is less.

The District Officer shall be responsible for the payment of allowances referred to in sub-rules (1) and (2).

6. Complaint of sexual harassment-For the purpose of sub-section (2) of section 9-

(i) where the aggrieved woman is unable to make a complaint on account of her physical incapacity, a complaint may be filed by-

(a) her relative or friend; or

(b) her co-worker; or

(c) an officer of the National Commission for Women or State Women's Commission; or

(d) any person who has knowledge of the incident, with the written consent of the aggrieved woman;

(ii) where the aggrieved woman is unable to make a complaint on account of her mental incapacity, a complaint may be filed by-

(a) her relative or friend; or

(b) a special educator; or

(c) a qualified psychiatrist or psychologist; or

(d) the guardian or authority under whose care she is receiving treatment or care; or

(e) any person who has knowledge of the incident jointly with her relative or friend or a special educator or qualified psychiatrist or psychologist, or guardian or authority under whose care she is receiving treatment or care;

(iii) where the aggrieved woman for any other reason is unable to make a complaint, a complaint may filed by any person who has knowledge of the incident, with her written consent;

(iv) where the aggrieved woman is dead, a complaint may be filed by any person who has knowledge of the incident, with the written consent of her legal heir.

7. Manner of inquiry into complaint-

(1) Subject to the provisions of section 11, at the time of filing the complaint, the complainant shall submit to the Complaints Committee, six copies of the complaint along with supporting documents and the names and addresses of the witnesses.

(2) On receipt of the complaint, the Complaints Committee shall send one of the copies received from the aggrieved woman under sub-rule (1) to the respondent within a period of seven working days.

(3) The respondent shall file his reply to the complaint along with his list of documents, and names and addresses of witnesses, within a period not exceeding ten working days from the date of receipt of the documents specified under sub-rule (1).

(4) The Complaints Committee shall make inquiry into the complaint in accordance with the principles of natural justice.

(5) The Complaints Committee shall have the right to terminate the inquiry proceedings or to

give an ex parte decision on the complaint, if the complainant or respondent fails, without sufficient cause, to present herself or himself for three consecutive hearings convened by the Chairperson or Presiding Officer, as the case may be:

Provided that such termination or ex parte order may not be passed without giving a notice in writing, fifteen days in advance, to the party concerned.

(6) The parties shall not be allowed to bring in any legal practitioner or represent them in their case at any stage of the proceedings before the Complaints Committee.

(7) In conducting the inquiry, a minimum of three Members of the Complaints Committee including the Presiding Officer or the Chairperson, as the case may be, shall be present.

8. Other relief to complainant during pendency of inquiry-The Complaints Committee at the written request of the aggrieved woman may are commend to the employer to-

(a) restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report, and assign the same to another officer;

(b) restrain the respondent in case of an educational institution from supervising any academic activity of the aggrieved woman.

9. Manner of taking action for sexual harassment-Except in cases where service rules exist, where the Complaints Committee arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be, to take any action including a written apology, warning, reprimand or censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service or undergoing a counselling session or carrying out community service.

10. Action for false or malicious complaint or false evidence-Except in cases where service rules exist, where the Complaints Committee arrives at the conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or District Officer, as these may be, to take action in accordance with the provisions of rule 9.

11. Appeal-Subject to the provisions of section 18, any person aggrieved from the recommendations made under sub-section (2) of section 13 or under clause (i) or clause (ii) of sub-section (3) of section 13 or sub-section (1) or sub-section (2) of section 14 or section 17 or non-implementation of such recommendations may prefer an appeal to the appellate authority notified under clause (a) of section 2 of the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946).

12. Penalty for contravention of provisions of section 16- Subject to the provisions of section 17, if any person contravenes the provisions of section 16, the employer shall recover a sum of five thousand rupees as penalty from such person.

13. Manner to organise workshops, etc.-Subject to the provisions of section 19, every employer shall-

(a) formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace intended to promote gender sensitive safe spaces and remove underlying factors that contribute towards a hostile work environment against women;

(b) carry out orientation programmes and seminars for the Members of the Internal Committee;

(c) carry out employees awareness programmes and create forum for dialogues which may involve Panchayati Raj Institutions, Gram Sabha, women's groups, mothers' committee, adolescent groups, urban local bodies and any other body as may considered necessary;

(d) conduct capacity building and skill building programmes for the Members of the Internal Committee;

(e) declare the names and contact details of all the Members of the Internal Committee;

(f) use modules developed by the State Governments to conduct workshops and awareness programmes for sensitising the employees with the provisions of the Act.

14. Preparation of annual report-The annual report which the Complaints Committee shall prepare under section 21, shall have the following details:-

(a) number of complaints of sexual harassment received in the year;

(b) number of complaints disposed of during the year;

(c) number of cases pending for more than ninety days;

(d) number of workshops or awareness programme against sexual harassment carried out;

(e) nature of action taken by the employer or District Officer.

THE ENVIRONMENT (PROTECTION) ACT, 1986

1. Short title, extent and commencement

(1) This Act may be called the Environment (Protection) Act, 1986.

(2) It extends to the whole of India.

(3) It shall come into force on such[1] [date] as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and for different areas.

2. Definitions

In this Act, unless the context otherwise requires-

(a) "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;

(b) "environmental pollutant" means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment;

(c) "environmental pollution" means the presence in the environment of any environmental pollutant;

(d) "handling", in relation to any substance, means the manufacture, processing, treatment, package, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like of such substance;

(e) "hazardous substance" means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment;

(f) "occupier", in relation to any factory or premises, means a person who has control over the affairs of the factory or the premises and includes, in relation to any substance, the person in possession of the substance;

(g) "prescribed" means prescribed by rules made under this Act.

GENERAL POWERS OF THE CENTRAL GOVERNMENT

3. Power of Central Government to take measures to protect and improve environment

(1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:-

(i) co-ordination of actions by the State Governments, officers and other authorities-

(a) under this Act, or the rules made thereunder, or

(b) under any other law for the time being in force which is relatable to the objects of this Act;

(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(iii) laying down standards for the quality of environment in its various aspects;

(iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever:

PROVIDED that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;

[1]W.e.f. 19-11-1986, vide GSR 1198(E), dt. 12-11-1986.

(v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(vii) laying down procedures and safeguards for the handling of hazardous substances;

(viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;

(xii) collection and dissemination of information in respect of matters relating to environmental pollution;

(xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

4. Appointment of officers and their powers and functions

(1) Without prejudice to the provisions of sub-section (3) of section 3, the Central Government may appoint officers with such designation as it thinks fit for the purposes of this Act and may entrust to them such of the powers and functions under this Act as it may deem fit.

(2) The officers appointed under sub-section (1) shall be subject to the general control and direction of the Central Government or, if so directed by that government, also of the authority or authorities, if any, constituted under sub-section (3) of section 3 or of any other authority or officer.

5. Power to give directions

Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.

Explanation: For the avoidance of doubts, it is hereby declared that the power to issue directions under this section, includes the power to direct-

(a) the closure, prohibition or regulation of any industry, operation or process;

or

(b) stoppage or regulation of the supply of electricity or water or any other service.

[1]**[5A. Appeal to National Green Tribunal**

Any person aggrieved by any directions issued under section 5, on or after the commencement of the National Green Tribunal Act, 2010, may file an appeal to the National Green Tribunal established under section 3 of the National Green Tribunal Act, 2010, in accordance with the provisions of that Act.]

6. Rules to regulate environmental pollution

(1) The Central Government may, by notification in the Official Gazette, make rules in respect of all or any of the matters referred to in section 3.
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-
(a) the standards of quality of air, water or soil for various areas and purposes;
(b) the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas;
(c) the procedures and safeguards for the handling of hazardous substances;
(d) the prohibition and restrictions on the handling of hazardous substances in different areas;
(e) the prohibition and restrictions on the location of industries and the carrying on of processes and operations in different areas;
(f) the procedures and safeguards for the prevention of accidents which may cause environmental pollution and for providing for remedial measures for such accidents.

PREVENTION, CONTROL AND ABATEMENT OF ENVIRONMENTAL POLLUTION

7. Persons carrying on industry, operation, etc. not to allow emission or discharge of environmental pollutants in excess of the standards

No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

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1 Inserted by National Green Tribunal Act, 2010 (Act 19 of 2010), dt. 2-6-2010, w.e.f. 18-10-2010 vide SO 2569(E), dt. 18-10-2010.

8. Persons handling hazardous substances to comply with procedural safeguards

No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed.

9. Furnishing of information to authorities and agencies in certain cases

(1) Where the discharge of any environmental pollutant in excess of the prescribed standards occurs or is apprehended to occur due to any accident or other unforeseen act or event, the person responsible for such discharge and the person in charge of the place at which such discharge occurs or is apprehended to occur shall be bound to prevent or mitigate the environmental pollution caused as a result of such discharge and shall also forthwith-

(a) intimate the fact of such occurrence or apprehension of such occurrence; and
(b) be bound, if called upon, to render all assistance,

to such authorities or agencies as may be prescribed.

(2) On receipt of information with respect to the fact or apprehension of any occurrence of the nature referred to in sub-section (1),whether through intimation under that sub-section or otherwise, the authorities or agencies referred to in sub-section (1) shall, as early as practicable, cause such remedial measures to be taken as are necessary to prevent or mitigate the environmental pollution.

(3) The expenses, if any, incurred by any authority or agency with respect to the remedial measures referred to in sub-section (2), together with interest (at such reasonable rate as the government may, by order, fix) from the date when a demand for the expenses is made until it is paid, may be recovered by such authority or agency from the person concerned as arrears of land revenue or of public demand.

10. Powers of entry and inspection

(1) Subject to the provisions of this section, any person empowered by the Central Government in this behalf shall have a right to enter, at all reasonable times with such assistance as he considers necessary, any place-

(a) for the purpose of performing any of the functions of the Central Government entrusted to him;
(b) for the purpose of determining whether and if so in what manner, any such functions are to be performed or whether any provisions of this Act or the rules made thereunder or any notice, order, direction or authorisation served, made, given or granted under this Act is being or has been complied with;
(c) for the purpose of examining and testing any equipment, industrial plant, record, register, document or any other material object or for conducting a search of any building in which he has reason to believe that an offence under this Act or the rules made thereunder has been or is being or is about to be committed and for seizing any such equipment, industrial plant, record, register, document or other material object if he has reasons to believe that it may furnish evidence of the commission of an offence punishable under this Act or the rules made thereunder or that such seizure is necessary to prevent or mitigate environmental pollution.

(2) Every person carrying on any industry, operation or process of handling any hazardous substance shall be bound to render all assistance to the person empowered by the Central Government under sub-section (1) for carrying out the functions under that sub-section and if he fails to do so without any reasonable cause or excuse, he shall be guilty of an offence under this Act.

(3) If any person willfully delays or obstructs any person empowered by the Central Government under sub-section (1) in the performance of his functions, he shall be guilty of an offence under this Act.

(4) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), or, in relation to the State of Jammu and Kashmir, or any area in which that Code is not in force, the provisions of any corresponding law in force in that State or area shall, so far as may be, apply to any search or seizure under this section as they apply to any search or seizure made under the authority of a warrant issued under section 94 of the said Code or, as the case may be, under the corresponding provisions of the said law.

11. Power to take sample and procedure to be followed in connection therewith

(1) The Central Government or any officer empowered by it in this behalf, shall have power to take, for the purpose of analysis, samples of air, water, soil or other substance from any factory, premises or other place in such manner as may be prescribed.

(2) The result of any analysis of a sample taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of sub-sections (3) and (4) are complied with.

(3) Subject to the provisions of sub-section (4),the person taking the sample under sub-section (1) shall-

(a) serve on the occupier or his agent or person in charge of the place, a notice, then and there, in such form as may be prescribed, of his intention to have it so analysed;
(b) in the presence of the occupier or his agent or person, collect a sample for analysis;
(c) cause the sample to be placed in a container or containers which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent or person;
(d) send without delay, the container or the containers to the laboratory established or recognised by the Central Government under section 12.

(4) When a sample is taken for analysis under sub-section (1) and the person taking the sample serves on the occupier or his agent or person, a notice under clause (a) of sub-section (3), then-

(a) in a case where the occupier, his agent or person wilfully absents himself, the person taking the sample shall collect the sample for analysis to be placed in a container or containers which shall be marked and sealed and shall also be signed by the person taking the sample; and
(b) in a case where the occupier or his agent or person present at the time of taking the sample refuses to sign the marked and sealed container or containers of the sample as required under clause (c) of sub-section (3), the marked and sealed container or containers shall be signed by the person taking the samples,

and the container or containers shall be sent without delay by the person taking the sample for analysis to the laboratory established or recognised under section 12 and such person shall inform the Government Analyst appointed or recognised under section 13 in writing, about the wilful absence of the occupier or his agent or person, or, as the case may be, his refusal to sign the container or containers.

14. Reports of government analysts

Any document purporting to be a report signed by a government analyst may be use as evidence of the facts stated therein in any proceeding under this Act.

15. Penalty for contravention of the provisions of the Act and the rules, orders and directions

(1) Whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued there under, shall, in respect of each such failure or contravention, be punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

(2) If the failure or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years.

16. Offence by companies

(1) Where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of , and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

PROVIDED that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is pro9ved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this section-

(a) "company" means anybody corporate, and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

17. Offences by government departments

(1) Where an offence under this Act has been committed by any department of government, the head of the department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

PROVIDED that nothing contained in this section shall render such head of the department liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a department of government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than the head of the department, such officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

MISCELLANEOUS

18. Protection of action taken in good faith

No suit, prosecution or other legal proceeding shall lie against the government or any officer or other employee of the government or any authority constituted under this Act or any member, officer or to the employee of such authority in respect of anything which is done or intended to be done in good faith in pursuance of this Act or the rules made or orders or directions issued there under.

19. Cognisance of offences

No court shall take cognisance of any offence under this Act except on a complaint made by –
(a) the Central Government or any authority or officer authorised in this behalf by that government; or
(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the

alleged offence and of his intention to make a complaint, to the Central Government or the authority of officer authorised as aforesaid.

20. Information, reports or returns

The Central Government may, in relation to its functions under this Act, from time to time, require any person, officer, State Government or other authority to furnish to it or any prescribed authority or officer any reports, returns, statistics, accounts and other information and such person, officer, State Government or other authority shall be bound to do so.

21. Members, officers and employees of the authority constituted under section 3 to be public servants

All the members of the authority, constituted, if any, under section 3 and all officers and other employees of such authority when acting or purporting to act in pursuance of any provisions of this Act or the rules made or orders or directions issued there under shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

22. Bar of jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of anything done, action taken or order or direction issued by the Central Government or any other authority or officer in pursuance of any power conferred by or in relation to its or his functions under this Act.

23. Power to delegate

Without prejudice to the provisions of sub-section (3) of section 3, the Central Government may, by notification in the Official Gazette, delegate, subject to such conditions and limitations as may be specified in the notifications, such of its powers and functions under this Act, except the powers to constitute an authority under sub-section (3) of section 3 and to make rules under section 25, as it may deem necessary or expedient, to any officer, State Government or other authority.

24. Effect of other laws

(1) Subject to the provisions of sub-section (2), the provisions of this Act and the rules or orders made therein shall have effect notwithstanding anything inconsistent there with contained in any enactment other than this Act.

(2) Where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act.

25. Power to make rules

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely–

a) the standards in excess of which environmental pollutants shall not be discharged or emitted under section 7;
b) the procedure in accordance with and the safeguards in compliance with which hazardous substances shall be handled or caused to be handled under section 8;
c) the authorities or agencies to which intimation of the fact of occurrence or apprehension of occurrence of the discharge of any environmental pollutant in excess of the prescribed standards shall be given and to whom all assistance shall be bound to be rendered under sub-section (1) of section 9;
d) the manner in which sample of air, water, soil or other substance for the purpose of

analysis shall be taken under sub-section (1) section 11;

e) the form in which notice of intention to have a sample analysed shall be served under clause (a) of sub-section (3) of section 11;

f) the functions of the environmental laboratories, the procedure for the submission to such laboratories of samples of air, water, soil and other substances for analysis or test; the form of laboratory report; the fees payable for such report and other matters to enable such laboratories to carry out their functions under sub-section (2) of section 12;

g) the qualifications of government analyst appointed or recognised for the purposes of analysis of samples or air, water, soil or other substances under section13;

h) the manner in which notice of the offence and of the intention to make a complaint to the Central Government shall be given under clause (b) of section 19;

i) the authority or office to whom any reports, returns, statistics, accounts and other information shall be furnished under section 20;

j) any other matter which is required to be, or may be, prescribed.

THE ENVIRONMENT (PROTECTION) RULES, 1986

1. **Short title and commencement**

(i) These rules may be called the Environment (Protection) Rules, 1986.

(ii) They shall come into force on the date of their publication in the Official Gazette.

2. **Definitions**

In the rules, unless the context otherwise requires–

(a) "Act" means the Environment (Protection) Act, 1986 (29 of 1986);

[2]**[(aa)** "areas" means all areas where the hazardous substances are handled;]

(b) "Central Board" means the Central Board for the Prevention and Control of Water Pollution constituted under section 3 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974);

(c) "form" means a form set forth in Appendix A to these rules;

(d) "government analyst" means a person appointed or recognised as such under section 13;

(e) "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 and includes in relation to any substance, the person in possession of the substance;

[1][**(ee)** "prohibited substance" means the substance prohibited for handling;]

(f) "recipient system" means the part of the environment such as soil, water, air or other medium which receives the pollutants'

[1][**(ff)** "restricted substance" means the substance restricted for handling;]

(g) "section" means a section of the Act;

(h) "Schedule" means a Schedule appended to these rules;

(i) "standards" means standards prescribed under these rules;

(j) "State Board" means a State Board for the Prevention and Control of Water Pollution constituted under section 4 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), or a State Board for the Prevention and Control of Air Pollution constituted under section 5 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981).

1. ***Enforceable w.e.f. 19-11-1986.***
2. ***Inserted by GSR 931(E), w.e.f. 27-10-1989.***

3. **Standards for emission or discharge of environmental pollutants**

(1) For the purposes of protecting and improving the quality of the environment and preventing and abating environmental pollution, the standards for emission or discharge of environmental pollutants from the industries, operations or processes shall be as specified in [1][Schedules I to IV].

(2) Notwithstanding anything contained in sub-rule (1), the Central Board or a State Board may specify more stringent standards from those provided in [1][Schedules I to IV] in respect of any specific industry, operation or process depending upon the quality of the recipient system and after recording reasons there for in writing.

[3]**(3)** The standards for emission o r discharge of environmental pollutants specified under sub-rule (1) or sub-rule (2) shall be complied with by an industry, operation or process within a period of one year of being so specified.

[4]**[(3A)(i)** Notwithstanding anything contained in sub-rules (1) and (2), on and from the 1st day of January, 1994, emission or discharge of environmental pollutants from the [5][industries, operations or processes other than those industries, operations or processes for which standards have been specified in Schedule I shall] not exceed the relevant parameters and standards specified in Schedule VI:

PROVIDED that the State Boards may specify more stringent standards for the relevant parameters with respect to specific industry or locations after recording reasons there for in writing;

(ii) The State Board shall while enforcing the standards specified in Schedule VI follow the guidelines specified in Annexures I and II in that Schedule.]

[6][(3B) The combined effect of emission or discharge of environmental pollutants in an area, from the industries, operations, automobiles and domestic sources, or processes shall not be permitted to exceed the relevant concentration in ambient air specified against each pollutants [7][in columns (4) and (5) of Schedule VII.]

[3][(4) Notwithstanding anything contained in sub-rule (3)–

(a) the Central Board or a State Board, depending on the local conditions or nature of discharge of environmental pollutants, may, by order, specify a lesser period than a period specified under sub-rule (3) within which the compliance of standards shall be made by an industry, operation or process;

(b) the Central Government in respect of any specific industry, operation or process, by order, may specify any period other than a period specified under sub-rule (3) within which the compliance of standards shall be made by such industry, operation or process.

(5) Notwithstanding anything contained in sub-rule (3), the standards for emission or discharge of environmental pollutants specified under sub-rule (1) or sub-rule (2) in respect of an industry, operation or process before the commencement of the Environment (Protection) (Amendment) Rules, 1991, shall be complied with by such industry, operation or process by the 31st day of December, 1991].

1. Substituted by GSR 422(E), dt. 19-5-1993 w.e.f. 19-5-1993.

2. Proviso to sub-rule (1) of rule 3 omitted by S.O. 23(E), w.e.f. 16-1-1991.
3. Inserted by SO 23(E), w.e.f. 16-1-1991.
4. Inserted by GSR 422(E), w.e.f. 19-5-1993.
5. Substituted by GSR 801(E), w.e.f. 31-12-1993.
6. Substituted by GSR 7, dt. 22-12-1998, w.e.f. 2-1-1999.
7. Substituted for "in columns (3) to (5) of Schedule VII" vide GSR826(E), dt. 16-11-2009, w.e.f. 16-11-2009.

[1](6) Notwithstanding anything contained in sub-rule (3), an industry, operation or process which has commenced production on or before 16th May, 1981 and has shown adequate proof of at least commencement of physical work for establishment of facilities to meet the specified standards within a time-bound programme, to the satisfaction of the concerned State Pollution Control Board, shall comply with such standards latest by the 31st day of December, 1993.

(7) Notwithstanding anything contained in sub-rule (3) or sub-rule (6) an industry, operation or process which has commenced production after the 16th May, 1981 but before the 31st day of December, 1991 and has shown adequate proof of at least commencement of physical work for establishment of facilities to meet the specified standards within a time-bound programme, to the satisfaction of the concerned State Pollution Control Board, shall comply with such standards latest by the 31st day of December, 1992.]

[2][(8)] With effect from the date specified hereunder, the following coal based thermal power plants shall be supplied with, and shall use, raw or blended or beneficiated coal with ash content not exceeding thirty-four percent, on quarterly average basis, namely:-

(a) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located beyond 1000 kilometres from the pit-head or, in an urban area or an ecologically sensitive area or a critically polluted industrial area, irrespective of its distance from the pit-head, except a pit-head power plant, with immediate effect;

(b) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located between 750-1000 kilometres from the pit-head, with effect from the 1st day of January, 2015;

(c) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located between 500-749 kilometres from the pit-head, with effect from the 5th day of June, 2016;

PROVIDED that in respect of a thermal power plant using Circulating Fluidised Bed Combustion or Atmosphere Fluidised Bed Combustion or Pressurized Fluidised Bed Combusion or Integrated Gasification Combined Cycle technologies or any other clean technologies as may be notified by the Central Government in the Official Gazette, the provisions of clauses (a), (b) and (c) shall not be applicable.

Explanation: For the purpose of this rule,-

(i) 'beneficiated coal' means coal containing higher calorific value but lower ash than the original ash content in the raw coal obtained through physical separation or washing process;

(ii) 'captive thermal power plant' means a power plant which is set up by an industry to generate electricity for its exclusive use;

(iii) 'critically polluted industrial area' means an industrial cluster or area where pollution levels have reached or likely to reach critical level, and has been identified as such by the Central Government or the State Government or the Central Pollution Control Board or a State Pollution Control Board;

(iv) 'ecologically sensitive area' means an area whose ecological balance is prone to be easily disturbed and has been identified and notified by the Central Government;

(v) 'installed capacity' shall be calculated by adding, individual capacity of all units within a boundary;

(vi) 'pit-head power plant' means any captive or stand-alone power station having captive transportation system for its exclusive use for transportation of coal from the loading point at the mining end, up to the uploading point at the power station without using the normal public transportation system;

(vii) 'stand-alone thermal power plant' means a power plant which is set up to generate electricity for feeding to electricity grid or for locations that are nor fitted with an electricity distribution system; and

(viii) 'urban area' means an area limit of a city having a population of more than one million according to the last census.]

4. Directions

(1) Any direction issued under section 5 shall be in writing.

(2) The direction shall specify the nature of action to be taken and the time within which it shall be complied with by the person, officer or the authority to whom such direction is given.

[1][(3a)] The person, office or authority to whom any direction is sought to be issued shall be served with a copy of the proposed direction and shall be given an opportunity of not less than fifteen days from the date of service of a notice to file with an office designated in this behalf the objections, if any, to the issue of the proposed direction.

2[(3b) Where the proposed direction is for the stoppage or regulation of electricity or water or any other service affecting the carrying on of any industry, operation or process and is sought to be issued to an officer or an authority, a copy of the proposed direction shall also be endorsed to the occupier of the industry, operation or process, as the case may be, and objections, if any, filed by the occupier with an officer designated in this behalf shall be dealt with in accordance with the procedures under sub-rules (3a) and (4) of this rule:

PROVIDED that no opportunity of being heard shall be given to the occupier if he had already been heard earlier and the proposed direction referred to in sub-rule (3b) above for the stoppage or regulation of electricity or water or any other service was the resultant decision of the Central Government after such earlier hearing.]

1. ***Renumbered vide SO 64(E), w.e.f. 18-1-1988.***
2. ***Inserted, ibid.***

(4) The Central Government shall within a period of 45 days from the date of receipt of the objections, if any, or from the date up to which an opportunity is given to the person, officer or authority to file objections, whichever is earlier, after considering the objections, if any, received from the person, officer or authority sought to be directed and for reasons to be recorded in writing, confirm, modify or decide not to issue the proposed direction.

(5) In a case where the Central Government is of the opinion that in view of the likelihood of a grave injury to the environment it is not expedient to provide an opportunity to file objections against the proposed direction, it may, for reasons to be recorded in writing, issue directions without providing such an opportunity.

(6) Every notice or direction required to be issued under this rule shall be deemed to be duly served–

(a) where the person to be served is a company, if the document is addressed in the name of the company at its registered office or at its principal office of place of business and is either–

(b) where the person to be served is an officer serving government, if the document is addressed to the person and a copy thereof is endorsed to the Head of the Department and also to the Secretary to the government, as the case may be, in charge of the department in which for the time being the business relating to the department in which the officer is employed is transacted and is either–

(i) sent by registered post, or

(ii) is given or tendered to him;

(d) in any case, if the document is addressed to the person to be served and–

(i) is given or tendered to him, or

(ii) if such person cannot be found, is affixed on some conspicuous part of his last known place of residence or business or is given or tendered to some adult member of his family of is affixed on some conspicuous part of the land or building, if any, to which it relates, or

(iii) is sent by registered post to that person.

Explanation: For the purposes of this sub-rule, -

(a) "company" means anybody corporate and includes a firm or other association of individuals;

(b) "a servant" is not a member of the family.

5. **Prohibition and restriction on the location of industries and the carrying on processes and operations in different areas**

(1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas:-

(i) Standards for quality of environment in its various aspects laid down for an area.

(ii) The maximum allowable limits of concentration of various environmental pollutants (including noise) for an area.

(iii) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.

(iv) The topographic and climatic features of an area.

(v) The biological diversity of the area which, in the opinion of the Central Government, needs to be preserved.

(vi) Environmentally compatible land use.

(vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

(viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified as such under the Wile Life (Protection) Act, 1972, or places

protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.

(ix) Proximity to human settlements.

(x) Any other factors as may be considered by the Central Government to be relevant to the prote4ction of the environment in an area.

(2) While prohibiting or restricting the location of industries and carrying on of processes and operations in an area, the Central Government shall follow the procedure hereinafter laid down.

(3) (a) Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the location of an industry or the carrying on of processes and operations in an area, it may, by notification in the Official Gazette[1] and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

(b) Every notification under clause (a) shall give a brief description of the area, the industries, operations, processes in that area about which such notification pertains and also specify the reasons for the imposition of prohibition or restrictions on the location of the industries and carrying on of processes or operations in that area.

(c) Any person interested in filing an objection against the imposition of prohibition or restriction on carrying of processes or operations as notified under clause (a) may do so in writing to the Central Government within sixty days from the date of publication of the notification in the Official Gazette.

(d) The Central Government shall within a period of three hundred and sixty-five days from the date of publication of the notification in the Official Gazette, consider all the objections received against such notification and 2[may 3[within 4[five hundred and forty-five days 5[and in respect of the States of Assam, Meghalaya, Arunachal Pradesh, Mizoram, Manipur, Nagaland, Tripura, Sikkim and Jammu and Kashmir in exceptional circumstance and for sufficient reasons within a further period of one hundred and eighty days,] from such date of publication], impose prohibition or restrictions on location of such industries and the carrying on of any process or operations in an area.

[1][(4)] Notwithstanding anything contained in sub-rule (3), whenever it appears to the Central Government that it is in public interest to do so, it may dispense with the requirement of notice under clause (a) of sub-rule (3).]

1. ***Vide SO 1545(E), dt. 25-06-2009, the Central Govt. notified as Mount Abu and surrounding region as Eco-sensitive Zone.***
2. ***Inserted by GSR 562(E), dt. 27-05-1992.***
3. ***Substituted by GSR 884(E), dt. 20-11-1992.***
4. ***Substituted for "three hundred and sixty five days" vide GSR 513(E), dt. 28-06-2012, w.e.f. 28-06-2012.***
5. ***Inserted vide SO 2357(E), dt. 8-8-2017, w.e.f. 9-8-2017.***
6. **Procedure for taking samples**

The Central Government or the officer empowered to take samples under section 11 shall collect the sample in sufficient quantity to be divided into two uniform parts and effectively

seal and suitably mark the same and permit the person from whom the sample is taken to add his own seal or mark to all or any of portions so sealed and marked. In case where the sample is made up in containers or small volumes and is likely to deteriorate or be otherwise damaged if exposed, the Central Government or the officer empowered shall take two of the said samples without opening the containers and suitably seal and mark the same. The Central Government or the officer empowered, shall dispose of the samples so collected as follows:-

(i) One portion shall be handed over to the person from whom the sample is taken under acknowledgement; and

(ii) The other portion shall be sent forthwith to the environment laboratory for analysis.

7. **Service of notice**

The Central Government or the officer empowered shall serve on the occupier or his agent or person in charge of the place a notice then and there in Form I of his intention to have the sample analysed.

8. **Procedure for submission of samples for analysis, and the form of laboratory report thereon**

(1) Sample taken for analysis shall be sent by the Central Government or the officer empowered to the environmental laboratory by registered post or through special messenger along with Form II.

(2) Another copy of Form II together with specimen impression of seals of the officer empowered to take samples along with the sales/marks, if any, of the person form whom the sample is taken shall be sent separately in a sealed cover by registered post or through a special messenger to the environmental laboratory.

(3) The findings shall be recorded in Form III in triplicate and signed by the government analyst and sent to the officer from whom the sample is received for analysis.

(4) On receipt of the report of the findings of the government analyst, the officer shall send one copy of the report to the person from whom the sample was taken for analysis, the second copy shall be retained by him for his record and the third copy shall be kept by him to be produced in the court before which proceedings, if any, are instituted.

1. ***Inserted by GSR 320(E), w.e.f. 16-3-1994***
2. ***Substituted by SO 64(E), w.e.f. 18-1-1988***

9. **Functions of environmental laboratories**

The following shall be the functions of environmental laboratories:-

(i) to evolve standardized methods for sampling and analysis of various types of environmental pollutants;

(ii) to analyse samples sent by the Central Government or the officers empowered under sub-section (1) of section 11;

(iii) to carry out such investigations as may be directed by the Central Government to lay down standards for the quality of environment and discharge of environmental pollutants, to monitor and to enforce the standards laid down;

(iv) to send periodical reports regarding its activities to the Central Government;

(v) to carry out such other functions as may be entrusted to it by the Central Government

from time to time.

10. **Qualifications of Government Analyst**

A person shall not be qualified for appointment or recognised as a Government Analyst unless he is a–

(a) graduate in science from a recognised university with five years' experience in a laboratory engaged in environmental investigations, testing or analysis, or

(b) post-graduate in science or a graduate in engineering or a graduate in medicine or equivalent with two years' experience in a laboratory engaged in environmental investigations, testing or analysis; or

(c) post-graduate in environmental science from a recognised university with two years' experience in a laboratory engaged in environmental investigations, testing or analysis.

11. Manner of giving notice

The manner of giving notice under clause (b) of section 19 shall be as follows, namely:-

(1) The notice shall be in writing in Form IV.

(2) The person giving notice may send notice to, -

(a) If the alleged offence has taken place in a Union Territory:

(A) the Central Board; and

(B) the Ministry of Environment and Forests (represented by the Secretary to the Government of India):

(b) if the alleged offence has taken place in a State:

(A) the State Board; and

(B) the Government of the State (represented by the Secretary to the State Government in charge of environment); and

(C) the Ministry of Environment and Forests (represented by the Secretary to the Government of India).

(3) The notice shall be sent by registered post acknowledgement due.

(4) The period of sixty days mentioned in clause (b) of section 19 of the Environment (Protection) Act, 1986, shall be reckoned from the date it is first received by one of the authorities mentioned above.

12. **Furnishing of information to authorities and agencies in certain cases**

Where the discharge of environmental pollutant in excess of the prescribed standard occurs or is apprehend to occur due to any accident or other unforeseen act or event, the person in charge of the place at which such discharge occurs or is apprehended to occur shall forthwith intimate the fact of such occurrence or apprehension of such occurrence to all the following authorities or agencies, namely–

(i) The Officer-in-charge of emergency or disaster relief operations in a district or other region of a State or Union territory specified by whatever designation, by the Government of the said State or Union territory, and in whose jurisdiction the industry, process or operation is located.

(ii) The Central Board or a State Board, as the case may be, and its regional officer having local jurisdiction who have been delegated powers under sections 20, 21, 23 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), and section 24 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981);

(iii) The statutory authorities or agencies specified in column 3 in relation to places mentioned in column 2 against thereof of] [1][Schedule V].

1. ***Substituted by GSR 422(E), w.e.f. 19-5-1993***
2. ***Inserted by GSR 931 w.e.f. 27-10-1989***

13. Prohibition and restriction on the handling of hazardous substances in different areas.

(1) The Central Government may take into consideration the following factors while prohibiting or restricting the handling of hazardous substances in different areas: -

(i) the hazardous nature of the substance (either in qualitative or quantitative terms) as far as may be in terms of its damage causing potential to the environment, human beings, other living creatures, plants and property;

(ii) the substances that may be or are likely to be or readily available substitutes for the substances proposed to be prohibited or restricted;

(iii) the indigenous availability of the substitute, or the state of technology available in the country for developing a safe substitute;

(iv) the gestation period that may be necessary for gradual introduction of a new substitute with a view to bringing about a total prohibition of the hazardous substance in question; and

(v) any other factor as may be considered by the Central Government to be relevant to the protection of environment.

(2) While prohibiting or restricting the handling of hazardous substances in an area including their imports and exports the Central Government shall follow the procedure hereinafter laid down:–

(i) Whenever it appears to the Central Government that it is expedient to impose prohibition or restriction on the handling of hazardous substances in an area, it may, by notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

(ii) Every notification under clause (i) shall give a brief description of the hazardous substances and the geographical region or the area to which such notification pertains and also specify the reasons for the imposition of prohibition or restriction on the handling of such hazardous substances in that region or area.

(iii) Any person interested in filing an objection against the imposition of prohibition or restriction on the handling of hazardous substances as notified under clause (i) may do so in writing to the Central Government within thirty days from the date of publication of the notification in the Official Gazette.

(iv) The Central Government shall with a period of sixty days from the date of publication of the notification in the Official Gazette consider all the objections received against such notification and may impose prohibition or restrictions on the handling of hazardous substances in a region or an area.]

[14. Submission of environmental 2[statement]

Every person carrying on an industry, operation or process requiring consent under section 25 of the Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974) or under section 21 of the Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981) or both or authorization under

the Hazardous Wastes (Management and Handling) Rules, 1989 issued under the Environment (Protection) Act, 1986 (29 of 1986) shall submit an environmental [2][statement] for the financial year ending on the 31st March in Form V to the concerned State Pollution Control Board on or before the [3][thirtieth day of September] every year, beginning 1993.]

1. Inserted by GSR 329(E), w.e.f. 13-3-1992.
2. Substituted for "audit report" by GSR 386 (E), w.e.f. 28-4-1993.
3. Substituted for "15th day of May" by GSR 386(E), w.e.f. 28-4-1993.

2 COMMERCIAL LAWS

SALE OF GOODS ACT

DEFINITION

Introduction

The law relating to sale or purchases goods was dealt with by the Indian Contract Act, 1872, prior to 1930. During the year 1930, Sections 76 to 123 of the Contract Act were repealed. A separate Act viz., Sale of Goods Act, 1930 was passed. The Sale of Goods Act, 1930 lays down the special provisions governing the contract of sales of goods. The provisions of the Contract Act are also applicable to the contracts for the sale of goods unless they are inconsistent with the express provisions of Sale of Goods Act.

Applicability

This Act extends to whole of India, except Jammu and Kashmir.

Effective date

This Act came into force from 01.07.1930.

IMPORTANT DEFINITIONS

Goods

Section 2(7) defines the term 'goods' as every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Future Good

Section 2(6) defines the phrase 'future good' as goods to be manufactured or produced or acquired by the seller after making of the contract of sale;

Document of title to goods

Section 2(4) defines the phrase 'document of tile to goods' as including bill of lading dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, multimodal transport document, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;

Insolvent

Section 2 (8) provides that a person is said to be "insolvent" who has ceased to pay his debts in the

ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not;

Mercantile agent

Section 2(9) defines the phrase 'mercantile agent' as a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods;

Specific goods

Section 2(14) defines the phrase 'specific goods' as goods identified and agreed upon at the time a contract of sale is made;

CONTRACT OF SALE

As per section 4(1) "**A** contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price."

Essentials of a Contract of Sale

The following are thus the essentials of a contract of sale of goods:

(1) **Bilateral contract**: It is a bilateral contract because the property in goods has to pass from one party to another. A person cannot buy the goods himself.

(2) **Transfer of property**: The object of a contract of sale must be the transfer of property (meaning ownership) in goods from one person to another.

(3) **Goods**: The subject matter must be some goods.

(4) **Price** or money consideration: The goods must be sold for some price, where the goods are exchanged for goods it is barter, not sale.

(5) All essential elements of a valid contract must be present in a contract of sale.

Agreement to sell

Where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Contract of sale how made

Section 5 provides that a contract of sale is made by-

- an offer to buy or sell goods for a price; and
- the acceptance of such offer.

the contract may provide for the immediate delivery of the goods or immediate payment of the price of both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

A contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Subject matter of contract

The subject matter of the contract –

- existing or future goods;
- goods perishing before making contract;

- goods perishing before sale but after agreement to sell

Existing or future goods

Section 6 provides that-

- The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.
- There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
- Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods perishing before making contract

Section 7 provides that where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before sale but after agreement to sell

Section 8 provides that where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Ascertainment of price

Section 9(1) provides that the price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

Section 9(2) provides that where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to sell at valuation

Section 10(1) provides that where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided. If the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price there for.

Section 10(2) provides that where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

Stipulations to time

Section 11 provides that unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Difference between contract of sale and agreement to sell.

Basis	Contract of sale	Agreement to sell
Transfer of property	The property of the goods passes from the buyer to the seller.	The transfer of property takes place at a future time or subject to certain conditions to be fulfilled.
Type of contract	It is an executed contract	It is an executory contract

Type of goods	Sales takes place only for existing and specific goods.	Future and contingent goods.
Risk of loss	If the goods are destroyed, the loss falls on the buyer despite the goods are in the possession of the seller.	If the goods are destroyed, the loss falls on the seller despite the goods are in the possession of the buyer
Breach of contract	The seller can sue the buyer for price and for damages in case of breach by the buyer	The seller can sue for damages only in case of breach by the buyer
General and particular property	It gives buyer to enjoy the goods as against the world at large including the seller	It gives a right to the buyer against the seller to sue for damages
Insolvency of the buyer	In the absence of lien over the goods the seller is to return the goods to the Official receiver or assignee. He is entitled to get the dividend declared by the Official receiver which will be at the reduced rate.	The seller is not bound to part with the goods until the price is paid to him.
Insolvency of the seller	The buyer, becoming the owner, is entitled to recover the same from the Official receiver or assignee	The buyer cannot claim the goods but the dividend declared by the Official receiver or assignee.

TRANSFER OF OWNERSHIP

Transfer of Ownership

The Sections 18 to 25 of the Sale of Goods Act, determine when the property passes from the seller to the buyer.

Rules for Ascertaining Passing of Property:

The provisions are discussed hereunder:

(A) Goods must be ascertained (section18)

As per section 18 in a contract for sale of unascertained goods, the property in the goods does not pass to the buyer unless and until the goods are ascertained.

(B) Intention of the parties for such transfer (section 19)

As per section 19(2), in a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case.

When intention of the parties cannot be ascertained, rules contained in section 20-24 are required to be applied for ascertaining the time of transfer of property which is discussed hereunder:

(i) Specific goods (Secs 20 to 22)

(a) Specific goods in a deliverable state (section 20)

In an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. (Sec 20). Goods are said to be in deliverable state when they are in such a state that the buyer would under the contract is bound to take delivery thereof.

(b) Specific goods to be put into a deliverable state (Sec. 21)

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof (sec 21).

(c) Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price (section 22)

If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. (sec 22).

(ii) Unascertained goods (Sec 23)

(a) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(b) Delivery to carrier: Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have appropriated the goods for the purpose of the contract.

(iii) Goods on approval or 'on sale or return'

In order to push up the sales generally there is a practice of sending goods to the customer with the clear cut understanding that he has option to approve or return the goods within a given period. This type of sales is known as "approval or sale or return" In such cases the transaction does not culminate into sale until the goods are approved by the customer and the property in goods still remains with the seller.

When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller

(b) When he does any other act adopting the transaction.

(c) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Reservation of Right of Disposal (Sec 25)

Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

The seller is deemed to have reserved the right of disposal:

(1) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of landing or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

(2) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of

exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance to payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

Effect of Destruction of Goods:

As per section 26 of the Act, the goods remains at the seller's risk until the property therein is transferred to the buyer, but when the property in goods is transferred to the buyer the goods are at the risk of the buyer whether delivery of the goods has been made or not. Thus risk prima facie passes with property unless otherwise is agreed by the parties. In other word the parties may in the contract have different stipulation as to time of passing of risk irrespective of what is provided in section 26 of the Act.

Quite often it may happen without knowledge of the seller the goods have perished or so damaged as not to answer the description of the goods contracted to be sold, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before making of contract **(Sec 7)** – Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before sale but after agreement to sell **(Sec 8)** – Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Sec (7 & 8) is applicable only in case of specific goods and not unascertained/generic goods.

Risk Prima Facie Passes with Property: Exceptions

The rule regarding risk passes with the property enshrined in section 26 is subject to the following exceptions:

(a) This rule of 26 will apply only if there is no agreement to the contrary. It is permissible for the parties to provide in the agreement that although the property does not pass, the risk passes and they may fix the point of time when it is to pass.

(b) Where delivery has been delayed through the fault of either party the buyer or the seller, the goods are at the risk of the party at fault as regards any loss which might not have been occurred but for such loss. The goods are at the risk of the party who is at fault in delay of delivery.

(c) If there is a custom in that particular trade that the risk does not pass with property, in such a case the risk will pass as per the custom.

(d) Risk and property may be separated by agreement between the parties. Section 40 of the Act also provides that where the seller agrees to deliver the goods at his own risk at a distant place from where they are, the buyer shall unless otherwise agreed, not take any risk of deterioration in the goods incidental to the transit. This will be discussed subsequently in the paragraph dealing with delivery of goods.

Transfer of Title by Non-Owners of Goods:

As per section 27 of the Sale of Goods Act where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.

A buyer cannot get good title to the goods unless he purchased the goods from a person who is the owner thereof and sell them under the authority or with the consent of real owner.

"*Nemo dat qui non habet*" means that no one can give what he himself does not have. It means a non owner cannot make valid transfer of property in goods. If the title of the seller is defective, the buyer's title will also be subject to same defect. If the seller has no title, the buyer does not acquire any title although he might have acted honestly and might have acquired the goods after due payment. This rule is to protect the real owner of the goods. Though this doctrine seeks to protect the interest of real owners, but in the interest of the trade and commerce there must be some safeguard available to a person who acquired such goods in good faith for value.

Accordingly the Act provides the following **exceptions** to this doctrine which seeks to protect the interest of *bona fide* buyers:

1. **Sale by a mercantile agent:** If a mercantile agent is authorized by the owner of the goods sell on his behalf, then such sale shall be valid. In such cases, the buyer can acquire a good title of the goods. This exception will be implemented subject to fulfilment of the following conditions:-
   - he person must be in possession of goods or documents of title to the goods in his capacity as a mercantile agent and with the consent of his owner
   - The person must sell the goods while acting in the ordinary course of business.
   - The buyer must act in good faith without having any notice, at the time of contract that the mercantile agent has no authority to sell the goods.
2. **Transfer of title by Estoppels**: This exception is based on the principle of personal estoppels. Sometime, the real owner may lead the buyers by virtue of his conduct or words or by act to believe that the seller is the owner of the goods or has the authority to sell them. In such case, he may not thereafter deny the seller's authority to sell.
3. **Sale by a joint owner**: It there are several joint owners of goods, one of them if has sole possession of the goods by permission of the co-owners, then the property in goods is transferred to any person who buys them from such joint owner. In order to apply this exception following conditions must be fulfilled.
   - One of the several owners must be in sole possession of the goods.
   - The joint owner must have permission of co-owners.
   - The buyer must purchase goods in good faith.
   - The buyer should not have notice regarding the matter that the seller has no authority to sell.
4. **Sale by person in possession under voidable contract**: - According to the Section 29 a person in possession of goods under a voidable contract which is not rescinded, can transfer a good title to the buyer. The buyer should purchase the goods in good faith and without notice of the seller's defective title.
5. **Sale by seller in possession after sale**: - Under Section 30 (1) it is laid down that where a person has sold goods but he continues in possession of goods or of the documents of title to the goods, he may sell them to a third person and if such person obtains delivery thereof in good faith and without notice of the previous sale, the person can get a good title to them. In order to apply this exception, the seller must be in possession after sale of goods and there must be delivery or transfer of the goods or documents of title by the seller.
6. **Sale by buyer in possession after sale:-** Under Section 30 (2), it is laid down that where a buyer having bought or having agreed to buy goods, obtain with the consent of the seller the possession of the goods or documents of title to the goods can and resells the goods to a *bona fide* transfer. If at the time of this sale, buyer was not in possession, then this exception will not apply.
7. **Sale by an unpaid seller:-** If the unpaid seller has exercised right of lien or stoppage in transit, resells the goods, then the buyer acquires a good title as against the original buyer, even though the resale is not justified in the circumstances.

8. **Exception under other Acts:-** According to some Acts, a person although he is not the owner of the goods may sell the goods and pass a better title than he himself has. As for example-
   (i) Under Section 169 of the Contract Act, a finder of the goods has the right to sell.
   (ii) Under Section 176 of the Contract Act, a pawnee of goods has the right to sell the goods pawned subject to satisfying some conditions.
   (iii) In certain cases, a special right of sale is given to officers of court, liquidators of the companies, receivers of insolvents estate, custom officers for duties remaining unpaid etc.
   (iv) A person who takes a negotiable instrument in good faith and for value becomes the true owner even if he takes it from a thief or finder.

2.3 CONDITIONS AND WARRANTIES

Section 12(1) provides that a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

Condition [Section 12(2)]

A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to right to treat the contract as repudiated.

A condition in a contract of sale of goods is of fundamental nature for breach of which the buyer can repudiate the contract.

Warranty [Section 12(3)]

A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

Differences between Condition and Warranty

S.No.	Condition	Warranty
1.	A condition is a stipulation which is essential to the main purpose of the contract.	A Warranty is a stipulation which is collateral to the main purpose of the contract.
2.	The aggrieved party can repudiate the contract of sale in case there is a breach of a condition	The aggrieved party can claim damages only in case of breach of a warranty.
3.	A breach of condition may be treated as a breach of a warranty. This would happen where the aggrieved party is contended with damages only	A breach of a warranty, con not be treated as a breach of a condition.

When condition to be treated as warranty?

Section13 provides that where a contract of sale is-

- subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.;
- not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Remedies Available to the Buyer for Breach of Conditions

(a) Affected party may claim refund of price and reject the goods;

(b) Elect to treat breach of condition as breach of warranty and claim damages or compensation;

(c) When the affected party treat breach of condition as breach of warranty he cannot repudiate the contract but claim damages only;

(d) No remedy is available when the fulfilment of condition is excused by law by means of impossibility or otherwise 13(3).

Consequences of Breach of Warranty:

(a) The breach of warranty gives right to a claim for damages but not to reject the goods and treat the contract as repudiated.

(b) Buyer may sue for damages.

(c) No remedy is available if the fulfilment of warranty becomes impossible by law.

Implied conditions are of the following types:

(i) Condition as to title [Sec 14(a)]

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(a) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

(b) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(c) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

(ii) Sale by description (Sec 15)

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. Goods are sold be description when they are described in the contract such as MP Atta, Dehradun Rice, Kasmiri Rajama, Amul butter and the buyer contracted relying on such description of goods by the seller.

(iii) Condition as to quality or fitness (Sec 16)

As per Sec 16 of the Sale of Goods Act, the buyer is supposed to satisfy himself about the quality of goods he purchased and is also charged with the responsibility of seeing that the goods suit the purpose for which they were purchased by him. Later on if the goods does not turn out to be as per his purpose, the seller cannot be asked to compensate him. This is based on the famous doctrine of CAVEAT EMPTOR which means 'let the buyer beware'. However, there are some exceptions to this which are as under:

(a) Where the buyer, expressly or by implication, makes it known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably be fit for such purpose. However, in the case of a contract for the sale of a specified article under its patent or other trade name, there are no implied conditions as to its fitness for any particular purpose.

(b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods

shall be of merchantable quality. However, if the buyer has examined the goods, there shall be no implied conditions as regards defects which such examination ought to have revealed.

In order to apply the implied condition as to merchantability the following requirements must be satisfied.

(i) the seller should be dealer in goods of that description;

(ii) the buyer must have not opportunity to examine the goods or there must be some latent defect in the goods which would not be apparent on reasonable examination of the same.

It may be noted the term merchantability has not been defined in the Act. As per English Sale of Goods Act, goods of any kind are merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly brought as it is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances.

(c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. In some cases the purpose for which the goods are required may be ascertained from the acts and conducts of the parties to the sale or from the nature of the description of the article purchased. For example if a hot water bottle is purchased, the purpose for which it is purchased is implied in the thing itself. In such a case the buyer need not tell the seller the purpose for which the bottle is purchased. Similarly if a thermometer is purchased in common usage, the purpose of thermometer is well known, the buyer need not tell the seller.

(d) An express warranty or conditions does not negative a warranty or condition implied by this Act unless inconsistent therewith.

(iv) Sale by sample (Sec 17)

A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

In the case of a contract for sale by sample there is an implied condition -

- That the bulk shall correspond with the sample in quality.
- That they shall have a reasonable opportunity of comparing the bulk with the sample.
- That the goods shall be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination of the goods.

(v) In case of eatables and provisions, in addition to the implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

Implied warranties are of following types:

The implied warranties are as under:

(i) Warranty of quiet possession [Sec.14 (b)]

If the buyer in any way is disturbed from enjoying the quiet possession of goods purchased because of seller's defective title, the buyer can claim damages from seller. It is a warranty that neither the seller shall not nor shall anybody claiming under a superior title or under his authority interfere with the quite enjoyment of the superior title or under his authority interfere with the quite enjoyment of buyer.

(ii) Warranty of freedom from encumbrances [Sec.14(c)]

The buyer is also entitled to additional warranty that the goods are free from any charge or right of any third party, not declared or known to the buyer. It is presumed that the goods are free of third parties charges if it is otherwise the buyer is entitled to claim damages from the seller.

(iii) Warranty as to quality or fitness by usage of trade:

An implied warranty as to quality or fitness for a particular purpose may be annexed by usage of trade.

(iv) Warranty to disclose dangerous nature of goods:

Where a person sell goods knowing that the goods are inherently dangerous or they are likely to be dangerous to the buyer and the buyer is ignorant of the danger he must be warn the buyer of the probable danger, otherwise he will be liable in damages.

DOCTRINE OF CAVEAT EMPTOR

The term "caveat emptor" is a Latin word which means "let the buyer beware". This principle states that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires. If he buys goods for a particular purpose, he must satisfy himself that they are fit for that purpose. The doctrine of caveat emptor is embodied in Section 16 of the Act which states that "subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale". In simple words, it is not the seller's duty to give to the buyer the goods which are fit for a suitable purpose of the buyer. If he makes a wrong selection, he cannot blame the seller if the goods turn out to be defective or do not serve his purpose. The principle was applied in the case of Ward v. Hobbs, (1878) 4 A.C. 13, where certain pigs were sold by auction and no warranty was given by seller in respect of any fault or error of description. The buyer paid the price for healthy pigs. But they were ill and all but one died of typhoid fever. They also infected some of the buyer's own pigs. It was held that there was no implied condition or warranty that the pigs were of good health. It was the buyer's duty to satisfy himself regarding the health of the pigs.

Exceptions: Section 16 lays down the following exceptions to the doctrine of Caveat Emptor:

(1) Where the seller makes a false representation and the buyer relies on it.

(2) When the seller actively conceals a defect in the goods which is not visible on a reasonable examination of the same.

(3) When the buyer, relying upon the skill and judgement of the seller, has expressly or impliedly communicated to him the purpose for which the goods are required.

(4) Where goods are bought by description from a seller who deals in goods of that description.

2.4 PERFORMANCE OF CONTRACT OF SALE

Chapter IV of the Act describes the procedure for performance of the contract of sales. Section 31 provides that it is the duty of the seller to deliver the goods and the buyer to accept and pay for them, in accordance with the terms of the contract. The performance of contract involves the following-

- Payment and delivery are concurrent conditions;
- Delivery;
- Buyer's right of examining the goods;
- Acceptance of goods;
- Buyer's liability

Payment and delivery are concurrent conditions

Section 32 provides that the delivery of the goods and payment of the price are concurrent conditions unless otherwise agreed.

- The seller shall be ready and willing to give the possession of the goods to the buyer in exchange for the price.
- The buyer shall be ready and willing to pay the price in exchange of the possession of the goods.

Delivery

Section 33 provides that the delivery of goods sold may be made-

- by doing anything which the parties agree; or
- which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf;

Section 35 provides that the seller of goods is not bound to deliver them until the buyer applies for the delivery apart from any express contract.

Part delivery

Section 34 deals with the effect of part delivery. A delivery of part of goods, in progress of the delivery of the whole, has the same effect as a delivery of the whole for the purpose of passing the property in such goods. If a delivery of part of the goods is done with an intention of severing it from the whole, then it does not operate as a delivery to the reminder.

Rules as to delivery

Section 36 provides rules for the delivery as detailed below:

- Apart from any contract goods sold are to be delivered
  - at the place at which they are at the time of the sale; and
  - goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell; or
  - if not then in existence, at the place at which they are manufactured or produced;
- Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time;
- Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless until such third person acknowledges to the buyer that he holds the goods on his behalf; This shall not affect the operation of the issue or transfer of any document of title to the goods;
- Demand or tender of delivery may be treated as ineffectual unless made at reasonable hour;
- Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

Delivery of wrong quantity

The transfer of goods, in a sale, is expected to be delivered as agreed to in the contract. If there is variation in the quantity of goods delivered the following action may be taken by the buyer-

- Section 37(1) provides that where the sellers delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. If the buyer accepts the goods so delivered he shall pay for them at the contract rate;
- Section 37(2) provides that where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and the reject the rest. Or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate;
- Section 37(3) provides that where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the reject or may reject the whole;
- Section 37(4) provides that the provisions of this section are subject to any usage of trade, special

agreement or course of dealing between the parties.

Instalment deliveries

Section 38(1) provides that the buyer of the goods is not bound to accept the delivery of goods by installments unless otherwise agreed to between both the parties.

Section 38(2) provides that where there is a contract for the sale of goods to be delivered by stated installments which are to be separately paid for and-

- the seller makes no delivery or defective delivery in respect of one or more installments; or
- the buyer neglects or refuses to take delivery of or pay for one or more installments

it is a question in each case, depending on the terms of the contract and circumstances of the case as to whether the breach of contract is-

- a repudiation of the whole contract; or
- whether it is severable breach giving rise to a claim for compensation

but not to treat the whole contract as repudiated.

Delivery to carrier or wharfinger

Section 39(1) provides that if the seller is authorized or required to send the goods to the buyer, through a carrier whether it is named by the buyer or not or delivery of the goods to a wharfinger for safe custody, the delivery of goods to such a carrier or wharfinger shall be deemed to be a delivery of the goods to the buyer.

Section 39(2) provides that the seller shall make contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and other circumstances of the case. If the seller omits so to do and the goods are lost or damaged in the course of transit or whilst in the custody of the wharfinger, the buyer –

- may decline to the treat the delivery to the carrier or wharfinger as a delivery to himself; or
- may hold the seller responsible for damages.

Section 39(3) provides that where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure the seller shall give such notice to the buyer as may enable him to insure them during their sea transit. If the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

Delivery of goods at a distant place

Section 40 provides that where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Buyer's right of examining the goods

According to Section 41, the buyer is having right to examine the goods, which have not been examined by him previously before acceptance. The examination of the goods by the buyer is for the purpose of ascertaining whether they are in conformity with the contract. The seller is also bound to afford an opportunity to the buyer for examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Acceptance

Section 42 provides that the buyer is deemed to have accepted the goods-

- when he intimates to the seller that he has accepted them; or
- when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller; or

- when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Return of rejected goods

Section 43 provides that where goods are delivered to the buyer and he refuses to accept them, the buyer is not bound to return them to the seller. It is sufficient if he intimates to the seller that he refuses to accept them.

Liability of the buyer

Section 44 provides that where the seller is already and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time take delivery of the goods he is liable to the seller any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. The rights of the seller shall not be affected by this section where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

2.5 RIGHTS OF AN UNPAID VENDOR

Unpaid seller

The seller of the goods is deemed to be 'unpaid seller' within the meaning of this Act-

- when the whole of the price has not been paid or tendered;
- when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instruments or otherwise;

Section 45(2) defines the term 'seller' as including any person who is in the position of a seller as an agent of the seller to whom the bill of lading has been endorsed or a consignor or agent who has himself paid, is directly responsible for the price.

Rights of an Unpaid Seller against the Goods

An unpaid seller's right against the goods are:

(a) A lien or right of retention

(b) The right of stoppage in transit.

(c) The right of resale.

(d) The right to withhold delivery

(a) Right of Lien (Sections 47-49 and 54) An unpaid seller in possession of goods sold, may exercise his lien on the goods, i.e., keep the goods in his possession and refuse to deliver them to the buyer until the fulfilment or tender of the price in cases where:

(i) the goods have been sold without stipulation as to credit; or

(ii) the goods have been sold on credit, but the term of credit has expired; or

(iii) the buyer becomes insolvent.

The lien depends on physical possession. The seller's lien is possessory lien, so that it can be exercised only so long as the seller is in possession of the goods. It can only be exercised for the non-payment of the price and not for any other charges.

A lien is lost – (i) When the seller delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;

(ii) When the buyer or his agent lawfully obtains possession of the goods;

(iii) By waiver of his lien by the unpaid seller

(b) Stoppage in transit (Sections 50-52) The right of stoppage in transit is a right of stopping the

goods while they are in transit, resuming possession of them and retaining possession until payment of the price.

The right to stop goods is available to an unpaid seller

(i) when the buyer becomes insolvent; and

(ii) the goods are in transit.

The buyer is insolvent if he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due. It is not necessary that he has actually been declared insolvent by the court.

The goods are in transit from the time they are delivered to a carrier or other bailee like a wharfinger or warehouse keeper for the purpose of transmission to the buyer and until the buyer takes delivery of them.

The transit comes to an end in the following cases:

(i) If the buyer obtains delivery before the arrival of the goods at their destination;

(ii) If, after the arrival of the goods at their destination, the carrier acknowledges to the buyer that he holds the goods on his behalf, even if further destination of the goods is indicated by the buyer;

(iii) If the carrier wrongfully refuses to deliver the goods to the buyer.

If the goods are rejected by the buyer and the carrier or other bailee holds them, the transit will be deemed to continue even if the seller has refused to receive them back.

The right to stop in transit may be exercised by the unpaid seller either by taking actual possession of the goods or by giving notice of the seller's claim to the carrier or other person having control of the goods. On notice being given to the carrier, he must redeliver the goods to the seller who must pay the expenses of the redelivery.

The seller's right of lien or stoppage in transit is not affected by any sale on the part of the buyer unless the seller has assented to it. A transfer, however, of the bill of lading or other document of seller to a bona fide purchaser for value is valid against the seller's right.

(c) Right of re-sale (Section 54):

The unpaid seller may re-sell:

(i) where the goods are perishable;

(ii) where the right is expressly reserved in the contract;

(iii) where in exercise of right of lien or stoppage in transit, the seller gives notice to the buyer of his intention to re-sell, and the buyer, does not pay or tender the price within a reasonable time.

If on a re-sale, there is a deficiency between the price due and amount realised, he is entitled to recover it from the buyer. If there is a surplus, he can keep it. He will not have these rights if he has not given any notice and he will have to pay the buyer profit, if any, on the resale.

(d) Rights to withhold Delivery:

If the property in the goods has passed, the unpaid seller has right as described above. If, however, the property has not passed, the unpaid seller has a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit.

Rights of an unpaid seller against the buyer

An unpaid seller in addition to his rights against the goods has the following rights against the buyer personally.

1. Suit for price: [Sec. 55]

Where the property in goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay the price, the seller can sue the buyer for price.

2. Suit for damages for non-acceptance: [Sec. 56]

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller can sue him for damages for non-acceptance of the goods.

3. Suit for repudiation:

Where the buyer repudiates the contract before the date of delivery, the seller may wait till the date of delivery or may treat the contract as cancelled and sue for damages for breach.

4. Suit for interest: [Sec. 61]

Where there is specific agreement between the seller and the buyer regarding interest on the price of goods, the seller may claim it from the date when payment becomes due. If there is no specific agreement, the interest is payable from the date notified by the seller to the buyer.

Buyer's Remedies against Seller for Breach of Contract

A buyer also has certain remedies against the seller who commits a breach. These are:

1. Suit for Damages for Non-Delivery- When the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. This is in addition to the buyer's right to recover the price, if already paid, in case of non-delivery.

2. Suit for price- Where the buyer has paid the price and the goods are not delivered to him, he can recover the amount paid.

3. Suit for specific performance- When the goods are specific or ascertained, a buyer may sue the seller for specific performance of the contract and compel him to deliver the same goods. The court orders for specific performance only when the goods are specific or ascertained and an order for damages would not be an adequate remedy. Specific performance is generally allowed where the goods are of special significance or value e.g. a rare paining, a unique piece of jewellery, etc

4. Suit for Breach of Warranty- Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat the breach of condition as breach of warranty; the buyer cannot reject the goods. The buyer may,

(a) set up the breach of warranty in extinction or diminution of the price payable by him, or

(b) sue the seller for damages for breach of warranty.

5. Repudiation of contract before the due date

Section 60 provides that where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting or wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

6. Suit for interest

The buyer may recover such interest or special damages, as may be recoverable bylaw. He may also recover the money paid where the consideration for the payment of it has failed.

In the absence of a contract to the contrary, the court may award interest, to the buyer, in a suit by him for the refund of the price in a case of a breach on the part of the seller, at such rate as it thinks fit on the amount of the price from the date on which the payment was made.

2.6 AUCTION SALE

Section 64 provides that in the case of a sale by auction-

- where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;
- the sale is complete when the auctioneer announces its completion by the fall of the hammer

or in other customary manner; and until such announcement is made, any bidder may retract its bid;

- a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bit at the auction;
- where the sale is not notified to the subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer;
- the sale may be notified to be subject to a reserved or set up price;
- if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

Section 64 does not deal with the question of passing of the property at auction sale but merely deals with completion of the contract of sale which takes place at the fall of the hammer or at the announcement of the close of the sale in other customary manner by the auctioneer. In other words, all that happens at the fall of the hammer or at the announcement of the closure of the sale in other customary manner is that a contract of sale comes into existence and parties get into the relationship of a promisor and a promisee in an executory contract.

DEFINITION AND FEATURES OF NEGOTIABLE INSTRUMENTS

Introduction

The law relating to negotiable instruments is contained in the negotiable Instruments Act, 1981. It is an act to define and amend the law relating to promissory note, bills of exchange and cheques. The purpose of the Act is to present an orderly and authoritative statement of the leading rules of law relating to the negotiable instruments.

Applicability of the Act

This Act is applicable to the whole of India.

Negotiable Instrument

Section 13 of the Act defines the terms 'negotiable instrument' as a promissory note, bill of exchange or either payable either to order or to bearer. A promissory note, bill of exchange or cheque-

- is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable;
- is payable to the bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank;
- either originally or by endorsement, is expressed to be payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

Section 13 shows that the Act is confined to three specific types of instruments most in common use, namely, promissory notes, bills of exchange and cheques. The Contract Act is a general statute dealing with contracts. The Negotiable instruments Act is a statute dealing with a particular form of the contract. The law laid down for special cases must always overrule the provisions of general character as held in 'Kwong Hip Lone Saw Mill Co. V. C.A.M.A.L. Firms' – AIR 1933 Rang.131. The following are not the negotiable instruments-

- share certificate passing from hand to hand with blank transfers – Hazarimaul V. Statis Chandra' – ILR 46 Cal.331;
- Deposit receipts – Anantharam V. O.L., of T.N.Q. Bank' – 1939 Mad W.N. 1096;
- Mate's receipt – Nacheppa Chetty V. Irravaddy Flotila & Co., - ILR 41 Cal. 670;
- Bill of lading – United Bank of India V. N.S. Bank – AIR 1959 Cal. 328;
- Promissory note - Khirodnath Gountia V. Arjun Panda' – (1971) 2 Cut. W.R. 223
- A benefit under a letter of credit – Joseph Pyke & Son V. Kedarnath- AIR 1962 Cal.326.

Essential Features of a Negotiable Instrument:

1. It must be in writing.
2. It should be signed by the maker or drawer.
3. There must be a promise or order to pay.
4. The promise or order must be unconditional.
5. It must call for payment in money and money only.
6. It should call for payment of a certain sum.
7. The property in the instrument may be passed in two ways:
   (a) by mere delivery; and

(b) by indorsement and delivery.

8. The consideration is also presumed to have been passed

Promissory Note

Section 4 of the Act defines the term 'promissory note' as an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

Example - 1. I promise to B or order ₹ 50000/-;

2. I acknowledge myself to be indebted to B in ₹1 lakh to be paid on demand, for value received.

The instruments in the above two examples are promissory notes.

3. I promise to pay B ₹20000/- seven days after my marriage with Helen.

4. I promise to pay ₹ 50000/- on D's death, provided D leaves me enough to pay that sum.

The instruments in the above two examples do not amount to promissory notes.

The High Court in 'Santsingh v. Madandas Panika'AIR 1976 MP 144 held that an instrument is a promissory note if there are present the following elements-

- There should be an unconditional undertaking to pay;
- The sum should be a sum of money and should be certain;
- The payment should be the order of a person who is certain, or to the bear of the instrument;
- The maker should sign it.

The High Court, Andhra Pradesh in 'Bahadurrinisa V. Vasudev' AIR 1967 AP 123 categorized the promissory note into three types-

- A promise to pay a certain sum of money to a certain person;
- A promise to pay a certain sum of money to the order of a certain person;
- A promise to pay the bearer.

Bill of exchange

Section 5 defines the expression 'bill of exchange' as an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

A promise or order to pay is not 'conditional' within the meaning of this section and Section 4, by reason of the time for payment of the amount or any installment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be 'certain' within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an installment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a 'certain person' within the meaning of this section and section 4, although he is mis-named or designated by description only.

The Calcutta High Court in 'Hundi V. Sinha V. Bidhy Bhasan' AIR 1955 Cal. 562 narrated the essential character of a bill of exchange which is that it contains an order to accept or to pay and that the acceptor should accept it; in the absence of such a direction to pay, the document will not be a bill of exchange or a hundi.

The following are the bills of exchange-

- A banker's draft – Birbhum Central Co-op bank V. Pioneer Bank Limited – AIR 1956 Cal. 615;
- A demand draft even if it be drawn upon another office of the same bank – S.N. Shukla V. Punjab National Bank Limited' – AIR 1960 All. 238;
- An order issued by a District Board Engineer on Government Treasury for payent to or order of a certain person – Rangaswami V. Sankaralingam – ILR 43 Mad 816.

Cheque

The term 'cheque' is defined under Section 6 of the Act. It is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

For the purposes of this section, the terms 'a cheque in the electronic form', 'truncated cheque' are defined which has been substituted by the Negotiable Instruments (Amendment) Act, 2015, with effect from 26.12.2015.

'A cheque in the electronic form' is a cheque drawn in electronic form by using any computer resource and signed in a secure system with digital signature (with or without biometric signature) and asymmetric crypto system or with electronic signature, as the case may be.

'A truncated cheque' is a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

The expression 'clearing house' is the clearing house managed by the RBI or a clearing house recognized as such by RBI.

Distinction between Promissory Note and Bill of Exchange

Promissory Note		Bill of Exchange	
1.	It is defined in Sec. 4 of NI Act, 1881.	1.	It is defined in Sec. 5 of the NI Act, 1881.
2.	There are two parties: • Maker. • Payee If it is given a guarantee, then there will be a third person, who is called as "Guarantor" or "Surety".	2.	There are three parties: • Drawer. • Drawee. • Payee.
3.	It contains a **Promise** to pay.	3.	It contains an **order** to pay.
4.	**No conditions** shall be made in a promissory note.	4.	A bill may be **accepted conditionally**.
5.	The liability of a maker of the promissory note is primary and absolute.	5.	The liability of the drawee of a bill of exchange is secondary and conditional.

Distinction between Promissory Note and Cheque

Promissory Note		Cheque	
1.	It is defined in Sec. 4 of NI Act, 1881.	1.	It is defined in Sec. 6 of the NI Act, 1881.
2.	There are two parties: • Maker. • Payee If it is given a guarantee, then there will be a third person, who is called as "Guarantor" or "Surety".	2.	There are three parties: • Drawer. • Drawee. • Payee.
3.	Promissory note contains a promise to pay the sum with interest or without interest at a later date.	3.	A cheque is payable immediately on demand without any days of grace.
4.	Promissory note is not crossed.	4.	Cheque can be crossed.
5.	No protection is available to the payee of note.	5.	Statutory protection is given to the drawee banker. (Sec. 128)
6.	A promissory note cannot be self drawn.	6.	A cheque can be self drawn or bearer cheque.
7.	No criminal liability shall be imposed on the maker.	7.	Criminal Liability may be imposed on drawee for the dishonour of cheques in certain circumstances.
8.	Stamp is necessary.	8.	Stamp is not necessary.
9.	Limitation: 3 years	9.	Limitation: 6 months

Distinction between Bill of Exchange and Cheque

Bill of Exchange		Cheque	
1.	It is defined in Sec. 5 of NI Act, 1881.	1.	It is defined in Sec. 6 of the NI Act, 1881.
2.	There are three parties: • Drawer. • Drawee. • Payee.	2.	There are three parties: • Drawer. • Drawee. • Payee.
3.	Bills of exchange are not crossed.	3.	Cheques may be crossed.
4.	Generally three days of grace are given for the payment in case of a bill of exchange. However, this convenience is not allowed in case of bill of exchange payable on demand.	4.	Immediate payment is required in case of cheque. No grace days are allowed.
5.	Anybody including banker may be a drawee in case of bill of exchange.	5.	The drawee is always a baker.
6.	It must be accepted before the acceptor can be made liable upon it.	6.	It requires immediate payment. It does not require acceptance of the maker. Thus the question of acceptance does not arise in case of cheque.
7.	Where a Bill of Exchange is not paid and not honoured, a notice of dishonour should be sent to the drawer to charge him.	7.	Where a cheque is dishonoured, Notice of Dishonour is not strictly necessary. The banker can return the cheque with the memo "Refer to Drawer" which is a sufficient notice.

8.	Statutory protection is not available.	8.	Sec. 85 of the N.I Act, 1881 affords protection to bankers.
9.	Civil Liability in case of dishonour of bill of exchange.	9.	Criminal liability in case of dishonour of a cheque/bouncing of a cheque and is liable to be prosecuted under Sec. 138 of the N.I. Act, 1881.

PARTIES TO THE INSTRUMENTS

The transaction of the instrument requires at least two persons. One is the **drawer** and other is the **drawee.** The drawer of the instrument is the person who makes a bill of exchange or a cheque and the person thereby directed to pay is called the drawee. In 'Shivanth V. Bsihambar'- AIR 1935 Lah. 153 it was held that the definition of drawer is not exhaustive; the maker of the promissory note can also be called a drawer.

Drawer in case of need – When in the bill or in any endorsement thereof the name of any person is given in addition to the drawee to be resorted to in case of need, such a person is called a 'drawee in case of need'.

Acceptor – After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the acceptor.

Acceptor for honor- When a bill of exchange has been noted or protested for non acceptance or for better security and any person accepts it supra protest for honor of the drawer or any one of the endorsers, such person is called an 'acceptor for honor'.

Payee – The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the 'payee'.

Holder – Section 8 defines the term 'holder'. The holder of a promissory note or a bill of exchange or cheque is any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

In 'Anjaniaih V. Nagappa' – AIR 1967 AP 61 it was held that the term 'holder' as defined in Section 8 of the Act would not include a person, who, though in possession of the instrument, had no right to recover the amount due from the parties thereto, such as the finder of a lost instrument payable to bearer or a thief in possession of such an instrument, or even the payee himself, is he is prohibited by an order of court from receiving the amount due on the instrument. Where a plaintiff sued not as a holder in possession of the promissory note but claimed to recover the debt, on the basis of a succession certificate, he would be the only person entitled to recover the debt.

Holder in due course – Section 9 defines the term 'holder in due course. It means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or the endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

In 'Braja Kishore Dikshit V. Purna Chandra Panda' – AIR 1957 Ori. 153 the High Court held that the holder in due course under Section 9 has to satisfy the following three conditions-

- An endorsee becomes a holder in due course for consideration;
- He can become an endorsee before the amount mentioned in the promissory note became payable; and
- He should have no sufficient cause to believe that any defect existed in the title of the person from whom he was to derive his title.

As regard to the second condition the promissory note becomes payable either on demand or at maturity.

Difference between holder and holder-in-due course

Holder	Holder in due course
1. Holder is entitled in his own name to possess the instrument and the amount thereon from parties involved.	1. Holder in due course possesses the instrument for consideration before maturity and in good faith.
2. Title of the holder is subject to title of the transferor.	2. Holder in due course gets a better title than transferor.
3. Holder may receive the instrument without consideration.	3. Holder in due course always receives the instrument for consideration.
4. Holder does not get certain privileges available to the holder in due course.	4. Holder in due course always gets privileges not available to holder.

Payment in due course- Section 10 defines this expression as payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

Example:

Where a bank makes payment in accordance with the apparent tenor of the instrument in good faith and without negligence under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment, payment is said to be done in due course. Therefore it is said "A banker's duty in paying a cheque is discharged by payment in due course".

Instruments

There are various types of instruments mentioned in this Act as follows:

- **Inland instrument** – a promissory note, bill of exchange or cheque drawn or made in India and made payable in, or drawn upon any person resident in, India shall be deemed to be an inland instrument.
- **Foreign instrument** – a promissory note, bill of exchange or cheque not drawn, made or made payable, in India, shall be deemed to be a foreign instrument.
- **Ambiguous instrument** – where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election, treat it as either and the instrument shall be thenceforward treated accordingly.
- **Instruments payable on demand** – A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.
- **Inchoate stamped instruments** – Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments for the time being in force in India and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the mount intended by him to be paid there under.

Maturity (Sec 22-25)

Section 22 provides the date of the maturity of the instruments. The maturity of a promissory note or bill of exchange is the date at which falls due. If the promissory note or bill of exchange does not express to be payable on demand, at sight or on presentment, the maturity for such cases is the third day on which it is expressed to be payable.

In 'Hemadri V. Seshamma' – 1930 M.W.N. 1232 it was held that the term used in this section cannot apply to a promissory note payable on demand.

Calculation of maturity date

Section 23 provides for calculating maturity of bill or note payable so many months after date or sight. In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity-

- the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated; or
- presented for acceptance or sight; or
- noted for non acceptance; or
- or protested for non acceptance; or
- the event happens; or
- where the instrument is a bill of exchange made payable a stated number of months after sight and has been accepted for honor with the day on which it was so accepted.

If the month in which the period would terminate has no corresponding day, the period shall held to terminate on the last day of such month.

Example – 1. A negotiable instrument, dated 29th January, 2015, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February, 2015, i.e., 3rd March, 2015;

2. A negotiable instrument, dated 30th August, 2015 is made payable three months after date. The instrument is at maturity on 3rd December, 2015;

3. A promissory note or bill of exchange dated 31st August, 2015, is made payable three months after date. The instrument is at maturity on the 3rd December, 2015.

Section 24 provides for exclusion of days in calculating the maturity date. In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight or after a certain event is at maturity, the day of the date, or of presentment for acceptance or sight, or of protect for non acceptance, or on which the event happens shall be excluded.

If the maturity day is a public holiday then which will be the maturity date. Section 25 provides that when the day on which a promissory note or bill of exchange is maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day. The public holiday includes Sundays and any other day declared by the Central Government, by notification in the Official Gazette to be a public holiday.

Example – The maturity date is 14th April, 2016. That day was declared by the Central Government, as a public holiday on the eve of Dr. Ambedhkar's birthday. In this case the maturity date is 13th April, 2016.

CROSSING, ENDORSEMENT AND MATERIAL ALTERATION

CROSSING OF CHEQUES

Section 123 provides that where a cheque bears across its face an addition of the words 'and company' or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words 'not negotiable' that addition shall be deemed

a crossing, and the cheque shall be deemed to be crossed generally.

Section 124 provides that where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

Section 125 provides that where a cheque is not crossed, the holder may cross it generally or specially.

- Where a cheque is crossed generally, the holder may cross it specially;
- Where a cheque is crossed generally or specially, the holder may add the word 'not negotiable';
- Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

Payment of cheque

The payment may be made in respect of the following cases-

- payment of cheque crossed generally;
- payment of cheque crossed specially;
- payment of cheque crossed specially more than once;
- payment in due course of crossed cheque;
- payment of crossed cheque out of due course.

Section 126 provides that where a cheque is crossed generally, the banker, on whom it is drawn, shall not pay it otherwise than to a banker. Section 127 provides that where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collect, the banker on whom it is drawn shall refuse payment thereof. Section 128 provides that where the banker on whom a cross cheque is drawn has paid the same in due course, the banker paying the cheque, and (in such case cheque has come to the hands of the payee) the drawer thereof, shall respectively entitled to the same rights and be placed in the same position in all respects, as they would respectively be entitled to and placed in it if the amount of the cheque had been paid to and received by the true owner thereof.

Section 129 provides that any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Cheque bearing 'not negotiable'

Section 130 provides that a person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable', shall not have, and shall not be capable of giving, a better title to the cheque than which the person from whom he took it had.

Non liability of banker

Section 131 provides that a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title of the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

It shall be the duty of the banker who receives payment based on an electronic image of a truncated cheque held with him, to verify the prima facie genuineness of the cheque to be truncated and any fraud, forgery or tampering apparent on the face of the instrument that can be verified with due diligence and ordinary case.

ENDORSEMENT

Meaning of Endorsement: The term 'Endorsement' can also be pronunciated as 'Indorsement'. This term is said to have been derived from the Latin word 'indorsum', which means 'upon the back' (in = upon; dorsum = back).

The 'Indorsement' means signatures of the person which are generally made at the back of the instrument, for the purpose of transfer of rights to another person.

Section 15 of the Act provides that when the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negation on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as negotiable instrument he is said to indorse the same and is called the 'indorser'.

Therefore, endorsement (indorsement) means writing of a person's name (other than maker) on the face or back of an instrument or on a slip of paper attached thereto for the purpose of negotiation. The person signing the instrument is known as endorser and the person in whose favour it is endorsed is known as endorsee.

Essentials of a valid endorsement (endorsement)

(I) It must be on the instrument itself or on a separate slip of paper (called allonge) attached thereto.

(II) For the purpose of negotiation, it must be signed by the endorser.

(III) The instrument may contain in addition to the signature of the endorser, the name of the endorsee also. No particular form of words is necessary for endorsement.

(IV) Endorsement is complete when the instrument is delivered to the endorsee with the intention of passing the property in it to the endorsee. Delivery is to be made by the endorser himself or someone on behalf of him.

Who may endorse a bill

The first endorsement of an instrument can be made by the payee only, however, subsequent endorsement can be made by any person who becomes the holder of the instrument. As per section 15 endorsement can not be made by the maker or holder of an instrument as maker. Thus if a bill is drawn payable to the drawer's order the first signature of the drawer as a drawer is not an endorsement, but if he signs the bills second time for the purpose of negotiating it, the second signature would be an endorsement.

It may noted that as per section 51 every sole maker, drawer, payee or indorsee or all of several joint makers, drawers, payees or indorsees of a negotiable instrument may endorse and negotiate it.

TYPES OF ENDORSEMENT

The endorsement of a negotiable instrument can be (i) blank (ii) full (iii) restrictive endorsement or (iv) conditional endorsement

As per section 16(1), if the endorser signs his name only, the endorsement is said to be "**in blank**", and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the endorsement is said to be "**in full**", and the person so specified is called the "endorsee" of the instrument. Section 49 of the Act provides the mechanism of conversion of a blank endorsement into a full endorsement. As per section 49 the holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the endorser's signature a direction to pay to any other person as endorsee, convert the endorsement in full; and the holder does not thereby incur the responsibility of an endorser.

Example:

X is a holder of a bill which has been endorsed in blank by Y and delivered to him. If X writes over the signature of Y "Pay to Z or order", X is not liable as a endorser but this operate as full endorsement by

Y to Z.

As per section 55 if a negotiable instrument, after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the endorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person. As per section 54, subject to the provisions hereinafter (section 55) contained crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even although originally payable to order.

Example:

If A is a payee and holder of a negotiable instrument. He endorses it in blank and delivers it to B who in turn endorse in full" Pay to C or order". C transfers it to D without any formal endorsement. In the instant D as the bearer of the instrument is entitled to payment or to sue drawer, acceptor or A who endorsed the bill in blank but he cannot hold B or C liable. However, C can sue B as he received the bill in full endorsement from B. But if C makes a proper endorsement in favor of D and then delivers to him, D can claim payment from all the prior parties including A and B in addition to C.

As per section 50 endorsement of a negotiable instrument followed by delivery thereof has the effect of transferring the property in the instrument to the endorsee with a further right to negotiate the Instrument. But the endorser may by express words restrict or exclude such rights in which it will be called a **restrictive endorsement**. As per section 50 the of a negotiable instrument followed by delivery transfers to the endorsee the property therein with the right of further negotiation; but the endorsement may be express words, restrict or exclude such right, or may merely constitute the endorsee an agent to indorse the instrument, or to receive its contents for the endorser, or for some other specified person. The effect of restrictive endorsement is that the endorsee gets the right to full payment of the bill when due for payment and has right to sue any party to the bill but he has no right to transfer this right to any other person unless he expressly authorized to do so. The negotiability of the instrument comes to an end and the last endorsee is the person to sue upon. However, when the restrictive endorsement transfer the right of further endorsement or transfer all the subsequent endorsee get the bill with same right and liabilities as the fires endorsee after the first restrictive endorsement.

As per section 40 if the holder of a negotiable instrument without consent of the endorsee, destroys or impairs the endorser's remedy against a prior party, the endorser is discharged from liability as if the instrument had been paid at maturity.

Quite possible the holder of a negotiable instrument lost the instrument before its date of maturity. In such cases as per section 45 A of the act the holder has right to claim a duplicate copy of the lost bill subject to giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so as he has no option to give a duplicate copy of the said instrument.

As per section 52 of the Act, the endorser of a negotiable instrument may, by express words in the endorsement, exclude his own liability thereon, or make such liability or the right of the endorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. This is called **conditional endorsement.**

Where an endorser so excludes his liability and afterwards becomes the holder of the instrument all intermediate endorsers are liable to him.

Example 1:

The Endorser of a negotiable instrument signs his name adding the words "without resources" upon this endorsement he incurs no liability.

Example 2:

X is both holder as well payee of a negotiable instrument. Excluding personal liability by an endorsement " without recourse" he transfers the Instrument to B and B further endorses it to C who endorse it to A. A is not only reinstated in his former rights, but has the rights of an endorsee against B and C.

As clear from the above examples we can say that an endorser can exclude or limit his liability in the

following ways;

(a) By excluding his liability by making a Sans recourse endorsement. This can be done by adding the words' Sans recourse(Without recourse) to the endorsement. For example the endorsement can be in the form" Pay A or order without recourse to me" or "pay A or order sans recourse' or 'Pay A or order at his own risk'. In the instant case if the instrument is dishonored, the subsequent holder or the endorsee cannot look to the endorser for the payment of the same. Where an endorser excludes or limits his liability in this manner and afterwards becomes the holder of the same instrument, all intermediate endorsers continue to be liable to him.

(b) Sans Frais endorsement: It may be understood that where the endorser does not want that the endorsee or any other holder to incur any expense on his account, it is called a " sans frais endorsement".In a "Sans Frais' endorsement the endorsee or any other holder does not want to incur any expense on his account This is called without expense endorsement also.

(c) By making his liability contingent upon an uncertain event which may never happen as when the uncertain future event is not possible his liability is extinguished. But the endorsee can sue the prior parties before happening of the event.

Example:

The holder of a bill may endorse it "pay A or order on the arrival of the ship 'Vikrant" at Surat or pay A or order on his marriage with B. In all these cases, the liability of the holder as an endorser would arise upon the happening of the event specified.

(d) By making right of endorse to receive payment on event which may never happen. In this case endorsee can not sue prior parties before the happening of the specified event.

(e) Partial endorsement: In order to be called a proper and valid endorsement the whole amount of the bill has to be endorsed. A part of the amount of an instrument cannot be endorsed. However, where a part of the amount has been paid or received by the holder, in such endorsement of the remaining unpaid amount can be made.

Example:

An instrument is of ₹ 5,000 however, if any party to the instrument endorsee it for ₹4000 in favor of any party such endorsement will not be valid.

However, where ₹ 1000 has been received against that instrument and the fact is recorded in the instrument then the endorsement of balance ₹4000 is perfectly valid.

(f) Facultative endorsement;-In case of such an endorsement the endorser abandone some rights or increases his liability as endorser e.g "Pay A or order, notice of dishonor waived".

MATERIAL ALTERATION

Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties:

Alteration by endorsee: And any such alteration, if made by an endorsee, discharges his endorser from all liability to him in respect of the consideration thereof.

It may be noted that to get benefit of this section the alteration must be intentional and not purely accidental. Secondly the alteration must be material. In *Lookaram Sethiya V Ivon E John(1977) SC* defined the term material alteration as follows:

"A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deeds in its original state or otherwise varies the legal effets of the instruments as originally expressed or which may otherwise prejudice the party bound by the deed as originally executed. Some of the alterations which have been held to be material in various cases are as under;

(i) Alteration of an order cheque to a bearer cheque except by or with the consent of the drawer.

(ii) Alteration by tearing material part of the instrument.

(iii) Alteration by erasing account paying crossing (*J ladies Beauty V State Bank of India,AIR 1984 Guj 33*)

(iv) Alteration by affixing stamps without the promisor's knowledte to a note. (*Thommer v Union Khan 1967 Ker LJ 80 N Gowda v B Gowda 1968 1 Myrs LJ 591*)

(v) Alteration of the date of payment [(*A Subha Reddy v Neelapa Reddy Rammana Reddy AIR 1966 AP 267]*

(vi) Alteration of the time of payment. (*Long v Moore,1790 3 Esp 155*)

(vii) Alteration of the place of payment (*Tidamarsh v Grover 1813 23 LJ QB 261)*

(viii) Alteration of the sum payable (*scholfield v Earl of Londesborough 1896 AC 514*)

(ix) Alteration by adding new party to the instrument (*Garner v Walsh 1855 5 ESB 83*)

(x) Alteration by tearing a material part of the instrument.

(xi) Alteration of the rate of interest (*Seeth Tulsidas lalchand v Rajagopal 1967 2 MLJ 66*)

From the above cases of alteration which have been treated material alteration we can say that any alteration which changes the legal character of the instrument or alters the liabilities of the parties, whether change is prejudicial or beneficial is a material alteration.

Though we have discussed that material alteration discharges the parties to an instrument. But still there are some alterations which do not vitiate the instrument. These are as under;--

(i) Alteration before the completion of the instrument.

(ii) Crossing of an open cheque or conversion of general crossing into a special crossing.

(iii) Making qualified acceptance.

(iv) Completion of inchoate instrument.

(v) Making a blank endorsement into full endorsement.

(vi) Conversion of a bearer cheque into an order cheque.

(vii) Alteration with the consent of the party liable on the instrument.

(viii) Alteration made for the purpose of correcting mistake.

(ix) Making a blank instrument into a full endorsement.

Payment of instrument on which alteration is not apparent

So far we have discussed that material alteration on a instrument discharge the parties to it. Still there may be some alteration in an instrument which may not be apparent at the time of payment. As per section 89:

(1) Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay an paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker liable to pay and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such a person or banker from all liability thereon, and such payment shall not be questioned by reasons of the instrument having been altered, or the cheque crossed.

(2) Where the cheque is an electronic image of a truncated cheque, any difference in apparent tenor of such electronic image and the truncated cheque shall be a material alteration and it shall be the duty of the bank or the clearing house, as the case may be, to ensure the exactness of the apparent tenor of electronic image of the truncated cheque while truncating and transmitting

the image.

(3) Any bank or a clearing house which receives a transmitted electronic image of a truncated cheque, shall verify from the party who transmitted the image to it, that the image so transmitted to it and received by it, is exactly the same.

If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.(Section 90)

3.3 ACCEPTANCE, ASSIGNMENT AND NEGOTIATION

ACCEPTANCE

Only certain types of bills require acceptance. Essentials of a valid acceptance are—

(i) Must be written on the face of the bill,

(ii) The bill must be signed by drawee or his authorized agent.

(iii) The accepted bill is required to be delivered to the holder of the instrument.

Meaning of acceptance:

A bill is said to be accepted when the drawee (i.e., the person on whom the bill is drawn), after putting his signature on it, *either delivers* it *or gives* notice of such acceptance to the holder of the bill or to some person on his behalf.

Acceptor:

After the drawee has accepted the bill, he is known as the acceptor. It is only the bill of exchange (other than cheque) which requires acceptance. However, acceptance is not necessary to make a valid bill. If a bill is not accepted, it does not become invalid. It only becomes dishonoured by non-acceptance.

Presentation for acceptance may be excused in the following circumstances:

(a) Where the drawee is dead or insolvent.

(b) Where the drawee is a fictitious person or one incapable of contracting.

(c) When the drawee can cannot be found with reasonable efforts.

(d) When acceptance has been refused on some other grounds.

Acceptance in Case of Bills in Sets:

Where a bill is drawn in sets, the acceptance is required to be put on one part only. Where the drawee signs his acceptance on two or more parts, he may become liable on each of them respectively.

When presentation for acceptance is necessary:

(a) Where the bill is payable at a given time after acceptance or after sight.

(b) Where the bill expressly stipulates that it shall be presented for acceptance before presented for payment.

(c) Where the bill is made payable at a place other than the place of residence or business of the drawee.

In no other case is presentation for acceptance necessary in order to render liable any party to the bill.

Types of Acceptance:

Acceptance may be either general or qualified.

General Acceptance: An acceptance is said to be general when the drawee accepts the bill without qualification to the order of the drawer. If the acceptance is not absolute, the holder may treat the bill as dishonoured by non- acceptance

Qualified Acceptance: *An acceptance is said to be qualified when the drawee accepts the bill subject to qualification.* It may be noted that an acceptance will not be treated as a qualified acceptance unless the qualification is expressed on the bill in the clearest language. The qualification may relate to an event, amount, place, time, etc.

Circumstances indicating Qualified Acceptance

According to Section 86, an acceptance is qualified under the following circumstances:

(a) Where it undertakes the payment on the happening of an event therein stated;

(b) Where it undertakes the payment of part only of the sum ordered to be paid;

(c) Where it undertakes the payment at a specified place of his choice and not otherwise or elsewhere;

(d) Where it undertakes the payment at a time other than that at which under the order it would be legally due.

(e) Where it is not signed by all drawees who are not partners.

Effect of Qualified Acceptance

(a) The holder, may, treat the bill as dishonoured due to non-acceptance and after giving due notice of dishonour, sue the drawer and prior endorsers.

(b) If he accepts a qualified acceptance all prior parties whose consent is not obtained are discharged as against the holder and those deriving title from him.

Examples of Qualified Acceptance

(a) Accepted payable when in funds.

(b) Accepted payable on giving up bill of lading.

(c) Accepted payable when a cargo consigned to me is sold.

(d) A bill drawn for ₹1,000 accepted for ₹ 900 only.

(e) Accepted payable at Delhi only where no place of payment is specified in the order.

(f) Accepted payable at Delhi only where the place of payment specified in the order was Bombay.

(g) Accepted payable 4 months after date where the bill drawn as payable 3 months after date.

(h) Accepted by *A, B* and *C* where drawees were *A. B. C* and *D* who not partners.

(i) Accepted payable on receiving income tax refund

(j) A bill drawn for ₹ 1,000 but accepted to the extent considered reasonable and just by a common friend of both.

NEGOTIATION

Chapter IV of the Act deals with negotiation.

Section 14 defines the term 'negotiation'. When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

In 'L. Parsotam V. L. Bankey Lal' – AIR 1935 All. 1041 it was held that handing over a negotiable instrument to an agent for safe custody is not negotiation. There must be a transfer by the holder to the transferee to make the latter a holder within the meaning of Section 8.

Delivery

Section 46 provides that the making, acceptance or indorsement of a promissory note, bill of exchange or cheque is completed by delivery. The delivery is of two types – one is actual delivery

and the other is constructive delivery.

As between parties standing in immediate relation, delivery to be effectual must be made by the party making, accepting or indorsing the instrument, or by a person authorized by him in that behalf.

As between such parties and any holder of instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange or cheque payable to bearer is negotiable by the delivery thereof. A promissory note, bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof.

In 'Bhagwati Prasad V. Pahil Sundari'- AIR 1969 Pat 215 it was held where property in a promissory note is transferred by partition, the transferee is entitled to maintain his suit on it; his rights cannot be defeated on the ground of non endorsement.

In 'Vaddadi Venkitasami V. Mh. Begum' – AIR 1956 AP 9 it was held that in addition to the mode of transfer of a promissory note indicated in Section 46 here are two other modes of its transfer-

- By operation of law; and
- Transfer as a chose-in-action contemplated by Section 130 of the Transfer of Property Act.

The only difference between the two modes is that while transfer by negotiation clothes the transferee with certain rights, assignment as a chose-in-action under Section 130 limits such rights, as the transferor had in the document i.e., the assignee takes only subject to equities in favor of the maker; an assignee of a promissory note otherwise than by indorsement such as transfer by means of writing under Section 130 of the Transfer of Property Act, can sue on the promissory note.

Negotiation is of two types – one is negotiation by delivery and the other is negotiation by indorsement.

Negotiation by delivery

Section 47 provides that subject to the provisions of Section 58 a promissory note, bill of exchange or cheque payable to bearer is negotiable by delivery thereof. There is an exception to this. A promissory note, bill of exchange or cheque delivered on condition that it is not to take effect except in certain event is not negotiable (except in the hands of a holder for value without notice to the condition) unless such event happens.

Example:

1. A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated.
2. A, the holder of a negotiable instrument payable to bearer, which is in the hands of A's banker, who is at the time, the bank of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly now possesses the instrument as B's agent. The instrument has been negotiated, and B has becomes the holder of it.

Negotiation by indorsement

Section 48 provides that subject to the provisions of Section 58, a promissory note, a bill of exchange or cheque payable to order is negotiable by the holder by indorsement and delivery thereof.

In 'Chaitram V. Mohanlal' – AIR 1957 Nag. 65 it was held that where a promissory note payable to a particular person does not contain any words prohibiting transfers or indicating that it was not transferable, it would be a negotiable instrument payable to order; it would be negotiable by the holder by endorsement and delivery with the necessary intention to constitute the person in whose favor the endorsement is made as the holder thereof; there must be intention of the endorser to

constitute the endorsee as a holder of the pro-note accompanied by delivery; unless this is proved negotiation is not complete.

Conversion of indorsement in blank into indorsement in full

Section 49 provides that the holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a director to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full and the holder does not thereby incur the responsibility of an indorse.

Effect of indorsement

Section 50 provides that the indorsement of a negotiable instrument followed by delivery transfer to the indorsee the property therein with the right of further negotiation, but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person.

Example:

B signs the following indorsements on different negotiable instruments payable to bearer-

(a) 'Pay the contents to C only'

(b) 'Pay C for my use'

(c) 'Pay C for order for the account of B'

(d) 'The within must be credited to C'

These indorsements exclude the right of further negotiation by C

(e) 'Pay C'

(f) 'Pay C value in account with the Oriental bank'

(g) 'Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to the indorser and others'

These indorsements do not exclude the right of further negotiation by C.

In 'Wasudev V. National Savings Bank' – IR 1953 Bom. 209 it was held that Section 50 deals with what are known as restrictive endorsements which in express words restrict or exclude the rights of endorsees; it does not apply to cases where the endorsee wishes to satisfy the Court by oral evidence that he was endorsee for a particular purpose only.

Who may negotiate?

Section 51 provides that every sole maker, drawer, payee or indorsee, or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in Section 50, indorse and negotiate the same.

Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof; or enables a payee or indorsee to indorse or negotiate an instrument unless he is holder thereof.

Example – A bill is drawn payable to A or order. A indorses it to B, the indorsement not containing the words 'or order' or any equivalent words. B may negotiate the instrument.

Indorser who excludes his own liability

Section 52 provides that the indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. Where an indorser so excludes his liability and after becomes the holder of the instrument, all intermediate indorsers are liable to him.

Holder deriving title from holder in due course

Section 53 provides that a holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course.

Instrument indorsed in blank

Section 54 provides that subject to the provisions contained as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even although originally payable to order.

Claim on the conversion of indorsement of blank into indorsement in full

Section 55 provides that if a negotiable instrument, after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives the title through such person.

Indorsement for part of sum due

Section 56 provides that no writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

Instrument obtained by unlawful means

Section 57 provides that when a negotiable instrument has been lost, or has been obtained from any maker, acceptor or holder by means of an offence or fraud or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course.

Instrument acquired after dishonor

Section 59 provides that the holder of a negotiable instrument, who has acquired it after dishonor, whether by non acceptance or nonpayment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor.

Accommodation bill

Any person, who in good faith and for consideration becomes the holder, after maturity, of a promissory note or a bill of exchange made, drawn or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount or bill from any party.

Example – The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill but if it were not paid at maturity. The bill not having been paid at maturity the drawer sold the goods and retained the proceeds, but indorsed the bill to A. A's title is subject to the same objection as the drawer's bill.

Instrument negotiable till payment

Section 60 provides that a negotiable instrument may be negotiated, (except by the maker, drawee or acceptor after maturity) until payment or satisfaction by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction.

Presentment

Chapter V of the Act provides the procedure of presentment of negotiable instruments.

- Section 61 – Presentment for acceptance;
- Section 62 – Presentment of promissory note at sight;

- Section 63 – Drawee's time for deliberation;
- Section 64 – Presentment for payment;
- Section 65 – Hours for presentment;
- Section 66 – Presentment for payment of instrument payable after the date or sight;
- Section 67 – Present for payment of instrument payable by installments;
- Section 68 – Presentment for payment of instrument payable at specified place and not elsewhere;
- Section 69 – Instrument payable at specified place;
- Section 70 – Presentment where no exclusive place specified;
- Section 71 – Presentment when maker, etc., has no known place of business or residence;
- Section 72 – Presentment of cheque to charge drawer;
- Section 73 – Presentment of cheque to charge any other person;
- Section 74 – Presentment of instrument payable on demand;
- Section 75 – Presentment by or to agent, representative or deceased or assignee of insolvent;

In 'Jagjivan Mavji V. Ranchoddas' AIR 1954 SC 553 it was held by the Supreme Court that a bill payable after sight has two distinct stages; firstly when it is presented for acceptance and later when it is presented for payment. Section 61 deals with the former and Section 64 deals with the later. Presentment for acceptance must always and in every case precede presentment for payment. But when the bill is payable on demand, both stages synchronize; there would be only one presentment, both for acceptance and for payment. When the bill is paid, it involves acceptance; but when not paid, it is really dishonored for non acceptance. But whether the bill is payable after sight, or at sight or on demand, acceptance by the drawee is necessary before he can fixed with liability on it. It is acceptance that establishes privity on the instrument between the payee and the drawee.

In 'Banaras Bank Limited V. Normusji Pestonji' – AIR 1930 All. 648 it was held that Section 64 should be given its plain meaning; the exception to it must be read as more or less an independent rule of law; non presentment of hundis for payment does not exempt the acceptor from his liability; it exempts only other parties to the hundis.

In 'Nanumal V. Shibba Mal' AIR 1939 Lah. 18 it was held that where the place of payment is not indicated by the maker in the instrument, the note or bill has to be presented at the place of business, if any, or at the usual residence of the maker, drawee or acceptor.

In 'Jayaram V. Sivaram' AIR 1963 Mad 294 it was held that the term specified place in Section 69 must have been intended to refer to a place indicated with sufficient precision to enable the person, who wants to charge the maker with liability, to resort to him readily, a promissory note which refers to a large city like Madras as the place for presentment does not fall under Section 69 and does not require presentment.

In 'Gopikisan V. Jethmal' Air 1935 Nag.144 it was held that in the absence of any indication in the instrument itself of the place of payment, presentment must be at the place of business of the acceptor or maker or the place where he has his home or residence.

Presentment when not necessary

Section 76 provides that no presentment for payment is necessary in any one of the following cases-

- If the maker, drawee or acceptor intentionally prevents the presentment of the instrument; or
- If the instrument is being payable at his place of business, he closes such place on a business day during the usual business hours; or

- If the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours; or
- If the instrument not being payable at any specified place, he cannot after due search be found;
- As against any party sought to be charged therewith, if he has engaged to pay notwithstanding non presentment;
- As against any party if, after maturity, with knowledge that the instrument has not been presented he makes a part payment on account of the amount due on the instrument or promises to pay the amount due thereon in whole or in part or otherwise waives his right to take advantage of any default in presentment for the payment

Payment and interest

Chapter VI deals with the payment of interest. Section 78 provides that the payment should be made to the holder or his accredited agent. Section 79 provides that interest is payable on the amount which has been paid after the due date. The interest is payable from the date of due to the date of realization. Section 80 provides that when no interest rate has been specified in the instrument then the interest shall be calculated at the rate of 18% per annum from the date of due to the date of realization of the amount.

Section 80 provides that any person liable to pay and called upon by the holder to pay the amount due on a negotiable instrument is before payment entitled to have it shown and is on payment entitled to have it delivered up, to him, or if the instrument is lost or cannot be produced to be indemnified against any further claim thereon against him.

ASSIGNMENT OF NEGOTIABLE INSTRUMENTS

Assignment takes place where the holder of an instrument transfers it to another so as to confer a right on the transferee to receive the payment of the instrument. All negotiable instruments are chose in action and as such are transferable by assignment without endorsement under sections 130-132 of the Transfer of property act. Assignment of a negotiable instrument is effected by writing without endorsement. The main feature of assignment is that the assignee obtains the right of the assignor. Therefore if the assignor's title is defective assignee's title will also be defective.

Difference between Negotiation and Assignment

Negotiation	Assignment
Consideration is presumed until contrary is proved.	Consideration must be proved
It transferee is a holder in due course he takes the instrument free from any defects.	Assignee's title is always subject to defenses and equities between the original debtor and assignor.
Notice of transfer is not necessary.	Notice of assignment must be given.
Negotiation is effected by delivery in case of instruments payable to bearer and by delivery and endorsement in case of instrument payable to order.	Assignment is effected only by writing
Transferee can sue the third party in his own name.	Assignee cannot do so.
There are a number of presumptions in favor of holder in due courses.	There are no such presumptions.

Discharge from liability

Chapter VII deals with the discharge from liability on negotiable instruments. Section 82 provides the methods of discharge from liability-

- by cancellation;

- by release; and
- by payment.

Section 83 provides that if the holder allows the drawee more than 48 hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance and thereby discharged them from liability to such holder.

Delay in presentation of cheque

Section 84 provides that where a cheque is not presented for payment within a reasonable time and the drawer at the time when presentment ought to have been made, as between himself and the banker, to have the cheque paid and suffers actual damage through the delay, he discharged to the extent of such damage, that is to say, to the extent to which such drawer is a creditor of the banker to a larger amount that he would have been if such cheque had been paid.

In 'Abdul Majid V. Ganesh Das Kalooram' – AIR 1954 Ori. 124 it was held that a drawer of a cheque who wants to take advantage of Section 84 must prove two facts-

- He had sufficient money in deposit in the bank in his account to honor the cheque; and
- He had suffered actual damage on account of non presentment of the cheque within a reasonable time.

Cheque payable to order

Section 85 provides that where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharge by the payment in due course. Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any indorsement whether in full or in blank appearing thereon, and notwithstanding that any such indorsement purports to restrict or exclude further negotiation.

3.4 RIGHTS AND LIABILITIES OF PARTIES

Parties to notes, bills and cheques

Chapter III of the Act deals with the parties to notes, bills and cheques.

Capacity

Section 26 provides that every person capable of contracting may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself.

Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered.

In 'Sulochana V. Pnaidyan Bank Limited' - AIR 1975 Mad 70 (DB) it was held that when a minor being along with one other executed a promissory note, held, though no liability could be enforced against the minor executants, the other executants, also a party to the document, could not escape his liability.

In 'Orilo Industries Limited v. Bombay Mercantile Bank Limited' – AIR 1961 SC 993 it was held that Section 26 does not purpose to make any provision of substantive or procedural law. The latter part of the section merely brings out that a company cannot claim authority to issue a cheque under its first part. The law in regard to the company's power to issue negotiable instruments has to be found in the relevant provisions of the Companies Act itself.

Agency

Section 27 provides that every person capable of binding himself or being bound may so bind himself

or be bound by a duly authorized agent acting in his name. A general authority to transact business and to receive and discharge debt does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal. An authority to draw bills of exchange does not itself import an authority to indorse.

In 'M. Rajagopal V. K.S. Imam Ali' – AIR 1981 Ker 36 (DB) it was held that in case of conflict between Sections 19 and 22 of the Partnership Act on the one hand and Sections 26, 27 and 28 of the Negotiable Instruments Act on the other, the latter Act should prevail. A claim against a firm based on a written contract by one partner in the course of business and with authority to act is binding on the firm. But when such claim is made on a promissory note or bill of exchange, the Court has to be satisfied that the negotiable instrument disclosed the liability of the firm clearly.

Liability of agent

Section 28 of the Act provides that an agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

This section carries an exception to the general law of contract, that the principal, though not disclosed on the instrument may be proceeded against if it is discovered later on that the agent had acted on his behalf as held in 'Ramanathan V.Baldeo Singh'- AIR 1933 Rang.111.

Liability of the representative

Section 29 provides that a legal representative of a deceased person who signs his name to a promissory note, bill of exchange or a cheque is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.

Liability of drawer

Section 30 provides that the drawer of a bill of exchange or cheque is bound, in case of dishonor by the drawee or accepter thereof, to compensate the holder, provided due notice of dishonor has been given to, or received by the drawer as herein provided.

In 'Union Bank of India V. Swastika Motors' – AIR 1983 Del. 420 it was held that a drawee having dishonored the hundis, their drawer would be liable to the payee provided he had due notice of dishonor, even if the documents of title, accompanying the hundis, had been delivered to the drawee without valid acceptance.

In 'Silchar Bank V. Pioneer Bank'- AIR 1951 Assam 127 it was held that if the drawee bank dishonors the cheque after the drawer had stopped payment, the question of notice of dishonor does not arise; the drawer is liable to compensate the holder.

Liability of the drawee of cheque

Section 31 provides that the drawee of a cheque having sufficient funds of the drawer in his hands property applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.

Liability of maker of note and acceptor of bill

Section 32 provides that in the absence of contract to the contrary, the maker of promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder of the demand. In default of such payment, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

In 'Jagjivan Mavji V. Ranchoddas' – AIR 1954 SC 554, the Supreme Court held that the drawee of a negotiable instrument is not liable to the payee, unless the drawee has accepted it. Under Section 32

the liability of the drawee arises only when he accepts the bill; there is no provision in the Act that the drawee is as such liable on the instrument, except under Section 31 when the drawee has sufficient funds of the customer in his hands; and even then, the liability is only towards the drawer, not the payee.

In 'M. Ramnarain Private Limited V. State Trading Corporation of India Limited' – AIR 1988 Bom 45 (DB) it was held that where the payee was the holder of bills but not willing to part with them unless the entire amount covered by the bills had been paid to him, the drawer may sue the acceptor for compensation but only after payment to the payee and his endorsement on the bills in favor of the drawer.

Only drawee can be acceptor except in need or for honor

Section 33 provides that no person except the drawee of the bill of exchange or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honor can bind him by an acceptance.

In 'Manikchand V. Chartered bank' – AIR 1961 Cal. 653 (DB) the High Court narrated the scope of Section 33. Section 33 must not be misread as preventing the drawee from accepting through an agent; under Section 26 and 27 the drawee can accept a bill through his agent.

Acceptance by several drawees not partners

Section 34 provides that where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

Liability of Indorser

Section 35 provides that in the absence of contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonor by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonor, provided due notice of dishonor has been given to, or received by, such indorser as herein after provided.

Liability of prior parties to holder in due course

Section 36 provides every prior party to a negotiable instrument is liable thereon to holder in due course until the instrument is duly satisfied.

Maker, drawer and acceptor principals

Section 37 provides that the maker of a promissory note or a cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor as the case may be.

Prior party a principal in respect of each subsequent party

Section 38 provides that as between the parties the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party.

Example – A draws a bill payable to his own order on B, who accepts. A afterwards indorses the bill to C, C to D and D to E. As between E and B, B is the principal debtors, and A,C and D are his sureties. As between E and A, A is the principal debtors and C and D are his sureties. As between E and C, C the principal debtor and D is his surety.

Suretyship

Section 39 provides that when the holder of an accepted bill of exchange enters into any contract with the acceptor which, under Sections 134 or 135 of the Contract Act, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they

are not discharged.

Discharger of indorser's liability

Section 40 provides that where the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

Example –

As the holder of a bill of exchange made payable to the order of B, which contains the following indorsements in blank-

- First indorsement - B
- Second indorsement – Peter Williams;
- Third indorsement – Wright and Co;
- Fourth indorsement – John Rozario

This bill A puts in suit against John Rozario and strikes without John Rozario's consent the indorsements by Peter Williams and Wright and Co. A is not entitled to recover anything from Rozario

Acceptor bound, although indorsement forged

Section 41 provides that an acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

Acceptance of bill drawn in fictitious name

Section 42 provide that an acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

Negotiable instrument made without consideration

Section 43 provides that a negotiable instrument made, drawn, accepted , indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Explanation 1 to this section provides that no party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Explanation 2 to this section provides that no party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

In 'Ram Narain V. Ramjiwan' AIR 1937 Nag. 267 it was held that Section 43 must be read subject to Section 59 in all cases in which the latter section applies; the holder, as against other parties, would have only the rights thereon of his transferor.

Partial absence or failure of money consideration

Section 44 provides that when the consideration for which a person signed a promissory note, bill of exchange or cheque consisted or money, and was originally absent in part of has subsequently failed in part, the sum which is a holder standing in immediate relation with such signer is entitled to

receive from his is proportionately reduced.

Explanation to this section provides that the drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange or cheque stands in immediate relation with the payee, and the indorser with the indorsee. Other signers may by agreement stand in immediate relation with the holder.

Example:

A draws a bill on ₹500 payable to the order of A. B accepts the bill, but subsequently dishonors it by non payment. A sues B on the bill, B proves that it was accepted for value as to ₹400/- and as accommodation to the plaintiff as to the residue. A can only recover ₹400/-.

In 'Mutyala Yarakadu V. State of Andhra Pradesh' – 1955 An.WR 870 it was held that where a promissory note has been endorsed to a third person, Section 44 cannot be applied so as to prejudice his rights. Where the maker of the promissory note stands in immediate relation to the payee, Section 44 would entitle the debtor to relief.

In 'Tirupagari Tayaramma V. Sri Ramanjaneya Mercantile Co. Eluru' – AIR 1977 AP 205 it was held that Section 44 would not apply when consideration for the promissory note was a set of obligations, not merely of money.

Partial failure of consideration not consisting of money

Section 45 provides that where a part of the consideration for which a person signed a promissory note, bill of exchange or a cheque, though not consisting of money, is ascertainable in money without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.

Holder's right to duplicate of lost bill

Section 45A provides that where a bill of exchange has been lost before it is overdue the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request refuses to give such duplicate bill, he may be compelled to do so.

3.5 DISHONOUR OF NEGOTIABLE INSTRUMENT

Notice of dishonor

Chapter VIII deals with the notice of dishonor.

When dishonored?

The dishonor may be due to the following reasons-

- non acceptance; and
- by nonpayment.

Section 91 provides that a bill of exchange is said to be dishonored by non acceptance when the drawee, or one of several drawees, not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused and the bill is not accepted. When the drawee is incompetent to contract, or the acceptance is qualified the bill may be treated as dishonored.

Section 92 provides that an instrument is said to be dishonored by nonpayment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same.

Notice

Section 93 provides that when an instrument is dishonored the holder must give notice that the instrument has been dishonored. In 'Union bank V. Dina Nath' – AIR 1953 All. 637 it was held that

this section was intended to confine the holder's right of enforcing the liability to only those who are otherwise liable under the law and to whom notice has been given; it was not intended to enlarge the holder's right so as to enable him to claim damages from persons against whom he has no remedy under the Act.

Mode of giving notice

Section 94 provides that the notice may be in writing or oral. If it is in written form it must be sent by post and may be in any form but it must inform the party to whom it is given either in express term or by reasonable intendment that the instrument has been dishonored and he will be held liable thereon. It must be given within a reasonable time after dishonor at the place of business or at the residence of the party for whom it is intended.

Section 95 provides that any party receiving notice of dishonor must, in order to render any prior party liable to himself, give notice of dishonor to such party within a reasonable time, unless such party otherwise receives due notice.

Section 96 provides that when the instrument is deposited with an agent for presentment, the agent is to issue notice to his principal who is entitled to a further like period to give notice of dishonor.

Section 97 provides that when the party, to whom a notice of dishonor is dispatched, is dead, but the party is not aware of the death, the notice is sufficient.

Notice – when not necessary?

Section 98 provides that in the following circumstances there is no requirement to issue notice-

- When it is dispensed with by the party entitled thereto;
- In order to charge the drawer, when he has countermanded payment;
- When the party charged could not suffer damage for want of notice;
- When the party entitled to notice cannot after due search be found; or the party bound to give notice is, for any other reason, unable without any fault of his own to give it;
- To charge the drawers, when the acceptor is also a drawer;
- In the case of a promissory note which is not negotiable;
- When the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

Noting and Protest

Chapter IX deals with the procedure of noting and protest.

Noting

Section 99 provides that when an instrument is dishonored for any reason, the holder may cause the dishonor to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon each. The noting must be made within a reasonable time after dishonor. The noting must specify the date of dishonor, the reason assigned for such dishonor or if the instrument has not been expressly dishonored, the reason the holder treats it as dishonored and the notary's charges.

Protest

Section 100 provides that when an instrument is dishonored the holder may cause such dishonor to be noted and certified by a notary public. Such certificate is called a protest.

When the acceptor of an instrument becomes insolvent or his credit has been publicly impeached, before maturity of bill, the older may, within a reasonable time, cause a notary public to demand better security of the acceptor and on its being refused may, within a reasonable time, cause such facts to be noted and certified. Such certificate is called a protest for better security.

Contents of the protest

Section 101 provides that a protest must contain-

- either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon;
- the name of the person for whom and against whom the instrument has been protested;
- a statement that payment or acceptance or better security, as the case may be, has been demanded of such person by the notary public, or that he could not be found;
- when the note or bill has been dishonored, the place and time of dishonor and when better security has been refused, the place and time of refusal.
- the subscription of the notary public making the protest;
- in the event of an acceptance for honor or of a payment for honor, the name of the person by whom, of the person for whom, and the manner in which such acceptance or payment was offered and effected.

Notice of protest

Section 102 provides that notice of protest must be given instead of notice of dishonor in the same manner and subject to the same conditions but the notice may be given by the notary public who makes the protest.

Special Rules of evidence

Chapter XIII deals with this subject. Section 118 what are the presumptions that can be made as to negotiable instruments. Until the contrary is proved the following presumptions shall be made-

- of consideration;
- as to date;
- as to time of acceptance;
- as to time of transfer;
- as to order of indorsement;
- as to stamp;
- that holder is a holder in due course.

It can be presumed that-

- every negotiable instrument was made or drawn for consideration and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
- every negotiable instrument bearing a date was made or drawn on such date;
- every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;
- every transfer of a negotiable instrument was made before its maturity;
- the indorsement appearing upon a negotiable instrument were made in the order in which they appear thereupon;
- a promissory note, bill of exchange of cheque was duly stamped;
- the holder of a negotiable instrument is a holder in due course.

Onus of holder in due course

Where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder

is a holder in due course lies upon them.

Presumption on proof of protest

Section 119 provides that in a suit upon an instrument which has been dishonored, the Court shall, on proof of the protest, presume the fact of dishonor, unless and until such fact is disproved.

Estoppel

Sections 120 to 122 deals with the following types of estoppels-

- estoppel against denying original validity of instrument;
- estoppel against denying capacity of payee to indorse;
- estoppel against denying signature or capacity of prior party.

Section 120 provides that no maker of a promissory note, and no drawer of a bill of exchange or cheque and no acceptor of a bill of exchange for the honor of the drawer shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

Section 121 provides that no maker of a promissory note and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

Section 122 provides that no indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the indorsement.

TRANSFER OF PROPERTY ACT

Transfer of Ownership

The Sections 18 to 25 of the Sale of Goods Act, determine when the property passes from the seller to the buyer.

Rules for Ascertaining Passing of Property:

The provisions are discussed hereunder:

(A) Goods must be ascertained (section18)

As per section 18 in a contract for sale of unascertained goods, the property in the goods does not pass to the buyer unless and until the goods are ascertained.

(B) Intention of the parties for such transfer (section 19)

As per section 19(2), in a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. The intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case.

When intention of the parties cannot be ascertained, rules contained in section 20-24 are required to be applied for ascertaining the time of transfer of property which is discussed hereunder:

LAWS & ETHICS51When intention of the parties cannot be ascertained, rules contained in section 20-24 are required to be applied for ascertaining the time of transfer of property which is discussed hereunder:

(i) Specific goods (Secs 20 to 22)

(a) Specific goods in a deliverable state (section 20)In an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. (Sec 20). Goods are said to be in deliverable state when they are in such a state that the buyer would under the contract is bound to take delivery thereof.

(b) Specific goods to be put into a deliverable state (Sec. 21)Where there is a contract for the sale of specific goods and the seller is bound to do something

(c) Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price (section 22)If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. (sec 22).

(ii) Unascertained goods (Sec 23)(a)Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.(b)Delivery to carrier: Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have appropriated the goods for the purpose of the contract.

(iii) Goods on approval or 'on sale or return'In order to push up the sales generally there is a practice of sending goods to the customer with the clear cut understanding that he has

option to approve or return the goods within a given period. This type of sales is known as "approval or sale or return" In such cases the transaction does not culminate into sale until the goods are approved by the customer and the property in goods still remains with the seller.When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller

(b) When he does any other act adopting the transaction.

(c) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.Reservation of Right of Disposal (Sec 25)Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. The seller is deemed to have reserved the right of disposal:

(1) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of landing or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

(2) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance to payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

Effect of Destruction of Goods:

As per section 26 of the Act, the goods remains at the seller's risk until the property therein is transferred to the buyer, but when the property in goods is transferred to the buyer the goods are at the risk of the buyer whether delivery of the goods has been made or not. Thus risk prima facie passes with property unless otherwise is agreed by the parties. In other word the parties may in the contract have different stipulation as to time of passing of risk irrespective of what is provided in section 26 of the Act.

Quite often it may happenwithout knowledge of the seller the goods have perished or so damaged as not to answer the description of the goods contracted to be sold, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before making of contract (Sec 7) – Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Goods perishing before sale but after agreement to sell (Sec 8) – Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Sec (7 & 8) is applicable only in case of specific goods and not unascertained/generic goods.

Risk Prima Facie Passes with Property: Exceptions

The rule regarding risk passes with the property enshrined in section 26 is subject to the following exceptions:

(a) This rule of 26 will apply only if there is no agreement to the contrary. It is permissible for the parties to provide in the agreement that although the property does not pass, the risk passes and they may fix the point of time when it is to pass.

(b) Where delivery has been delayed through the fault of either party the buyer or the seller, the goods are at the risk of the party at fault as regards any loss which might not have been occurred but for such loss. The goods are at the risk of the party who is at fault in delay of delivery.

(c) If there is a custom in that particular trade that the risk does not pass with property, in such a case the risk will pass as per the custom.

(d) Risk and property may be separated by agreement between the parties. Section 40 of the Act also provides that where the seller agrees to deliver the goods at his own risk at a distant place from where they are, the buyer shall unless otherwise agreed, not take any risk of deterioration in LAWS & ETHICS53the goods incidental to the transit. This will be discussed subsequently in the paragraph dealing with delivery of goods.

Transfer of Title by Non-Owners of Goods:

As per section 27 of the Sale of Goods Act where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.A buyer cannot get good title to the goods unless he purchased the goods from a person who is the owner thereof and sell them under the authority or with the consent of real owner."Nemo dat qui non habet" means that no one can give what he himself does not have. It means a non owner cannot make valid transfer of property in goods. If the title of the seller is defective, the buyer's title will also be subject to same defect. If the seller has no title, the buyer does not acquire any title although he might have acted honestly and might have acquired the goods after due payment. This rule is to protect the real owner of the goods. Though this doctrine seeks to protect the interest of real person who acquired such goods in good faith for value. Accordingly the Act provides the following exceptions to this doctrine which seeks to protect the interest of bona fide buyers:

1. **Sale by a mercantile agent:** If a mercantile agent is authorized by the owner of the goods sell on his behalf, then such sale shall be valid. In such cases, the buyer can acquire a good title of the goods. This exception will be implemented subject to fulfilment of the following conditions:-
   (i) he person must be in possession of goods or documents of title to the goods in his capacity as a mercantile agent and with the consent of his owner.
   (ii) The person must sell the goods while acting in the ordinary course of business.
   (iii) The buyer must act in good faith without having any notice, at the time of contract that the mercantile agent has no authority to sell the goods.
2. **Transfer of title by Estoppels:** This exception is based on the principle of personal estoppels. Sometime, the real owner may lead the buyers by virtue of his conduct or words or by act to believe that the seller is the owner of the goods or has the authority to sell them. In such case, he may not thereafter deny the seller's authority to sell.
3. **Sale by a joint owner:** It there are several joint owners of goods, one of them if has sole possession of the goods by permission of the co-owners, then the property in goods is transferred to any person who buys them from such joint owner. In order to apply this exception following conditions must be fulfilled.
   - One of the several owners must be in sole possession of the goods.

- The joint owner must have permission of co-owners.
- The buyer must purchase goods in good faith.
- The buyer should not have notice regarding the matter that the seller has no authority to sell.

4. **Sale by person in possession under voidable contract:** According to the Section 29 a person in possession of goods under a voidable contract which is not rescinded, can transfer a good title to the buyer. The buyer should purchase the goods in good faith and without notice of the seller's defective title.

5. **Sale by seller in possession after sale:** Under Section 30 (1) it is laid down that where a person has sold goods but he continues in possession of goods or of the documents of title to the goods, he may sell them to a third person and if such person obtains delivery thereof in good faith and Sale of Goods Act, 193054LAWS & ETHICSwithout notice of the previous sale, the person can get a good title to them. In order to apply this exception, the seller must be in possession after sale of goods and there must be delivery or transfer of the goods or documents of title by the seller.

6. **Sale by buyer in possession after sale:** Under Section 30 (2), it is laid down that where a buyer having bought or having agreed to buy goods, obtain with the consent of the seller the possession of the goods or documents of title to the goods can and resells the goods to a bona fide transfer. If at the time of this sale, buyer was not in possession, then this exception will not apply.

7. **Sale by an unpaid seller:** If the unpaid seller has exercised right of lien or stoppage in transit, resells the goods, then the buyer acquires a good title as against the original buyer, even though the resale is not justified in the circumstances.

8. **Exception under other Acts:** According to some Acts, a person although he is not the owner of the goods may sell the goods and pass a better title than he himself has. As for example-

   (i) Under Section 169 of the Contract Act, a finder of the goods has the right to sell.

   (ii) Under Section 176 of the Contract Act, a pawnee of goods has the right to sell the goods pawned subject to satisfying some conditions.

   (iii) n certain cases, a special right of sale is given to officers of court, liquidators of the companies, receivers of insolvents estate, custom officers for duties remaining unpaid etc.

   (iv) A person who takes a negotiable instrument in good faith and for value becomes the true owner even if he takes it from a thief or finder.

3 COMPANY LAWS

TYPES OF COMPANIES

Meaning and Definition of a Company

The word 'company' is derived from the Latin word (Com=with or together; panis =bread), and it originally referred to an association of persons who took their meals together. In popular parlance, a company denotes an association of likeminded persons formed for the purpose of carrying on some business or undertaking. A company is a corporate body and a legal person having status and personality distinct and separate from the members constituting it.

In terms of the Companies Act, 2013 a "company" means a company incorporated under this Act or under any previous company law [Section 2(20)].

Lord Justice Lindley has defined a company as "an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business and who share the profit and loss arising there from. The common stock so contributed is denoted in money and is the capital of the company. The persons who contributed in it or form it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his "share". The shares are always transferable although the right to transfer them may be restricted."

Salient features of 'company'-

Separate legal entity – Company is a separate legal person and artificial person. It is distinguished from the shareholders of the company.

Limited liability – The liability of the members of a company having share capital is limited to the extent of the nominal value of the shares held by them. The shareholders cannot be called upon to pay more than the unpaid value of his shares, whatever may be the indebtedness of the company;

Perpetual succession- The Company has its existence from the time of incorporation to winding up. Members may go and members may come but the company survives up to the winding up;

Separate property – The company is having right to acquire properties for its own and to transfer the said properties;

Common seal – The common seal is used by the company for affixing it in the documents such as contract etc., since it is artificial person and cannot sign on its own in the documents. Now the common seal is made at the option of the company. Companies act 2013 required common seal to be affixed on certain documents (such as bill of exchange, share certificates, etc.) Now, the use of common seal has been made optional. All such documents which required affixing the common seal may now instead be signed by two directors or one director and a company secretary of the company.

• Transferability of shares – The shares of the members, except in the private company, may be freely transferable.

• Capacity to sue and be sued – Being a separate legal entity the company is having capacity to sue others and it can be sued by others.

1.1.5 Classes of Companies

A company may be incorporated as a One Person Company (OPC) a new concept all together in the Companies Act, 2013, Private Company or a Public Company, depending upon the number of members joining it. Again it may either be an unlimited company, or may be limited by shares or by guarantee or by both. On the basis of control, companies can be classified as associate company, holding company and subsidiary company. Some other forms of classification of companies are: foreign company, Government Company, small company, dormant company, Nidhi Company and company formed for charitable objects. Companies may be classified into various classes on the following basis:

1.1.5.1 On the Basis of Incorporation

(a) Statutory companies

These are the companies which are created by a special Act of the Legislature, e.g., the Reserve Bank of India, the State Bank of India, the Life Insurance Corporation, the Industrial Finance Corporation, the Unit trust of India and State Financial Corporations These are mostly concerned with public utilities, e.g. railways, tramways, gas and electricity companies and enterprises of national importance. The provisions of the Companies Act, 2013 do not apply to them unless the special act specifies such application. Banking Regulation Act, 1949 is a special legislation concerning banking companies.

(b) Registered companies

These are the companies which are formed and registered under the Companies Act, 2013, or were registered under any of the earlier Companies Acts.

1.1.5.2 On the basis of liability

(a) Company limited by shares

Section 2 (22) of the Companies Act, 2013, defines that when the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares. It thus implies that for meeting the debts of the company, the shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings. His separate property cannot be encompassed to meet the company's debt.

(b) Company limited by guarantee

Section 2 (21) of the Companies Act, 2013 defines it as the company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up. Thus, the liability of the member of a guarantee company is limited up to a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum.

(c) Unlimited company

Section 2 (92) of the Companies Act, 2013 defines unlimited company as a company not having any limit on the liability of its members. In such a company the liability of a member ceases when he ceases to be a member.

The liability of each member extends to the whole amount of the company's debts and liabilities but he will be entitled to claim contribution from other members.

1.1.5.3 On the basis of members

(a) One person company

(1) The Concept of One Person Company (OPC)

The concept of One Person Company (OPC) has now been introduced in India, through Section 2 (62) of Companies Act, 2013 thereby enabling Entrepreneur(s)

carrying on the business in the Sole Proprietor form of business to enter into a Corporate Framework. Though this concept is new in India but it is already a part of many other countries like China, Australia, Pakistan and UK etc.

According to Section 2 (62) of the Companies Act, 2013 'One Person Company' means a company which has only one person as a member. A company formed under one person company may be either:

a) A company limited by shares, or
b) company limited by guarantee, or
c) An unlimited company.

One Person Company is a hybrid of Sole-Proprietor and Company form of business, and has been provided with concessional/relaxed requirements under the Act.

(2) Features of One Person Company (OPC)

(a) Only One Shareholder: Only a natural person, who is an Indian citizen and resident in India, shall be eligible to incorporate a One Person Company.

(b) Nominee for the Shareholder: The Shareholder shall nominate another person who shall become the shareholders in case of death/incapacity of the original shareholder. Such nominee shall give his/her consent and such consent for being appointed as the Nominee for the sole Shareholder. Only a natural person, who is an Indian citizen and resident in India, shall be a nominee for the sole member of a One Person Company.

(c) Director: Must have a minimum of One Director, the Sole Shareholder can himself be the Sole Director. The Company may have a maximum number of 15 directors.

(b) Private Company [Section 2 (68)]

According to Section 2 (68) of Companies Act, 2013 a 'private company' means a company having a minimum paid-up share capital as may be prescribed, and which by its articles:

(1) restricts the right to transfer its shares.

(2) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member;

Provided further that:

(a) persons who are in the employment of the company, and

(b) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members, and

(3) prohibits any invitation to the public to subscribe for any securities of the company.

The Companies (Amendment) Act, 2015 has omitted 'of one lakh rupees or such higher paid-up share capital' from the definition of Private Company w.e.f. 25.05.2015. The impact of this amendment is that today one can have a company of paid up capital of mere ` Two (with each subscriber giving a rupee as subscription) for a private company and ` Seven for a public company.

(c) Public company [Section 2 (71)]

According to Section 2 (71) of Companies Act, 2013 a 'public company' means a company which:

(1) is not a private company.

(2) has a minimum paid-up share capital, as may be prescribed:

(3) Seven or more members are required to form the company.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.
The Companies (Amendment) Act, 2015 has omitted "of five lakh rupees or such higher paid-up capital," from the definition of Public Company w.e.f. 25.05.2015.

(d) Small Company [Section 2 (85)]

According to Section 2 (85) of Companies Act, 2013 a ''small company'' means a company, other than a public company:

(1) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees. Or

(2) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to:

a) a holding company or a subsidiary company.

b) a company registered under Section 8, or

c) a company or body corporate governed by any special Act.

Some of the advantages enjoyed by the small companies are:

a) holding of two board meetings instead of four – one each in the first and second half years and the gap between the two meeting should not be more than 90 days. [section 173(5)]

b) Not required to give cash flow statements with the financial statements [section 2(40)]

1.1.5.4 On the basis of control

Holding company and Subsidiary company

'Holding' and 'Subsidiary' Companies are relative terms. A company is a holding company of another if the other is its subsidiary.

According to Section 2 (46) of the Companies Act, 2013 'holding company', in relation to one or more other companies, means a company of which such companies are subsidiary companies.

According to Section 2 (87) of the Companies Act, 2013 'subsidiary company' or 'subsidiary', in relation to any other company (that is to say the holding company), means a company in which the holding company :

a) controls the composition of the Board of Directors, Or

b) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

1.1.5.5 On the basis of Listing in the recognised Stock Exchange

(a) Listed company (also widely held)

According to Section 2 (52) of the Companies Act, 2013, a 'listed company' means a company which has any of its securities listed on any recognised stock exchange.

Whereas the word securities as per the Section 2 (81) of the Companies Act, 2013 has been assigned the same meaning as defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

(b) Unlisted company

Unlisted Company means company other than listed company.

1.1.5.6 Others

(a) Government Company

According to Section 2 (45) of the Companies Act, 2013, a 'Government company' means any company in which not less than fifty one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

(b) Foreign Company

According to Section 2 (42) of the Companies Act, 2013, 'foreign company' means any company or body corporate incorporated outside India which:

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode. And

(b) conducts any business activity in India in any other manner.

(c) Associate Company

According to Section 2 (6) of the Companies Act, 2013, 'associate company' in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

As per the Explanation given under the Section, the clause, 'significant influence' means control of at least twenty per cent of total share capital, or of business decisions under an agreement.

(d) Dormant company

Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

'Significant accounting transaction' means any transaction other than:

(a) payment of fees by a company to the Registrar.

(b) payments made by it to fulfil the requirements of this Act or any other law.

(c) allotment of shares to fulfil the requirements of this Act, and

(d) payments for maintenance of its office and records.

(e) Nidhi Companies

Company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift (cost cutting) and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefits and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. [Section 406 of the Companies Act, 2013]

(f) Public financial institutions

According to Section 2 (72) of the Companies Act, 2013 the following institutions are to be regarded as public financial institutions:

(1) The Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956.

(2) The Infrastructure Development Finance Company Limited,

(3) Specified company referred to in the Unit Trust of India (Transfer of Undertaking and

Repeal) Act, 2002.

(4) Institutions notified by the Central Government under Section 4A (2) of the Companies Act, 1956 so repealed under Section 465 of this Act.

(5) Such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

Provided that no institution shall be so notified unless:

a) it has been established or constituted by or under any Central or State Act. Or

b) not less than fifty-one per cent of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.

1.1.6 Conversion of Public Company into a Private Company or vice versa

(a) Conversion of public company into private company

A public company can be converted into a private company by passing a special resolution, after altering its articles so as to include therein the restrictions contained in Section 2(68) of the Act. A special resolution passed to convert a public company into a private company is binding on dissenting shareholders provided it is bona fide, is in the interest of the company as a whole, and is consistent with the objects in the Memorandum of Association [Bal Ramba vs. Master Silk Mills AIR 1955 N.U.R. Saurashtra 927]. Under Section 14 (1), any alteration made in the articles to convert a public company into a private company shall take effect only with the approval of the Tribunal which shall make such order as it may deems fit.

(b) Conversion of private company into public company

Similarly where a private company alters its articles by passing special resolution in such a manner that they no longer includes the restrictions and limitations which are required to be included in the articles of a private company, then such company shall cease to be a private company from the date of such alteration.

(c) Filing with the registrar

Every alteration of the articles and a copy of the order of the Tribunal approving the alteration of articles in respect of conversion of public company into private company or private company into public company shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally in the articles.

1.1.7 When Companies must be registered

According to Section 464 of the Companies Act, 2013, no association or partnership consisting of more than such number of persons (i.e., not exceeding 50 as per Rule 10 of Companies (Miscellaneous) Rules, 2014) shall be, formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force:

Above stated provision shall not apply to:

(a) Hindu undivided family carrying on any business. Or

(b) an association or partnership, if it is formed by professionals who are governed by special Acts.

Every member of an association or partnership carrying on business in contravention of above law, shall be punishable with fine which may extend to one lakh rupees and shall also be personally liable for all liabilities incurred in such business.

Where an association is formed, which has membership in excess of the number aforementioned, will be an illegal association. Such a body will have no legal existence and it cannot be wound up under the Act, or even as an unregistered company. Neither a member of it would be able to sue it, nor would it be able to sue the member. Nevertheless, a member

who has paid any money to the association would be able to recover it from the director or agents or the association before the money so paid has been applied to an illegal purpose [Greeberg vs. Cooperstein [1965] Ch. 657 followed in Ram Das vs. Kunut Dhari AIR 1925]. Every person who is, or continues to be a member of an association in the circumstance described above, is personally culpable for all liabilities incurred in such business and every member is, in addition punishable for any person or persons to trade or carry on business under any name or title of which 'limited' is the last word, without being fully incorporated.

INCORPORATION OF COMPANY

(a) Formation of company

Persons who form the company are known as promoters. It is they, who conceive the idea of forming the company. They take all necessary steps for its registration.

Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company.

(1) Public Company: In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration.

(2) Private Company: In exactly the same way, 2 or more persons can form a private company.

(3) One person company (OPC): One person, where the company to be formed is to be One Person Company.

1.1.8 Incorporation of Company

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(b) Procedural aspects of incorporation of company

Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.

(1) Filing of the documents and information with the registrar: For the registration of the company following documents and information are required to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated:

a) the memorandum and articles of the company duly signed by all the subscribers to the memorandum.

b) a declaration by person who is engaged in the formation of the company (an advocate, a chartered accountant, cost accountant or company secretary in practice), and by a person named in the articles (director, manager or secretary of the company), that all the requirements of this Act and the rules made there under in respect of registration and matters precedent or incidental thereto have been complied with.

c) an affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles stating that:

1) he is not convicted of any offence in connection with the promotion, formation or management of any company, or

2) he has not been found guilty of any fraud or misfeasance or of any breach of duty

to any company under this Act or any previous company law during the last five years,

3) and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.

d) the address for correspondence till its registered office is established.

e) the particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.

f) the particulars (names, including surnames or family names, the Director Identification Number, residential address, nationality) of the persons mentioned in the articles as the first directors of the company and such other particulars including proof of identity as may be prescribed, and

g) the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed. Particulars provided in this provision shall be of the individual subscriber and not of the professional engaged in the incorporation of the company [The Companies (Incorporation) Rules, 2014].

(2) Issue of certificate of incorporation on registration: The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

(3) Allotment of corporate identity number (CIN): On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

(4) Maintenance of copies of all documents and information: The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its dissolution under this Act.

(5) Furnishing of false or incorrect information or suppression of material fact: If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under Section 447.

(6) Company incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact: where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under this Section shall each be liable for action under Section 447.

(7) Order of the Tribunal: where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants:

(a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors, or

(b) direct that liability of the members shall be unlimited. or

(c) direct removal of the name of the company from the register of companies, or

(d) pass an order for the winding up of the company, or

(e) pass such other orders as it may deem fit.

Provided that before making any order:
1) the company shall be given a reasonable opportunity of being heard in the matter, and
2) the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

(8) Formation of OPC

a) The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.

b) The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.

c) Such other person may be given the right to withdraw his consent

d) The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar

e) Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

f) Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year):

1) shall be eligible to incorporate a OPC.

2)shall be a nominee for the sole member of a OPC.

g) No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.

h) No minor shall become member or nominee of the OPC or can hold share with beneficial interest.

i) Such Company cannot be incorporated or converted into a company under Section 8 of the Act. Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the Rules 6 & 7 of the Companies (Incorporation) Rules, 2014.

j) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.

k) OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

l) If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

(c) Effect of registration

According to Section 9 of the Companies Act, 2013, from the date of incorporation (mentioned in the certificate of incorporation), the subscribers to the memorandum and all other persons, who may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum. Such a registered Company shall be capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from the incorporators and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association [Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjhunwala AIR 1961 SC 1669]. It has perpetual existence until it is dissolved by liquidation or struck out of the register. A shareholder who buys shares, does not buy any interest in the property of the company but in certain cases a writ petition will be maintainable by a company or its shareholders.

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a separate existence and the law recognises it as a legal person separate and distinct from its members [State Trading Corporation of India vs. Commercial Tax Officer AIR 1963 SC 1811]. It may be noted that under the provisions of the Act, a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity [Spencer & Co. Ltd. Madras vs. CWT Madras (1969) 39 Comp. Case 212].

(d) Certificate as Conclusive Evidence

According to Section 35 of the 1956 Act, a Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Acts have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act. The Certificate of Incorporation is conclusive evidence that everything is in order as regards registration and that the company has come in to existence from the earliest moment of the day of incorporation stated therein with rights & liabilities of a natural person, competent to enter into contracts [Jubilee Cotton Mills Ltd. v. Lewis (1924) A.C. 958.]. The validity of the registration cannot be questioned after the issue of the certificate.

It is for the purpose of incorporation that the certificate was made conclusive by the legislature and the certificate cannot legalise the illegal object contained in the Memorandum. Where the object of the company is unlawful, it has been held that the certificate of registration is not conclusive for this purpose [Performing Right Society Ltd. v. London Theatre of Varieties

(1992) 2 KB 433].

Even if the two signatures to a Memorandum were written by one person, or were forged, the certificate would be conclusive that the company was duly incorporated. So too, if the signatories were all minors, the certificate would still be conclusive [Hammod v. Prentice Bros (1920) 1 Ch. 201 and Bowman v. Secular Society Ltd. 1917 AC 406,438].

Section 35 of the 1956 Act has not been incorporated bodily in the 2013 Act and the same shall be watched with interest as to how the Courts would interpret the absence of such a provision.

(e) Effect of Memorandum and Articles

As per Section 10 of the Companies Act, 2013, where the memorandum and articles when registered, shall bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and an agreement to observe all the provisions of the memorandum and of the articles. All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

As a result, a number of legal relationships are formed between different parties and the company which are described below:

(1) Between the members and company: The memorandum and articles constitute a contract between the members and the company. In consequence, the members are bound to the company under a statutory covenant.

Views differ on the questions as to whether and how far the memorandum and articles bind the company to the members. One view is that it is bound just as its members are. Another view is that the company is not wholly bound. But it seems that courts, instead of conforming to either of these views, have elected to take a via media. It is not true to say that the company is wholly bound so that any member can enforce any articles against it. But it is bound to the extent that any member can sue it so as to prevent any breach of the article which is likely to affect his right as a member of the company [Hickman vs. Kent Sheepbreeder's Association [1985] 1 Ch. 881]. Thus an individual member can file a suit against the company to enforce his individual rights, e.g., right to contest election for directorship of the company, right to get back his shares wrongfully forfeited, right to receive a share certificate, share warrants to bearer or notice of general meetings etc. [Pender vs. Lushington (1817) 7 Ch. D. 70; Nagaffa vs. Madras Race Club, AIR 1951 Mad. 83; C.L. Joseph vs. Los AIR 1965 (Ker.) 68]. The member suing in such cases 'sues not in the rights of a member but in his own right to protect from invasion of his own individual right as a member' [Per Jenkis L.J. in Edwards vs. Halliwell [1950] 2 All ER 1964 at p. 1067].

(2) Between member inter se: In the case of Wood vs. Odessa Water Works Co. [1989] 42 Ch. D. 363, Sterling J. Observed: The articles of Association constitute a contract not merely between the shareholders and the company but between each individual shareholder and every other.

(3) Between the company and the outsiders: The memorandum and the articles do not constitute a contract between the company and outsiders. Neither the company nor the members are bound by the articles to outsiders, since these constitute a contract between members, inter se, and the outsider is not a party to the articles although he may be named therein.

Nonetheless, an outsider is entitled to assume that in respect of contract entered into with him all the formalities required to be carried out under the articles or memorandum have been duly complied with [Royal British Bank vs. Turquand (1956) 6 E.B. 327].

(f) Commencement of business, etc.

Prior to the Companies (Amendment) Act, 2015, Section 11 of the Companies Act, 2013 seeks to provide that a company having a share capital shall not commence any business or exercise any borrowing powers only after fulfilment of certain conditions. However, the Companies (Amendment) Act, 2015 has done away with this requirement.

(g) Registered office of a company

Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the company for the communication and serving of necessary documents, notices letters etc. The domicile and the nationality of a company are determined by the place of its registered office. This is also important for determining the jurisdiction of the court.

(1) Registered office: From the 15th day of its incorporation and at all times thereafter a company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

(2) Verification of registered office: The Company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation. The form to be filed in INC-22.

(3) Labelling of company: Every company shall:

a) paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.

b) have its name engraved in legible characters on its seal (the Companies (Amendment) Act, 2015 has deleted the requirement of having Common Seal compulsorily).

c) get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications, and

d) have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed.

(4) Name change by the company: Where a company has changed its name/s during the last two years, it shall paint or affix or print, along with its name, the former name or names so changed during the last two years.

(5) In case of OPC: The words ''One Person Company'' shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

(6) Notice of change to registrar: Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar within 15 days of the change, who shall record the same. This is applicable to change in the registered address of the company within the local limits of the village, town or city and remaining within the jurisdiction of the same Registrar of Companies.

(7) Change by passing of special resolution: The registered office of the company shall be changed only by passing of special resolution by a company:

a) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company, and

b) in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company.

(8) Change of registered office outside the jurisdiction of registrar: Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to confirmed by the Regional Director on an application made by the company.

(9) Communication and filing of confirmation: The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be:

a) communicated within 30 days from the date of receipt of application by the Regional Director to the company, and

b) the company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation who shall register the same, and
The Registrar of Companies of the new jurisdiction shall certify the registration within a period of thirty days from the date of filing of such confirmation. As of now, Tamil Nadu and Maharashtra are the two states where there are two Registrars of Companies are operating. The jurisdictions of the respective Registrars of Companies are notified.

(10) Certificate, a conclusive evidence of compliance of requirements of this Act: The certificate shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.

(11) In case of default: If any default is made in complying with the requirements of this Section, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees.

(h) Act to override memorandum, articles, etc.
According to Section 6 of the Companies Act, 2013, the provisions of this Act shall have overriding effect on provisions contained in memorandum or articles or in an agreement or in resolution passed by the company in the general meeting or by its board of directors, whether they are registered, executed or passed before or after the commencement of this Act.
Any provision contained in any of the above mentioned document, shall be void, to the extent to which it is inconsistent to the provisions of this Act.

1.1.9 Memorandum of Association

The Memorandum of Association of company is in fact its charter. It defines its constitution and the scope of the powers of the company with which it has been established under the Act.

A memorandum is a public document under Section 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

Section 4 of the Companies Act, 2013 seeks to provide for the requirements with respect to memorandum of a company.

(a) Content of the memorandum
The memorandum of a company shall state:

(1) the name of the company with the last word 'Limited' in the case of a public limited company, or the last words 'Private Limited' in the case of a private limited company.

(2) the State in which the registered office of the company is to be situated.

(3) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

(4) the liability of members of the company, whether limited or unlimited, and also state:
a) in the case of a company limited by shares, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them. And
b) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute:
1) To the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may

have been contracted before he ceases to be a member, as the case may be, and

2) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves.

(5) in the case of a company having a share capital:

a) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share, and

b) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name.

(6) in the case of OPC, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

(b) Applying for the name of the company

The name stated in the memorandum shall not:

(a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law. or

(b) be such that its use by the company:

(1) will constitute an offence under any law for the time being in force, or

(2) is undesirable in the opinion of the Central Government.

(3) Registration of name of the company: Without effecting the above provisions, a company shall not be registered with a name which contains:

a) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force, or

b) such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

(4) Requirement for the reservation of the name of the company:

a) A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as:

1) the name of the proposed company. or

2) the name to which the company proposes to change its name.

b) Upon receipt of an application under Sub-Section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of sixty days from the date of the application.

c) Where after reservation of name it is found that name was applied by furnishing wrong or incorrect information, then:

1) if the company has not been incorporated, the reserved name shall be cancelled and the person making application shall be liable to a penalty extending to one lakh rupees.

2) if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard:

a. either direct the company to change its name within a period of three months, after passing an ordinary resolution.

b. take action for striking off the name of the company from the register of companies, or

c. make a petition for winding up of the company.

(5) Forms and schedule related to memorandum: The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

(6) Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be void.

Doctrine of ultra vires: The meaning of the term 'ultra vires' is simply 'beyond (their) powers'. This pre supposes that the powers are in their nature limited. To an ordinary citizen, the law permits whatever does the law not expressly forbid. It is only when the law has called into existence a person for a particular purpose or has recognised its existence, such as in the case of a limited company that the power is limited to the authority delegated expressly or by implication and to the objects for which it was created. In the case of such a creation, the ordinary law applicable to an individual is somewhat reversed, whatever is not permitted expressly or by implication, by the constituting instrument, is prohibited not by any express prohibition of the legislature, but by the doctrine of ultra vires.

The impact of the doctrine of ultra vires is that a company can neither be sued on an ultra vires transaction, nor can it sue on it. Since the memorandum is a 'public document', it is open to public inspection. Therefore, when one deals with a company one is deemed to know about the powers of the company. If in spite of this you enter into a transaction which is ultra vires the company, you cannot enforce it against the company.

An act which is ultra vires the company being void, cannot be ratified by the shareholders of the company. Sometimes, act which is ultra vires can be regularised by ratifying it subsequently. For instance, if the act is ultra vires the power of the directors, the shareholders can ratify it. If it is ultra vires the articles of the company, the company can alter the articles, if the act is within the power of the company but is done irregularly, shareholder can validate it.

1.1.11 Articles of Association

The articles of association of a company are its rules and regulations, which are framed to manage its internal affairs. Just as the memorandum contains the fundamental conditions upon which along the company is allowed to be incorporated, so also the articles are the internal regulations of the company [Guiness vs. Land Corporation of Ireland 22 Ch. D. 349, 381].

The articles of association are in fact the bye-laws of the company according to which director and other officers are required to perform their functions as regards the management of the company, its accounts and audit. It is important therefore that the auditor should study

them and, while doing so he should note the provisions therein in respect of relevant matters. Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association as follows:

(a) Regulations for management: The articles of a company shall contain the regulations for management of the company.

(b) Inclusion of matters: The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such additional matters in its articles as may be considered necessary for its management.

(c) Contain provisions for entrenchment: The articles may contain provisions for entrenchment (to protect something) to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.

(d) Manner of inclusion of the entrenchment provision: The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

(e) Notice to the registrar of the entrenchment provision: Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

(f) Forms of articles: The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

(g) Model articles: A company may adopt all or any of the regulations contained in the model articles applicable to such company.

(h) Company registered after the commencement of this Act: In case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

(i) Section not apply on company registered under any previous company law: Nothing in this Section shall apply to the articles of a company registered under any previous company law, unless amended under this Act.

1.1.13 Copies of memorandum, articles, etc., to be given to members

According to Section 17 every company on being so requested by a member, shall send copies of the following documents within seven days of the request on the payment of fees:

(a) the memorandum.

(b) the articles, and

(c) every agreement and every resolution referred in Section 117 (Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum or articles.

In case of default, the company and every officer who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

Number of director (section 5810)

Every Producer Company shall have at least 5 directors and not more than 15 directors. The proviso to the Section states that in the case of the Inter-State Co-operative Society incorporated as a Producer Company, such company may have more than 15 directors for a period of one year from the date of its incorporation as a Producer Company.

COMPANY MEETINGS

3.3.1 Procedure relating to foreign companies carrying on business in India

According to Section 2(42) 'foreign company' means any company or body corporate incorporated outside India which

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode, and

(b) conducts any business activity in India in any other manner.

The Companies Act, 2013 provides detailed provisions for compliance by the foreign companies carrying on business in India. These provisions are discussed below:

Inspection, inquiry or investigation [Section 228]

The provisions as to inspection, inquiry or investigation under Chapter XIV of the Act shall apply 'mutatis mutandis' to foreign companies.

Merger into a company registered under this Act or vice versa [Section 234(2)]

Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Explanation: For the purposes of sub-section (2), the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

1.2.2.5 General Meetings

(a) Matters to be transacted at general meeting (Section 581S)
The Board of directors of a Producer Company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at the annual general meeting of its members, namely:
(1) approval of budget and adoption of annual accounts of the Producer Company.
(2) approval of patronage bonus.
(3) issue of bonus shares.
(4) declaration of limited return and decision on the distribution of patronage.
(5) specify the conditions and limits of loans that may be given by the Board to any director, and
(6) approval of any transaction of the nature as is to be reserved in the articles for approval by the members.

(b) Quorum (Section 581Y)
Unless the articles require a larger number, one-fourth of the total membership shall constitute the quorum at a general meeting.

(c) Voting Rights (Section 581Z)
Subject to Sections 581D, (1) & (3), every member shall have one vote and in the case of equality of votes, the Chairman or the person presiding shall have a casting vote except in the case of election of the Chairman.

1.4.3 Wound up as an unregistered company [Section 376]
Where a body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India, it may be wound up as an unregistered company under this Part, notwithstanding that the body corporate has been dissolved or otherwise

ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

1.4.4 Capital requirement [Section 379]

Where not less than fifty per cent of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII of the Act and such other provisions of the Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

1.4.5 Registration with the Registrar of Companies [Section 380(1)]

(a) Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration:
   (1) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language.
   (2) the full address of the registered or principal office of the company.
   (3) a list of the directors and secretary of the company containing such particulars as may be prescribed.
   (4) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company.
   (5) the full address of the office of the company in India which is deemed to be its principal place of business in India.
   (6) particulars of opening and closing of a place of business in India on earlier occasion or occasions.
   (7) declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad, and
   (8) any other information as may be prescribed.

(b) Every foreign company existing at the commencement of this Act shall, if it has not delivered to the Registrar before such commencement, the documents and particulars specified in sub-section (1) of section 592 of the Companies Act, 1956, continue to be subject to the obligation to deliver those documents and particulars in accordance with that Act.

(c) Where any alteration is made or occurs in the documents delivered to the Registrar under this section, the foreign company shall, within thirty days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form.

1.4.6 Balance sheet and profit and loss account [Section 381(1)]

(a) Every foreign company shall, in every calendar year:
   (1) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents as may be prescribed, and
   (2) deliver a copy of those documents to the Registrar:
   Provided that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in that notification.

(b) If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof in the English language.

(c) Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out.

1.4.7 Display of Name of the Company [Section 382]

(a) Every foreign company shall

(b) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate.

(c) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, billheads and letter paper, and in all notices, and other official publications of the company, and

(d) if the liability of the members of the company is limited, cause notice of that fact:

(1) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and

(2) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situate.

1.4.8 Service of documents [Section 383]

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under Section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

(a) The provisions of section 71 shall apply mutatis mutandis to a foreign company [Section 384(1)].

(b) The provisions of section 92 shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.

(c) The provisions of section 128 shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.

(d) The provisions of Chapter VI shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.

(e) The provisions of Chapter XIV shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

1.4.9 Expressions [Section 386]

For the purposes of the foregoing provisions of this Chapter:

(a) the expression "certified" means certified in the prescribed manner to be a true copy or a correct translation.

(b) the expression "director", in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act, and

(c) the expression "place of business" includes a share transfer or registration office.

1.4.10 Issue of prospectus and Indian Depository Receipts [Section 391(1)]

The provisions of sections 34 to 36 (both inclusive) shall apply to:

(1) the issue of a prospectus by a company incorporated outside India under section 389 as

they apply to prospectus issued by an Indian company;

(2) the issue of Indian Depository Receipts by a foreign company.

The provisions of Chapter XX shall apply 'mutatis mutandis' for closure of the place of business of a foreign company in India as if it were a company incorporated in India.

1.4.11 Penalty for contravention [Section 392]

Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and in the case of a continuing offence, with an additional fine which may extend to fifty thousand rupees for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees, or with both

1.4.12 Applicability of all references under the Act [Section 405(5)]

Where a foreign company carries on business in India, all references to a company in this section shall be deemed to include references to the foreign company in relation, and only in relation, to such business.

DIRECTORS & DIRECTORS' MEETINGS

1.1.1 Meetings of Board (Section 173)

Section 173 of the Act provides for Meetings of Board. According to this section:

1.1.1.1 Frequency of Board Meetings [Section 173 (1)]

(a) First Board meeting: Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its Incorporation.

(b) Subsequent Board meetings: Every company shall hold minimum of 4 meetings every year provided that the gap between two consecutive board meetings shall not be more than 120 days.

However, the Central Government may by notification, direct that these provisions will not apply in relation to any class or descriptions of companies or will apply in relation thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

Exceptions:

(a) A one person company, small company and dormant company shall be deemed to have complied with the provisions of section 173, if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days.

(b) Provided that, a one person company in which there is only one director on its Board of Directors shall not be required to hold at least one Board meeting in each half of a calendar year. Thus, it is exempt from following the provisions of section 173(5).

(c) Vide Notification G.S.R. 466(E) dated 5th June 2015, this sub-section 1 of section 173 shall apply to the company formed under section 8 of the Companies Act, 2013 only to the extent that the Board of Directors of such companies shall hold at least one meeting within every six calendar months.

(d) Meetings of Committees: As per Secretarial Standards, Committees shall meet as often as necessary subject to the minimum number and frequency stipulated by the Board, or as prescribed by any law or authority.

(e) Meeting of Independent Directors: As per Secretarial Standards, where a company is required to appoint Independent Directors under the Act, such Independent Directors shall meet atleast once in a calendar year.

1.1.1.2 Participation in Board meeting [Section 173 (2)]

(a) Sub section (2) of section 173 allows directors to attend Board meetings:

(1) in person, or,

(2) through video conferencing, or,

(3) other audio visual means as may be prescribed.

(b) Such audio visual means should be capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

(c) However, the Central Government may by notification specify such matters as given under Rule 4 of the Companies (Meetings of Board and its powers) Rules, 2014 which shall not be dealt within a meeting through video conferencing and other audio visual means.

(d) Video conferencing - Key Points: Key points related to meetings of Board that are held

through conferencing or other audio visual means, as provided in Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 are as under:

(1) Every Company shall make necessary arrangements to avoid failure of video or audio visual connection.

(2) The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care:

a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

b) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorised participants at the Board meeting;

c) to record proceedings and prepare the minutes of the meeting;

d) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year;

e) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means; and

f) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting.

However, the differently disabled persons may make a request to the Board to allow a person to accompany him.

(e) Matters not to be dealt with in a meeting through video conferencing or other audio-visual means:-The following matters shall not be dealt with in any meeting held through video conferencing or other audio-visual means, as provided in Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014:

(i) the approval of annual financial statements;

(ii) the approval of the Board's report;

(iii) the approval of the prospectus;

(iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any to be approved by the Board; and

(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

1.1.1.3 Notice of the Meeting [Section 173 (3)]

(a) According to section 173(3), every board meeting shall be called by giving at least 7 days notice in writing to all the directors at their registered address (whether in India or outside India). The notice may be sent by hand delivery or by post or by electronic means.

Provided that a meeting of the Board of Directors may be called on a shorter notice (than 7 days) in order to transact an urgent business, subject to the condition that at least one independent director, if any, shall be present at the meeting. If no independent director is present at such a meeting of the Board then the decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least

one independent director, if any.

As per Secretarial Standards, the fact that meeting is being called at shorter notice, shall be stated in the notice.

(b) The Companies (Meetings of Board and its Powers) Rules, 2014 further provides that

(i) The notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means.

(ii) On receiving such a notice, a director intending to participate through video conferencing or audio visual means shall communicate his intention to the chairperson or the company secretary of the company. He shall give prior intimation to that effect sufficiently in advance so that the company is able to make suitable arrangements in this behalf.

(i) If the director does not give any intimation of his intention to participate that he wants to participate through the electronic mode, it shall be assumed that the director shall attend the meeting in person.

(ii) The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year. In the absence of any such intimation from the director, it shall be assumed that he will attend the meeting in person.

(iii) Notice of the meeting, wherein the facility of participation through Electronic mode is provided, shall clearly mention a venue to be the venue of the meeting and it shall be the place where all the recordings of the proceedings at the meeting would be made.

(c) The SS-1 (Secretarial Standards on the Meeting of Board) provides that:

(i) Where director specifies a particular means of delivery of notice, notice shall be given to him by such means.

(ii) Notice shall be issued by the Company Secretary or where there is no Company Secretary, by any director or any other person authorized by the Board for the purpose.

(iii) The notice shall specify the serial number, day, date, time and full address of the venue of the meeting.

(iv) In case the facility of participation through Electronic Mode is being made available, the notice shall provide the available option of such facility, information to avail such facility, and contact number or e-mail address of the Chairman or Company Secretary or any other authorized person to whom director shall confirm as to whether they will participate through electronic mode in the meeting.

(v) The Agenda, setting out the business to be transacted at the meeting, and Notes to agenda shall also be sent to all the directors alongwith Notice of the Board Meeting.

(vi) Each item of the business to be taken up in the meeting shall be serially numbered.

(vii) Proof of sending notice, agenda and notes on agenda and their delivery shall be maintained by the company.

(viii) Every Meeting shall have a serial number.

(ix) A meeting may be convened at any time and place, on any day, excluding a National Holiday.

National Holiday includes Republic Day i.e. 26th January, Independence Day i.e. 15th

August, Gandhi Jayanti i.e. 2nd October and such other day as may be declared as National Holiday by the Central Government.

1.1.1.4 Penalty for failure to give notice [Section 173(4)]

The Act under section 173(4) has prescribed a penalty of ` 25,000 on every officer of the Company whose duty is to give notice under this section and who has failed to do so.

1.1.1.5 Quorum for meetings of Board (Section 174)

A quorum is the minimum number of qualified persons who must attend in order to transact business at a duly convened Board meeting. A meeting shall not be deemed to have been properly held unless the quorum was present at that meeting.

Section 174 of the Companies Act, 2013 provides for Quorum for meetings of Board. According to this section:

(a) The quorum for a Board Meeting shall be one-third of its total strength or two directors, whichever is higher.

(b) The directors who participate by video conferencing or by other audio visual means shall also be counted for the purpose of determining the quorum at the meeting.

Further, the explanation given in the Companies (Meetings of Board and its Powers) Rules, 2014 provides that the a director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.

(c) The continuing directors may notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.

(d) Where at any time the number of interested directors exceeds or is equal to two third of the total strength of the Board of Directors, the quorum shall be the number of directors who are present at the meeting and not interested directors and are not be less than 2.

(e) Interested director for the purposes of this sub section means a director within the meaning of section 184 (2). Under section 184 (2) interested director means every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:

(1) with a body corporate in which such director or such director in association with any other director, holds more than two per cent shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate, or

(2) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting.

However, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested. Vide Notification no. G.S.R.464(E) dated 5th June, 2015, Section 184(2) shall apply to the private companies with the exception that interested director may participate in such meeting after

disclosure of his interest.

Where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

There is no ban on contract in which a director is interested. The only requirement is that the interest should be disclosed, bonafide and fair. [P. Leslie & Co. v Vo Wapshare; AIR (1969) SC 843]

Notes:

(1) The companies covered under section 8 of the Act shall constitute quorum for the Board meeting, either eight members or 25% of its total strength whichever is less. Provided that quorum shall not be less than two members. [Vide Notification G.S.R.466(E) dated 5th June 2015].

(2) The provisions of section 174 are not applicable to one person company in which there is only one director on its Board of directors.

(3) For the purpose of calculating quorum, any fraction of a number shall be rounded off as one.

(4) Total strength shall not include directors whose places are vacant.

(5) As per the SS-1 (Secretarial Standards on the Meeting of Board):

a) Quorum shall be present throughout the meeting.

b) Meetings of Committees: The presence of all members of any committee constituted by the Board is necessary to form the quorum for the meetings of such committee unless otherwise stipulated in the Act, or any other law, or the Articles or by the Board.

1.1.1.6 Passing of resolution by circulation (Section 175)

The Act requires certain business to be approved only at meetings of the Board. However, other business that require urgent decisions can be approved by means of Resolution passed by circulation. Resolution passed by circulation shall be deemed to be passed at a duly convened Meeting of the Board and have equal authority.

Section 175 of the Act provides for Passing of resolution by circulation. According to this section:

(a) The Act allows the Board of directors to pass resolution by circulation also. No resolution shall be deemed to have been duly passed by the Board or by a Committee thereof by circulation unless:

(1) The resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the Committee, as the case may be,

(2) at their addresses registered with the company in India,

(3) by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

If at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board.

(b) A resolution that has been passed by circulation shall have to be necessarily be noted in the next meeting of board or the committee, as the case may be, and made part of the minutes of such meeting.

(c) According to Secretarial Standards, not more than seven days from the date of circulation of draft resolution shall be given to the Directors to respond.

Annexure-A to Secretarial Standards-1 provides illustrative list of items of business which shall not be passed by circulation and shall be placed before the Board at its Meeting, as under:

General Business Items

1. Noting Minutes of Meetings of Audit Committee and other Committees.
2. Approving financial statements and the Board's Report.
3. Considering the Compliance Certificate to ensure compliance with the provisions of all the laws applicable to the company.
4. Specifying list of laws applicable specifically to the company.
5. Appointment of Secretarial Auditors and Internal Auditors.

Specific Items

1. Borrowing money otherwise than by issue of debentures.
2. Investing the funds of the company.
3. Granting loans or giving guarantee or providing security in respect of loans.
4. Making political contributions.
5. Making calls on shareholders in respect of money unpaid on their shares.
6. Approving Remuneration of Managing Director, Whole-time Director and Manager .
7. Appointment or Removal of Key Managerial Personnel.
8. Appointment of a person as a Managing Director / Manager in more than one company.
9. According sanction for related party transactions which are not in the ordinary course of business or which are not on arm's length basis.
10. Purchase and Sale of subsidiaries/assets which are not in the normal course of business.
11. Approve Payment to Director for loss of office.
12. Items arising out of separate meeting of the Independent Directors if so decided by the Independent Directors.

Corporate Actions

1. Authorise Buy Back of securities
2. Issue of securities, including debentures, whether in or outside India.
3. Approving amalgamation, merger or reconstruction.
4. Diversify the business.
5. Takeover another company or acquiring controlling or substantial stake in another company.

Additional list of items in case of listed companies

- Approving Annual operating plans and budgets.
- Capital budgets and any updates.
- Information on remuneration of KMP.
- Show cause, demand, prosecution notices and penalty notices which are materially

important.

- ❖ Fatal or serious accidents, dangerous occurrences, any material effluent or pollution problems.
- ❖ Any material default in financial obligations to and by the company, or substantial non-payment for goods sold by the company.
- ❖ Any issue, which involves possible public or product liability
- ❖ claims of substantial nature, including any judgement or order which, may have passed strictures on the conduct of the company or taken an adverse view regarding another enterprise that can have negative implications on the company.

1.1.2 Minutes

The minute in a literal sense means a note to preserve the memory of anything. The minutes of a meeting are a written record of the business transacted; decisions and resolutions arrived at the meeting.

1.1.2.1 Minutes of the Meeting of the General Meeting/Board Meeting [Section 118]

Section 118 of the Companies Act, 2013 imposes a statutory obligation on every company to cause minutes of all proceedings of general meetings, board meetings and other meeting and resolution passed by postal ballot.

However, vide Notification No.G.S.R.466(E) dated 05th June, 2015, this Section shall not apply as a whole to Section 8 companies except the minutes may be recorded within 30 days of the conclusion of every meeting in case of companies where the articles of association provide for confirmation of minutes by circulation.

According to the Section, every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every Committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within thirty days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered [Section 118(1)]

The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat [Section 118(2)].

All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting [Section 118(3)].

The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes [Section 118(6)].

The minutes kept in accordance with the provisions of this Section shall be evidence of the proceedings recorded therein [Section 118(7)].

As per Section 118(10), every company shall observe Secretarial Standards with respect to general and board meetings specified by the Institute of Company Secretaries of India constituted under Section 3 of the Company Secretaries Act, 1980 and approved as such by the Central Government. Accordingly, upon receipt of approval of MCA, ICSI has notified two Secretarial Standards viz. SS-1: Meetings of the Board of Directors and SS-2: General Meetings vide Notification ICSI No.1(SS) of 2015 dated 23rd April, 2015.

1.1.2.2 Inspection of minute books of general meeting [Section 119]

(a) The books containing the minutes of the proceedings of any general meeting of a company or of a resolution passed by postal ballot, shall:

(1) be kept at the registered office of the company, and

(2) be open, during business hours, to the inspection by any member without charge, subject to such reasonable restrictions as the company may, by its articles or in general meeting, impose, so, however, that not less than two hours in each business day are allowed for inspection.

(b) The other statutory requirements relating to keeping of the minutes of meeting are:

(1) The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.

(2) All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(3) In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain:

a) the names of the directors present at the meeting, and

b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

(4) There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting:

(a) is or could reasonably be regarded as defamatory of any person, or

(b) is irrelevant or immaterial to the proceedings; or

(c) is detrimental to the interests of the company.

(5) The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in sub-section (5).

(6) The draft minutes of the meeting shall be circulated among all the directors within 15 days of the meeting either in writing or in electronic mode as may be decided by the Board. The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.

(7) Where the minutes have been kept in accordance with sub-section (1) then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.

(8) No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.

(9) Every company shall observe Secretarial Standards with respect to General and Board meetings specified by the Institute of Company Secretaries of India (ICSI) constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.

(10) If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of twenty five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

(11) If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty five thousand rupees but which may extend to one lakh rupees.

ACCOUNTS AND AUDIT

According to Section 2(13) of the Companies Act, 2013, "Books of Account" includes records maintained in respect of:

(i) All sums of money received and expended by a company and matters in relation to which receipts and expenditure take place;

(ii) All sales and purchases of goods and services by the company ;

(iii) The assets and liabilities of the company; and

The items of costs as may be prescribed under Section 148 in the case of a company which belongs to any class of companies specified under that section

Section 128 of the Companies Act, 2013 provides for Books of account, etc., to be kept by the company. This provision came into force from 1st April, 2014. This Section provides:

3.4.1 Maintenance of books of accounts [Section 128 (1)]

(a) Every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any.

(b) The company shall be in a position to explain the transactions effected both at the registered office and its branches.

(c) Such books of Account shall be kept on accrual basis and according to the double entry system of accounting.

3.4.2 Place of maintenance of books of account [Section 128 (1)]

(a) The books of account and other relevant papers are required to be kept at the registered office of the company.

(b) The company may also keep all or any of the books of account at any other place in India as the Board of directors may decide. In such a case, the company shall file with the Registrar of Companies, a notice in writing giving the full address of that other place within 7 days of the Board's decision.

3.4.3 Electronic form of Books of account [Section 128 (1)]

(a) Rule 3 of the Companies (Accounts) Rules, 2014 provides that the company may keep its books of account or other relevant papers in electronic mode.

(b) The books of account and other relevant books and papers maintained in electronic mode shall:

(1) remain accessible in India so as to be usable for subsequent reference.

(2) be retained completely in the format in which they were originally generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered.

(3) The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches.

(4) The information in the electronic record of the document shall be capable of being displayed in a legible form.

(5) There shall be a proper system for storage, retrieval, display or printout of the electronic

records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law.

(6) The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a periodic basis.

(c) The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement:

(1) the name of the service provider.

(2) the internet protocol address of service provider.

(3) the location of the service provider (wherever applicable).

(4) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider .

3.4.4 Proper books of account in relation to a branch of the company [Section 128(2)]

Where company has a branch office in India or outside India, proper books of account relating to the transactions effected at the branch office may be kept at that branch office.

Provided, proper summarised returns periodically must be sent by the branch office to the company at its registered office or the other place as decided by the Board of directors.

3.4.5 Persons who can inspect [Section 128 (3) and (4)]

(a) The books of account and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by any director during business hours.

(b) In the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as prescribed under the Rule 4 of the Companies (Accounts) Rules, 2014 which provides that:

(1) The summarised returns of the books of account of the company kept and maintained outside India shall be sent to the registered office at quarterly intervals, which shall be kept and maintained at the registered office of the company and kept open to directors for inspection.

(2) Where any other financial information maintained outside the country is required by a director, the director shall furnish a request to the company setting out the full details of the financial information sought, the period for which such information is sought.

(3) The company shall produce such financial information to the director within 15 days of the date of receipt of the written request.

(4) The financial information required under Sub-rules (2) and (3) above shall be sought for by the director himself and not by or through his power of attorney holder or agent or representative.

(c) The inspection in respect of any subsidiary of the company shall be done only by the person authorised in this behalf by a resolution of the Board of Directors.

(d) The officers and other employees of the company shall give to the person making such inspection all assistance in connection with the inspection which the company may reasonably be expected to give.

3.4.6 Period of Maintenance [Section 128 (5)]

(a) The books of account of every company together with the vouchers relevant to any entry in such books of account shall be kept in good order by the company for a minimum period of 8 financial years immediately preceding a financial year.

(b) Where the company had been in existence for a period of less than 8 years, it shall maintain the books of account in respect of all such preceding years in good order.

(c) Where an investigation has been ordered in respect of the company, the Central Government may direct that the books of account may be kept for such longer period as it may deem fit.

3.4.7 Persons responsible for Maintenance & Penalty [Section 128 (6)]

(a) The following persons are responsible for the maintenance of proper books of account:

(1) The managing director, the whole-time director in charge of finance, the Chief Financial Officer, or

(2) any other person of a company charged by the Board.

(b) If any of the persons mentioned above contravenes provisions of this Section, they shall be punishable with:

(1) Imprisonment for a term which may extend to 1 year, Or

(2) Fine which shall not be less than ` 50,000 but which may extend to ` 5 lakh, or

(3) Both with imprisonment and fine.

3.4.8 Financial Statement [Section 129]

(a) As per the definition of Financial Statement under Section 2(40), 'financial statement' in relation to the company includes:-

1) A balance sheet as at the end of the financial year

2) A profit & loss account, or in case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

3) Cash Flow Statement for the financial year;

4) A statement of changes in equity, if applicable; and

5) Any explanatory note annexed to or forming part of any document referred above.

Provided that the financial statement, with respect to One Person Company, small company and dormant company, may not include Cash Flow Statement.

(b) Section 129(1) provides that the financial statements shall:

(1) give a true and fair view of the state of affairs of the company or companies,

(2) comply with the accounting standards notified under Section 133 and,

(3) shall be in the form or forms as may be provided for different class or classes of companies in Schedule III.

(4) However, the items contained in such financial statements shall be in accordance with the accounting standards.

(c) The above provisions relating to form and content of financial statement shall not apply to following companies:

(1) Insurance Companies, or

(2) Banking companies, or

(3) Company engaged in the generation or supply of electricity, or

(4) Any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company.

(d) If the following disclosures are not made, the financial statements shall not be treated as not disclosing a true and fair view of the state of affairs of the company:

(1) In case of Insurance Company, matters which are not required to be disclosed by the Insurance Act, 1938, or the Insurance Regulatory and Development Authority Act, 1999.

(2) In case of Banking Company, matters which are not required to be disclosed by the Banking Regulation Act, 1949.

(3) In case of Company engaged in the generation or supply of electricity, matters which are not required to be disclosed by the Electricity Act, 2003.

(4) In case of company governed by any other law, matters which are not required to be disclosed by that law.

(e) Here, any reference to the financial statement shall include any notes annexed to or forming part of such financial statement, giving information required to be given and allowed to be given in the form of such notes under this Act.

3.4.9 Laying of financial statements at Annual General Meeting [Section 129(2)]

At every annual general meeting of a company, the Board of directors of the company shall lay before such meeting the financial statements for the financial year.

3.4.10 Consolidated Financial Statements [Section 129(3) & (4)]

(a) Where a company has one or more subsidiaries, it shall, in addition to its own financial statements prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own.

(b) The Consolidated financial statements shall also be laid before the annual general meeting of the company along with the laying of its own financial statement.

(c) The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in Form AOC-1.

(d) For the purposes of consolidated financial statements, subsidiary shall include associate company and joint venture.

(e) According to Rule 6 of the Companies (Accounts) Rules, 2014, the consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III to the Act and the applicable accounting standards. However, a company which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions on consolidated financial statements provided in Schedule III of the Act. (Proviso to Rule 6)

'Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statements by a company if it meets the following conditions:-

(i) It is a wholly owned subsidiary, or is a partially owned subsidiary of another company and all its other members, including those who are not otherwise entitled to vote, having been intimated in writing and for which proof of delivery of such intimation is available with the company, do not object to the company not presenting consolidated financial statements;

(ii) it is a company whose securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India; and

(iii) its ultimate or any intermediate holding company files consolidated financial statements with the Registrar which are in compliance with applicable Accounting Standards.'

Nothing contained in this rule shall, subject to any other law or regulation, apply for the financial year commencing from the 1st day of April, 2014 and ending on the 31st March, 2015, in case of a company which does not have a subsidiary or subsidiaries but has one or more associate companies or joint ventures or both, for the consolidation of financial statement in respect of associate companies or joint ventures or both, as the case may be.

Provided also that nothing in this rule shall apply in respect of consolidation of financial statement by a company having subsidiary or subsidiaries incorporated outside India only for the financial year commencing on or after 1st April, 2014.

(f) The provisions applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, also apply to the consolidated financial statements [Section 129(4)].

3.4.11 Deviations from Accounting Standards [Section 129 (5)]

If the financial statements of a company do not comply with the accounting standards, the company shall disclose in its financial statements the following namely:

(a) the deviation from the accounting standards.

(b) the reasons for such deviation and

(c) the financial effects, if any, arising out of such deviation.

3.4.12 Exemptions [Section 129 (6)]

(a) The Central Government may, on its own or on an application by a class or classes of companies, by notification, exempt any class or classes of companies from complying with any of the requirements of this Section or the rules made thereunder, if it is considered necessary to grant such exemption in the public interest.

(b) Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

This notification shall be applicable in respect of financial statement prepared in respect of the financial years ending on or after the 31st March, 2016.

3.4.13 Contravention [Section 129 (7)]

If a company contravenes the provisions of this Section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this Section and in the absence of any of the officers mentioned above, all the directors shall be punishable with

(a) Imprisonment for a term which may extend to 1 year, or

(b) Fine which shall not be less than ` 50,000 but which may extend to ` 5 lakhs, or

(c) Both with imprisonment and fine.

3.4.14 Central Government to prescribe Accounting Standards (Section 133)

Section 133 of the Companies Act, 2013 deals with the power of the Central Government to prescribe the accounting standards. Accounting Standards means the standards of

accounting or any addendum thereto as recommended by the Institute of Chartered Accountants of India (ICAI) constituted under Section 3 of the Chartered Accountants Act, 1949, as may be prescribed by the Central Government in consultation with and after examination of the recommendations made by the National Financial Reporting Authority constituted under Section 132 of the Companies Act, 2013.

In respect of accounting standards, the role of National Financial Reporting Authority is limited to advise the Central Government on the accounting standards recommended by ICAI for adoption by companies.

Financial Reporting Authority, the existing Accounting Standards notified under the Companies Act, 1956 shall continue to apply.

3.4.15 Financial Statement, Board's report, etc (Section 134)

Section 134 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for financial statement, Board's report, etc. According to this Section:

(a) Authentication of Financial statements [Sections 134 (1), (2) & (7)]

(1) The financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the following:

a) The chairperson of the company where he is authorised by the Board, or

b) By two directors out of which one shall be managing director and other the Chief Executive Officer, if he is a director in the company,

c) The Chief Financial Officer, wherever he is appointed, and

d) The company secretary of the company, wherever he is appointed.

(2) In the case of a One Person Company, the financial statement shall be signed by only one director, for submission to the auditor for his report thereon.

(3) The auditors' report shall be attached to every financial statement [Section 134(2)].

(4) A signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of

a) Any notes annexed to or forming part of such financial statement.

b) The auditor' report. and

c) The Board's report. [Section 134(7)]

(b) Board's report [Sections 134 (3) & (4)]

(1) According to Companies (Accounts) Rules, 2014, the Board's Report shall be prepared based on the stand alone financial statements of the company and vide notification G.S.R. 742(E) dated 27th July, 2016, Board report shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report.

(2) There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include:

a) The extract of the annual return as provided under Sub-Section (3) of Section 92 in Form MGT-9;

b) number of meetings of the Board;

c) Directors' Responsibility Statement;

d) Details in respect of frauds reported by auditors under Section 143 (12) other than those which are reportable to the Central Government. [inserted by the Companies [Amendment) Act, 2015 notified on 29th May, 2015]

e) a statement on declaration given by independent directors under Sub-Section (6) of Section 149.

f) in case of a company covered under Sub-Section (1) of Section 178, company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided under Sub-Section (3) of Section 178.

However, it is provided vide notification no. G.S.R. 463 (E) dated 5th June, 2015, this clause shall not apply to Government Company.

g) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made:

1) by the auditor in his report. and

2) by the company secretary in practice in his secretarial audit report.

h) particulars of loans, guarantees or investments under Section 186.

i) particulars of contracts or arrangements with related parties referred to in Sub-Section (1) of Section 188 in Form AOC-2.

j) the state of the company's affairs.

k) the amounts, if any, which it proposes to carry to any reserves.

l) the amount, if any, which it recommends should be paid by way of dividend.

m) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the financial statements relate and the date of the report.

n) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as prescribed under the Rule 8(3) of the Companies (Accounts) Rules, 2014 which provides for.

o) A statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company.

p) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year.

q) Every listed company and every other public company having a paid up share capital of ` 25 crore or more calculated at the end of the preceding financial year shall include (as prescribed under the Companies (Accounts) Rules, 2014), in the report by its Board of directors, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.

r) Such other matters as contain as prescribed under the Companies (Accounts) Rules, 2014. According to which the report of the Board shall also contain:

1) the financial summary or highlights.

2) the change in the nature of business, if any.

3) the details of directors or key managerial personnel who were appointed or have resigned during the year.

4) the names of companies which have become or ceased to be its subsidiaries, joint ventures or associate companies during the year.

5) the details relating to deposits like:

   a. accepted during the year.

   b. remained unpaid or unclaimed as at the end of the year.

   c. whether there has been any default in repayment of deposits or payment of interest thereon during the year and if so, number of such cases and the total amount involved:

      1. at the beginning of the year.

      2. maximum during the year.

      3. at the end of the year.

6) the details of deposits which are not in compliance with the requirements of Chapter V of the Act.

7) the details of significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future.

8) the details in respect of adequacy of internal financial controls with reference to the Financial Statements.

(c) Board's Report in case of OPC [Section 134 (4)]

In case of a One Person Company, the report of the Board of Directors to be attached to the financial statement under this Section shall, mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

(d) Directors' Responsibility Statement [Section 134 (5)

The Directors' Responsibility Statement referred to in 134 (3) (c) shall state that:

(a) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures.

(b) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period.

(c) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.

(d) the directors had prepared the annual accounts on a going concern basis, and

(e) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

Here, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting

records, and the timely preparation of reliable financial information.

(f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

(e) Signing of Board's Report [Section 134(6)]

The Board's report and any annexures thereto shall be signed by its chairperson of the company if he is authorised by the Board and where he is not so authorised, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director.

(f) Contravention [Section 134(8)]

(a) If a company contravenes any provisions of this Section, the company shall be punishable with fine which shall not be less than ` 50,000 but which may extend to ` 25 lacs.

(b) Every officer of the company who is in default shall be punishable with:

(1) Imprisonment for a term which may extend to 3 years. or

(2) fine which shall not be less than ` 50,000 but which may extend to ` 5 lacs, or

(3) Both with imprisonment and fine

3.4.16 Corporate Social Responsibility (Section 135)

Corporate Social Responsibility ('CSR') was introduced in the Companies Act, 2013. It requires that every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. The Board's report shall disclose the composition of the Corporate Social Responsibility Committee.

The Corporate Social Responsibility Committee shall formulate and recommend to the Board a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII of the Companies Act, 2013, it shall recommend the amount of expenditure to be incurred on the activities referred to above and monitor the Corporate Social Responsibility Policy of the company from time-to-time.

The Board of every company shall after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve of the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed and ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

The Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

(a) Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility.

(b) Provided further that if the company fails to spend such amount, the Board shall, in its report made specify the reasons for not spending the amount.

Average net profit shall be calculated in accordance with the provisions of Section 198

of the Companies Act, 2013.

In this context, the ICAI has issued a guidance note on accounting for expenditure on corporate social responsibility (CSR) activities. It provides guidance on the recognition, measurement, presentation and disclosure of expenditure on activities relating to CSR activities.

3.4.17 Right of member to copies of Audited Financial Statement (Section 136)

According Section 136 of the Companies Act, 2013:

(a) A copy of the financial statements, which are to be laid before a company in its general meeting, shall be sent to the following:

(1) every member of the company,

(2) to every trustee for the debenture holder of any debentures issued by the company, and

(3) to all persons other than such member or trustee, being the person so entitled.

(b) Consolidated financial statements, if any, auditors' report and every other document required by law to be annexed or attached to the financial statements shall be annexed with financial statements.

(c) These financial statements shall be sent in not less than 21 days before the date of the meeting.

(d) In the case of a listed company:

(1) The above provisions shall be deemed to be complied with, if the copies of the documents are made available for inspection at its registered office during working hours for a period of 21 days before the date of the meeting.

(2) Along with it a statement containing the salient features of such documents in the Form AOC-3 or copies of the documents, as the company may deem fit, is sent to every member of the company and to every trustee for the holders of any debentures issued by the company.

(3) The statement is to be sent not less than 21 days before the date of the meeting unless the shareholders ask for full financial statements.

Vide Circular No. 11/2015 dated 21st July, 2015, it is clarified that a company holding a general meeting after giving a shorter notice as provided under Section 101 of the Act may also circulate financial statements (to be laid/considered in the same general meeting) at such shorter notice.

Vide Notification No. G.S.R. 466(E) dated 5th June, 2015, in respect of Section 8 companies, for the word "twenty one days" , the words "fourteen days" shall be substituted.

(e) A company shall also allow every member or trustee of the debenture holder to inspect the audited Financial Statement at its registered office during business hours.

(f) In case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent:

(1) by electronic mode to such members whose shareholding is in dematerialized format and whose email Ids are registered with Depository for communication purposes.

(2) where Shareholding is held otherwise than by dematerialized format, to such members

who have positively consented in writing for receiving by electronic mode, and

(3) by dispatch of physical copies through any recognised mode of delivery as specified under Section 20 of the Act, in all other cases.

(g) A listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.

(h) Every company having a subsidiary or subsidiaries shall:

(1) place separate audited accounts in respect of each of its subsidiary on its website, if any.

(2) provide a copy of separate audited financial statements in respect of each of its subsidiary, to any shareholder of the company who asks for it.

3.4.18 Contravention

(a) If any default is made in complying with the provisions of this Section, the company shall be liable to a penalty of ` 25,000.

(b) Every officer of the company who is in default shall be liable to a penalty of ` 5,000.

3.4.19 Copy of financial statements to be filed with Registrar (Section 137 of the Companies Act, 2013)

Section 137 of the Companies Act, 2013 provides for copy of financial statements to be filed with Registrar. According to this Section:

(a) Filing of financial statements [Section 137 (1)]

A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within 30 days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed within the time specified under Section 403.

(b) If Financial Statements are not adopted [First proviso to Section 137 (1)]

(a) Where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of annual general meeting.

(b) The Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.

(c) If the financial statements are adopted in the adjourned annual general meeting, then they shall be filed with the Registrar within 30 days of the date of such adjourned annual general meeting with such fees or such additional fees as may be prescribed within the time specified under Section 403 (i.e. within 270 days from the date by which it should have been filed with additional fees).

(c) Filing by One Person Company [Third proviso to Section 137 (1)]

A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.

(d) Company having subsidiaries outside India [Fourth proviso to Section 137 (1)]

A company shall, along with its financial statements to be filed with the Registrar, attach the accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India.

It has also been clarified vide General Circular No. 11/2015 dated 21st July 2015 that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian may place or file such unaudited accounts to comply with requirements of Section 136 (1) and 137 (1) as applicable. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

(e) Annual General meeting not held [Section 137 (2)]

Where the annual general meeting of a company for any year has not been held, the financial statements along with the documents required to be attached, duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held and in such manner, with such fees or additional fees as may be prescribed within the time specified, under Section 403.

(f) Penalty [Section 137 (3)]

If any of the provisions of this Section are contravened:

(a) The company shall be punishable with fine of ` 1,000 for every day during which the failure continues but which shall not be more than ` 10 Lacs, and

(b) The managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this Section, and, in the absence of any such director, all the directors of the company, shall be punishable with:

(1) Imprisonment for a term which may extend to 6 months, or

(2) Fine which shall not be less than `1 lac but which may extend to `5 Lacs, or

(3) Both with imprisonment and fine.

3.4.20 Internal Audit (Section 138)

There was no provision under the Companies Act, 1956 for Internal Audit. Section 138 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for it. According to Section 138 of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014:

(a) Companies required to appoint Internal Auditor

(1) The following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate [As amended vide notification no. G.S.R. 742(E) dated 27th July, 2016], namely:

a) every listed company.

b) every unlisted public company having:

1) paid up share capital of ` 50 crore or more during the preceding financial year, or

2) turnover of ` 200 crore or more during the preceding financial year, or

3) outstanding loans or borrowings from banks or public financial institutions exceeding ` 100 crores or more at any point of time during the preceding financial year, or

4) outstanding deposits of ` 25 crore or more at any point of time during the preceding financial year, and

c) every private company having:

1) turnover of ` 200 crore or more during the preceding financial year, or

2) outstanding loans or borrowings from banks or public financial institutions exceeding ` 100 crore or more at any point of time during the preceding financial year.

(2) The Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, formulate the scope, functioning, periodicity and methodology for conducting the internal audit.

(b) Transitional period

An existing company covered under any of the above criteria shall comply with the requirements of Section 138 and this rule within 6 months of commencement of such Section.

(c) Who is Internal Auditor

(a) Internal Auditor shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company. Here, the term Chartered Accountant shall mean a Chartered Accountant whether engaged in practice or not.

(b) The internal auditor may or may not be an employee of the company.

3.4.1 Appointment of auditors [Section 139]

Section 139 of the Companies Act, 2013 provides for appointment of auditors. This provision came into force from 1st April, 2014. This Section provides:

3.4.1.1 Appointment of auditor [Section 139 (1)]

(a) Every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor of the company.

(b) The auditor shall hold office from the conclusion of 1st annual general meeting (AGM) till the conclusion of its 6th AGM and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at AGM has been prescribed under the Companies (Audit and Auditors) Rules, 2014. According to the Rules:

(c) Manner and Procedure of selection and appointment of auditors [Rule 3 of Companies (Audit and Auditors) Rules, 2014]:

(1) In case of a company that is required to constitute an Audit Committee under Section 177, the committee and in case where such a committee is not required to be constituted, the Board shall take into consideration the qualifications and experience of the individual or the firm proposed to be considered for appointment as auditor and whether such qualifications and experience are commensurate with the size and requirements of the company.

(2) Audit Committee or the board, as the case may be, shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India or any competent authority or any Court.

(3) It may call for such other information from the proposed auditor as it may deem fit.

(4) If the Board agrees with the recommendation of the Audit Committee, it shall further recommend the appointment of an individual or a firm as auditor to the members in the AGM.

(5) If the Board disagrees with the recommendation of the Audit Committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.

(6) If the Audit Committee, after considering the reasons given by the Board, decides not to reconsider its original recommendation, the Board shall record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the annual general meeting; and if the Board agrees with the recommendations of the Audit Committee, it shall place the matter for consideration by members in the AGM.

(d) The company shall place the matter relating to such appointment for ratification by members at every AGM. According to the Companies (Audit and Auditors) Rules, 2014, the appointment shall be subject to ratification in every annual general meeting till the 6th meeting by way of passing of an ordinary resolution.

If the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditor or auditors after following the procedure laid down in this behalf under the Act.

(e) Before the appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor.

(f) Certificate by Auditor: The Companies (Audit and Auditors) Rules, 2014 provides the content of the Certificate. According to this, the auditor appointed shall submit a certificate that:

(1) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made there under.

(2) the proposed appointment is as per the term provided under the Act.

(3) the proposed appointment is within the limits laid down by or under the authority of the Act.

(4) the list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

(g) The certificate shall also indicate whether the auditor satisfies the criteria provided in Section 141 [Section 141 provides provisions on eligibility, qualification and disqualification of Auditor which will be discussed later].

(h) Further, the company shall inform the auditor concerned of his or its appointment, and also file a notice (in the Form ADT-1) of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed.

Note : It may kindly be noted that appointment includes reappointment also.

3.4.1.2 Term of Auditor [Section 139 (2)]

(a) Section 139 (2) provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint:

(1) an individual as auditor for more than one term of five consecutive years, and

(2) an audit firm as auditor for more than two terms of five consecutive years.

(b) Rule 5 of the Companies (Audit and Auditors) Rules, 2014 has prescribed the following classes of companies for the purposes of Section 139 (2):

(1) all unlisted public companies having paid up share capital of ` 10 crore or more.

(2) all private limited companies having paid up share capital of ` 20 crore or more.

(3) all companies having paid up share capital of below threshold limit mentioned in (1) and (2) above, but having public borrowings from financial institutions, banks or public deposits of ` 50 crores or more.

(c) Cooling off Period:

(1) An individual auditor who has completed his term (i.e., one term of five consecutive years) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term.

(2) An audit firm which has completed its term (i.e., two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.

(d) Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

(e) Every company, existing on or before the commencement of this Act which is required to comply with provisions of Section 139 (2), shall comply with the requirements of this Sub-Section within three years from the date of commencement of this provision.

(f) It is also provided that nothing contained in this Sub-Section shall prejudice the right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

3.4.1.3 Rotation of auditor [Section 139 (3) and (4)]

(a) Members of a company may resolve to provide that:

(1) in the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members, or

(2) audit shall be conducted by more than one auditor.

(b) The Central Government may, by rules, prescribe the manner in which the companies shall rotate their auditors.

(c) Manner of rotation of auditors by the companies on expiry of their term as provided under the Companies (Audit and Auditors) Rules, 2014:

(1) The Audit Committee shall recommend to the Board, the name of an individual auditor or of an audit firm who may replace the incumbent auditor on expiry of the

term of such incumbent.

(2) Where a company is required to constitute an Audit Committee, the Board shall consider the recommendation of such committee, and in other cases, the Board shall itself consider the matter of rotation of auditors and make its recommendation for appointment of the next auditor by the members in annual general meeting.

(3) For the purpose of the rotation of auditors:

a) in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of five consecutive years or ten consecutive years, as the case may be.

b) the incoming auditor or audit firm shall not be eligible if such auditor or audit firm is associated with the outgoing auditor or audit firm under the same network of audit firms.

The term: same network includes the firms operating or functioning, hitherto or in future, under the same brand name, trade name or common control.

c) For the purpose of rotation of auditors:

1) a break in the term for a continuous period of five years shall be considered as fulfilling the requirement of rotation.

2) if a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of five years.

3.4.1.4 First auditors [Section 139 (6)]

(a) Notwithstanding anything contained in Sub-Section (1), the first auditor of a company, other than a Government Company, shall be appointed by the Board of directors within 30 days of the date of registration of the company and the auditor so appointed shall hold office until the conclusion of the first annual general meeting.

(b) If the Board fails to exercise its powers i.e. appointment of first auditor, it shall inform the members of the company and the company in general meeting may appoint the first auditor within 90 days at an extra ordinary general meeting and such auditor shall hold office till the conclusion of the first annual general meeting.

3.4.1.5 Filling up casual vacancy [Section 139 (8)]

(a) The Board may fill any casual vacancy in the office of an auditor within 30 days but where such vacancy is caused by the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board.

(b) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

3.4.1.6 Appointment of auditors in case of Government Company or any other company having controlled by State Government or Central Government [Sections 139 (5), 139 (7) and 139 (8)]

(a) As per Section 139 (5), the Comptroller and Auditor-General of India shall, in respect of a financial year, appoint an auditor duly qualified to be appointed as an auditor of companies under this Act in the case of:

(1) a Government company, or

(2) any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments.

(b) The auditor shall be appointed within a period of 180 days from the commencement of the financial year. The auditor appointed shall hold office till the conclusion of the annual general meeting.

(1) First auditor [Section 139 (7)]

a) In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor General of India within 60 days from the date of registration of the company.

b) In case the Comptroller and Auditor General of India does not appoint first auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next 30 days.

c) Further, in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

(2) Casual vacancy [Section 139 (8)]

a. In the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor General of India, casual vacancy of an auditor be filled by the Comptroller and Auditor General of India within 30 days.

b. In case the Comptroller and Auditor-General of India do not fill the vacancy within the said period, the Board of Directors shall fill the vacancy within next 30 days.

(3) Clarification with regard to applicability of Sections 139 (5) and 139 (7) by MCA

Deemed government Company (as per Section 619B of the Companies Act, 1956):

The following companies shall be deemed to be a Government company, if not less than 51% (impliedly, may be more) of the paid up share capital is held by one or more of the following or any combination thereof:

1) the Central Government and one or more Government companies.

2) any State Government or Governments and one or more Government companies.

3) the Central Government, one or more State Governments and one or more Government companies.

4) the Central Government and one or more corporations owned or controlled by the Central Government.

5) the Central Government, one or more State Governments and one or more corporations owned and controlled by the Central Government.

6) one or more corporations owned or controlled by the Central Government or the State Government.

7) more than one Government company.

3.4.1.7 Re-appointment of retiring auditor [Sections 139 (9), (10) and (11)]

(a) At any annual general meeting, a retiring auditor may be re-appointed at an AGM, if:

(1) he is not disqualified for re-appointment;

(2) he has not given the company a notice in writing of his unwillingness to be reappointed, and

(3) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.

(b) Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

3.4.1.8 Audit committee's recommendation [Section 139 (11)]

Where a company is required to constitute an Audit Committee under Section 177, all appointments, including the filling of a casual vacancy of an auditor under this Section shall be made after taking into account the recommendations of such committee.

3.4.1.9 Removal, resignation of auditor and giving of special notice (Section 140)

Section 140 of the Companies Act, 2013 came into force partially from 1st April, 2014 which provides for removal, resignation of auditor and giving of special notice. According to this Section:

(a) The auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government by making an application in E-Form ADT-2 and shall be accompanied with the prescribed fees.

(b) The application shall be made to the Central Government within 30 days of the resolution passed by the Board.

(c) The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution. [Every special resolution is required to be filed in E-Form MGT-14 as per Section 117(3)(a)].

(d) Giving opportunity of being heard (Audi Alteram Partem) i.e., before taking any action for removal of auditor before the expiry of his term, the auditor concerned shall be given a reasonable opportunity of being heard.

3.4.1.10 Resignation by Auditor [Sections 140 (2) & (3)]

(a) If the Auditor has resigned from the company, he shall file within a period of 30 days from the date of resignation, a statement in the form ADT-3 with the company and the Registrar.

(b) In case of government companies or company controlled by Central Government or State Government, the auditor shall also file such statement with the Comptroller and Auditor General of India also along with company and the Registrar.

(c) The auditor shall indicate the reasons and other facts as may be relevant with regard to his resignation, in the statement

(d) If the auditor does not comply with aforesaid provision, he or it shall be punishable with fine which shall not be less than ` 50,000 but which may extend to ` 5 Lacs.

3.4.1.11 Special Notice for removing Auditor before the expiry of his term [Section 140 (4)]

(a) If the retiring auditor has not completed a consecutive tenure of 5 years or, as the case may be, 10 years, as provided under Sub-Section (2) of Section 139, special notice shall

be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.

(b) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(c) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so:

(1) in any notice of the resolution given to members of the company, state the fact of the representation having been made, and

(2) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company.

(d) If a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.

(e) However, if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar.

3.4.2 Eligibility, qualifications and disqualifications of auditors (Section 141)

3.4.2.1 Qualifications of an auditor [Section 141 (1) & (2)]

(a) A person shall be eligible to be appointed as auditor of a company only if he is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949.

(b) A firm whereof majority of partners practicing in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company.

(c) Where a firm including a Limited Liability Partnership is appointed as an auditor of a company, only the partners who are chartered accountants shall be authorised to act and sign on behalf of the firm.

3.4.2.2 Disqualifications of auditors [Section 141 (3)]

The following persons shall not be qualified for appointment as auditor of a company:

(a) A body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008.

(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, or his relative or partner

(1) is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company:

Provided that the relative may hold security or interest in the company of face value not exceeding 1,00,000 rupees as prescribed under the Company (Audit and Auditors) Rules, 2014.

The Company (Audit and Auditors) Rules, 2014 provides that a relative of an auditor may hold securities in the company of face value not exceeding ` 1 Lac. Further,

the above condition shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities. If the relative acquires any security or interest above the prescribed threshold i.e., ` 1 Lac, the corrective action to maintain the limits as specified above shall be taken by the auditor within sixty days of such acquisition or interest.

(2) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ` 5 Lacs, or

(3) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ` 1 Lac.

(e) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company. According to the Companies (Audit and Auditors) Rules, 2014, the term business relationship shall be construed as any transaction entered into for a commercial purpose, except:

(1) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts.

(2) commercial transactions which are in the ordinary course of business of the company at arm's length price - like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.

(f) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel.

(g) a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies other than one person companies, dormant companies and private companies having paid-up share capital less than one hundred crore rupees. [MCA vide Notification No. 464(E) dated 05/06/2015]. It may be clarified that now the Limit of 20 Companies includes only: a) Public Companies and b) Private Companies having paid up capital of ` 100 crore or more.

(h) a person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction.

(i) any person whose subsidiary or associate company or any other form of entity, is engaged as on the date of appointment in consulting and specialized services as provided in Section 144 (This Section deals with certain services not to be tendered by auditor).

3.4.2.3 Vacation of office by an auditor [Section 141 (4)]

If a person appointed as an auditor of a company incurs any of the disqualification specified in Section 141 (3), he shall be deemed to have vacated his office. Such vacation shall be deemed to be a casual vacancy in the office of the auditor.

3.4.3 Remuneration of auditors (Section 142)

(a) The remuneration of the auditors of a company shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

(b) In the case of first auditor, remuneration may be fixed by the Board.

(c) The remuneration mentioned aforesaid shall, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him. But the remuneration does not include any remuneration paid to him for any other service rendered by him at the request of the company.

3.4.4 Powers and duties of auditors and auditing standards (Section 143)

3.4.4.1 Powers of Auditors [Section 143 (1)]

(a) Access to books of account and vouchers: Every auditor of a company shall have a right of access at all times to the books of account and vouchers of the company, whether kept at the registered office of the company or at any other place.

(b) Entitled to have necessary information and explanation: He shall be entitled to require from the officers of the company such information and explanations as the auditor may consider necessary for the performance of his duties as auditor.

(c) Matters of inquiry: The auditor may also inquire into the following matters, namely:

(1) Whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members.

(2) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company.

(3) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company.

(4) Whether loans and advances made by the company have been shown as deposits.

(5) Whether personal expenses have been charged to revenue account.

(6) Where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.

(d) Access to record of all its subsidiaries: The auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries in so far as it relates to the consolidation of its financial statements with that of its subsidiaries.

3.4.4.2 Duties of auditors [Sections 143 (2), (3) and (4)]

(a) The auditor shall make a report to the members of the company on the following:

(1) On the accounts examined by him, and

(2) On every financial statements which are required by or under this Act to be laid before the company in general meeting. And

(b) The auditor while making the report shall take into account the provisions of the Act, the accounting and auditing standards and matters which are required to be included in the audit report under the provisions of this Act or any rules made thereunder or under any order made under Section 143 (11).

(c) The auditor shall express his opinion of the accounts and financial statements examined by him. He shall express the opinion which according to him and to the best of his

information and knowledge, the said accounts, financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.

(d) The auditors' report shall also state:

(1) whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements.

(2) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him.

(3) whether the report on the accounts of any branch office of the company audited under Sub-Section (8) by a person other than the company's auditor has been sent to him under the proviso to that Sub-Section and the manner in which he has dealt with it in preparing his report.

(4) whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns.

(5) whether, in his opinion, the financial statements comply with the accounting standards.

(6) the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company.

(7) whether any director is disqualified from being appointed as a director under Sub-Section (2) of Section 164.

(8) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith.

(9) whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls.

(10) Such other matters as prescribed under Rule 11 of the Companies (Audit and Auditors) Rules, 2014 which provides that the auditor's report shall also include their views and comments on the following matters, namely:

(1) whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement.

(2) whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts.

(3) whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.

(e) Where any of the matters is answered in the negative or with a qualification, the auditor's report shall state the reason for the answer.

(f) Compliance with auditing standards:

(1) Every auditor shall comply with the auditing standards [Section 143(9)].

(2) The Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under Section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial

Reporting Authority.

(3) It is further provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.

(g) Additional matters to be reported in case of specified companies: In respect of such class or description of companies, as may be specified in the general or special order by the Central Government may, in consultation with the National Financial Reporting direct, the auditor's report shall also include a statement on such matters as may be specified therein.

(h) Reporting of frauds by auditors [Section 143 (12)]

(1) Notwithstanding anything contained in this Section, if an auditor of a company in the course of performance of his duties as auditor, has reason to believe that a offence of fraud involving such amount or amounts as may be prescribed, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government immediately but not later than 60 days of his knowledge and after following the procedure as prescribed in Rule 13 of the Companies (Audit and Auditors) Rules, 2014:

a) Auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud, seeking their reply or observations within 45 days;

b) on receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days of receipt of such reply or observations;

c) In case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time.

d) The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same.

e) The report shall be on the letter head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number.

f) The report shall be in the form of a statement as specified in Form ADT-4.

(2) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred above if it is done in good faith [Section 143(13)].

(3) The provision of this section shall mutatis mutandis apply to the cost accountant in practice conducting cost audit under section 148 and also to the company secretary in practice conducting secretarial audit under section 204 [Section 143(14)].

(4) Penalty for non compliance of Section 143 (12): If any auditor, the cost accountant or the company secretary in practice do not comply with the provisions of Section 143 (12) (reporting about the offence to the Central Government), he shall be punishable with fine which shall not be less than ` 1 Lacs but which may extend to ` 25 Lacs

[Section 143(15)].

1.2.5 Audit of Government Companies [Sections 143 (5), (6) & (7)]

(a) In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor General of India shall appoint the auditor under Section 139 (5) or 139 (7) and direct such auditor the manner in which the accounts of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor General of India.

(b) The audit report among other things, include the following:

(1) the directions, if any, issued by the Comptroller and Auditor General of India,

(2) the action taken thereon and

(3) its impact on the accounts and financial statement of the company.

(c) The Comptroller and Auditor General of India shall within 60 days from the date of receipt of the audit report have a right to:

(1) conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorise in this behalf and for the purposes of such audit, require information or additional information to be furnished to any person or persons, so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor General of India may direct, and

(2) comment upon or supplement such audit report.

(d) Any comments given by the Comptroller and Auditor General of India upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under Section 136 (1) and also be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

(e) Test Audit: For Government Company or Company controlled by State Government or Central Government, the Comptroller and Auditor General of India may, if he considers necessary, by an order, cause test audit to be conducted of the accounts of such company, without prejudice to the provisions related to Audit and Auditors. The provisions of Section 19A of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971, shall apply to the report of such test audit.

1.2.6 Audit of accounts of branch office of company [Section 14 3(8)]

(a) Branch office in India:

Where a company has a branch office, the accounts of that office shall be audited either by:

(1) the company's auditor appointed under Section 139, or

(2) by any other person qualified for appointment as an auditor of the company under Section 139.

(b) Branch office outside India:

(1) If the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by:

a) the company's auditor, or

b) by an accountant, or

c) by any other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country.

(c) The duties and powers of the company's auditor with reference to the audit of the branch and the branch auditor, if any, shall be as contained in Sub-Sections (1) to (4) of Section 143.

(d) The branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

(e) The provisions of regarding reporting of fraud by the auditor shall also extend to such branch auditor to the extent it relates to the concerned branch.

1.2.7 Auditor not to render certain services (Section 144)

(a) An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be. But such services shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company), namely:

(1) accounting and book keeping services.

(2) internal audit.

(3) design and implementation of any financial information system.

(4) actuarial services.

(5) investment advisory services.

(6) investment banking services.

(7) rendering of outsourced financial services.

(8) management services. and

(9) any other kind of services as may be prescribed.

(b) According to the explanation given under Section 144, the term directly or indirectly shall include rendering of services by the auditor:

(1) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual.

(2) in case of auditor being a firm, either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

1.2.8 Auditors to sign audit reports, etc. (Section 145)

(a) The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company in accordance with the provisions of Sub-Section (2) of Section 141 (i.e. in case of firm including LLP, only Chartered Accountants are authorised to act and sign).

(b) The qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor' report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

1.2.9 Auditors to attend general meeting (Section 146)

(a) All notices of and other communications relating to, any general meeting shall be forwarded to the auditor of the company.

(b) The auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting.

(c) The auditor shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

1.2.10 Punishment for contravention (Section 147)

(a) Penalty on company [Section 147 (1)]

If any of the provisions of Sections 139 to 146 (both inclusive) is contravened, the company shall be punishable with fine which shall not be less than ` 25,000 but which may extend to ` 5 lacs.

(b) Penalty on officers [Section 147 (1)]

If any of the provisions of Sections 139 to 146 (both inclusive) is contravened, every officer of the company who is in default shall be punishable with:

(1) imprisonment for a term which may extend to 1 year or

(2) With fine which shall not be less than ` 10,000 but which may extend to ` 1 lacs, or

(3) Both with imprisonment and fine.

(c) Penalty on auditor [Sections 147 (2) & (3)]

(a) If an auditor of a company contravenes any of the provisions of Section 139, Section 143, Section 144 or Section 145, the auditor shall be punishable with fine which shall not be less than ` 25,000 but which may extend to ` 5 lacs.

(b) If an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with:

(1) imprisonment for a term which may extend to 1 year and

(2) fine which shall not be less than ` 1 lac but which may extend to ` 25 lacs.

(c) Further, where an auditor has been convicted as above, he shall be liable to:

(1) refund the remuneration received by him to the company, and

(2) pay for damages to the company, statutory bodies or authorities or to any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.

(d) Filing of Report with the Central Government [Section 147 (4)]

The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons. Such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in

such manner as may be specified in the said notification.

(e) Liability of Audit firm [Section 147 (5)]

Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in the Companies Act, 2013, or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally.

1.2.11 Cost Audit [Section 148]

According to Section, the Central Government may specify audit of items of cost in respect of certain companies. These provisions are detailed below:

(a) Notwithstanding anything contained in the provisions related to audit and auditor (Chapter X), the Central Government may, by order, in respect of such class of companies engaged in the production of such goods or providing such services as may be prescribed, direct that particulars relating to the utilisation of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept under Section 128 by that class of companies in Form CRA-1 as per Rule 5(1) of the Companies (Cost Records and Audit) Rules, 2014.

(b) The Central Government shall, before issuing such order in respect of any class of companies regulated under a special Act, consult the regulatory body constituted or established under such special Act.

(c) If the Central Government is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies, which are covered aforesaid and which have a net worth of such amount as may be prescribed or a turnover of such amount as may be prescribed, shall be conducted in the manner specified in the order.

(d) The cost audit shall be conducted by a Cost Accountant in practice who shall be appointed by the Board on such remuneration as may be determined by the members in such manner as may be prescribed [Section 148(3)].

The MCA has issued the Companies (Auditor's Report) Order, 2016 (CARO 2016), on 29th March 2016. This order has been issued in supersession of the Companies (Auditor's Report) Order, 2015, and is applicable for reporting on financial statements of companies whose financial year commences on or after 1st April 2015. CARO 2015 was issued by MCA in supersession of CARO 2003 which was issued earlier in pursuance with the provision of Section 227 (4A) of Companies Act 1956.

Now, the MCA has relaxed the applicability of CARO 2016 to private companies by increasing applicability thresholds. CARO 2016 will not apply to the auditor's report on consolidated financial statements. The total number of clauses in the new CARO is 16. CARO 2016 has enhanced the auditor's reporting requirements in certain areas, such as related party transaction and managerial remuneration. The provisions of the CARO 2016 are furnished below:

CARO 2016 is applicable from FY 2015-16 and the matters specified therein shall be included in each report made by the auditor under Section 143 of the Companies Act, 2013 on the account of every company to which CARO 2016 applies.

Section 143 (11) of the Act stipulates that the Central Government may order for the inclusion of statement on specified matter in the auditor's report for specified class or description of companies. Accordingly, CARO 2016 is issued in pursuance of Section 143 (11) of Companies Act 2013 for inclusion of the matters specified therein in auditors' report. Hence, CARO 2016 should be complied by the statutory auditor of every company on which it applies.

CARO 2016 applicable to every company including a foreign company as defined in clause (42) of Section 2 of the Companies Act 2013.

1.3.1 The following classes of companies are outside the purview of the CARO 2016.

(a) Banking company as defined under Section 5 (c) of the Banking Regulation Act, 1949.

(b) Insurance company as defined under the Insurance Act 1938.

(c) Company licensed to operate under Section 8 of the Companies Act 2013 (companies registered with charitable object).

(d) A one person company (OPC) as defined under clause (62) of Section 2 of Companies Act 2013 (OPC means a company which has only one person as a member).

(e) A small company under Section 2 (85) of the Companies Act, 2013.

(1) As per sec 2(85) of Companies Act 2013 small company means a company, other than a public company:

a) Paid up share capital of which does not exceed ` 50 lacs or such higher amount as may be prescribed which shall not be more than ` 5 crore, and

b) Turnover of which as per its last profit and loss account does not exceed ` 2 crore or such higher amount as may be prescribed which shall not be more than ` 20 crore.

(2) The following company shall not qualify as a small company:

a) A holding company or a subsidiary company.

b) A company registered under Section 8 of the Act.

c) A company or body corporate governed by any special act.

(f) The auditor of following type of Private Companies are not required to comment on the matter prescribed under CARO 2016:

(1) A private company which is not holding or subsidiary company of a public company, and

(2) A private company having a paid up capital and reserve and surplus not more than ` 1 crore as on the balance sheet date, and

(3) A private company which does not have total borrowing exceeding ` 1 crore from any bank and financial institution at any point of time during the financial year, and

(4) A private company which does not have total revenue exceeding ` 10 crore during the financial year.

Note: Such revenue means revenue as disclosed in scheduled III to the Companies Act, 2013 and includes revenue from discontinuing operation.

1.3.2 Matters included in CARO 2016 are discussed below:

1.3.2.1 Fixed Asset [clause 3 (i)]

(a) Whether the company is maintain proper records showing full particulars including quantitative details and situation of fixed asset.

(b) Whether these fixed asset have been physically verified by management at reasonable interval.

(c) Whether any material discrepancies were noticed on such verification and if so, whether the same have been properly dealt with in the books of account.

1.3.2.2 Inventory [Clause 3 (ii)]

(a) Whether physical verification of inventory has been conducted at reasonable interval by the management.

(b) Whether any material discrepancies has been noticed on such verification and if so, whether the same has been properly dealt with in the books of account

1.3.2.3 Loan given by Company [Clause 3 (iii)]

Whether the company has granted any loans, secured or unsecured to companies, firms, LLP or other parties covered in the registered maintained under Section 189 of the Companies Act, 2013. If so,

(a) Whether terms and conditions of the grant of such loan are not prejudicial to the company's interest.

(b) Whether the schedule of repayment of principal and payment of interest has been stipulated and whether the repayments and receipts are regular

(c) If the amount is overdue, state the total amount overdue, state the total amount overduefor more than 90 days and whether reasonable steps have been taken by the company for recovery of principal.

1.3.2.4 Loan to director and investment by the company [Clause 3 (iv)]

In respect of loan, investment, guarantees and security whether provision of Sections 185 and 186 of the Companies Act, 2013 has been complied with. If not, provide the details thereof.

1.3.2.5 Deposits [Clause 3 (v)]

In case, the company has accepted deposits, whether the following has been complied with:

Directives issued by the reserve bank of India

(a) The provision of sec 73 to 76 or any other relevant provision of Companies Act, 2013 and the rules framed there under, and

(b) If the order has been passed by company law board (CLB) or National company law tribunal (NCLT) or RBI or any court or any other tribunal.

(c) However, if any of the above not complied with, the nature of contraventions should be stated.

1.3.2.6 Cost Records [Clause 3 (vi)]

If Central Government has specified maintenance of cost records under sec 148 (1) of Companies Act, 2013 whether such accounts and records have been made and maintained.

1.3.2.7 Statutory Dues [Clause 3 (vii)]

(a) Whether the company is regular in depositing undisputed statutory dues with the appropriate authorities including Provident fund, Employees State Insurance fund, income tax, sales tax, service tax, duty of custom, duty of excise, value added tax, cess or any other statutory dues. If the company is not regular in depositing such statutory dues, the extent of arrears of outstanding statutory dues as at the last day of the financial year concerned for a period of more than six months from the date they become payable, shall be indicated by the auditor.

(b) In case dues of income tax and sales tax or service tax or duty of custom or duty of excise or value added tax have not been deposited on account of any dispute, then the amount involved and the forum where dispute is pending shall be disclosed.

1.3.2.8 Repayment of Loan [Clause 3 (viii)]

Whether the company has defaulted in repayment of loans and borrowing to a financial institution, banks, government or dues to debenture holders. If yes, the period and the amount of default to be reported.

1.3.2.9 Utilisation of IPO and further public offer [Clause 3 (ix)]

Whether money raised by way of initial public offer or further public offer and the term loans were applied for the purpose for which those are raised. If not, the details together with delays and defaults and subsequent rectification, if any, as may be applicable, be reported

1.3.2.10 Reporting of Fraud [Clause 3 (x)]

Whether any fraud by the company or any fraud on the company by its officers and employees has been noticed or reported during the year: if yes, the nature and the amount involved is to be indicated.

1.3.2.11 Approval of managerial remuneration [Clause 3 (xi)

Whether managerial remuneration has been paid or provided in accordance with the requisite approvals mandated by the provision of Section 197 read with schedule 5 to the Companies Act, 2013. If not, state the amount involved and step taken by the company for securing refund of the same.

1.3.2.12 Nidhi Company [Clause 3 (xii)]

Whether the Nidhi company has complied with the net owned funds to deposit in the ratio of 1:20 to meet out the liability and whether the Nidhi company is maintain 10% unencumbered term deposit as specified in the Nidhi rules 2014 to meet out the liability.

1.3.2.13 Related Party Transaction [Clause 3 (xiii)]

Whether all transaction with the related party is in compliance with Section 177 and 188 of the Companies Act, 2013 where applicable and the details have been disclosed in the financial statement etc., as required by the applicable accounting standard.

1.3.2.14 Private Placement of Preferential Issues [Clause 3 (xiv)]

Whether the company has made any preferential allotment or private placement of shares or fully or partly convertible debentures during the year under review and if so, as to whether the requirement of Section 42 of Companies Act, 2013 have been complied with and the amount raised has been used for the purpose for which the funds were raised . If not, provide the detail in respect of the amount involved and the nature of non-compliance.

1.3.2.15 Non Cash Transaction [Clause 3 (xv)]

Whether the company has entered into any non-cash transaction with the director or person concerned with his and if so, whether the provision of Section 192 of Companies Act, 2013 has been complied with.

1.3.2.16 Register under RBI Act 1934 [Clause 3(xvi)]

Whether the company is required to be registered under Section 45 IA of Reserve Bank of India Act, 1934 and if so, whether the registration has been obtained.

ROLE AND RESPONSIBILITIES OF THE BOARD OF DIRECTORS AND MOMMITTEES

Duties of a Director

Section 166 of the Act prescribes the duties of a director under the provisions of this Act as detailed below:

- A director of a company shall act in accordance with the articles of the company;
- A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment;
- A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment;
- A director shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company;
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company;
- A director of a company shall not assign his office and any assignment so made shall be void;

If a director of the company contravenes the provisions of Section 166 such director shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

POWERS OF THE BOARD OF DIRECTORS

Powers of the Board: Section 179

Section 179 of the Act deals with the powers of the board; all powers to do such acts and things for which the company is authorised is vested with board of directors. But the board can act or do the things for which powers are vested with them and not with general meeting.

The following (section 179(3) read with Rule 8 of Companies (Management & Administration) Rules, 2014 powers of the Board of directors shall be exercised only by means of resolutions passed at meetings of the Board, namely :-

(1) to make calls on shareholders in respect of money unpaid on their shares;

(2) to authorise buy-back of securities under section 68;

(3) to issue securities, including debentures, whether in or outside India;

(4) to borrow monies;

(5) to invest the funds of the company;

(6) to grant loans or give guarantee or provide security in respect of loans;

(7) to approve financial statement and the Board's report;

(8) to diversify the business of the company;

(9) to approve amalgamation, merger or reconstruction;

(10) to take over a company or acquire a controlling or substantial stake in another company;

(11) to make political contributions;

(12) to appoint or remove key managerial personnel (KMP);

(13) to appoint internal auditors and secretarial auditor;

The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in (4) to (6) above on such conditions as it may specify.

The banking company is not covered under the purview of this section. The company may impose restriction and conditions on the powers of the Board.

Section 180: Restrictions on powers of Board

The board can exercise the following powers only with the consent of the company by special resolution, namely –

(a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

(b) to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

(c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, apart from temporary loans obtained from the company's bankers in the ordinary course of business;

(d) to remit, or give time for the repayment of, any debt due from a director.

The special resolution relating to borrowing money exceeding paid up capital and free reserves specify the total amount up to which the money may be borrowed by Board.

The title of buyer or the person who takes on lease any property, investment or undertaking on good faith cannot be affected and also in case if such sale or lease covered in the ordinary business of such company.

The resolution may also stipulate the conditions of such sale and lease, but this doesn't authorise the company to reduce its capital except the provisions contained in this Act.

The debt incurred by the company exceeding the paid up capital and free reserves is not valid and effectual, unless the lender proves that the loan was advanced on good faith and also having no knowledge of limit imposed had been exceeded.

Section 181 : Contributions to Charitable Funds and Political Parties

The power of making contribution to 'bona fide' charitable and other funds is available to the board subject to certain limits. Further, the permission of company in general meeting is required if such contribution exceeds five percent of its average net profits for the three immediately preceding previous years

Section 182 : Prohibitions and Restrictions Regarding Political Contributions

According to Section 182 of the Act, a company, other than a government company which has been in existence for less than three financial years, may contribute any amount directly to any political party. Further, the limit of contribution to political parties is 7.5% of the average net profits during the three immediately preceding financial years.

The contribution must be authorised by board in its meeting by resolution and such resolution deemed to be the justification in law for such contribution.

The donation may be directly or indirectly. The contribution so made if or likely to affect the public support fora political party deemed to be the contribution for political purpose. If the expenditure incurred on advertisement in any publication souvenir, brochure, tract, pamphlet or the like is

deemed as political contribution if such publication is by or on behalf of political party or if not, then for the advantage to such political party for a political purpose.

The company is required to disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year and the particular of total amount contributed and the name of political party to whom the contribution so made.

Penalty for Contravention

The contribution in contravention of the provisions of this section, the company shall be punishable for an amount of which may extend to five times of the amount so contributed and every officer who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times of the amount so contributed.

Section 183: Power of Board and other Persons to make Contributions to National Defence Fund, etc.

The Board is authorised to contribute such amount as it thinks fit to the National Defence Fund or any other fund approved by the Government for the purpose of national defence. The company is required to disclose in its profit and loss account the total amount or a mounts contributed by it during the financial year.

Duties and Liabilities of Directors

Directors acting collectively i.e. Board of Directors are authorized to do what the company is authorized to do unless barred by restrictions on their powers by the provisions of the Companies Act, 2013, the Memorandum or Articles of the company.

The Act specifies certain powers to be exercised only at Board Meeting (Section 179) and, certain powers only with the consent of shareholders in general meeting (Section 180). The Act also casts certain duties upon the directors such as duty to disclose the interest in contracts, duty to attend Board meetings etc.

Except where express provisions are made that the powers of a company in respect of any matter are to be exercised by the company in general meeting, in all other cases the Board is entitled to exercise all its powers. The directors acting together are the authority for conducting the affairs of the company. They are authorised to do what the company is authorised to do, unless barred by restrictions on their powers by the provisions of the Companies Act, 2013, the memorandum or articles of the company (Section 179).

The directors shall exercise their powers bonafide and in interest of the company. The directors while exercising their powers do not act as agents for the majority or even all the members and so the members cannot by resolution passed by a majority or even unanimously supercede the director‘s powers, or instruct them how they shall exercise their powers. This sovereignty of the directors within the limits of the powers conferred on them by the articles, and within limit laid down by the Act was clearly expressed by Greer L.J. in [John Shaw & Sons (Salford) Ltd. v. Shaw (1935) 2 K.B. 113] in the following words:

‘A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. The powers of management are vested in the directors. They and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles, in the directors, is by altering the articles, or if opportunity arises under the articles, by refusing to re-elect the directors whose action they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders’

In [Milan Sen v. Guardian Plasticate Ltd. (1998) 2 Comp L J 320], the directors passed a resolution

for rights issue which was questioned by certain shareholders. The Calcutta High Court held that the question whether the company needed additional capital was a question which should primarily be decided by the directors of the company and if they were of the view that further capital in the form of rights issue was required, the Court would not be allowed to disturb the same unless there were extreme circumstances of malafides or breach of trust.

Thus, from the provisions of Section 179 and the exposition of the law stated above, it is clear that subject to the restrictions contained in the Act, Memorandum and Articles, the powers of directors are co-extensive with those of the company itself. The relationship of the Board of directors with the shareholders is more of federation than one of subordinates and superior. Some powers are specially reserved for the Board. On the other hand, some powers are exclusively reserved for the members in general meeting.

1.7.1 Duties of directors (section 166)

Duties of directors has been defined in the company Law for the first time under section 166 of the Companies Act, 2013.The following duties have been prescribed for a director under the said section:

(a) He shall act in accordance with the articles of the company, subject to the provisions of this Act.

(b) He shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(c) He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

(d) He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

(e) He shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

(f) He shall not assign his office and if any assignment so made, it shall be void.

(g) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than ` 1,00,000 but which may extend to ` 5,00,000.

1.7.2 Liabilities of directors

The liabilities of the directors may be grouped under certain heads for convenience of consideration and discussion. They are:

1.7.2.1 Liability to outsiders

Directors of a company may personally become liable to outside parties in the following cases:

(a) When they enter into contracts on behalf of the company:

(1) if the contracts are ultra vires the company;

(2) if they act outside the scope of their own authority;

(3) if they act in their own name and not for and on behalf of the company;

(b) When they issue a prospectus; in violation of the provisions of the Companies Act, 2013 and the SEBI (ICDR) Regulations which contains mis-statements(s).

(c) When they are found guilty of fraud.

(d) When they allot shares in an irregular manner.

(e) When the Court orders that the directors are personally liable for all or any of the debts or liabilities of the company for fraudulent trading on the part of the company.

1.7.2.2 Liability to the company

The directors are liable to the company in the following cases:

(a) When they are negligent in the performance of their duty as directors and the company suffers loss, etc.

(b) When they commit an act which is ultra vires their powers or ultra vires the company.

(c) When any illegal act or breach of trust is committed by them.

1.7.2.3 Liability to the shareholders

The position of the directors in respect of the company's properties and the rights conferred upon them to be exercised as directors is that of a trustee. If they commit any breach of trust or indulge in wrongful uses of their rights and the company suffers loss, they have to make good the loss. Similarly, if shareholders suffer loss due to the negligence of the directors they are personally liable for the loss.

1.7.2.4 Liability for statutory defaults and violations.

Under the Companies Act, 2013 the directors are required to ensure compliance with the several provisions of the Act and penalties have been prescribed for defaults and/or non-compliance. The directors are liable for consequences.

1.8.1 Section 182 of the Act provides for prohibitions and restrictions regarding political contributions. According to this section:

(a) Notwithstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party. Here, political party means a political party registered under section 29A of the Representation of the People Act, 1951.

(b) The following companies are not allowed to contribute to any political party:

(1) a Government company; and

(2) a company which has been in existence for less than three financial years.

(c) The aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years.

(d) No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

(e) Without prejudice to the generality of the provisions of sub-section (1),

(1) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose.

(2) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed:

a) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

b) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

(f) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed. [Section 182(3)].

(g) If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed. [Section 182(4)].

CORPORATE GOVERNANCE AND CSR

Corporate Governance (CG) refers to the set of policies that are created for directing a company on the tenets of accountability, transparency's and ethical practices. It is an overview of rules and regulations for the people in-charge for regulating the functioning of the company with the objective of enhancing its value.

The state of corporate governance can have an important effect on the availability and cost of capital for companies and good corporate governance of companies is essential for fostering financial stability and healthy economic growth. Good corporate governance frameworks help firms and countries improve accountability, more efficiently use capital and attract quality and long term investors at lower costs. These, in turn, contribute to a country's competitiveness and thereby its development.

Corporate Governance has been gaining momentum across the world due to various corporate failures, unethical business practices and insufficient disclosure etc.

The topic of Corporate Governance has gained attention since the 1980's and more so after the code of corporate governance issued by the Cadbury committee. In line with the Cadbury committee, the Kumara Mangalam Birla Committee in India suggested a code of corporate governance for companies in India. According to the Kumara Mangalam Birla Committee:

"Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting."

The governance structure of a country protects the investors from expropriation by managers and large shareholders. In different jurisdictions, rules protecting investors come from different sources, including company, security, bankruptcy, takeover and competition laws and also from stock exchange regulations and accounting standards.

7.1.1 Legal Framework of Corporate Governance

The companies in India have to comply with the provisions of the Companies Act, 2013 the SEBI guidelines, the Kumara Mangalam Birla report on corporate governance, the Accounting Standards issued by the ICAI and the listing agreements with the stock exchanges in which they are listed. The Companies Act, 2013 is the relevant statute in India that governs the incorporation and, functioning of the companies. The ordinary business activities like declaration of dividends, appointment of directors, acceptance of the financial statements and appointment of auditors requires the consent of 51% of the shareholders, whereas all other business activities (other than routine business activities) requires the approval of 75% of the shareholders. If a company wants to start a new business it requires the approval of 75% shareholders, which means that the board of a widely held company should be able to persuade the shareholders about their strategy to pass the special resolution. Whereas, the board of a closely held company will not find it difficult to pass such a resolution, because the shareholders are usually the managers in such cases.

However the Kumara Mangalam Birla report (KMB report) required that in case of appointment/ reappointment of directors, shareholders should be provided a resume, information regarding functional expertise and number of directorships held in other companies. KMB report mentioned that the board shall consist of at least 50% of non-executive directors. And if the chairman is an executive director then at least half of the board of directors shall be independent and in other case at least one-third of the total directors shall be independent.

The KMB report has taken a more stringent view that the directors shall not be members of more than 10 committees or chairman of more than 5 committees across all companies.

The remuneration payable to managerial personnel under the Act, if there is only one such person, shall not exceed 5% of its net profit and in case of more than one managerial personnel it shall not exceed 10% of its net profit except with prior permission of the Central Government. In case of companies, which incurred a loss in the current financial year the limits on the salaries and perquisites to be paid to the Managing personnel.

The minority shareholders are protected under the Act and the members holding at least 10% of the share capital can make an application for relief to the concerned authorities in the cases of oppression and mismanagement. The minority shareholders have a provision to appoint representative director on the board. There is no special provision under the companies to protect the creditors. If the company makes default then the creditors have to move the civil court for realization of dues, which demands more time and money to be spent around the courts.

The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Act, 2002 [SARFAESI Act] was enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The Institute of Chartered Accountants of India is the concerned authority to issue Accounting Standards, which are mandatory in most of the cases. These Standards provide guidelines for disclosures of financial information to ensure uniformity between companies.

The Securities and Exchange Board of India is the regulatory authority, which issues regulations, rules and guidelines to companies to ensure protection of investors. The companies whose shares are listed on the stock exchanges should comply with additional requirements as mentioned in the listing agreement on a regular basis.

7.1.2 Pre-liberalization

During the initial years Indian organizations were bound by colonial rules and most of the rules and regulations catered to the whims and fancies of the British Employers. The companies act was introduced in the year 1866 and was gradually revised in 1882, 1913 and 1932. Indian Partnership act was introduced for the first time in 1932. The various agendas which were on its focus were managing agency model to corporate affair as individuals/business firms entered into legal contract with joint stock companies. It was characterized by abuse/ misuse of responsibilities by managing agent due to dispersed ownership. The issues of profit generation and control were dilapidated leading to various conflicts.

The period of 1950s and 1960s was a period of setting up of industrial activities and cost plus regime. The genesis was the demand for very many products for which the Government administered Fair Prices. This was the time when the Tariff Commission and the Bureau of Industrial Costs and Prices were set up by the Govt. 1951 – India's development Regulation Act 1956 – Companies Act came into existence. Development and Banking institutions came into existence. The period between 70's to mid eighties was an era of Cost, Volume and Profit analysis, as an integral part of the Cost Accounting function.

7.1.3 Post-Liberalization

After liberalization, India has been keenly looked upon by the organizations/companies worldwide for the purpose of creating new markets. Progressive firms in India have made an attempt to put the systems of good corporate governance in place. There have been number of discussions and events leading to the development of Corporate Governance. The basic minimal code for corporate governance was proposed by the Chamber of Indian Industries (CII), 1998. The guiding definition proposed by CII:

"Corporate Governance deals with laws, procedures, practices and implicit rules that determines a company's ability to take managerial decisions vis-a-vis its claimants – in

particular its shareholders, creditors, customers, the state and the employees."

7.1.4 The First Phase of India's Corporate Governance Reforms : 1996-2008

India's corporate governance reform efforts were initiated by corporate industry groups, many of which were instrumental in advocating for and drafting corporate governance guidelines. Following vigorous advocacy by industry groups, SEBI proceeded to adopt considerable corporate governance reforms. The first phase of India's corporate governance reforms were aimed at making boards and audit committees more independent, powerful and focused monitors of management as well as aiding shareholders, including institutional and foreign investors, in monitoring management. These reform efforts were channeled through a number of different paths with both SEBI and the MCA playing important roles.

7.1.4.1 1998 - Confederation of Indian Industry (CII) - Desirable Corporate Governance – A Code

In 1996, CII took a special initiative on corporate governance, the first institutional initiative in Indian Industry. The objective was to develop and promote a code for companies, be in private sector, public sectors, Banks or financial Institutions, all of which are corporate entities. The initiatives by CII flowed from Public concerns regarding the protection of investor interest, especially the small investor; the promotion of transparency within business and industry; the need to move towards international standards in terms of disclosure of information by the corporate sector, and through all of this to develop a high level of public confidence in business and industry. The completed final draft of this code came out in April 1998.

7.1.4.2 1999- Report of the Committee (Kumar Manglam Birla) on Corporate Governance

SEBI, appointed Kumar Manglam Birla – as chairman to give a comprehensive view of the issues related to insider trading to protect the rights of various stakeholders. The heart of the committee's report is the set of recommendations which distinguishes the responsibilities and obligations of the board and the management in instituting the systems for good corporate governance and emphasizes the rights of shareholders in demanding corporate governance. Many of the recommendations are mandatory. These recommendations are expected to be enforced on the listed companies for initial and continuing disclosures in a phased manner within specified dates, through the listing agreement. The companies will also be required to disclose separately in their annual reports, a report on corporate governance delineating the steps they have taken to comply with the recommendations of the committee. These will enable shareholders to know, where the companies, in which they have invested, stand with respect to specific initiatives taken to ensure robust corporate governance.

7.1.4.3 November 2000 - Report of the task force on Corporate Excellence through Governance

Department of Company Affairs (now MCA), prepared a report on achieving corporate excellence through governance. Depending upon the size and capabilities of the companies as well the requirements of the market place, the task force recommended phased implementations of the essential measures.

7.1.4.4 2000 - Enactment of Clause 49

Shortly after introduction of the CII Code, SEBI appointed the Committee on Corporate Governance (the Birla Committee). In 1999, the Birla Committee submitted a report to SEBI to promote and raise the standard of Corporate Governance for listed companies. The Birla Committee's recommendations were primarily focused on two fundamental goals improving the function and structure of company boards and increasing disclosure to shareholders. With respect to company boards, the committee made specific recommendations regarding board representation and independence that have persisted to date in Clause 49. The committee also recognized the importance of audit committees and made many specific recommendations regarding the function and constitution of board audit committees. The Birla Committee also made several recommendations regarding disclosure and transparency issues, in particular with respect to information provided to shareholders.

Among other recommendations, the Birla Committee stated that a company's annual report to shareholders should contain a Management Discussion and Analysis (MD&A) section and that companies should transmit certain information, such as quarterly reports and analyst presentations, to shareholders.

SEBI implemented the Birla Committee's proposals less than five months later, in February 2000. At that time, SEBI revised its Listing Agreement to incorporate the recommendations of the country's new code on corporate governance. These rules contained in Clause 49, a new section of the Listing Agreement took effect in phases between 2000 and 2003. The reforms applied first to newly listed and large companies, then to smaller companies and eventually to the vast majority of listed companies.

7.1.4.5 March 2001 – RBI – Report of the advisory group on Corporate Governance: Standing Committee on International Financial Standards and Code

The governance mechanism differs in each country and is shaped by its political, economic and social history as also by its legal framework. With keen interest shown by organizations like World Bank, Asian Development Bank etc., Organization for Economic Cooperation and Development (OECD) developed a set of principles of Corporate Governance which are internationally recognized to serve as good benchmarks.

They are discussed below:

(a) The Basis of an Effective Corporate Governance Framework

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law, and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.

(b) Rights of Shareholders and Key Ownership Functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights. Seven core principles in this category spell out the various rights of shareholders and call for effective shareholder participation in key corporate governance decisions.

(c) Equitable Treatment of Shareholders

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

(d) Role of Stakeholders in Corporate Governance

The corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and should encourage active cooperation between corporations and stakeholders in creating wealth, jobs and sustainability of financially sound enterprises.

(e) Disclosure and Transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters with respect to the corporation, including the financial situation, performance, ownership, and governance of the company.

(f) Responsibilities of the Board

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board and the board's accountability to the company and the shareholders.

The advisory group on CG attempted to compare the status of corporate governance in India vis-a-vis the internationally recognized best standards and suggested to improve corporate governance standards in India.

7.1.4.6 April 2001 – RBI – Report of the consultative Group of Directors of Banks/Financial Institutions

The Consultative group of directors of banks and financial institutions was set up by reserve bank to review the supervisory role of boards of banks and financial institutions and to obtain feedback on the functioning of the boards vis-a-vis compliance, transparency, disclosures, audit committees etc and make recommendations for making the role of board of directors more effective with a view to minimizing risks and over exposure. Following the best international practices as recommended by Basel Committee on Banking Supervision, the committee recommended a review of the existing framework governing the constitution of the boards of banks and financial institutions.

7.1.4.7 December 2002 –Report of the committee (Naresh Chandra) on Corporate Audit and Governance Committee

The Department of Company Affairs (DCA) under the ministry of finance and company affairs appointed a committee under the chairmanship of Naresh Chandra to examine various corporate governance issues. The committee took upon the task to analyze, and recommend changes in diverse areas like: the statuary auditor, company relationship, procedure for appointment of auditors and determination of audit fee, restrictions, if required on non-auditory fee, measures to ensure that management and companies put forth a 'true and fair' statement of financial affairs of company. It also reflected on other measures such as certification of accounts and financial statement by the management and directors. The committee intended to study and build upon its report following the benchmarks set by Sarbanes Oxley Law (SOX).

7.1.4.8 February 2003 (N. R. Narayan Murthy) – SEBI report on Corporate Governance

The Securities and Exchange Board of India (SEBI), in its effort to improve the governance standards constituted a committee to study the role of independent directors, related parties, risk management, directorship and director compensation, codes of conduct and financial disclosures. The committee based its recommendations on various parameters like fairness, accountability, transparency, ease of implementation, verifiability and enforceability.

7.1.4.9 July, 2003 (Naresh Chandra Committee II) Report of the committee on regulation of private companies and partnerships

The Companies Act, 1956 had its base in environment encompassing the license and permit raj in India. The act has undergone amendments more than two dozen occasions, keeping in view the various changes in the business environment. As large number of private sector companies was coming into picture there was a need to revisit the law again. In order to build upon this framework, government constituted a committee in January, 2003, to ensure a scientific and rational regulatory environment. The main focus of this report was on:

(a) The Companies Act; 1956.

(b) The Indian Partnership Act, 1932.

The final report was submitted in July 23, 2003.

7.1.4.10 Clause 49 Amendments

The Murthy Committee paid particular attention to the role and responsibilities of audit committees. It recommended that audit committees be composed of financially literate members, provided a greater role for the audit committee and stated that whistleblowers

should have access to the audit committee without first having to inform their supervisors. Further, the committee required that companies should annually affirm that they have not denied access to the audit committee or unfairly treated whistleblowers generally.

In 2004, SEBI further amended Clause 49 in response to the Murthy Committee's recommendations. However, implementation of these changes was delayed until January 1, 2006 due primarily to industry resistance and lack of preparedness to accept such wide-ranging reforms. While there were many changes to Clause 49 as a result of the Murthy Report, governance requirements with respect to corporate boards, audit committees, shareholder disclosure and CEO/CFO certification of internal controls constituted the largest transformation of the governance and disclosure standards of Indian companies.

Clause 49, as currently in effect, includes the following key requirements:

(a) Board: Independence Boards of directors of listed companies must have a minimum number of independent directors. Where the Chairman is an executive or a promoter or related to a promoter or a senior official, then at least one-half the board should comprise independent directors; in other cases, independent directors should constitute at least one-third of the board size.

(b) Audit Committees: Listed companies must have audit committees of the board with a minimum of three directors, two-thirds of whom must be independent; in addition, the roles and responsibilities of the audit committee are specified in detail.

(c) Disclosure: Listed companies must periodically make various disclosures regarding financial and other matters to ensure transparency.

(d) CEO/CFO certification of internal controls: The CEO and CFO of listed companies must:

(i) certify that the financial statements are fair, and

(ii) accept responsibility for internal controls.

(e) Annual Reports: Annual reports of listed companies must carry status reports about compliance with corporate governance norms.

7.1.4.11 OECD Principles of Corporate Governance

(a) In response to a call by its council, the OECD issued the OECD Principles of Corporate Governance in 1999 after extensive consultations. These were later revised in 2004 following a comprehensive survey of corporate governance practices in and outside the OECD area. Since their launch, the principles have formed the basis for corporate governance initiatives in both OECD and non-OECD countries alike. They represent the minimum standard that countries with different traditions have agreed on, being applicable to countries with a civil and common law tradition without being unduly prescriptive.

The principles have been devised with four fundamental concepts in mind: responsibility, accountability, fairness and transparency and enabling diversity of rules and regulations. They outline the following:

(1) the basis for an effective corporate governance framework.

(2) the rights of shareholders.

(3) equitable treatment of shareholders.

(4) the role of stakeholders in corporate governance.

(5) disclosure and transparency, and

(6) the responsibilities of the board.

(b) The 2004 revisions covered four main areas:

(1) a new set of principles on the development of regulatory framework to underpin corporate governance mechanisms for implementation and enforcements.

(2) additional principles to strengthen the exercise of informed ownership by shareholders that call on institutional investors to disclose their corporate governance policies and to strengthen the rights of shareholders when choosing Board members.

(3) strengthened principles to reinforce Board oversight and enhance Board members' independent judgment, and

(4) new and strengthened principles to contain conflicts of interest through enhanced disclosure and transparency (for example, on related party transactions), thus making auditors more accountable to shareholders and promoting auditors' independence.

7.1.5 The Second Phase of Reform: Corporate Governance After Satyam

India's corporate community experienced a significant shock in January 2009 with damaging revelations about board failure and colossal fraud in the financials of Satyam. The Satyam scandal also served as a catalyst for the Indian government to rethink the corporate governance, disclosure, accountability and enforcement mechanisms in place. As described below, Indian regulators and industry groups have advocated for a number of corporate governance reforms to address some of the concerns raised by the Satyam scandal. Industry response shortly after news of the scandal broke, the CII began examining the corporate governance issues arising out of the Satyam scandal. Other industry groups also formed corporate governance and ethics committees to study the impact and lessons of the scandal. In late 2009, a CII task force put forth corporate governance reform recommendations. In its report the CII emphasized the unique nature of the Satyam scandal, noting that 'Satyam is a one-off incident'. The overwhelming majority of corporate India is well run, well regulated and does business in a sound and legal manner.

In addition to the CII, the National Association of Software and Services Companies (NASSCOM, self-described as the premier trade body and the chamber of commerce of the IT-BPO industries in India) also formed a Corporate Governance and Ethics Committee, chaired by N. R. Narayana Murthy, one of the founders of Infosys and a leading figure in Indian corporate governance reforms. The Committee issued its recommendations in mid-2010, focusing on stakeholders in the company. The report emphasizes recommendations related to the audit committee and a whistleblower policy. The report also addresses improving shareholder rights. The Institute of Company Secretaries of India (ICSI) has also put forth a series of corporate governance recommendations. Government response Satyam prompted quick action by both SEBI and the MCA.

7.1.6 SEBI actions

In September 2009 the SEBI Committee on Disclosure and Accounting Standards issued a discussion paper that considered proposals for:

(a) appointment of the Chief Financial Officer (CFO) by the audit committee after assessing the qualifications, experience and background of the candidate.

(b) rotation of audit partners every five years.

(c) voluntary adoption of International Financial Reporting Standards (IFRS).

(d) interim disclosure of balance sheets (audited figures of major heads) on a half-yearly basis, and

(e) streamlining of timelines for submission of various financial statements by listed entities as required under the Listing Agreement.

In early 2010, SEBI amended the Listing Agreement to add provisions related to the

appointment of the CFO by the audit committee and other matters related to financial disclosures. However, other proposals such as rotation of audit partners were not included in the amendment of the Listing Agreement.

7.1.7 MCA actions

Inspired by industry recommendations, including the influential CII recommendations, in late 2009 the MCA released a set of voluntary guidelines for corporate governance. The Voluntary Guidelines address a myriad of corporate governance matters including:

(a) independence of the boards of directors.

(b) responsibilities of the board, the audit committee, auditors, secretarial audits.

(c) mechanisms to encourage and protect whistle blowing.

(d) Important provisions include: Issuance of a formal appointment letter to directors.

(e) Separation of the office of chairman and the CEO.

(f) Institution of a nomination committee for selection of directors.

(g) Limiting the number of companies in which an individual can become a director.

(h) Tenure and remuneration of directors.

(i) Training of directors.

(j) Performance evaluation of directors.

(k) Additional provisions for statutory auditors.

In discussing the voluntary nature of the guidelines, the then Corporate Affairs Secretary, R. Bandyopadhyaya, stated that the MCA did not want to enact a rigid, mandatory law. However, the MCA also indicated that the guidelines are first step and that the option remains open to perhaps move to something more mandatory.

7.1.8 Impact of Clause 49 on IT Governance

Most Indian corporate entities have witnessed a heavy penetration of IT in the running of business processes. Corporate majors have gone in for massive state-of-the-art enterprise resource planning (ERP) implementations across their geographically dispersed business locations, reaping in the bargain online recording of transactions and availability of information at the click of the mouse. Major ERP vendors have come out with India-specific versions to service their expanding Indian clientele. Adding momentum to this development is the increasing offshore (and often intercontinental) acquisitions of business units by most of the top business houses over the last year, in services and manufacturing verticals. The cumulative impact of all these developments boils down to the fact that the road to corporate governance definitely lies through achieving IT governance. Many of the Indian corporate entities have started recognizing the importance of having a Chief Information Officer (CIO) working independently and reporting directly to the board of directors, in place of the traditional reporting structure of working under and reporting to the CFO. This has lent a sense of urgency to giving the IT function its rightful place in the management scheme of things.

IT in Corporate Governance (IT Governance) ensures right decisions and accountability framework for encouraging desirable behaviour in the use of IT. IT Governance reflects broader corporate governance principles while focusing on management and use of IT to achieve corporate performance goals. Because IT outcomes are often hard to measure, firms must assign responsibility for desired outcomes and assess how well they achieve them. IT Governance should not be considered in isolation because IT is linked to other key

enterprise assets (i.e. human, financial, intellectual property, physical and relationships). Thus, IT Governance might share mechanisms with other governance processes, thereby coordinating enterprise-wise decision making processes. When a carefully designed and implemented governance structure is missing there is no harmony and the enterprise is left to chance. Governance should include an approach to exception handling and continuous improvement.

A good corporate governance regime is central to the efficient use of capital. First, it promotes market confidence; helps to attract additional long term capital, both domestic and foreign; and fosters market discipline through appropriate disclosure and transparency. Second, good corporate governance helps to ensure that corporations take into account the interests of a wide range of constituencies, particularly when the board recognizes that corporate social responsibility can mutually benefit the company and its operating environment. Those actions, in turn, help to ensure that corporations operate for the benefit of society as a whole, and induce stable business development and growth, lower risk, and sustainability. The experiences of economic transition and all too frequent financial crises in developing and emerging market economies have confirmed that a weak institutional framework for corporate governance is incompatible with sustainable financial markets and private sector development. As a result, good governance structures are valued increasingly highly by investors, particularly those seeking to diversify their portfolios to include stakes in developing countries. They also mitigate the risks posed by weak institutions. Furthermore it is expected that poor corporate governance is going to a become critical foreign policy issue as cross boarder investors and the importance of securing their rights gain more importance.

7.2.1 The Companies Act 2013 - Key Initiatives

The passing of the long awaited Companies Act in 2013 is probably the single most important development in India's history of corporate legislation. While significant improvements have been effected in required standards of corporate governance, there is also some concern regarding overly increasing compliance and regulatory costs and efforts for companies as well as their independent directors. Among the major provisions of the Act are those of restraining voting rights of interested shareholders on related party transactions, recognition of board accountability to stakeholders besides shareholders, and extension of several good governance requirements to relatively large unlisted corporations.

7.3.1 Corporate Governance in Family Business

Corporate governance is a blend of the internal and external corporate governance mechanisms. The external mechanisms include the managerial labour market, the capital market, takeover and legal protections/systems. The internal governance mechanisms include the board of directors and most important is ownership.

The governance of a family firm is in many ways more harsh and complex than the governance of a firm with no family involvement. Family relationships have to be managed in addition to business relationship usually. The investors in companies with controlling family ownership are at risk of unreliable degrees of expropriation, mainly through the family procuring confidential benefits at the price of the other shareholders, including related-party transactions on noncommercial terms and the transfer of the company's assets to other companies owned by the family. Research study of the Italian stock market reveals that the high risk of expropriation connected with concentrated ownership can negatively affect a company's value when the ultimate owner is either the state or a family.

Good corporate governance strengthens and elucidates the activities of the family Controlled firm while improving its competitiveness. Proper functioning and transparency of the roles and responsibilities of all organs in the firm are defiantly in the interest of the owners, other stakeholders and the whole company. But apart from the lengthy systems and processes

that one puts in place, it is really the spirit of practice that defines the essence of the concept.

Family businesses range from Cluster Companies and Small and Medium sized companies to large Group of companies that operate in multi range industries and countries. Normally businesses are founded in small level and after the passage of time and getting value for its unique core values and become listed companies.

Some of the well-known family businesses include: Salvatore Ferragamo, Benetton, and Fiat Group in Italy; L'Oreal, Carrefour Group, LVMH, and Michelin in France; Samsung, Hyundai Motor, and LG Group in South Korea; BMW, and Siemens in Germany; Kikkoman, and Ito-Yokado in Japan; Tata, Reliance and Birla Groups in India, and Saigol, Dewan, Mansha and Hashu Groups in Pakistan and finally Ford Motors Co, and Wal-Mart Stores in the United States.

It is also a true fact and proved by research that most family businesses have short life length beyond their founder's stage and that some 95 per cent of family Controlled businesses do not survive to the third generation of ownership. This is often the consequence of a lack of grounding of the subsequent generations to handle the demands of a growing business and a much larger family in fact. Family Controlled Firms can improve their probability of survival by setting the good governance structures and by starting the edifying process of the subsequent generations in this era.

The need for sharp Governance has been amplified due to globalization which brings many opportunities on the cost of bulky risk aspect.

McKinsey studied and demonstrated the value creation process of Good Governance. According to the McKinsey report, investors in emerging markets are willing to pay as much as 30% more for shares in companies with good corporate governance. The report further emphasizes for creating sustainable corporate and family governance, the first step is to plan for stable ownership, for instance by constraining shareholding rights and by creating exit mechanisms for family shareholders. The second step is to ensure inclusive and action oriented decision making, for which the business can leverage a variety of governance bodies. The last one is to manage the roles of family members in the business, which requires striking a balance between management and shareholding roles.

CORPORATE SOCIAL RESPONSIBILITY – NATURE OF ACTIVITIES; EVALUATION OF CSR PROJECTS

8.2.1 Introduction

The 21st century is characterized by unprecedented challenges and opportunities, arising from globalization, the desire for inclusive development and the imperatives of climate change. Indian business, which is today viewed globally as a responsible component of the ascendancy of India, is poised now to take on a leadership role in the challenges of our times. It is recognized the world over that integrating social, environmental and ethical responsibilities into the governance of businesses ensures their long term success, competitiveness and sustainability. This approach also reaffirms the view that businesses are an integral part of society and have a critical and active role to play in the sustenance and improvement of healthy ecosystems, in fostering social inclusiveness and equity and in upholding the essentials of ethical practices and good governance. This also makes business sense as companies with effective Corporate Social Responsibility (CSR), have image of socially responsible companies, achieve sustainable growth in their operations in the long run and their products and services are preferred by the customers.

Indian entrepreneurs and business enterprises have a long tradition of working within the values that have defined our nation's character for millennia. India's ancient wisdom, which is still relevant today, inspires people to work for the larger objective of the wellbeing of all stakeholders. These sound and all encompassing values are even more relevant in current times, as organizations grapple with the challenges of modern day enterprise, the aspirations of stakeholders and of citizens eager to be active participants in economic growth and development [Ministry of Corporate Affairs (MCA), Corporate Social Responsibility Voluntary Guidelines 2009].

The idea of CSR first came up in 1953 when it became an academic topic in HR Bowen's "Social Responsibilities of the Business". Since then, there has been continuous debate on the concept and its implementation. Although the idea has been around for more than half a century, there is still no clear consensus over its definition.

One of the most contemporary definitions is from the World Bank Group, stating, "Corporate social responsibility" is the commitment of businesses to contribute to sustainable economic development by working with employees, their families, the local community and society at large, to improve their lives in ways that are good for business and for development.

8.2.2 CSR in the global context

While there may be no single universally accepted definition of CSR, each definition that currently exists underpins the impact that businesses have on society at large and the societal expectations of them. Although the roots of CSR lie in philanthropic activities (such as donations, charity, relief work, etc.) of corporations, globally, the concept of CSR has evolved and now encompasses all related concepts such as triple bottom line [Triple bottom line (or otherwise noted as TBL or 3BL) is an accounting framework with three parts: social, environmental (or ecological) and financial.], corporate citizenship, philanthropy, strategic philanthropy, shared value, corporate sustainability and business responsibility. This is evident in some of the definitions presented below:

The European Commission (EC) defines CSR as "the responsibility of enterprises for their impacts on society". To completely meet their social responsibility, enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders"

The World Business Council for Sustainable Development (WBCSD) defines CSR as "the

continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large."

According to the United Nations Industrial Development Organization (UNIDO), "Corporate social responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives (Triple Bottom Line Approach), while at the same time addressing the expectations of shareholders and stakeholders. In this sense it is important to draw a distinction between CSR, which can be a strategic business management concept and charity, sponsorships or philanthropy. Even though the latter can also make a valuable contribution to poverty reduction, will directly enhance the reputation of a company and strengthen its brand, the concept of CSR clearly goes beyond that."

From the above definitions, it is clear that:

(a) The CSR approach is holistic and integrated with the core business strategy for addressing social and environmental impacts of businesses.

(b) CSR needs to address the wellbeing of all stakeholders and not just the company's shareholders.

(c) Philanthropic activities are only a part of CSR, which otherwise constitutes a much larger set of activities entailing strategic business benefits.

8.2.3 CSR in India

CSR in India has traditionally been seen as a philanthropic activity. And in keeping with the Indian tradition, it was an activity that was performed but not deliberated. As a result, there is limited documentation on specific activities related to this concept. However, what was clearly evident that much of this had a national character encapsulated within it, whether it was endowing institutions to actively participating in India's freedom movement, and embedded in the idea of trusteeship.

As some observers have pointed out, the practice of CSR in India still remains within the philanthropic space, but has moved from institutional building (educational, research and cultural) to community development through various projects. Also, with global influences and with communities becoming more active and demanding, there appears to be a discernible trend, that while CSR remains largely restricted to community development, it is getting more strategic in nature (that is, getting linked with business) than philanthropic and a large number of companies are reporting the activities they are undertaking in this space in their official websites, annual reports, sustainability reports and even publishing CSR reports.

The Companies Act, 2013 has introduced the idea of CSR to the forefront and through its 'disclose' or 'explain' mandate, is promoting greater transparency and disclosure. Schedule VII of the Act, which lists out the CSR activities, suggests communities to be the focal point. On the other hand, by discussing a company's relationship to its stakeholders and integrating CSR into its core operations, the rules to the Companies Act, 2013 suggest that CSR needs to go beyond communities and beyond the concept of philanthropy. It will be interesting to observe the ways in which this will translate into action at the ground level and how the understanding of CSR is set to undergo a change.

8.2.4 CSR and sustainability

Sustainability (Corporate Sustainability) is derived from the concept of sustainable development which is defined by the Brundtland Commission as "development that meets the needs of the present without compromising the ability of future generations to meet their

own needs". Corporate sustainability essentially refers to the role that companies can play in meeting the agenda of sustainable development and entails a balanced approach to economic progress, social progress and environmental stewardship.

CSR in India tends to focus on what is done with profits after they are made. On the other hand, sustainability is about factoring the social and environmental impacts of conducting business, that is, how profits are made. Hence, much of the Indian practice of CSR is an important component of sustainability or responsible business, which is a larger idea, a fact that is evident from various sustainability frameworks. An interesting case in point is the Naional Voluntary Guidelines (NVGs) for social, environmental and economic responsibilities of business issued by the Ministry of Corporate Affairs in June 2011. Principle eight relating to inclusive development encompasses most of the aspects covered by the CSR clause of the Companies Act, 2013. However, the remaining eight principles relate to other aspects of the business. The United Nations (UN) Global Compact, a widely used sustainability framework has 10 principles covering social, environmental, human rights and governance issues, and what is described as CSR is implicit rather than explicit in these principles.

Globally, the notion of CSR and sustainability seems to be converging, as is evident from the various definitions of CSR put forth by global organisations. The genesis of this convergence can be observed from the preamble to the recently released rules relating to the CSR clause within the Companies Act, 2013 which talks about stakeholders and integrating it with the social, environmental and economic objectives, all of which constitute the idea of a triple bottom line approach. It is also acknowledged in the Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises issued by the Department of Public Enterpirses (DPE) in April 2013. The new guidelines, which have replaced two existing separate guidelines on CSR and sustainable development, issued in 2010 and 2011 respectively, mentions the following:

"Since CSR and sustainability are so closely entwined, it can be said that CSR and sustainability is a company's commitment to its stakeholders to conduct business in an economically, socially and environmentally sustainable manner that is transparent and ethical."

8.2.5 Benefits of CSR programme

As the business environment gets increasingly complex and stakeholders become vocal about their expectations, good CSR practices can only bring in greater benefits, some of which are as follows:

(a) Communities provide the licence to operate: Apart from internal drivers such as values and ethos, some of the key stakeholders that influence corporate behaviour include governments (through laws and regulations), investors and customers. In India, a fourth and increasingly important stakeholder is the community and many companies have started realising that the 'licence to operate' is no longer given by governments alone, but communities that are impacted by a company's business operations. Thus, a robust CSR programme that meets the aspirations of these communities not only provides them with the licence to operate, but also to maintain the licence, thereby precluding the 'trust deficit'.

(b) Attracting and retaining employees: Several human resource studies have linked a company's ability to attract, retain and motivate employees with their CSR commitments. Interventions that encourage and enable employees to participate are shown to increase employee morale and a sense of belonging to the company.

(c) Communities as suppliers: There are certain innovative CSR initiatives emerging, wherein companies have invested in enhancing community livelihood by incorporating them into their supply chain. This has benefitted communities and increased their income levels,

while providing these companies with an additional and secure supply chain.

(d) Enhancing corporate reputation: The traditional benefit of generating goodwill, creating a positive image and branding benefits continue to exist for companies that operate effective CSR programmes. This allows companies to position themselves as responsible corporate citizens.

8.2.6 Global principles and guidelines

A comprehensive guidance for companies pertaining to CSR is available in the form of several globally recognised guidelines, frameworks, principles and tools. It must be noted that most of these guidelines relate to the larger concept of sustainability or business responsibility, in keeping with the fact that these concepts are closely aligned globally with the notion of CSR.

8.2.7 The Companies Act, 2013

The concept of CSR is governed by clause 135 of the Companies Act, 2013. The CSR provisions within the Act is applicable to companies with an annual turnover of 1,000 crore ` and more, or a net worth of 500 crore ` and more, or a net profit of five crore ` and more. The new rules, which are applicable from the fiscal year 2014-15 onwards, also require companies to set up a CSR committee consisting of their board members, including at least one independent director.

The Act encourages companies to spend at least 2% of their average net profit in the previous three years on CSR activities. In the rules with respect to CSR net profit is defined as the profit before tax as per the books of accounts, excluding profits arising from branches outside India.

8.2.8 CSR Nature of Activities

The Act lists out a set of activities eligible under CSR. Companies may implement these activities taking into account the local conditions after seeking board approval. The indicative activities which can be undertaken by a company under CSR have been specified under Schedule VII of the Act are furnished below:

SCHEDULE VII TO THE COMPANIES ACT, 2013

(Section 135)

Sl. No.	Activities which may be included by companies in their Corporate Social Responsibility Policies:
	Activities relating to :
(i)	eradicating extreme hunger and poverty;
(ii)	promotion of education;
(iii)	promoting gender equality and empowering women;
(iv)	reducing child mortality and improving maternal health;
(v)	combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;
(vi)	ensuring environmental sustainability;
(vii)	employment enhancing vocational skills;
(viii)	social business projects;
(ix)	contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and
(x)	such other matters as may be prescribed.

The main provisions contained in the rules framed under the Companies Act, 2013 stipulated

the following:

(a) Surplus arising out of the CSR projects or progammes or activities shall not form part of the business profit of a company.

(b) The company can implement its CSR activities through the following methods:

(1) Directly on its own.

(2) Through its own non-profit foundation set-up so as to facilitate this initiative.

(3) Through independently registered non-profit organisations that have a record of at least three years in similar such related activities.

(4) Collaborating or pooling their resources with other companies.

(c) Only CSR activities undertaken in India will be taken into consideration.

(d) Activities meant exclusively for employees and their families will not qualify.

(e) A format for the board report on CSR has been provided which includes amongst others, activity-wise, reasons for spends under 2% of the average net profits of the previous three years and a responsibility statement that the CSR policy, implementation and monitoring process is in compliance with the CSR objectives, in letter and in spirit. This has to be signed by either the CEO, or the MD or a Director of the company and Chairman of the CSR Committee. The report is required to be published in the Annual Report.

8.2.9 Governance

Clause 135 of the Act lays down the guidelines to be followed by companies while developing their CSR programme. The CSR committee will be responsible for preparing a detailed plan on CSR activities, including the expenditure, the type of activities, roles and responsibilities of various stakeholders and a monitoring mechanism for such activities. The CSR committee can also ensure that all the kinds of income accrued to the company by way of CSR activities should be credited back to the community or CSR corpus.

8.2.10 Reporting

The Companies Act, 2013 requires that the board of the company shall, after taking into account the recommendations made by the CSR committee, approve the CSR policy for the company and disclose its contents in their report and also publish the details on the company's official website, if any, in such manner as may be prescribed. If the company fails to spend the prescribed amount, the board, in its report, shall specify the reasons.

8.2.11 Evaluation of CSR Projects

The first step towards formalising CSR projects in a corporate structure is the constitution of a CSR committee as per the specifications provided under Section 135 of the Companies Act, 2013.

Section 135 of the Companies Act, 2013 requires a CSR committee to be constituted by the board of directors. They will be responsible for preparing a detailed plan of the CSR activities including, decisions regarding the expenditure, the type of activities to be undertaken, roles and responsibilities of the concerned individuals and a monitoring and reporting mechanism. The CSR committee will also be required to ensure that all the income accrued to the company by way of CSR activities is credited back to the CSR corpus.

This is an excellent starting point for any company new to CSR. In case a company already practices CSR, this committee should be set up at the earliest so that it can guide the alignment of the company's activities with the requirements of the Act. For effective implementation, the CSR committee must also oversee the systematic development of a set of processes and

guidelines for CSR to deliver its proposed value to the company, including:

(a) one-time processes such as developing the CSR strategy and operationalising the institutional mechanism.

(b) repetitive processes such as the annual CSR policy, due diligence of the implementation partner, project development, project approval, contracting, budgeting and payments, monitoring, impact measurement and reporting and communication.

A set of such enabling processes, their inter-relationships and the sequence in which they need to be developed have been identified below:

CSR Process Flow chart				
Step	Activity		Step	Activity
1	Developing a CSR strategy and policy	**+**	**2**	Operationalising the institutional mechanism
3	Due diligence of the implementation partner	**+**	**4**	Project development
5	Project approval	**+**	**6**	Finalising the arrangement with the implementing agency
Project implementation				
	Progress monitoring and reporting			
8	Impact Assessment	**+**	**9**	Report consolidation and communication

While developing these processes, no standard set of recommendations exist for all companies. However, an overview of the required details, the activities required to be completed for each of these processes along with some additional guidance on critical issues has been provided below:

Steps	Purpose	Objective	Process owners	**Activities**	**Inputs**	**Outputs**
(1)	(2)	(3)	(4)	(5)	(6)	(7)

1. Developing a CSR strategy and policy	The Companies Act, 2013 requires that every company fulfilling the specified criteria, to put out its CSR policy in the public domain. The guidance provided in the Act and the rules on what constitutes a CSR policy are that it should: exclude normal business activities of the company. contain a list of the CSR projects or programmes which the company plans to undertake during the implementation year.	Developing the CSR strategy and policy.	The CSR committee.	Reviewing the past as well as the current CSR activities and examining their alignment with Schedule VII of the Companies Act, 2013. Studying the publicly available information on national and local development priorities. Meeting development experts in the government as well as the NGOs to understand priorities and identifying potential areas of intervention. Conducting internal meetings with business leaders to establish the relevance of potential CSR activities to the company's core business. Studying the good CSR practices of other companies and their achievements. Developing a CSR strategy that defines. For the next three to five years, what the company's CSR activities will cover in terms of: vision and mission. sectors and issues. geographies: states and districts. beneficiaries. KPIs. Determining the implementation mechanism: grant-making or direct implementation. institutional mechanism: in-house department, corporate foundation, partnerships with other NGOs. Annually developing a CSR policy in line with the Companies Act, 2013 rules that defines programmes, geographies and budgets for the following financial year, aligned with the strategy and ensuring that the 2% requirement of funds allocation is met. Establish methods for monitoring and reporting.	Guidance from the board. Companies Act requirements. Corporate business strategy, plan and supply chain. Development priorities: both, national and wherever the company has business interests.	The CSR policy document and an indication of sectors and issues, geographies and a profile of the beneficiaries.

2. Operationalising the institutional mechanism	In order for a corporate to gain the greatest leverage and a strategic advantage through the investment of intellectual and financial resources, they are required to select their implementation mechanism.	Establishing a legal entity and aligning the accounting, tax, finance, administration, HR and IT systems to deliver the commitments made in the CSR policy.	The CSR committee	Selecting the organisation model for the CSR implementation: in-house versus outsourced and its legal entity (trust, society, Section 819 company, in-house department, etc). Identifying the implementation model (grant making, direct project execution, etc). Formalising the job description, the roles and responsibilities and the reporting relationships for the CSR team (whether in-house or in a foundation). Integrating budgeting, procurement, payments and reporting for CSR with the existing finance, administration and IT systems. Analysing accounting systems and chart of accounts and make required changes to record all expenses appropriately. Establish a method of allocation for the expenses (or assets created) that are partly for the CSR and partly for business or employee use.	The CSR strategy	creation of a separate legal entity or a CSR department for CSR activities other institutional mechanisms to align the accounting, finance, administration, HR and IT systems with CSR activities

3. Due diligence of the implementation partner	Due diligence refers to the process a company undertakes to determine the risks as well as the benefits of working with a potential implementation partner. This process has to be sufficiently robust to ensure that a company's implementation partners have the reputation, competence and integrity to deliver effective programmes on the ground.	Selecting the implementation partner.	The CSR department or Company Foundation.	Establishing a due diligence criteria to evaluate the implementation or concept development agency including its incorporation, permits and licenses, systems, processes, public image, management, team deployment, track record, financial soundness, competence level, presence in desired geography, compatibility with company CSR policy and any conflicts of interest. Establishing a due diligence criteria for evaluation and empanelment of private funders for partnership and joint projects. Evaluating the partnership opportunities for its risks and benefits.	the CSR strategy and policy. discussions with communities, board, staff, other funders, local government officials, local leaders or influencers, auditors. studying the books of accounts and the auditor's report.	a due diligence report

4. Project development	The CSR strategy of a company will be implemented through a series of projects which will have definite beginnings, ends, expected outputs and outcomes as well as budgets associated with it. These projects may be of a short duration (a few months) or multi-year.	Developing a feasible project proposal.	The implementation agency (the CSR department, company foundation or the NGO partner).	Developing a framework to identify key stakeholder groups including the local community, the local government or bodies, academia and research institutions, investors, etc. Conducting a needs assessment (if required) to assess development priorities. The methodology for this can be participatory processes, surveys or a combination of the two. Studying and adopting good practices to address similar challenges based on prior experiences or lessons available from other practitioners and developthe approach. Detailing the project: the objectives, the beneficiaries and the impact on the beneficiaries, the assumptions, the expected outputs and outcomes, detailed activities, potential to influence public policy and practice. Identifying the indicators of success with the means of verification and establish the baseline for each. This can be commissioned as a separate study or can even be included in the needs assessment stage. Estimating the budget and how it will be funded specifying the community contributions, leveraging of the government schemes and contributions from the other donors. Indicating the monitoring and evaluation methodologies for impact measurement.	the CSR policy. institutional mechanisms. information from the government sources, previous studies done in the area, etc. information on programs targeting similar geographies and beneficiary groups or strategies. monitoring impact measurement reports from any earlier projects.	a project context including the roles of other development actors. key needs of the target beneficiaries. project goals, KPIs, baselines and expected end lines. project milestones for progress monitoring purposes. activities and timelines to achieve the stated project goals. budgets along with the basis for estimation. risks and mitigation strategies. progress reporting: content, frequency.

5. Project approval	Every project, whether developed by the in-house team or an external agency, must be formally examined and approved. This is to ensure that each project is in line with the CSR strategy and policy, the monitoring indicators are clearly defined and relevant and there is an adequate budget available. Projects that go on for longer durations or demand a larger amount of resources must be scrutinised more carefully than the others.	Approve the project based on the CSR policy objectives, principles and guidelines.	CSR committee or the delegated project approval committee.	Determining the delegation of power for the project approval. Establishing an evaluation framework for the appraisal of the project concepts and implementing agencies that ensure complete alignment with the CSR policy. Establishing tests for the theory of change; whether the concept will be able to deliver the intended results. Establishing tests for the value for money, economy, effectiveness and efficiency. Reviewing risks and mitigation measures. Identifying resource availability and any specific organisational requirements and constraints. Laying down organisational supervision and oversight requirements.	a project proposal due diligence report	An approved project proposal including a monitoring process and reporting and responsibility for this.
6. Finalising the arrangement with the implementing agency	While working with an external agency, it is very important to enter into a formal arrangement which is referred to here as a Memorandum of Understanding or MoU. It defines the roles, responsibilities, deliverables, commitments and consequences in case of any breach. This is essentially a formal acknowledgement that all the partners have voluntarily consented to work together to achieve an agreed outcome that requires each one to play their respective roles.	Agree upon and sign the MoU with the partner.	The CSR department or company foundation.	Developing template MoUs based on the context. Specify the outputs and outcomes, the approach and methodology, the KPIs, key parameters to be monitored and reported, the mode of communication, contract management team, scope of change in management procedures, dispute or conflict resolution mechanisms, inspection and audit requirements, contract closeout requirements, timelines, milestones and deliverables, budgets, process of invoicing and release of payments, etc Establishing a process for negotiation of the MoU with the implementing agency. Negotiating, agreeing upon and signing the MoU.	an approved project proposal due diligence report	MoU with the implementing agency including the disbursement schedule

7. Progress monitoring and reporting	Routine progress monitoring.	Monitoring progress, distilling lessons and forming the basis for reporting.	The CSR committee	Determining the monitoring schedule for each project based on the approved project proposal. Obtaining all relevant progress reports from the project, studying them and making a note of the gaps. Holding discussions with the implementation team on reasons for slippages (if any) and agreeing on a corrective action. This may be done through a field visit or remotely, based on what has been agreed in the MoU. Holding discussions with the implementation team regarding what lessons are emerging and how they can be applied within the project as well as outside.	The approved project proposal. Previous monitoring reports.	Determining mid-course corrections. Recommendations for future project designs. Project monitoring reports to the CSR committee.
8. Impact Assessment	Impacts of the development projects typically take a while to manifest. For instance, a girl child education programme can show an increased enrolment and retention of girls and on a monthly basis, but further impacts such as improved learning levels will take at least a year. So, impact measurement studies have different objectives from project monitoring and typically have to be undertaken after providing sufficient time for them to manifest.	Measuring the outcome and impact of the projects.	The CSR committee.	Identifying methods for conducting the impact assessment and outcome measurement suited to the context and the size of the project and budgets available. Identifying the skills set required for the impact measurement team and accordingly identifying, selecting and appointing the team. Assisting the team to prepare the methodology for selecting a sample, conducting surveys, focus group discussions collecting information on the identified indicators. Making the provisions for the site visits by the team, involvement of the agency involved during the baseline and needs assessment. Undertaking the impact measurement exercise and preparing the report. Identifying the lessons for future interventions.	resource planning. the project MoU.	impact measurement report. recommendations for the future project designs.

9. Report consolidation and communication	Reporting and communication closes the loop between intent and achievement and is hence a crucial element of the CSR process. In the context of the Companies Act, 2013 this is also a mandatory requirement as it provides crucial inputs to preparing the directors' report.	Reporting the CSR at an individual project level, consolidated at a programme level and aligned with the requirements under the Companies Act, 2013 and the CSR committee.	The CSR department.	Identifying the recipient of the report: the board of directors, investors, government agencies, beneficiaries, etc. Selecting the appropriate reporting framework that is aligned with the requirements of the Companies Act, 2013 and the global best practices. Consolidating project reports into programme reports and an overall CSR report.	CSR strategy and policy. the project MoU. monitoring reports from individual projects.	consolidated CSR reports. external stakeholder communication.

PROFITS AND DIVIDENDS

Maximisation of shareholders wealth is one of the objectives of any business. Dividend in literal terms means the profit of a company which is not retained in the business and is distributed among the shareholders in proportion to the amount paid up on the shares held by them.

'Divisible profits' means the profits which the law allows the company to distribute to the shareholders by way of dividend. According to Palmer's Company Law, the terms 'divisible profits' and 'profits in the legal sense' are synonymous. The profits of a business mean the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned. [Bharat Insurance Co. Ltd. v. CIT (1931) 1 Com Cases 192, 196 (Lah)].

1.2.1 Meaning of Dividend

The term 'dividend' has been defined under Section 2(35) of the Companies Act, 2013. The term "Dividend" includes any interim dividend. It is an inclusive and not an exhaustive definition. According to the generally accepted definition, "dividend" means the profit of a company, which is not retained in the business and is distributed among the shareholders in proportion to the amount paid-up on the shares held by them.

Dividends are usually payable for a financial year after the final accounts are ready and the amount of distributable profits is available.

Dividend for a financial year of the company (which is called 'final dividend') are payable only if it is declared by the company at its annual general meeting on the recommendation of the Board of directors. Sometimes dividends are also paid by the Board of directors between two annual general meetings without declaring them at an annual general meeting (which is called 'interim dividend').

The companies having licence under Section 8 of the Act [Formation of companies with charitable objects etc.,] are prohibited by their constitution from paying any dividend to its members. They apply the profits in promoting the objects of the company.

1.2.2 Declaration of Dividend [Section 123]

According to Section 123 (1) of the Act dividend can be paid by a company:

(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or

(b) out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both, or

(c) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:

Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:

Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:

Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves.

The above proviso shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments. [Inserted vide Notification dated 5th June, 2015]

Further stipulations under the rules:

(a) For declaration of dividend out of accumulated profits, the Ministry of Corporate Affairs has provided Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014. Thereby, when there is inadequacy or absence of profits in any year, a company may declare dividend out of free reserves. However, the following conditions shall be fulfilled before declaring dividend out of reserves:

(1) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the 3 years immediately preceding that year: However, this rule will not apply if a company has not declared any dividend in each of the three preceding financial year.

(2) The total amount to be drawn from such accumulated profits shall not exceed one tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement. Therefore, the total amount that can be drawn from the accumulated profits is Less than or equal to 1/10th of the Paid up share capital and free reserves.

The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

(3) The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

[Note: "No company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company of the current year, inserted by the Companies (Declaration and Payment of Dividend) Amendment Rules, 2014" has been deleted vide Notification no. GSR 441(E) dated 29th May 2015.]

1.2.3 Depositing of amount of dividend

In terms of section 123(4), the amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within five days from the date of declaration of such dividend.

This sub- section shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by any state government or Governments or by the Central Government and one or more State Governments.

1.2.4 Interim Dividend

According to section 2(35), 'dividend' includes any interim dividend. According to section 123(3), the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

The Board of directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a separate bank account within five days from the date of declaration of such dividend.

1.2.5 Payment of dividend [123(5]

According to Section 123 (5) of the Act:

(a) Dividends are payable in cash. Dividends that are payable to the shareholder in cash may be paid by cheque or warrant or in any electronic mode.

(b) Dividend shall be payable only to the registered shareholder of the share or to his order or to his banker.

(c) Nothing in sub-section 5 of section 123, shall prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

1.2.6 Punishment for failure to distribute dividends (Section 127)

Section 127 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for punishment for failure to distribute dividend on time. According to this section:

(a) Where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years.

(b) He shall also be liable for a fine which shall not be less than ` 1,000 rupees for every day during which such default continues.

(c) The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.

(d) However, the following are the exceptions under which no offence shall be deemed to have been committed:

(1) where the dividend could not be paid by reason of the operation of any law.

(2) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him.

(3) where there is a dispute regarding the right to receive the dividend.

(4) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder, or

(5) where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

This section shall apply to the Nidhis company, subject to that where the dividend payable to a member is one hundred rupees or less, it shall be sufficient compliance of the provisions of the section, if the declaration of the dividend is announced in the local language in one local newspaper of wide circulation and announcement of the said declaration is also displayed on the notice board of the Nidhis for at least three months [Vide Notification no. 465(E) dated 5th June 2015].

1.2.7 Revocation of declared dividend:

Ordinarily, a dividend once declared at Annual General Meeting, cannot be revoked, except, with the consent of the shareholders, for a declaration of dividend creates a debt to the shareholders in whose favour it is declared.

If a dividend is declared and the amount is paid or credited to the shareholders as dividend, the character of the credit or payment as dividend cannot be altered by a subsequent resolution. [Kishanchand Chellaram v CIT (1962) 32 Comp Cas 1046,1050 (SC)].

(a) Investor Education and Protection Fund (IEPF) has been set-up under Section 205C of the Companies Act, 1956 by way of the Companies (Amendment) Act, 1999. As per the Act, the following amounts which have remained unclaimed and unpaid for a period of seven years from the date they became due for payment shall be credited to the IEPF:

(1) Unpaid dividend accounts of the companies.

(2) The application moneys received and due for refund.

(3) Matured deposits.

(4) The interest accrued in the amounts referred to in clauses (1) to (3).

(5) Matured debentures.

(6) Grants and donations by the Central Govt., State Govt., companies or any other institutions.

(7) The interest or other income received out of the investments made from the Fund.

The Fund has been established with a view to support the activities relating to investor education, awareness and protection.

The Act provides for setting up of a Committee for taking decisions regarding spending moneys out of the Fund for carrying out the objects.

For the purpose of administration of IEPF, the Investor Education and Protection Fund (awareness and protection of investors) Rules were notified which contain provisions relating to constitution and functions of the Committee, activities relating to investors' education, awareness and protection to be undertaken with the recommendation of the Committee, conditions for utilisation of Funds by the Committee, proforma for applications for registration of associations, institutions or organisations and also for seeking financial assistance under IEPF, etc.

Now, Section 125 of the Companies Act, 2013 provides detailed provisions as to establishment of Fund. Under Section 125(1) of the Act, The Central Government shall establish a Fund to be called the Investor Education and Protection Fund (herein referred to as the Fund).

(b) As per Sub Section (2) of the Act, there shall be credited to the Fund:

(8) the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund.

(9) donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund.

(10) the amount in the Unpaid Dividend Account of companies transferred to the Fund under sub-section (5) of section 124.

(11) the amount in the general revenue account of the Central Government which had been transferred to that account under sub-section (5) of section 205A of the Companies Act, 1956, as it stood immediately before the commencement of the

Companies (Amendment) Act, 1999, and remaining unpaid or unclaimed on the commencement of this Act.

(12) the amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956.

(13) the interest or other income received out of investments made from the Fund.

(14) the amount received under sub-section (4) of section 38.

(15) the application money received by companies for allotment of any securities and due for refund.

(16) matured deposits with companies other than banking companies.

(17) matured debentures with companies.

(18) interest accrued on the amounts referred to in clauses (8) to (10).

(19) sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years.

(20) redemption amount of preference shares remaining unpaid or unclaimed for seven or more years, and

(21) such other amount as may be prescribed.

(c) According to Sub-Section 3, the fund shall be utilised for:

(1) the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon.

(2) promotion of investors' education, awareness and protection.

(3) distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement.

(4) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 of the Act by members, debenture-holders or depositors as may be sanctioned by the Tribunal, and

(5) any other purpose incidental thereto, in accordance with such rules as may be prescribed:

(d) The following procedure should be followed by the company while transferring unpaid or unclaimed dividend from unpaid dividend account to IEPF:

(1) Section 124(5) of the Act, provides that any money transferred to the unpaid dividend account of a company which remains unpaid or unclaimed for a period of seven years from the date of such transfer is required to be transferred by the company along with interest accrued, if any, thereon to the Investor Education and Protection Fund (IEPF) established under Section 125.

(2) The amount shall be remitted into the specified branches of State Bank of India or any other nationalized bank along with challan (in triplicate) within a period of 90 days of such amount becoming due to be credited to the IEPF. The Bank will return two copies duly stamped to the Company as token of having received the amount and the company shall file one such copy of challan to the authority.

(3) The company shall send a statement of amount credited to Investor Education and Protection Fund in Form DIV 5 to the authority which administer the fund and the

authority shall issue a receipt to the company as evidence of such transfer.

(4) On receipt of this statement, the authority shall enter the details of such receipts in a register maintained by it in respect of each company every year and reconcile the amount.

(5) The company shall keep a record consisting of names, last known addresses of the persons entitled to receive the same, the amount to which each person is entitled, folio number/ client ID, certificate number, beneficiary details etc. of the persons in respect of whom amount has been remain unpaid or unclaimed for 7 years and transferred to IEPF. Such record shall be maintained for a period of 8 years from the date of such transfer to IEPF and authority shall have the powers to inspect such records.

(e) Any person claiming to be entitled to the amount referred in sub-section (2) may apply to the authority constituted under Sub-Section (5) for the payment of the money claimed.

(f) The Central Government shall constitute, by notification, an authority for administration of the Fund consisting of a Chairperson and such other members, not exceeding seven and a chief executive officer, as the Central Government may appoint.

(g) The manner of administration of the Fund, appointment of chairperson, members and chief executive officer, holding of meetings of the authority shall be in accordance with such rules as may be prescribed.

(h) The Central Government may provide to the authority such offices, officers, employees and other resources in accordance with such rules as may be prescribed.

UNDERSTANDING OF COMPANY DISSOLUTION / LIQUIDATION / WINDING UP

Chapter XX of the Companies Act, 2013 deals with Corporate Winding-Up. Under this Chapter, Part -I deals with Winding-Up by the Tribunal; Part-II deals with Voluntary Winding-Up; Part-III contains the provisions applicable to every mode of winding up and Part- IV deals with Official Liquidators.

CORPORATE WINDING UP AND DISSOLUTION

The Companies Act, 2013, provides various strategies to deal with such business failures such as arrangement, reconstruction, amalgamation and winding-up. Winding-up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

Winding up of a company is the stage, whereby the company takes its last breath. It is a process by which business of the company is wound up, and the company ceases to exist anymore. All the assets of the company are sold, and the proceedings collected are used to discharge the liabilities on a priority basis.

Winding-up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are realized and liabilities are discharged out of proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. At the end of the winding up the company will have no assets or liabilities and it will, therefore, be simply a formal step for it to be dissolved, that is, for its legal personality as a corporation to be brought to an end.

The main purpose of winding up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law. However, the purpose must not be exploited for the benefit or advantage of any class or person entitled to submit petition for winding up of a company. It may be noted that on winding up, the company does not cease to exist as such except when it is dissolved. The administrative machinery of the company gets changed as the administration is transferred in the hands of the liquidator. Even after commencement of the winding-up, the property and assets of the company belong to the company until dissolution takes place. On dissolution the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

Chapter XX Sections 270 to 365 of the Companies Act, 2013 deals with the provisions of winding up.

Under Companies Act 2013, the Company may be wound up in any of the following modes:

(a) By National Company Law Tribunal (the Tribunal).

(b) Voluntary winding up

1.2.1 Circumstances in which company may be wound up by Tribunal (Section 271)

Grounds on which a Company may be wound up by the Tribunal A company under Section 271(1) may be wound up by the tribunal if:

(a) if the company is unable to pay its debts.

(b) if the company has, by special resolution, resolved that the company be wound up by the Tribunal.

(c) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(d) if the Tribunal has ordered the winding up of the company under Chapter XIX(i.e., Revival and Rehabilitation of Sick Companies).

(e) if on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up.

(f) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years, or

(g) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

1.2.2 Inability to pay debts (Section 271(2)

A company shall be deemed to be unable to pay its debts:

(a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor.

(b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part, or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

K : 1.3 VOLUNTARY WINDING UP (SECTION 304 TO 323)

1.3.1 Circumstances in which a company may be wound up voluntarily (Section 304)

As per Section 304 (1), a company may be wound up voluntarily:

(a) if the company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved, or

(b) if the company passes a special resolution that the company be wound up voluntarily.

1.3.2 Declaration of Solvency in case of proposal to wind up voluntarily (Section 305)

The declaration to be made by the director or directors or in case the company has more than two directors, by the majority of directors of a company under Sub-Section (1) of Section 305 read with rule 24 of Companies (Winding up) Rules 2013 shall be in Form No. 51 and such a declaration has to be made at a meeting of the Board, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company and they have formed an opinion that the company has no debt or whether it will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up.

A declaration made under Section 305 (1) shall have no effect for the purposes of this Act, unless:

(a) it is made within five weeks immediately preceding the date of the passing of the resolution

for winding up the company and it is delivered to the Registrar for registration before that date.

(b) it contains a declaration that the company is not being wound up to defraud any person or persons.

(c) it is accompanied by a copy of the report of the auditors of the company prepared in accordance with the provisions of this Act, on the profit and loss account of the company for the period commencing from the date up to which the last such account was prepared and ending with the latest practicable date immediately before the making of the declaration and the balance sheet of the company made out as on that date which would also contain a statement of the assets and liabilities of the company on that date, and

(d) where there are any assets of the company, it is accompanied by a report of the valuation of the assets of the company prepared by a registered valuer Section 305 (4) states that when the company is wound up in pursuance of a resolution passed within a period of five weeks after the making of the declaration, but its debts are not paid or provided for in full, it shall be presumed, until the contrary is shown, that the director or directors did not have reasonable grounds for his or their opinion under Sub-Section (1).

Section 305 (5) states that any director of a company making a declaration under this Section without having reasonable grounds for the opinion that the company will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

E-mail: advstudies@icmai.in
Toll Free: 1800 345 0092/1800 110 910
www.icmai.in

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THE INSTITUTE OF COST ACCOUNTANTS OF INDIA

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HEADQUARTERS
CMA BHAWAN, 12 Sudder Street, Kolkata - 700016
Tel: +91-33-2252 1031/1034/1035/1492/1602/1619/7373/7143
Fax: +91-33-2252 7993/1026/1723

DELHI OFFICE
CMA BHAWAN, 3 Institutional Area, Lodhi Road, New Delhi - 110003
Tel: +91-11-24666100/24666124/24666129
Fax: +91-11-4358 3642

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