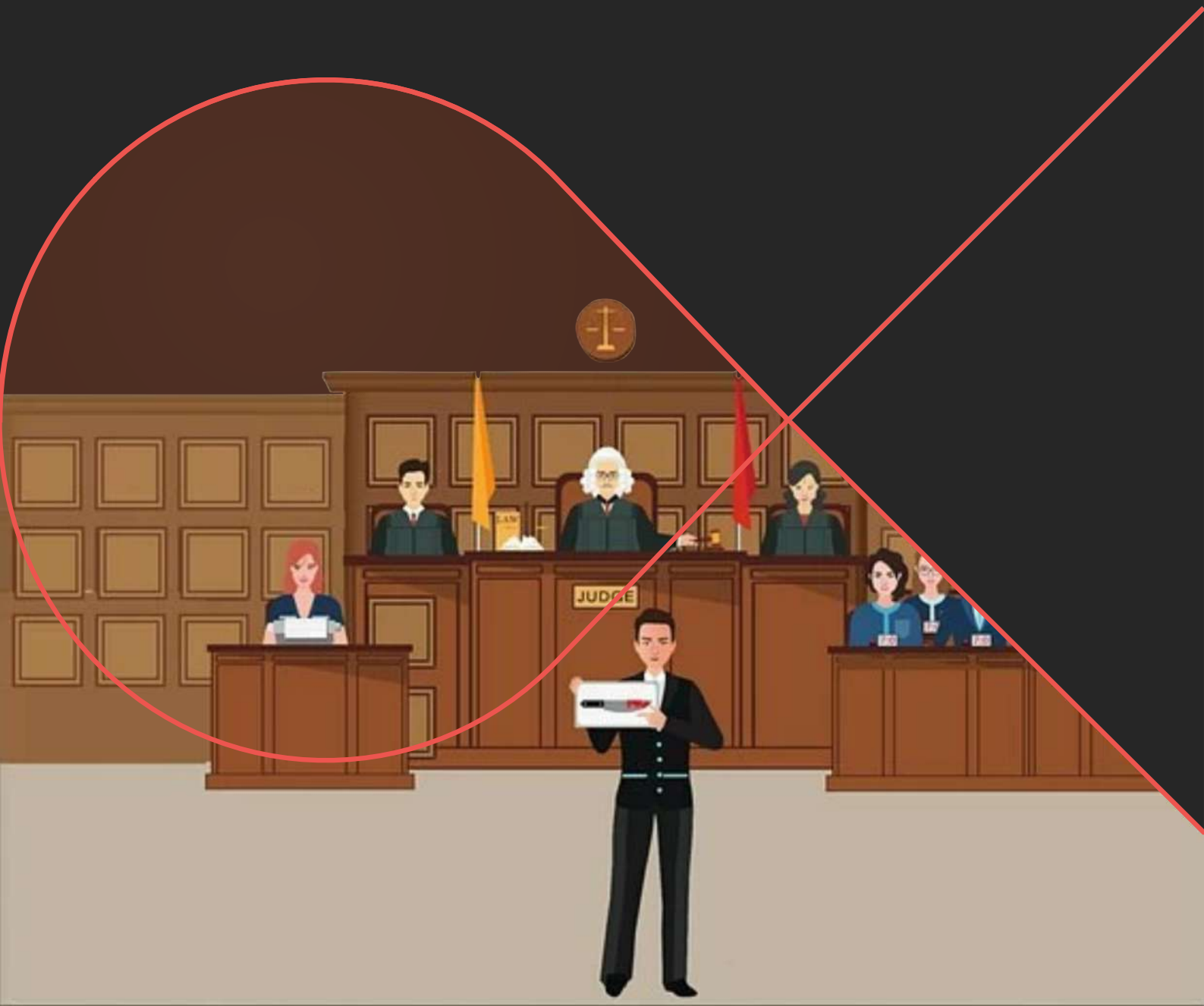


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## SANDESH



**CS Vikas Vohra    CA CS Harish A. Mathariya**

Welcome to YES Family!!

To begin with, we endorse our heartfelt thank you for showing your trust and confidence in YES Academy. We take pride to welcome you to this prestigious Academy, foundations of which are based on commitment, quality education and integrity. It has been our constant endeavour to deliver better and better. In our attempt to achieve mark of excellence and beyond, we would be even more grateful to have received your continued faith and love. We assure you, your trust will not go in vain and as reflected by our Vision Statement, we would continue to produce Best Company Secretaries as we have been doing for almost a decade now.

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On behalf of **TEAM YES**

**CS Vikas Vohra    CA CS Harish A. Mathariya**  
**Founders**

## "Speak only that which will bring you honour"

In spite of all the variable factors like the canvass, paint and brush, the quality of the painting is the responsibility of a painter. The quality of a sculpture is the responsibility of the sculptor. Similarly, the quality of your life is your responsibility. Your life, your death, your success or failure is in your hands.

If I ask you to carry a 12 KG granite block, you will struggle with it. Instead, if I ask you to carry an adorable child, who weighs 12 KG, you will happily do it. Anything in life that is perceived as KASHTAM KASHTAM will only make you struggle. Anything in life that is perceived as ISHTAM ISHTAM will give you fulfillment.

The secret of living a life of fulfillment is to see responsibilities with ISHTAM ISHTAM attitude. Responsibilities should cause happiness to you and in you. Take charge. Take control. Take ownership. Be responsible. Remember, life or death or success or failure is your responsibility.

## MY LOVE AND RESPECT TO....

To **Vikas Vohra** – You have never kept me like a faculty but like a small brother and always loved me unconditionally, I'll be your side till my last breath

To **Harish Mathariya** – for believing in my potentials like no one else can

To **my Mummy** – You are my inspiration, the way you believe in me is what makes me keep going

To **my Papa** – You taught me to stand up and never give up whatever the situation is

To **my Wife** – Thank You for Existing!

To **Manisha Parmar** – For strengthening the contents of this book and adding immense value to it

To **every Student** – Glad to have found so many teachers in you, my source of happiness, my strength

To **my Competitors** – Thank you for being so strong and amazing. You bring out the best in me

To **Yes Academy for everything**

## Sandesh....

Dear Reader,

At the outset, let me first take this opportunity to thank you for spending some of your valuable time with my words. I feel pleased to present to you, notes on **Legal Aptitude (Latest Edition - As per new module) for CSEET**

While writing this book, I have taken every possible effort to cover each and every provision as may be applicable to you and in the most lucid language, so this sums up the entire syllabus. Howsoever, there is always a scope for improvement. I shall highly appreciate any changes, corrections, errors, interpretations suggested by you so that the same can be incorporated in the subsequent editions. You may write to me at **chirag.chotrani2@gmail.com** or get in touch directly on my cell at **+91 8446427759**.

Many a times, while speaking with students, I come across this question about the opportunities for a Company Secretary and their scope in the times to come. I shall be wrong; if I simply quote that life would be simple post completion of the Course. Perhaps, the times ahead poses a lot of challenges and like I always say the only thing, which shall survive in the long run, shall be the Power of Knowledge and the ability to express the same and apply. Readers, empower yourself so robustly that as and when a challenge arises, it turns its way and says: let's catch hold of a weaker one.

It's said, "Fortune favors the brave". You give your best shot and leave the rest upon god to decide. Realize your strengths, work on your weaknesses, grab the best possible opportunity and overcome your threats. Different people define success differently as it means different to different. Realize your **"Being Successful"** factors and start chasing them every morning as you get up.

**"Do everything no matter how unglamorous, to the best of your ability"**

Because in the end, what shall matter would be quality of life you spent and the smiles you lent to the people around you!!!!

With this, I wish you all a happy reading and I hope that you fall in love with this subject. I wish you all good luck and that you achieve what all you work for. Keep working, keep reading, keep spreading love, happiness and smile. You shall be a part of my prayers. I promise to serve you with the best. Someday, we shall once again meet AT THE TOP....

Try to  
**Reinvent**  
**Yourself**

**CHIRAG CHOTRANI**  
**Cell: 8446427759**

*Thank You so much  
Fam for believing in us!*

Let me assure you one thing,  
its your success and happiness,  
which matters the most to me and  
I am committed to take every possible step,  
to make your Dream come true,  
as I sincerely believe,  
whats your dream has now become mine.  
Lets make it happen, **TOGETHER!**

*Lets turn the table  
to your side - CS it is!*

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## CHAPTER 1 – INDIAN CONSTITUTION

*PREAMBLE WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into  
SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC*

*And to secure to all its citizens:*

*JUSTICE, social, economic and political;*

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

*EQUALITY of status and of opportunity; and to promote Among them all*

*FRATERNITY Assuring the dignity of the individual and the unity and integrity of the Nation;*

*IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT,*

*ENACT AND GIVE TO OURSELVES THIS CONSTITUTION*

### INTRODUCTION

The vision of our founding fathers and the aim and objectives which they wanted to achieve through the Constitution are contained in the Preamble, the Fundamental Rights and the Directive Principles, these three may be described as the soul of the Constitution and in the later Part it contains the Fundamental Duties.

The vision of socio-economic change through the Constitution is reflected in its Preamble. It also expresses the ideals and aspirations of a new India. At independence, emerging out of a long period of foreign domination and oppression under a feudal system, the people were grimly struggling to be reborn into a life of dignity and hope.

The scheme of the Constitution for realisation of socio-economic agenda comprises of both the justiciable Fundamental Rights as well as the non-justiciable Directive Principles.

The Constitution places a pre-eminent emphasis on the values of liberty and justice, on treating all citizens as equal before law and on safeguarding the rights of minorities and the oppressed. The people of India derive their existence as a political community from the Constitution, which “we the people”, gave to ourselves and, in the process established the Republic of India.



It is because the country is Republic, and not a mere democracy, that the people are enjoined to nurture and indeed celebrate, their linguistic, ethnic, cultural and religious diversity and to ensure that the citizens do not suffer from want and indignity.

### **Broad Framework of the Constitution**

The Constitution of India came into force on January 26, 1950. It is a comprehensive document. Apart from dealing with the structure of Government, the Constitution makes detailed provisions for the rights of citizens and other persons and for the principles to be followed by the State in the governance of the country, labelled as "Directive Principles of State Policy".

All public authorities – legislative, administrative and judicial derive their powers directly or indirectly from the Constitution which in turn derive its authority from the people.

The preamble to the Constitution sets out the aims and aspirations of the people of India and is a part of the Constitution. The preamble declares India to be a Sovereign, Socialist, Secular, Democratic Republic and secures to all its citizens Justice, Liberty, Equality and Fraternity. It is declared that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

The expression "Sovereign" signifies that the Republic is externally and internally sovereign. Sovereignty in the strict and narrowest sense of the term implies independence all round, within and without the borders of the country, where legal sovereignty is vested in the people of India and political sovereignty is distributed between the Union and the States.

The democratic character of the Indian polity is illustrated by the provisions conferring on the adult citizens the right to vote and by the provisions for elected representatives and responsibility of the executive to the legislature.

The word "Socialist", added by the 42nd Amendment, aims to secure to its people "justice—social, economic and political". The Directive Principles of State Policy, contained in Part IV of the Constitution are designed for the achievement of the socialistic goal envisaged in the



**preamble.** The expression “Democratic Republic” signifies that our government is of the people, by the people and for the people.

### **Federal or Unitary**

Constitution of India is basically federal but with certain unitary features. The majority of the Supreme Court judges in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461, were of the view that the federal features form the basic structure of Indian Constitution.

However, there are discussions as to whether the Indian Constitution establishes a federal system or it stipulates a unitary form of Government with some basic federal features. Thus, to decide whether Constitution is federal, unitary or quasi federal, it would be better to have a look at the contents of the Constitution.

The essential features of a Federal System are — Dual Government, Distribution of Powers, Supremacy of the Constitution, Independence of Judiciary, Written Constitution, and a rigid procedure for the amendment of the Constitution.

The political system introduced by our Constitution possesses all the aforesaid essentials of a federal polity as both the Union and the State Governments and their respective organs derive their authority from the Constitution and it is not competent for the States to go ahead from the Union.

There is a division of legislative and executive powers between the Union and the State Governments. The Supreme Court stands at the head of our judiciary to guard against the violation of the constitutional provisions. The Supreme Court decides disputes between the Union and the States, or the States inter se and interprets finally the provisions of the Constitution.

The question as to whether the Indian Constitution has a federal form of Government or a unitary constitution with some federal features came up in various cases before the Supreme Court and the High Courts. The question rests mostly on value judgement i.e., on one's own philosophy.



## FUNDAMENTAL RIGHTS

The fundamental rights are envisaged in Part III of the Constitution.

Part III of the Indian Constitution guarantees six categories of fundamental rights. These are:

Right to Equality — Articles 14 to 18;

Right to Freedom — Articles 19 to 22;

Right against Exploitation — Articles 23 and 24;

Right to Freedom of Religion — Articles 25 to 28;

Cultural and Educational Rights — Articles 29 and 30;

Right to Constitutional Remedies — Articles 32.

Previously the right to property under Article 31 was also guaranteed as a Fundamental Right which has been removed by the 44th Constitutional Amendment Act, 1978. Now right to property is not a fundamental right, it is now only a legal right.

Apart from this, Articles 12 and 13 deal with definition of 'State' and 'Law' respectively.

No fundamental right in India is absolute and reasonable restrictions can be imposed in the interest of the state by valid legislation and in such case the Court normally would respect the legislative policy behind the same (People's Union for Civil Liberties v. Union of India)

From the point of view of persons to whom the rights are available, the fundamental rights may be classified as follows:

- (a) Articles 15, 16, 19 and 30 are guaranteed only to citizens.
- (b) Articles 14, 20, 21, 22, 23, 25, 27 and 28 are available to any person on the soil of India— citizen or foreigner.
- (c) The rights guaranteed by Articles 15, 17, 18, 20, 24 are absolute limitations upon the legislative power.

### State

Article 12, unless the context otherwise requires, "the State" includes:

- (a) the Government and Parliament of India;
- (b) the Government and the Legislature of each of the States; and
- (c) all local or other authorities;



- (i) within the territory of India; or
- (ii) under the control of the Government of India.

The expression 'local authorities' refers to authorities like Municipalities, District Boards, Panchayats, Improvement Trusts, Port Trusts and Mining Settlement Boards.

In *Ajay Hasia v. Khalid Mujib*:

The Supreme Court has enunciated the following test for determining whether an entity is an instrumentality or agency of the State:

- (1) If the entire share capital of the Corporation is held by the Government,
- (2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation
- (3) Whether the corporation enjoys a monopoly status which is conferred or protected by the State.
- (4) Existence of deep and pervasive State control may afford an indication that the corporation is a state agency
- (5) If the functions of the corporation are of public importance and closely related to government functions
- (6) If a department of government is transferred to a corporation, it would be a strong factor supporting an inference of the corporation being an instrumentality or agency of government.

### **Justifiability of Fundamental Rights**

Article 13 gives teeth to the fundamental rights. It lays down the rules of interpretation in regard to laws inconsistent with or in derogation of the Fundamental Rights.

**Existing Laws:** Article 13(1) relates to the laws already existing in force, i.e., laws which were in force before the commencement of the Constitution. A declaration by the Court of their invalidity, however, will be necessary before they can be disregarded and declares that pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

**Future Laws:** Article 13(2) relates to future laws, i.e., laws made after the commencement of the Constitution. After the Constitution comes into force the State shall not make any law



which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right.

The word 'law' according to the definition given in Article 13 itself includes—

any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law.”

By the Constitution (Twenty-Fourth Amendment) Act, 1971 a new clause has been added to Article 13 which provides that— “Nothing in this Article shall apply to any amendment of this Constitution made under Article 368”

Article 13 came up for judicial review in a number of cases and the Courts have evolved doctrines like doctrine of eclipse, severability, prospective overruling, acquiescence etc. for interpreting the provisions of Article 13.

### **Right of Equality**

Articles 14 to 18 of the Constitution deal with equality and its various facets. The general principle finds expression in Article 14. Particular applications of this right are dealt with in Articles 15 and 16. Still more specialised applications of equality are found in Articles 17 and 18.

### **Equality before the law and equal protection of the laws**

Article 14 of the Constitution says that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

As is evident, Article 14 guarantees to every person the right to equality before the law or the equal protection of the laws. The expression ‘equality before the law’ which is borrowed from English Common Law is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. Every person, whatever be his rank or position is subject to the jurisdiction of the ordinary courts.

The second expression “the equal protection of the laws” which is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination.





Article 14 applies to all persons and is not limited to citizens. A corporation, which is a juristic person, is also entitled to the benefit of this Article (*Chiranjit Lal Chowdhury v. Union of India*).

The right to equality is also recognised as one of the basic features of the Constitution (*Indira Sawhney v. Union of India*)

### **Prohibition of discrimination on grounds of religion etc.**

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of:

- (a) Religion
- (b) Race
- (c) Caste
- (d) Sex
- (e) Place of birth or
- (f) Any of them

Article 15(2) lays down that no citizen shall be subjected to any disability, restriction or condition with regard to—

- (a) Access to shops, public restaurants, hotels and places of public entertainment; or
- (b) The use of wells, tanks, bathing ghats, roads and places of public resort, maintained wholly or partially out of State funds or dedicated to the use of the general public.

Article 15(3) and 15(4) and 15(5) and 15(6) create certain exceptions to the right guaranteed by Article 15(1) and 15(2). Under Article 15(3) the State can make special provision for women and children. It is under this provision that courts have upheld the validity of legislation or executive orders discriminating in favour of women.

Article 15(4) permits the State to make special provision for the advancement of—

- (a) Socially and educationally backward classes of citizens;
- (b) Scheduled Castes; and
- (c) Scheduled tribes.



Article 15(5) inserted in the Constitution of India by the Constitution (Ninety-third Amendment) Act, 2005, permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Further, Article 15(6) inserted in the Constitution of India by the Constitution (One Hundred and Third Amendment) Act, 2019, provides that nothing in this article or sub-clause (g) of clause (1) of article 19 or

clause (2) of article 29 shall prevent the State from making:

- (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
- (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

### **Equality of opportunity in matters of public employment**

Article 16(1) guarantees to all citizens equality of opportunity in matters relating to employment or appointment of office under the State.

Article 16(2) prohibits discrimination against a citizen on the grounds of religion, race, caste, sex descent, place of birth or residence.

However, there are certain exceptions provided in Article 16(3), 16(4) and 16(5). These are as under:

- (1) Parliament can make a law that in regard to a class or classes of employment or appointment to an office under the Government of a State or a Union Territory, under any local or other





authority within the State or Union Territory, residence within that State or Union Territory prior to such employment or appointment shall be an essential qualification. [Article 16(3)]

(2) A provision can be made for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. [Article 16(4)]

(3) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State. [Article 16(4A)]

(4) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year. [Article 16(4B)]

(5) A law shall not be invalid if it provides that the incumbent of an office in connection with the affair of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. [Article 16(5)]

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category. [Article 16(6)]



### **Abolition of untouchability**

Article 17 says that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Untouchability does not include an instigation to social boycott (Davarajiah v. Padamanna)

### **Abolition of titles**

Article 18 is more a prohibition rather than a fundamental right. British Government used to confer titles upon persons who showed special respect to them. Many persons were made Sir, Raj Bahadur, Rai Saheb, Knight, etc. These titles had the effect of creating a class of certain persons which was regarded superior to others and thus had the effect of perpetuating inequality. To do away with that practice,

Article 18 provides as under:

- (i) No title, not being a military or academic distinction, shall be conferred by the State.
- (ii) No citizen of India shall accept any title from any foreign State.
- (iii) No person, who is not a citizen of India shall, while he holds any office or trust under the State, accept without the consent of the President, any title from any foreign State.
- (iv) No person, holding any office of profit or trust under State shall without the consent of the President, accept any present, emolument or office of any kind from or under a foreign State.

### **Rights Relating to Freedom**

Articles 19-22 guarantee certain fundamental freedoms.

### **The Six Freedoms of Citizens**

Article 19(1), of the Constitution, guarantees to the citizens of India six freedoms, namely:

- (a) Freedom of speech and expression;
- (b) Assemble peaceably and without arms;
- (c) Form associations or unions or co-operative societies
- (d) Move freely, throughout the territory of India;
- (e) Reside and settle in any part of the territory of India;
- (f) practise any profession, or to carry on any occupation, trade or business.



These freedoms are those great and basic rights which are recognized as the natural rights inherent in the status of a citizen. At the same time, none of these freedoms is absolute but subject to reasonable restrictions specified under clauses (2) to (6) of the Article 19.

The Constitution under Articles 19(2) to 19(6) permits the imposition of restrictions on these freedoms subject to the following conditions:

- (a) The restriction can be imposed by law and not by a purely executive order issued under a statute [Express News Papers Pvt. Ltd. v. Union of India];
- (b) The restriction must be reasonable;
- (c) The restriction must be imposed for achieving one or more of the objects specified in the respective clauses of Article 19.

Article 19(2) specifies the limits up to which the freedom of speech and expression may be restricted.

### **Permissible Restrictions**

- (1) Sovereignty and integrity of India
- (2) Security of the State
- (3) Friendly relations with foreign States
- (4) Public Order
- (5) Decency or morality
- (6) Contempt of court
- (7) Defamation
- (8) Incitement to an offence

Reasonable restrictions under these heads can be imposed only by a duly enacted law and not by the executive action

### **Protection of Life and Personal Liberty**

Article 21 confers on every person the fundamental right to life and personal liberty. It says that,

"No person shall be deprived of his life or personal liberty except according to procedure established by law."



The right to life includes those things which make life meaningful. The right to life enshrined in Article 21 guarantees right to live with human dignity. Right to live in freedom from noise pollution is a fundamental 21 right protected by Article 21 and noise pollution beyond permissible limits is an inroad into that right. (Noise Pollution).

In *Satwant Singh Sawhney v. A.P.O., New Delhi*, it was held that right to travel is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel, except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, the denial of a passport amounts to deprivation of personal liberty. In the absence of any procedure prescribed by the law of land sustaining the refusal of a passport to a person, its refusal amounts to an unauthorised deprivation of personal liberty guaranteed by Article 21.

### **Right to Education**

According to Article 21A of the Constitution of India, the State shall provide free and compulsory education to all children of the age of six to fourteen years

### **Protection against arrest and detention in certain cases**

According to Article 22 of the Constitution of India no arrested person shall be detained in custody without being informed of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Further, every arrested person and who is detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate. However, the protection is not available to an enemy alien and a person arrested or detained under any law providing for preventive detention.

### **Right against Exploitation**

According to Article 23 of Constitution of India traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of Article 23 shall be an offence punishable in accordance with law. Further, as per



Article 24 of Constitution of India, no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

### **Right to Freedom of Religion**

Articles 25, 26, 27 and 28 of Constitution of India deals with right to Freedom of Religion.

### **Right to Constitutional Remedies**

Article 32 guarantees the enforcement of Fundamental Rights. It is remedial and not substantive in nature.

### **Remedies for Enforcement of Fundamental Rights**

It is a cardinal principle of jurisprudence that where there is a right there is a remedy (*ubi jus ibi remedium*) and if rights are given without there being a remedy for their enforcement, they are of no use. While remedies are available in the Constitution and under the ordinary laws, Article 32 makes it a fundamental right that a person whose fundamental right is violated has the right to move the Supreme Court by appropriate proceedings for the enforcement of his fundamental right. It is really a far-reaching provision in the sense that a person need not first exhaust the other remedies and then go to the Supreme Court.

On the other hand, he can directly raise the matter before highest Court of the land and the Supreme Court is empowered to issue directions or orders or writs in the nature of ***habeas corpus, mandamus, prohibition, quo warranto and certiorari***, whichever may be appropriate for the enforcement of the right, the violation of which has been alleged. This power of the Supreme Court to issue directions, etc., may also be assigned to other Courts by Parliament without affecting the powers of the Supreme Court.

The right to move the Supreme Court is itself a guarantee right and the significance of this has been assessed by Gajendragadkar, J. in the following words:

“The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution.

## DIRECTIVE PRINCIPLES OF STATE POLICY

The Sub-committee on Fundamental Rights constituted by the Constituent Assembly suggested two types of Fundamental Rights — one which can be enforced in the Courts of law and the other which because of their different nature cannot be enforced in the law Courts. Later on, however, the former was put under the head 'Fundamental Rights' as Part III which we have already discussed and the latter were put separately in Part IV of the Constitution under the heading 'Directive Principles of State Policy' which are discussed in the following pages.

The Directives, however, differ from the fundamental rights contained in Part III of the Constitution or the ordinary laws of the land in the following respects:

- (i) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of individuals.
- (ii) The Directives require to be implemented by legislation and so long as there is no law carrying out the policy laid down in a Directive, neither the state nor an individual can violate any existing law.
- (iii) The Directives per-se do not confer upon or take away any legislative power from the appropriate legislature.
- (iv) The courts cannot declare any law as void on the ground that it contravenes any of the Directive Principles.
- (v) The courts are not competent to compel the Government to carry out any Directives or to make any law for that purpose.
- (vi) Though it is the duty of the state to implement the Directives, it can do so only subject to the limitations imposed by the different provisions of the constitution upon the exercise of the legislative and executive power by the state.

## FUNDAMENTAL DUTIES

Article 51A imposes the fundamental duties on every citizen of India.

These Fundamental Duties are:

- (a) to abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem;





- (b) To cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.
- (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

Since the duties are imposed upon the citizens and not upon the States, legislation is necessary for their implementation. Fundamental duties can't be enforced by writs (*Surya Narain v. Union of India*)

## CITIZENSHIP

"The State is a compound made of citizens; and this compels us to consider who should properly be called a citizen and what a citizen really is. The nature of Citizenship like that of the State, is a question which is often disputed; there is no general agreement on a single definition; the man who is a citizen in democracy is often not one in an oligarchy."

-Aristotle

Articles 5 to 9 of the Constitution determine who are the Indian citizens at the commencement of the Constitution.

Article 10 provides for their continuance as such citizens subject to the provisions of any law that may be made by Parliament.



Article 11 entrust the Parliament with powers to regulate the right of citizenship. In other words, the Constitution under Article 11 expressly left acquisition and termination of citizenship and all other matters relating thereto to the Parliament by way of legislation. The legislation related to this matter is the Citizenship Act, 1955.

### **Article 5: Citizenship at the commencement of the Constitution**

Article 5 provides that at the commencement of the Constitution, every person who has his domicile in the territory of India and—

- (a) Who was born in the territory of India; or
- (b) Either of whose parents were born in the territory of India; or
- (c) Who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

### **PARLIAMENT**

There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

### **President**

The President shall be elected by the members of an electoral college consisting of:

- (a) the elected members of both Houses of Parliament; and
- (b) the elected members of the Legislative Assemblies of the States.

### **Powers of the President**

Article 53 the Constitution lays down that the executive power of the union shall be vested in the President. The President of India shall, thus, be the head of the 'executive power' of the union. The executive power may be defined as the power of "carrying on the business of Government" or "the administration of the affairs of the state" excepting functions which are vested in any other authority by the Constitution. Various powers that are included within the comprehensive expression 'executive power' in a modern state have been classified under following heads:





- (i) Administrative power, i.e., the execution of the laws and the administration of the departments of Government.
- (ii) Military power, i.e., the command of the armed forces and the conduct of war.
- (iii) Legislative power, i.e., the summoning prorogation, etc. of the legislature.
- (iv) Judicial power, i.e., granting of pardons, reprieves etc. to persons convicted of crime.

These powers vest in the President under each of these heads, subject to the limitations made under the Constitution.

### **Power to Promulgate Ordinance**

The most important legislative power conferred on the President is to promulgate Ordinances.

Article 123 of the Constitution provides that the President shall have the power to legislate by Ordinances at any time when it is not possible to have a parliamentary enactment on the subject, immediately. This is a special feature of the Constitution of India.

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say it may relate to any subject in respect of which Parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.

### **Rajya Sabha (Council of States)**

The Council of States shall consist of twelve members to be nominated by the President and not more than two hundred and thirty-eight representatives of the States and of the Union territories.

The allocation of seats in the Council of States to be filled by representatives of the States and of the Union territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule of the Constitution.

The members to be nominated by the President shall consist of persons having special knowledge or practical experience in respect of literature, science, art and social service. The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means



of the single transferable vote. The representatives of the Union territories in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

### **Lok Sabha (House of the People)**

Lok Sabha is composed of representatives of the people chosen by direct election on the basis of the adult suffrage. The maximum strength of the House envisaged by the Constitution is 552, which is made up by election of upto 530 members to represent the States, upto 20 members to represent the Union Territories and not more than two members of the Anglo-Indian Community to be nominated by the Hon'ble President, if, in his/her opinion, that community is not adequately represented in the House. The total elective membership is distributed among the States in such a way that the ratio between the number of seats allotted to each State and the population of the State is, so far as practicable, the same for all States.

### **COUNCIL OF MINISTERS**

There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice. The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. The total number of Ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent. of the total number of members of the House of the People.

The Ministers shall continue office at the pleasure of the President. The Council of Ministers shall be collectively responsible to the House of the People. Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy. The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule.

The total number of Ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent of the total number of members of the House of the People.

## CONSTITUTION OF LEGISLATURES IN STATES

For every State there shall be a Legislature which shall consist of the Governor, and in the States of Andhra Pradesh, Bihar, Madhya Pradesh, Maharashtra, Karnataka, Tamil Nadu, Telangana and Uttar Pradesh having two Houses

Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

The Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty members chosen by direct election from territorial constituencies in the State. The total number of members in the Legislative Council of a State having such a Council shall not exceed one third of the total number of members in the Legislative Assembly of that State.

The total number of members in the Legislative Council of a State shall in no case be less than forty.

Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly. The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

## GOVERNOR

The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally there shall be a Governor for each State but the same person can be appointed as Governor for two or more states. The Governor of a State is not elected but is appointed by the President and holds his office at



**the pleasure of the President.** The head of the executive power to a State is the Governor just as the President for the Union.

The Governor possesses executive, legislation and judicial powers as the Presidents except that he has no diplomatic or military powers like the President.

The Governor's power to make Ordinances as given under Article 213 is similar to the Ordinance making power of the President and have the force of an Act of the State Legislature. He can make Ordinance only when the state Legislature or either of the two Houses (where it is bicameral) is not in session. He must be satisfied that circumstances exist which render it necessary to take immediate action. While exercising this power, the Governor must act with the aid and advice of the Council of Ministers.

But in following cases, the Governor cannot promulgate any Ordinance without instructions from the President:

- (a) if a Bill containing the same provisions would under this constitution have required the previous sanction of the President.
- (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President.
- (c) an Act of the state legislature containing the same provisions would under this constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President. The Ordinance must be laid before the state legislature (when it re-assembles) and shall automatically cease to have effect at the expiration of six weeks from the date of the re-assembly unless disapproved earlier by that legislature.

## THE JUDICIARY

### The Supreme Court

The Courts in the Indian legal system, broadly speaking, consist of

- (i) The Supreme Court,
- (ii) The High Courts, and
- (iii) The Subordinate Courts.

The Supreme Court, which is the highest Court in the country (both for matters of ordinary law and for interpreting the Constitution) is an institution created by the



Constitution. Immediately before independence, the Privy Council was the highest appellate authority for British India, for matters arising under ordinary law.

But appeals from High Courts in constitutional matters lay to the Federal Court (created under The Government of India Act, 1935) and hence to the Privy Council. The Supreme Court of India, in this sense, has inherited the jurisdiction of both the Privy Council and the Federal Court. However, the jurisdiction of the Supreme Court under the present Constitution is much more extensive than that of its two predecessors mentioned above.

The Supreme Court, entertains appeals (in civil and criminal and other cases) from High Courts and certain Tribunals. It has also writ jurisdiction for enforcing Fundamental Rights. It can advise the President on a reference made by the President on questions of fact and law. It has a variety of other special jurisdictions.

### **High Courts**

The High Courts that function under the Constitution were not created for the first time by the Constitution. Some High Courts existed before the Constitution, although some new High Courts have been created after 1950. The High Courts in (British) India were established first under the Indian High Courts Act, 1861 (an Act of the U.K. Parliament). The remaining High Courts were established or continued under the Constitution or under special Acts. High Courts for each State (or Group of States) have appellate, civil and criminal jurisdiction over lower Courts. High Courts have writ jurisdiction to enforce fundamental rights and for certain other purposes.

It should be added, that the "writ" jurisdiction vested at present in all High Courts by the Constitution was (before the Constitution came into force) vested only in the High Courts of Bombay, Calcutta and Madras (i.e. the three Presidency towns).

### **Subordinate Courts**

Finally, there are various subordinate civil and criminal courts (original and appellate), functioning under ordinary law. Although their nomenclature and powers have undergone change from time to time, the basic pattern remains the same. These have been created, not under the Constitution, but under laws of the competent legislature. Civil Courts are created mostly



under the Civil Courts Act of each State. Criminal courts are created mainly under the Code of Criminal Procedure.

### **Civil Courts**

In each district, there is a District Court presided over by the District Judge, with a number of Additional District Judges attached to the court. Below that Court are Courts of Judges (sometimes called subordinate Judges) and in, some States, Munsiffs. These Courts are created under State Laws.

### **Criminal Courts**

Criminal courts in India primarily consist of the Magistrate and the Courts of Session. Magistrates themselves have been divided by the Code of Criminal Procedure into 'Judicial' and 'Executive' Magistrates.

### **Executive Magistrate**

The Executive Magistrate do not try criminal prosecutions, and their jurisdiction is confined to certain miscellaneous cases, which are of importance for public tranquillity and the like. Their proceedings do not end in conviction or acquittal, but in certain other types of restrictive orders. In some States, by local amendments, Executive Magistrates have been vested with powers to try certain offences.

### **Judicial Magistrate**

Judicial Magistrates, are of two classes: Second Class and First Class. Judicial Magistrates are subject to the control of the Court of Session, which also in itself a Court of original jurisdiction. The powers of Magistrates of the two classes, vary according to their grade. The Court of Session can try all offences, and has power to award any sentence, prescribed by law for the offence, but a sentence of death requires confirmation by the High Court.



## Special Tribunals

Besides these Courts, which form part of the general judicial set up, there are specialised Tribunals dealing with Direct Taxes, Labour, Customs, Claims for accidents caused by motor vehicles, Copyright and Environment, Anti- Competitive Agreement etc.

## WRIT JURISDICTION OF HIGH COURTS AND SUPREME COURT

Under the Constitution by virtue of Article 226, every High Court has the power to issue directions or orders or writs including writs in the nature of Habeas corpus, Mandamus, Prohibition, Quo warranto and Certiorari or any of them for the enforcement of fundamental rights stipulated in Part III of the Constitution or for any other purpose.

This power is exercisable by each High Court throughout the territory in relation to which it exercises jurisdiction.

A person can also approach the Supreme Court by appropriate proceedings for the issue of directions or orders or writs, as referred to under Article 226 for the enforcement of the rights guaranteed by Part III of the Constitution.

Article 32 itself being a fundamental right, the Constitutional remedy of writ is available to anyone whose fundamental rights are infringed by state action.

## Types of Writs

A brief description of the various types of writs is given below:

### 1. Habeas Corpus

The writ of Habeas corpus - an effective bulwark of personal liberty - is a remedy available to a person who is confined without legal justification. The words 'Habeas Corpus' literally mean "to have the body".

When a prima facie case for the issue of writ has been made then the Court issues a rule nisi upon the relevant authority to show cause why the writ should not be issued.

This is in national order to let the Court know on what grounds he has been confined and to set him free if there is no justification for his detention. This writ has to be obeyed by the detaining authority by producing the person before the Court.



Under Articles 32 and 226 any person can move for this writ to the Supreme Court and High Court respectively.

The applicant may be the prisoner or any person acting on his behalf to safeguard his liberty for the issuance of the writ of Habeas Corpus as no man can be punished or deprived of his personal liberty except for violation of law and in the ordinary legal manner.

## 2. Mandamus

The word 'Mandamus' literally means we command. The writ of mandamus is, a command issued to direct any person, corporation, inferior court, or Government requiring him or it do a particular thing specified therein which pertains to his or its office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction while resort to certiorari and prohibition arises when the tribunal has wrongly exercised jurisdiction or exceeded its jurisdiction and are available only against judicial and quasi-judicial bodies. Mandamus can be issued against any public authority. It commands activity. The writ is used for securing judicial enforcement of public duties.

The Constitution of India by Articles 226 and 32 enables mandamus to be issued by the High Courts and the Supreme Court to all authorities.

## 3. Prohibition

A writ of prohibition is issued to an Inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. When a tribunal acts without or in excess of jurisdiction, or in violation of rules or law, a writ of prohibition can be asked for. It is generally issued before the trial of the case.

While mandamus commands activity, prohibition commands inactivity, it is available only against judicial or quasi-judicial authorities and is not available against a public officer who is not vested with judicial functions. If abuse of power is apparent this writ may be of right and not a matter of discretion.





#### 4. Certiorari

*It is available to any person, wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially in excess of their legal authority"*

*The writ removes the proceedings from such body to the High Court, to quash a decision that goes beyond its jurisdiction. Under the Constitution of India, all High Courts can issue the writ of certiorari throughout their territorial jurisdiction when the subordinate judicial authority acts (i) without or in excess of jurisdiction or (ii) in contravention of the rules of natural justice or (iii) commits an error apparent on the face of the record. The jurisdiction of the Supreme Court to issue such writs arises under Article 32. Although the object of both the writs of prohibition and of certiorari is the same, prohibition is available at an earlier stage whereas certiorari is available at a later stage but on similar grounds i.e. Certiorari is issued after authority has exercised its powers.*

#### 5. Quo Warranto

*The writ of quo warranto enables enquiry into the legality of the claim which a person asserts, to an office or franchise and to oust him from such position if he is a usurper. The holder of the office has to show to the court under what authority he holds the office. It is issued when:*

- (i) the office is of public and of a substantive nature,*
- (ii) created by statute or by the Constitution itself, and*
- (iii) the respondent has asserted his claim to the office. It can be issued even though he has not assumed the charge of the office.*

*The fundamental basis of the proceeding of Quo warranto is that the public has an interest to see that a lawful claimant does not usurp a public office. It is a discretionary remedy which the court may grant or refuse.*

## MAJOR CONSTITUTIONAL AMENDMENTS 1951 - 2022

### ***The Constitution (First Amendment) Act, 1951***

- Added Ninth Schedule to protect the land reform and other laws included in it from the judicial review.
- Added three more grounds of restrictions on freedom of speech and expression, viz., public order, friendly relations with foreign states and incitement to an offence. Also, made the restrictions 'reasonable' and thus, justiciable in nature.
- Empowered the state to make special provisions for the advancement of socially and economically backward classes.

### ***The Constitution (Second Amendment) Act, 1952***

The scale of representation in the Lok Sabha by providing that one member could represent even more than 7, 50,000 persons.

### ***Constitution (Forty - Second Amendment) Act, 1976***

- It is also known as Mini-Constitution. It was enacted to give effect to the recommendations of Swaran Singh Committee).
- Added three new words (i.e., socialist, secular and integrity) in the Preamble.
- Added Fundamental Duties by the citizens (new Part IV A).
- Made the president bound by the advice of the cabinet.
- Added three new Directive Principles viz., equal justice and free legal aid, participation of workers in the management of industries, protection and improvement of environment and safeguarding of forest & wild life.
- Shifted five subjects from the state list to the concurrent list, viz, education, forests, protection of wild animals and birds, weights and measures and administration of justice, constitution and organisation of all courts except the Supreme Court and the high courts — Empowered the Centre to deploy its armed forces in any state to deal with a grave situation of law and order.



### **Constitution (Fifty – Second Amendment) Act, 1985**

- This amendment popularly known as Anti-Defection Law
- Provided for disqualification of members of Parliament and state legislatures on the ground of defection and added a new Tenth Schedule containing the details in this regard.

### **Constitution (Sixty – First Amendment) Act, 1989**

Reduced the voting age from 21 years to 18 years for the Lok Sabha and state legislative assembly elections.

### **Constitution (Sixty – Ninth Amendment) Act, 1991**

Accorded a special status to the Union Territory of Delhi by designing it as the National Capital Territory of Delhi.

### **Constitution (Seventieth Amendment) Act, 1989**

Provided for the inclusion of the members of the Legislative Assemblies of National Capital Territory of Delhi and the Union Territory of Puducherry in the Electoral College for the election of the president.

### **Constitution (Eighty-Fourth Amendment) Act, 2001**

The number of seats in the Lok Sabha and the assemblies are to remain same till 2026.

### **Constitution (Eighty-Sixth Amendment) Act, 2002**

- Made elementary education a fundamental right. Added Article 21-A which declares that “the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may determine”.
- Changed the subject matter of Article 45 in Directive Principles. It now reads—“The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years”.
- Added a new fundamental duty under Article 51-A which reads—“It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or ward between the age of six and fourteen years”.



### **Constitution (Ninety-First Amendment) Act, 2003**

- The total number of ministers, including the Prime Minister, in the Central Council of Ministers shall not exceed 15% of the total strength of the Lok Sabha [Article 75(1A)].
- The total number of ministers, including the Chief Minister, in the Council of Ministers in a state shall not exceed 15% of the total strength of the legislative Assembly of that state. But, the number of ministers, including the Chief Minister, in a state shall not be less than 12 [Article 164(1A)].
- The provision of the Tenth Schedule (anti-defection law) pertaining to exemption from disqualification in case of split by one-third members of legislature party has been deleted. It means that the defectors have no more protection on grounds of splits. Constitution (One Hundred-One Amendment) Act, 2016
- Goods and Services Tax (GST) has commenced with the enactment of the 101st Constitution Amendment Act, 2016.
- Articles 246A, 269A and 279A were added in the constitution. The amendment made changes in the 7th schedule of the constitution.

### **Constitution (One Hundred-Second Amendment) Act, 2018**

- Constitutional status to the National Commission for Backward Classes.
- Inserted a new Article 342-A which empowers President to notify the list of socially and educationally backward classes of that state/union territory.

### **Constitution (One Hundred-Third Amendment) Act, 2019**

It changed two fundamental rights, Article 15 and 16. It provides for the advancement of the economically weaker sections of society. Ten (10%) of all government jobs and college seats will be reserved for people outside the high-income bracket.



## Lesson 2 ELEMENTS OF GENERAL LAWS

### A. INDIAN CONTRACT ACT

#### INTRODUCTION

The Indian Contract Act, 1872 came into force on the first day of September, 1872. The Act is by no means exhaustive on the law of contract. It does not deal with all the branches of the law of contract. Thus, contracts relating to partnership, sale of goods, negotiable instruments, insurance etc. are dealt with by separate Acts. The Indian Contract Act majorly deals with the general principles and rules governing contracts. The Act is divisible into two parts:

#### CONTRACT

The Indian Contract Act has defined "Contract" in Section 2(h) as "an agreement enforceable by law". This definition indicates that a contract essentially consists of two distinct parts. First, there must be an agreement. Secondly, such an agreement must be enforceable by law. To be enforceable, an agreement must be coupled with an obligation. A contract therefore, is a combination of the two elements:

- An agreement, and
- An obligation.

#### AGREEMENT

An agreement gives birth to a contract. As per Section 2(e) of the Indian Contract Act every promise and every set of promises, forming the consideration for each other, is an agreement.

It is evident from the definition given above that an agreement is based on a promise. What is a promise? According to Section 2(b) of the Indian Contract Act "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. An agreement, therefore, comes into existence when one party makes a proposal or offer to the other party and that other party signifies his assent thereto. In a nutshell, an agreement is the sum total of offer and acceptance."



## OBLIGATION

An obligation is the legal duty to do or abstain from doing what one has promised to do or abstain from doing. A contractual obligation arises from a bargain between the parties to the agreement who are called the promisor and the promisee.

Section 2(b) says that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; and a proposal when accepted becomes a promise. In broad sense, therefore, a contract is an exchange of promises by two or more persons, resulting in an obligation to do or abstain from doing a particular act, where such obligation is recognised and enforced by law.

### *Rights and Obligations*

Where parties have made a binding contract, they have created rights and obligations between themselves.

The contractual rights and obligations are correlative, e.g., A agrees with B to sell his car for Rs.10,00,000/- to him. In this example, the following rights and obligations have been created:

- (i) A is under an obligation to deliver the car to B. B has a corresponding right to receive the car.
- (ii) B is under an obligation to pay Rs.10,00,000/- to A. A has a correlative right to receive Rs.10,00,000/-

### *Agreements which are not Contracts*

Agreements in which the idea of bargain is absent and there is no intention to create legal relations are not contracts.

These are:

- (a) Agreements relating to social matters: An agreement between two persons to go together to the cinema, or for a walk, does not create a legal obligation on their part to abide by it. There cannot be any offer and acceptance to hospitality.
- (b) Domestic arrangements between husband and wife: In *Balfour v. Balfour*, a husband working in Ceylone, had agreed in writing to pay a housekeeping allowance to his wife living in England. On receiving information that she was unfaithful to him, he stopped the allowance. He was held to be entitled to do so. This was a mere domestic arrangement with no intention to create legally binding relations. Therefore, there was no contract.



### Three consequences follow from the above discussion

- a. To constitute a contract, the parties must intend to create legal relationship.
- b. The law of contract is the law of those agreements which create obligations, and those obligations have their source in agreement.
- c. Agreement is the genus of which contract is the specie and, therefore, all contracts are agreements but all agreements are not contracts.

### Essential Elements of a Valid Contract

Section 10 of the Indian Contract Act, 1872 provides that “all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void”.

The essential elements of a valid contract are:

- (i) An offer or proposal by one party and acceptance of that offer by another party resulting in an Agreement — **consensus-ad-idem**.
- (ii) An **intention to create legal relations** or an intent to have legal consequences.
- (iii) The agreement is supported by a **lawful consideration**.
- (iv) The parties to the contract are **legally capable of contracting**.
- (v) **Genuine consent** between the parties.
- (vi) The **object and consideration of the contract is legal** and is not opposed to public policy.
- (vii) The **terms of the contract are certain**.
- (viii) The agreement is capable of being performed i.e.; it is not impossible of being performed.
  - a. Therefore, to form a valid contract there must be:
  - b. An agreement
  - c. Based on the genuine consent of the parties
  - d. Supported by a lawful consideration
  - e. Made for a lawful object, and
  - f. Between the competent parties.





### **Offer or Proposal and Acceptance**

When one party (the offeror) makes a definite proposal to another party (the offeree) and the offeree accepts it in its entirety and without any qualification, there is a meeting of the minds of the parties and a contract comes into being, assuming that all other elements are also present.

A proposal is also termed as an offer. The word 'proposal' is synonymous with the English word "offer". An offer is a proposal by one person, whereby he expresses his willingness to enter into a contractual obligation in return for a promise, act or forbearance.

Section 2(a) of the Indian Contract 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". The person making the proposal or offer is called the proposer or offeror and the person to whom the proposal is made is called the offeree.

### **Rules Governing Offers**

A valid offer must comply with the following rules:

- (a) An offer must be clear, definite, complete and final. It must not be vague.
- (b) An offer must be communicated to the offeree. An offer becomes effective only when it has been communicated to the offeree so as to give him an opportunity to accept or reject the same.
- (c) The communication of an offer may be made by express words-oral or written-or it may be implied by conduct.
- (d) The communication of the offer may be general or specific. Where an offer is made to a specific person it is called specific offer and it can be accepted only by that person. But when an offer is addressed to an uncertain body of individuals i.e. the world at large, it is a general offer and can be accepted by any member of the general public by fulfilling the condition laid down in the offer'.





### **Lapse of Offer**

Section 6 deals with various modes of lapse of an offer. It states that an offer lapses if:

- (a) It is not accepted within the specified time (if any) or after a reasonable time, if none is specified.
- (b) It is not accepted in the mode prescribed or if no mode is prescribed in some usual and reasonable manner, e.g., by sending a letter by mail when early reply was requested;
- (c) The offeree rejects it by distinct refusal to accept it;
- (d) Either the offeror or the offeree dies before acceptance;
- (e) The acceptor fails to fulfil a condition precedent to an acceptance.
- (f) 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.

### **Revocation of Offer by the Offeror**

- a. An offer may be revoked by the offeror at any time before acceptance.
- b. Revocation must be communicated to the offeree, as it does not take effect until it is actually communicated to the offeree. Before its actual communication, the offeree, may accept the offer and create a binding contract. The revocation must reach the offeree before he sends out the acceptance.
- c. An offer to keep open for a specified time (option) is not binding unless it is supported by consideration.

### **Acceptance**

A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. Under Section 2(b) of the Contract Act when a 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.



### Rules Governing Acceptance

- (a) Acceptance may be express i.e. by words spoken or written or implied from the conduct of the parties.
- (b) If a particular method of acceptance is prescribed, the offer must be accepted in the prescribed manner.
- (c) Acceptance must be unqualified and absolute and must correspond with all the terms of the offer.
- (d) A counter offer or conditional acceptance operates as a rejection of the offer and causes it to lapse, e.g., where a horse is offered for Rs.1,000 and the offeree counter-offers Rs.990, the offer lapses by rejection.
- (e) Acceptance must be communicated to the offeror, for acceptance is complete the moment it is communicated. Where the offeree merely intended to accept but does not communicate his intention to the offeror, there is no contract. Mere mental acceptance is not enough.
- (f) Mere silence on the part of the offeree does not amount to acceptance.  
Ordinarily, the offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree as an acceptance. In other words, the offeror can prescribe the mode of acceptance but not the mode of rejection.
- (g) If the offer is one which is to be accepted by being acted upon, no communication of acceptance to the offeror is necessary, unless communication is stipulated for in the offer itself.  
Thus, if a reward is offered for finding a lost dog, the offer is accepted by finding the dog after reading about the offer, and it is unnecessary before beginning to search for the dog to give notice of acceptance to the offeror.
- (h) Acceptance must be given within a reasonable time and before the offer lapses or is revoked. An offer becomes irrevocable by acceptance.

An acceptance never precedes an offer. There can be no acceptance of an offer which is not communicated. Similarly, performance of conditions of an offer without the knowledge of the specific offer, is no acceptance.



### **Contracts over the Telephone**

Contracts over the telephone are regarded the same in principle as those negotiated by the parties in the actual presence of each other. In both cases an oral offer is made and an oral acceptance is expected. It is important that the acceptance must be audible, heard and understood by the offeror. If during the conversation the telephone lines go “dead” and the offeror does not hear the offeree’s word of acceptance, there is no contract at the moment. If the whole conversation is repeated and the offeror hears and understands the words of acceptance, the contract is complete (*Kanhaiyalal v. Dineshwarchandra* (1959) AIR, M.P. 234).

### **Intention to Create Legal Relations**

- a. The second essential element of a valid contract is that there must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. If there is no such intention on the part of the parties, there is no contract between them. Agreements of a social or domestic nature do not contemplate legal relationship. As such they are not contracts.
- b. A proposal or an offer is made with a view to obtain the assent of the other party and when that other party expresses his willingness to the act or abstinence proposed, he accepts the offer and a contract is made between the two. But both offer and acceptance must be made with the intention of creating legal relations between the parties. The test of intention is objective. The Courts seek to give effect to the presumed intention of the parties. Where necessary, the Court would look into the conduct of the parties, for much can be inferred from the conduct. The Court is not concerned with the mental intention of the parties, rather what a reasonable man would say, was the intention of the parties, having regard to all the circumstances of the case.

### **Consideration**

- (i) **Consideration is one of the essential elements of a valid contract.** The requirement of consideration stems from the policy of extending the arm of the law to the enforcement of mutual promises of parties. A mere promise is not enforceable at law. For example, if A promises to make a gift of Rs. 500 to B, and subsequently changes his mind, B cannot succeed against A for breach of promise, as B has not given anything in return.



- (ii) It is only when a promise is made for something in return from the promisee, that such promise can be enforced by law against the promisor. This something in return is the consideration for the promise.
- (iii) Sir Fredrick Pollock has defined consideration “as an act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought”. It is “some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other”
- (iv) Section 2(d) of the Indian Contract Act, 1872 defines consideration thus: “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”.
- (v) The fundamental principle that consideration is essential in every contract, is laid down by both the definitions but there are some important points of difference in respect of the nature and extent of consideration and parties to it under the two systems:
- (a) Consideration at the desire of the promisor: Section 2(d) of the Act begins with the statement that consideration must move at the desire or request of the promisor. This means that whatever is done must have been done at the desire of the promisor and not voluntarily or not at the desire of a third party. If A rushes to B’s help whose house is on fire, there is no consideration but a voluntary act. But if A goes to B’s help at B’s request, there is good consideration as B did not wish to do the act gratuitously.
- (b) Consideration may move from the promisee or any other person: In English law, consideration must move from the promisee, so that a stranger to the consideration cannot sue on the contract. A person seeking to enforce a simple contract must prove in court that he himself has given the consideration in return for the promise he is seeking to enforce.

In Indian law, however, consideration may move from the promisee or any other person, so that a stranger to the consideration may maintain a suit. In *Chinnaya v. Ramaya*, (1882) 4 Mad. 137, a lady by a deed of gift made over certain property to her daughter directing her to pay an



annuity to the donors brother as had been done by the donor herself before she gifted the property. On the same day, her daughter executed in writing in favour of the donors brother agreeing to pay the annuity. Afterwards the donee (the daughter) declined to fulfil her promise to pay her uncle saying that no consideration had moved from him. The Court, however, held that the uncle could sue even though no part of the consideration received by his niece moved from him. The consideration from her mother was sufficient consideration.

### **Privity of Contract**

A stranger to a contract cannot sue both under the English and Indian law for want of privity of contract.

A person who is not a party to a contract cannot sue upon it even though the contract is for his benefit. A, who is indebted to B, sells his property to C, and C the purchaser of the property, promises to pay off the debt to B. In case C fails to pay B, B has no right to sue C for there is no privity of contract between B and C.

### **Kinds of Consideration**

Consideration may be:

- (a) Executory or future which means that it makes the form of promise to be performed in the future, e.g., an engagement to marry someone; or
- (b) Executed or present in which it is an act or forbearance made or suffered for a promise. In other words, the act constituting consideration is wholly or completely performed, e.g., if A pays today Rs.100 to a shopkeeper for goods which are promised to be supplied the next day, A has executed his consideration but the shopkeeper is giving executory consideration—a promise to be executed the following day. If the price is paid by the buyer and the goods are delivered by the seller at the same time, consideration is executed by both the parties.
- (c) Past which means a past act or forbearance, that is to say, an act constituting consideration which took place and is complete (wholly executed) before the promise is made.

### **Rules Governing Consideration**

- (a) Every simple contract must be supported by valuable consideration otherwise it is formally void subject to some exceptions.



- (b) Consideration may be an act of abstinence or promise.
- (c) There must be mutuality i.e., each party must do or agree to do something. A gratuitous promise as in the case of subscription for charity, is not enforceable.
- (d) Consideration must be real, and not vague, indefinite, or illusory, e.g., a son's promise to "stop being a nuisance" to his father, being vague, is no consideration.
- (e) Although consideration must have some value, it need not be adequate i.e., a full return for the promise. "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate.
- (f) Consideration must be lawful, e.g., it must not be some illegal act such as paying someone to commit a crime. If the consideration is unlawful, the agreement is void.
- (g) Consideration must be something more than the promisee is already bound to do for the promisor. Thus, an agreement to perform an existing obligation made with the person to whom the obligation is already owed, is not made for consideration

### When Consideration not Necessary

The general rule is that an agreement made without consideration is void. But Section 25 of the Indian Contract Act lays down certain exceptions which make a promise without consideration valid and binding. Thus, an agreement without consideration is valid:

If it is expressed in writing and registered and is made out of natural love and affection between parties standing in a near relation to each other; or

If it is made to compensate a person who has already done something voluntarily for the promisor, or done something which the promisor was legally compellable to do; or

If it is promise in writing and signed by the person to be charged therewith, or by his agent, to pay a debt barred by the law of limitation; or

Besides, according to section 185 of the Indian Contract Act, consideration is not required to create an agency; or





In the case of gift actually made, no consideration is necessary. There need not be nearness of relation and even if it is, there need not be any natural love and affection between them.

The requirements in the above exceptions are noteworthy. The first one requires written and registered promise. The second may be oral or in writing and the third must be in writing.

### **Flaws in Contract**

There may be circumstances under which a contract made under these rules may still be bad, because there is a flaw, vice or error somewhere. As a result of such a flaw, the apparent agreement is not a real agreement. Where there is no real agreement, the law has three remedies:

**Firstly:** The agreement may be treated as of no effect and it will then be known as void agreement.

**Secondly:** The law may give the party aggrieved the option of getting out of his bargain, and the contract is then known as voidable.

**Thirdly:** The party at fault may be compelled to pay damages to the other party

### **Void Agreement and Voidable Contract**

A void agreement is one which is destitute of all legal effects. It cannot be enforced and confers no rights on either party. It is really not a contract at all, it is non-existent. Technically the words 'void contract' are a contradiction in terms. But the expression provides a useful label for describing the situation that arises when a 'contract' is claimed but in fact does not exist. For example, a minor's contract is void.

According to Section 2 (j) of the Indian Contract Act, a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. Void means a lack of existence or a nullity.

Contract Act, an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

A voidable contract is one which a party can put to an end. He can exercise his option, if his consent was not free. The contract will, however be binding, if he does not exercise his option to





avoid it within a reasonable time. The consent of a party is not free and so he is entitled to avoid the contract, if he has given his consent due to misrepresentation, fraud, coercion or undue influence.

### **Illegal Agreement**

An illegal agreement is one which, like the void agreement has no legal effects as between the immediate parties. Further, transactions collateral to it also become tainted with illegality and are, therefore, not enforceable. Parties to an unlawful agreement cannot get any help from a Court of law, for no polluted hands shall touch the pure fountain of justice. On the other hand, a collateral transaction can be supported by a void agreement.

For example, one party may have deceived the other party, or in some other way there may be no genuine consent. The parties may be labouring under a mistake, or one or both the parties may be incapable of making a contract. Again, the agreement may be illegal or physically impossible. All these are called “the FLAWS in contract or the VICES of contract”.

**The chief flaws in contract are:**

### **Flaw in Capacity - Capacity and Persons**

In law, persons are either natural or artificial. Natural persons are human beings and artificial persons are corporations. Contractual capacity or incapacity is an incident of personality.

The general rule is that all natural persons have full capacity to make binding contracts. But the Indian Contract Act, 1872 admits an exception in the case of:

- (i) minors,
- (ii) lunatics, and
- (iii) persons disqualified from contracting by any law to which they are subject.

These persons are not competent to contract. Section 11 of the Act provides that 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”. A valid agreement requires that both the parties should understand the legal implications of their conduct. Thus, both must have a mature mind. The legal yardstick to measure maturity



according to the law of contract is, that both should be major and of sound mind and if not, the law would presume that the maturity of their mind has not reached to the extent of visualising the pros and cons of their acts, hence, a bar on minors and lunatics competency to contract.

### **Lunatics Agreement**

A person of unsound mind is a lunatic. That is to say for the purposes of making contract, a person is of unsound mind if at the time when he makes the contract, he is incapable of understanding it and of forming rational judgment as to its effect upon his interests.

A person of unsound mind cannot enter into a contract. A lunatic's agreement is therefore void. But if he makes a contract when he is of sound mind, i.e., during lucid intervals, he will be bound by it.

If a contract entered into by a lunatic or person of unsound mind is for his benefit, it can be enforced (for the benefit) against the other party but not vice-versa [Jugal Kishore v. Cheddu]

### **Flaw in Consent**

The basis of a contract is agreement, i.e., mutual consent. In other words, the parties should mean the something in the same sense and agree voluntarily. It is when there is consent, that the parties are said to be consensus ad idem i.e. their minds have met. Not only consent is required but it must be a free consent. Consent is not free when it has been caused by coercion, undue influence, misrepresentation, fraud or mistake. These elements if present, may vitiate the contract.

When this consent is wanting, the contract may turn out to be void or voidable according to the nature of the flaw in consent. Where there is no consent, there can be no contract as in the case of mutual mistake. Where there is consent, but it is not free, a contract is generally voidable at the option of the party whose consent is not free. In the case of misrepresentation, fraud, coercion, undue influence, the consent of one of the parties is induced or caused by the supposed existence of a fact which did not exist.



### **Wilful Misrepresentation or Fraud**

As per Section 7 of the Indian 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:

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

Fraud is an untrue statement made knowingly or without belief in its truth or recklessly, carelessly, whether it be true or false with the intent to deceive. The chief ingredients of a fraud are:

- (i) a false representation or assertion;
- (ii) of fact (and not a mere opinion),
- (iii) made with the intention that it should be acted upon,
- (iv) the representation must have actually induced the other party to enter into the contract and so deceived him,
- (v) the party deceived must thereby be indemnified, for there is no fraud without damages, and
- (vi) the statement must have been made either with the knowledge that it was false or without belief in its truth or recklessly without caring whether it was true or false.

It is immaterial whether the representation takes effect by false statement or with concealment. The party defrauded can avoid the contract and also claim damages.

Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless silence is in itself equivalent to speech, or where it is the duty of the person keeping silent to speak as in the cases of contracts *uberrimaefidei*- (contracts requiring utmost good faith).



### **Contracts Uberrimae Fidei**

There are contracts in which the law imposes a special duty to act with utmost good faith i.e., to disclose all material information. Failure to disclose such information will render the contract voidable at the option of other party.

Contracts uberrimae fidei are:

- (a) Contract of insurance of all kinds: The assured must disclose to the insurer all material facts and whatever he states must be correct and truthful.
- (b) Company prospectus
- (c) Contract for the sale of land
- (d) Contracts of family arrangements

### **Coercion**

Coercion as defined in Section 15 of the Act means “the committing or threatening to commit any act forbidden by the Indian Penal Code, or 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”. Simply stated, the doing of any act forbidden by the Indian Penal Code is coercion even though such an act is done in a place where the Indian Penal Code is not in force. If A at the point of a pistol asks B to execute a promissory note in his favour and B to save his life does so he can avoid this agreement as his consent was not free. Even a threat to third-party, e.g., where A compels B to sign a document threatening to harm C, in case B does not sign would also amount to coercion.

It has been held that mere threat by one person to another to prosecute him does not amount to coercion. There must be a contract made under the threat and that contract should be one sought to be avoided because of coercion (Ramchandra v. Bank of Kohlapur, 1952 Bom. 715). It may be pointed out that coercion may proceed from any person and may be directed against any person, even a stranger and also against goods, e.g., by unlawful detention of goods.



### **Undue Influence**

Under Section 16 of the Indian Contract Act, 1872, a contract is said to be produced 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”.

The elements of undue influence are:

- (i) A dominant position, and
- (ii) The use of it to obtain an unfair advantage.

The words “unfair advantage” do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. In the words of Lord Kingston, “the principle applies to every case where influence is acquired and abused where confidence is reposed and betrayed”.

### **Legality of Object**

One of the requisites of a valid contract is that the object should be lawful. Section 10 of the Indian Contract Act, 1872, provides, “All agreements are contracts if they are made by free consent of parties competent to contract for a lawful consideration and with a lawful object...” Therefore, it follows that where the consideration or object for which an agreement is made is unlawful, it is not a contract.

Section 23 of the Indian Contract Act, 1872 provides that the consideration or object of an agreement is lawful unless it is

- (i) forbidden by law; or
- (ii) it is of such nature that if permitted it would defeat the provisions of law; or
- (iii) is fraudulent; or
- (iv) involves or implies injury to the person or property of another; or
- (v) the Court regards it as immoral or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.



### **Void and Illegal Contracts**

A void contract is one which is destitute of legal effects altogether. An illegal contract too has no legal effect as between the immediate parties to the contract, but has the further effect of tainting the collateral contracts also with illegality. For instance A borrows from B, Rs. 1,000 for lending to C a minor. The contract between A and C is void, but B can nevertheless recover the money from A. On the other hand, if A had borrowed Rs. 1,000 from B to buy a pistol to shoot C, the question whether B can recover the money hinges on whether B was aware of the purpose for which money was borrowed. If B had knowledge of the illegal purpose, he cannot recover. Therefore, it may be said that all illegal agreements are void but all void agreements are not necessarily illegal.

### **Consequence of Illegal Agreements**

- (i) an illegal agreement is entirely void;
- (ii) no action can be brought by a party to an illegal agreement. The maxim is “Ex turpi cause non oritur action” - from an evil cause, no action arises;
- (iii) money paid or property transferred under an illegal agreement cannot be recovered. The maxim is *in parti delicto potior est conditio defendentis*- In cases of equal guilt, more powerful is the condition of the defendant;
- (iv) where an agreement consists of two parts, one part legal and other illegal, and the legal parts is separable from the illegal one, then the Court will enforce the legal one. If the legal and the illegal parts cannot be separated the whole agreement is illegal; and
- (v) any agreement which is collateral to an illegal agreement is also tainted with illegality and is treated as being illegal, even though it would have been lawful by itself

### **Agreements Void as being opposed to Public Policy**

The head public policy covers a wide range of topics. Agreements may offend public policy by tending to prejudice of the State in times of war, by tending to abuse of justice or by trying to impose unreasonable and inconvenient restrictions on the free choice of individuals in marriage, or their liberty to exercise lawful trade or calling.





The following agreements are void as being against public policy but they are not illegal:

- (a) Agreement in restraint of parental rights
- (b) Agreement in restraint of marriage
- (c) Marriage brokerage or brokerage Agreements
- (d) Agreements in restraint of personal freedom are void
- (e) Agreement in restraint of trade

### **Wagering Agreements**

The literal meaning of the word “wager” is a “bet”. Wagering agreements are nothing but ordinary betting agreements. For example, A and B enter into an agreement that if England’s Cricket Team wins the test match, A will pay B Rs.100 and if it loses B will pay Rs.100 to A. This is a wagering agreement and nothing can be recovered by winning party under the agreement.

The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature that is to say, if the event turns out one way A will lose; but if it turns out the other way he will win

### **Wagering Agreements Void**

In India except Mumbai, wagering agreements are void. In Mumbai, wagering agreements have been declared illegal by the Avoiding Wagers (Amendment) Act, 1865. Therefore, in Mumbai a wagering agreement being illegal, is void not only between the immediate parties, but taints and renders void all collateral agreements to it.

Thus, A bets with B and losses, applies to C for a loan, who pays B in settlement of A’s losses. C cannot recover from A because this is money paid “under” or “in respect of ” a wagering transaction which is illegal in Mumbai. But in respect of India such a transaction (i.e., betting) being only void, C could recover from A. Of course, if A refused to pay B the amount of the bet that he has lost, B could not sue A anywhere. Again, where an agent bets on behalf of his principal and loses and pays over the money to the winner, he cannot recover the money from his principal, if the transactions took place in Mumbai, but elsewhere he could recover. But if the agent wins, he must pay the winnings to the principal, as this money was received on behalf of the principal.





Sometimes, commercial transactions assume the form of wagering contracts. The sample test to find out whether a particular transaction is a wager or a genuine commercial transaction is: "Where delivery of the goods sold is intended to be given and taken, it is valid contract, but where only the differences are intended to be paid, it will be a wagering contract and unenforceable".

In a wagering contract there must be mutuality in the sense that the gain of one party should be loss to the other on the happening of an uncertain event which is the subject matter of the contract.

### **Void Agreements**

The following types of agreements are void under Indian Contract Act:

- (a) Agreement by or with a minor or a person of unsound mind or a person disqualified to enter into a contract;
- (b) Agreement made under a mistake of fact, material to the agreement on the part of the both the parties
- (c) An agreement of which the consideration or object is unlawful
- (d) 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
- (e) An agreement made without consideration subject to three exceptions
- (f) An agreement in restraint of marriage
- (g) An agreement in restraint of trade
- (h) An agreement in restraint of legal proceedings
- (i) Agreements, the meaning of which is not certain, or capable of being made certain
- (j) Agreement by way of wager
- (k) An agreement to enter into an agreement in the future.
- (l) An agreement to do an act impossible in itself

### **When Contract becomes Void**

- An agreement not enforceable by law is void ab initio - Section 2(g).
- A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable - Section 2(j)



- A contract becomes void when, by reason of some event which the promisor could not prevent, the performance of the contract becomes impossible, e.g., by destruction of the subject-matter of the contract after the formation of the contract.
- A contract becomes void by reason of subsequent illegality. A in India agrees to supply goods to B in Pakistan. After the formation of the contract war breaks out between India and Pakistan and the supply of goods to Pakistan is prohibited by legislation. The contract becomes void.
- A contingent contract to do or not do to anything if an uncertain future event happens becomes void if the event becomes impossible.
- Where a contract is voidable at the option of the aggrieved party, the contract becomes void when the option is exercised by him.

### **Contingent Contract**

As per Section 31, a contingent contract is a contract to do or not to do something, if some event collateral to such contract, does or does not happen. For example, A contracts to sell B 10 bales of cotton for Rs. 20,000, if the ship by which they are coming returns safely. This is a contingent contract. Contract of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

### **Quasi-Contracts**

A valid contract must contain certain essential elements, such as offer and acceptance, capacity to contract, consideration and free consent. But sometimes the law implies a promise imposing obligation on one party and conferring right in favour 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 in the strict sense, but the Court recognises them as relations resembling those of contracts and enforces them as if they were contracts, hence the term quasi-contracts (i.e., resembling a contract).

A quasi-contract rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth, it is not a contract at all. It is an obligation which the law creates, in the absence of any agreement, when any person is in the possession of other person's 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. A very simple illustration is money paid under mistake. Equity demands that such money must be paid back.

### **Discharge or Termination of Contracts**

A contract is said to be discharged or terminated when the rights and obligations arising out of a contract are extinguished. Contracts may be discharged or terminated by any of the following modes:

- **Performance of Contracts**
- **Mutual consent or agreement**
- **Lapse of time**
- **Operation of law**
- **Impossibility of performance**
- **Breach of contract**

### **Discharge by Impossibility or Frustration**

In India, the doctrine of frustration is primarily looked at as contained in Sections 32 and 56 of the Act. The Court usually gives relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an event that was not contemplated by the parties. The Court also grants relief where one of the parties was or could have been aware of such a contingency happening and the other party was not. Before invoking the doctrine, it must be shown that the event, which has produced the frustration was one which the parties to the contract did not foresee and could not with reasonable diligence have foreseen.

A contract which is entered into to perform something that is clearly impossible is void. For instance, A agrees with B to discover treasure by magic. The agreement is void by virtue of Section 56 para 1 which lays down the principle that an agreement to do an act impossible in itself is void.



Sometimes subsequent impossibility (i.e. where the impossibility supervenes after the contract has been made) renders the performance of a contract unlawful and stands discharged; as for example, where a singer contracts to sing and becomes too ill to do so, the contract becomes void. In this connection, para 2 of Section 56 provides that a contract to do an act, which after the contract is made, becomes impossible

or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

If the impossibility is not obvious and the promisor alone knows of the impossibility or illegally then existing or the promisor might have known as such after using reasonable diligence, such promisor is bound to compensate the promisee for any loss he may suffer through the non-performance of the promise in spite of the agreement being void ab-initio (Section 56, para 3).

In *Satyabarta Ghose v. Mugnuram A.I.R. 1954 S.C. 44* the Supreme Court interpreted the term 'impossible' appearing in second paragraph of Section 56. The Court observed that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain; it can very well be said that the promisor found it impossible to do the act which he promised to do. In this case, A undertook to sell a plot of land to B but before the plot could be developed, war broke out and the land was temporarily requisitioned by the Government. A offered to return earnest money to B in cancellation of contract. B did not accept and sued A for specific performance. A pleaded discharge by frustration. The Court held that Section 56 is not applicable on the ground that the requisition was of temporary nature and there was no time limit within which A was obliged to perform the contract. The impossibility was not of such a nature which would strike at the root of the contract.

### **Breach of Contract**

Where the promisor neither performs his contract nor does he tender performance, or where the performance is defective, there is a breach of contract. The breach of contract may be (i) actual;



or (ii) anticipatory. The actual breach may take place either at the time the performance is due, or when actually performing the contract. Anticipatory breach means a breach before the time for the performance has arrived. This may also take place in two ways – by the promisor doing an act which makes the performance of his promise impossible or by the promisor in some other way showing his intention not to perform it.

Breach of contract may occur, before the time for performance is due. This may happen where one of the parties definitely renounces the contract and shows his intention not to perform it or does some act which makes performance impossible. The other party, on such a breach being committed, has a right of action for damages.

He may either sue for breach of contract immediately after repudiation or wait till the actual date when performance is due and then sue for breach. If the promisee adopts the latter course, i.e., waits till the date when performance is due, he keeps the contract alive for the benefit of the promisor as well as for his own. He remains liable under it and enables the promisor not only to complete the contract in spite of previous repudiation, but also to avail himself of any excuse for non-performance which may have come into existence before the time fixed for performance.

### **Remedies for Breach of Contract**

Where a contract is broken, the injured party has several courses of action open to him. The appropriate remedy in any case will depend upon the subject-matter of the contract and the nature of the breach.

When a party to a contract has broken the contract, the other party may treat the contract as rescinded and he is absolved from all his obligations under the contract. Under Section 65, when a party treats the contract as rescinded, he makes himself liable to restore any benefits he has received under the contract to the party from whom such benefits were received. Under Section 75 of the Indian Contract Act, if a person rightfully rescinds a contract, he is entitled to a compensation for any damage which he has sustained through the non-fulfilment of the contract by the other party. Section 64 deals with consequences of rescission of voidable contracts, i.e., where there is flaw in the consent of one party to the contract. Under this Section when a person at whose option a contract is voidable rescinds, the other party thereto need not perform any



promise therein contained in which he is the promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder, from another party to such contract, restore such benefit so far as may be, to the person from whom it was received.

#### IN CASE OF BREACH OF CONTRACT, THE INJURED PARTY MAY:

IN CASE OF BREACH OF CONTRACT, THE INJURED PARTY MAY:	Sue for damages	Sue for specific performance	Sue for an injunction to restrain the breach of a negative term	Sue on quantum meruit
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#### Contract of Indemnity and Guarantee

A contract of indemnity is a contract by which one party promises to save the other party from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person (Section 124).

For example, A contracts to indemnify B against the consequence of any proceedings which C may take against B in respect of a certain sum of 300 rupees. This is a contract of indemnity. The contract of indemnity may be express or implied. The latter may be inferred from the circumstances of a particular case, e.g., an act done by A at the request of B. If A incurs any expenses, he can recover the same from B.

The person who promises to indemnify or make good the loss is called the indemnifier and the person whose loss is made good is called the indemnified or the indemnity holder. A contract of insurance is an example of a contract of indemnity according to English Law. In consideration of premium, the insurer promises to make good the loss suffered by the assured on account of the destruction by fire of his property insured against fire.

Under the Indian Contract Act, the contract of indemnity is restricted to such cases only where the loss promised to be reimbursed, is caused by the conduct of the promisor or of any other person. The loss caused by events or accidents which do not depend on the conduct of any person, it seems, cannot be sought to be reimbursed under a contract of indemnity.





A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the Surety, the person for whom the guarantee is given is called the Principal Debtor, and the person to whom the guarantee is given is called the Creditor (Section 126). A guarantee may be either oral or written, although in the English law, it must be in writing.

### Illustration

A advances a loan of Rs.5, 000 to B and C promises to A that if B does not repay the loan, C will do so. This is a contract of guarantee. Here B is the principal debtor, A is the creditor and C is the surety or guarantor. Like a contract of indemnity, a guarantee must also satisfy all the essential elements of a valid contract. There is, however, a special feature with regard to consideration in a contract of guarantee. The consideration received by the principal debtor is sufficient for surety. 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 the guarantee.

### Distinction between Contract of Indemnity and Contract of Guarantee

Contract of Indemnity	Contract of Guarantee
In a contract of indemnity there are only two parties: the indemnifier and the indemnified.	In a contract of guarantee, there are three the surety, the principal debtor and the creditor.
In a contract of guarantee, the liability of the indemnifier is primary	In a contract of guarantee, the liability of the surety is secondary. The surety is liable only if the principal debtor makes a default, the primary liability being that of the principal debtor.
The indemnifier need not necessarily act at the request of the debtor.	The surety gives guarantee only at the request of the principal debtor.
In the case of indemnity, the possibility of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.	In the case of a guarantee, there is an existing debt or duty, the performance of which is guaranteed by the surety,





The indemnifier cannot sue third-parties in his own name, unless there be assignment. He must sue in the name of the indemnified.

The surety, on payment of the debt when the principal debtor has failed to pay is entitled to proceed against the principal debtor in his own right.

### Law of Agency

An agent is a person who is employed to bring his principal into contractual relations with third-parties. As the definition indicates, an agent is a mere connecting link between the principal and a third-party. But during the period that an agent is acting for his principal, he is clothed with the capacity of his principal.

A contract of agency may be express or implied, (Section 186) but consideration is not an essential element in this contract (Section 185). Agency may also arise by estoppel, necessity or ratification.

- (a) Express Agency: A contract of agency may be made orally or in writing. The usual form of written contract of agency is the Power of Attorney, which gives him the authority to act on behalf of his principal in accordance with the terms and conditions therein. In an agency created to transfer immovable property, the power of attorney must be registered. A power of attorney may be general, giving several powers to the agent, or special, giving authority to the agent for transacting a single act.
- (b) Implied Agency: Implied agency may arise by conduct, situation of parties or necessity of the case.
- (i) Agency by Estoppel: Estoppel arises when you are precluded from denying the truth of anything which you have represented as a fact, although it is not a fact. Thus, P where allows third-parties to believe that A is acting as his authorised agent, he will be stopped from denying the agency if such third-parties relying on it make a contract with A even when A had no authority at all.
- (ii) Wife as agent: Where a husband and wife are living together, the wife is presumed to have her husband's authority to pledge his credit for the purchase of necessities of life suitable to their standard of living.



But the husband will not be liable if he shows that

- a. he had expressly warned the tradesman not to supply goods on credit to his wife; or
- b. he had expressly forbidden the wife to pledge his credit; or
- c. his wife was already sufficiently supplied with the articles in question; or
- d. she was supplied with a sufficient allowance.

Similarly, where any person is held out by another as his agent, the third-party can hold that person liable for the acts of the ostensible agent, or the agent by holding out. Partners are each other's agents for making contracts in the ordinary course of the partnership business.

- (iii) **Agency of Necessity (Sections 188 and 189)** : In certain circumstances, a person who has been entrusted with another's property, may have to incur unauthorised expenses to protect or preserve it. Such an agency is called an agency of necessity. For example, A sent a horse by railway and on its arrival at the destination there was no one to receive it. The railway company, being bound to take reasonable steps to keep the horse alive, was an agent of necessity of A.

A wife deserted by her husband and thus forced to live separate from him, can pledge her husband's credit to buy all necessities of life according to the position of the husband even against his wishes.

- (iv) **Agency by ratification**: Where a person having no authority purports to act as agent, or a duly appointed agent exceeds his authority, the principal is not bound by the contract supposedly based on his behalf. But the principal may ratify the agent's transaction and so accept liability. In this way an agency by ratification arises. This is also known as *ex post facto* agency— agency arising after the event. The effect of ratification is to render the contract binding on the principal as if the agent had been authorised beforehand. Also ratification relates back to the original making of the contract so that the agency is taken to have come into existence from the moment the agent first acted, and not from the date the principal ratified it.

Ratification is effective only if the following conditions are satisfied-

- a. The agent must expressly contract as agent for a principal who is in existence and competent to contract.



- b. The principal must be competent to contract not only at the time the agent acted, but also when he ratified the agents act.
- c. The principal at the time of ratification has full knowledge of the material facts, and must ratify the whole contract, within a reasonable time.
- d. Ratification cannot be made so as to subject a third-party to damages, or terminate any right or interest of a third person.
- e. Only lawful acts can be ratified.

### Classes of Agents

Agents may be special or general or, they may be mercantile agents:

- (a) **Special Agent:** A special agent is one who is appointed to do a specified act, or to perform a specified function. He has no authority outside this special task. The third-party has no right to assume that the agent has unlimited authority. Any act of the agent beyond that authority will not bind the principal.
- (b) **General Agent:** A general agent is appointed to do anything within the authority given to him by the principal in all transactions, or in all transactions relating to a specified trade or matter. The third-party may assume that such an agent has power to do all that is usual for a general agent to do in the business involved. The third party is not affected by any private restrictions on the agent's authority.

### Sub-Agent

A person who is appointed by the agent and to whom the principal's work is delegated to known as subagent. Section 191 provides that "a sub-agent is a person employed by, and acting under the control of the original agent in the business of the agency." So, the sub-agent is the agent of the original agent.

As between themselves, the relation of sub-agent and original agent is that of agent and the principal. A sub-agent is bound by all the duties of the original agent. The sub-agent is not directly responsible to the principal except for fraud and wilful wrong. The sub-agent is responsible to the original agent. The original agent is responsible to the principal for the acts of the sub-



agent. As regards third persons, the principal is represented by sub-agent and he is bound and responsible for all the acts of sub-agent as if he were an agent originally appointed by the principal.

### **Mercantile Agents**

Section 2(9) of the Sale of Goods Act, 1930, defines a mercantile agent as “a mercantile agent having in the customary course of business as such agent authority either to sell goods or consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods”. This definition covers factors, brokers, auctioneers, commission agents etc.

### **Factors**

A factor is a mercantile agent employed to sell goods which have been placed in his possession or contract to buy goods for his principal. He is the apparent owner of the goods in his custody and can sell them in his own name and receive payment for goods. He has an insurable interest in goods and also a general lien in respect of any claim he may have arising out of the agency.

### **Brokers**

A broker is a mercantile agent whose ordinary course of business is to make contracts with other parties for the sale and purchase of goods and securities of which he is not entrusted with the possession for a commission called brokerage. He acts in the name of principal. He has no lien over the goods as he is not in possession of them.

### **Del Credere Agent**

A del credere agent is a mercantile agent, who is in consideration of an extra remuneration guarantees to his principal that the purchasers who buy on credit will pay for the goods they take. In the event of a third-party failing to pay, the del credere agent is bound to pay his principal the sum owned by third-party.

### **Auctioneers**

An auctioneer is an agent who sells goods by auction, i.e., to the highest bidder in public competition. He has no authority to warrant his principal's title to the goods. He is an agent for



the seller but after the goods have been knocked down he is agent for the buyer also for the purpose of evidence that the sale has taken place.

### **Partners**

In a partnership firm, every partner is an agent of the firm and of his co-partners for the purpose of the business of the firm.

### **Bankers**

The relationship between a banker and his customer is primarily that of debtor and creditor. In addition, a banker is an agent of his customer when he buys or sells securities, collects cheques, dividends, bills or promissory notes on behalf of his customer. He has a general lien on all securities and goods in his possession in respect of the general balance due to him by the customer.

### **Duties of the Agent**

An agent's duties towards his principal are as follows (which give corresponding rights to the principal who may sue for damages in the event of a breach of duty by the agent):

- (a) An agent must act within the scope of the authority conferred upon him and carry out strictly the instructions of the principal
- (b) In the absence of express instructions, he must follow the custom prevailing in the same kind of business at the place where the agent conducts the business
- (c) He must do the work with reasonable skill and diligence whereby the nature of his profession, the agent purports to have special skill, he must exercise the skill which is expected from the members of the profession
- (d) He must disclose promptly any material information coming to his knowledge which is likely to influence the principal in the making of the contract.
- (e) He must not disclose confidential information entrusted to him by his principal
- (f) He must not allow his interest to conflict with his duty, e.g., he must not compete with his principal
- (g) The agent must keep true accounts and must be prepared on reasonable notice to render an account.



(h) He must not make any secret profit; he must disclose any extra profit that he may make.

Where an agent is discovered taking secret bribe, etc., the principal is entitled to (i) dismiss the agent without notice,

(i) recover the amount of secret profit, and

(ii) refuse to pay the agent his remuneration.

He may repudiate the contract, if the third-party is involved in secret profit and also recover damages.

### **Rights of Agents**

Where the services rendered by the agent are not gratuitous or voluntary, the agent is entitled to receive the agreed remuneration, or if none was agreed, a reasonable remuneration. The agent becomes entitled to receive remuneration as soon as he has done what he had undertaken to do (Section 219).

Certain classes of agents, e.g., factors who have goods and property of their principal in their possession, have a lien on the goods or property in respect of their remuneration and expense and liabilities incurred. He has a right to stop the goods in transit where he is an unpaid seller.

As the agent represents the principal, the agent has a right to be indemnified by the principal against all charges, expenses and liabilities properly incurred by him in the course of the agency (Sections 222-223).

The extent of the authority of an agent depends upon the terms expressed in his appointment or it may be implied by the circumstances of the case. The contractual authority is the real authority, but implied authority is to do whatever is incidental to carry out the real authority. This implied authority is also known as apparent or ostensible authority. Thus, an agent having an authority to do an act has authority to do everything lawful which is necessary for the purpose or usually done in the course of conducting business.

An agent has authority to do all such things which may be necessary to protect the principal from loss in an emergency and which he would do to protect his own property under similar circumstances. Where butter was becoming useless owing to delay in transit and was therefore sold by the station master for the best price available as it was not possible to obtain instructions from the principal, the sale was held binding upon the principal.





### TERMINATION OF AGENCY

- a. By the performance of the contract of agency; (Section 201)
- b. By an agreement between the principal and the agent.
- c. By expiration of the period fixed for the contract of agency;
- d. By the death of the principal or the agency;
- e. By the insanity of either the principal or the agent;
- f. By the insolvency of the principal, and in some cases that of the agent;
- g. Where the principal or agent is an incorporated company, by its dissolution;
- h. By the destruction of the subject-matter;
- i. By the renunciation of his authority by the agent; (Section 201)
- j. By the revocation of authority by the principal. (Section 201)

### E-Contract

Electronic contracts are not paper based but rather in electronic form are born out of the need for speed, convenience and efficiency. In the electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of the contract. There was initially an apprehension amongst the legislatures to recognize this modern technology, but now many countries have enacted laws to recognize electronic contracts. The conventional law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. The Information Technology Act, 2000 solves some of the peculiar issues that arise in the formation and authentication of electronic contracts.





## NECESSARY INGREDIENTS OF ELECTRONIC CONTRACT

- An offer needs to be made.
- The offer needs to be acknowledged.
- There has to be lawful consideration.
- There has to be an intention to create lawful 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.

## LAW RELATING TO TORTS

### INTRODUCTION

- The word 'tort' is a French equivalent of English word 'wrong'. The word tort is derived from Latin word Tortum. Thus, simply stated 'tort' means wrong. But every wrong or wrongful act is not a tort. Tort is really a kind of civil wrong as opposed to criminal wrong. Wrongs, in law, are either public or private.
- Broadly speaking, public wrongs are the violations of 'public law and hence amount to be offences against the State, while private wrongs are the breaches of private law, i.e., wrongs against individuals. Public wrongs or crimes are those wrongs which are made punishable under the penal law belonging to the public law group.
- "Tort" means a civil wrong which is not exclusively the breach of a contract or the breach of trust. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

Section 2(m) of the Limitation Act, 1963, states: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

**Salmond** defines it as "a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."



*Fraser* describes it as “an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.”

*Winfield* says: “Tortious liability arises from the breach of duty, primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages”. Two important elements can be derived from these definitions, namely:

- (i) that a tort is a species of civil injury of wrong as opposed to a criminal wrong, and
- (ii) that every civil wrong is not a tort. Accordingly, it is possible to distinguish tort from a crime and from a contract, a trust and a quasi-contract. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law.

### **General Conditions of Liability for a Tort**

As stated earlier, there is no fixed catalogue of circumstances, which along and for all-time mark the limit of what are torts. Certain situations have been held to be torts and will continue to be so in the absence of statutory repeal, and others have been held not to be torts. However, certain general conditions for tortious liability can be laid down.

In general, a tort consists of some act or omission by the defendant (tortfeasor) whereby he has without just cause or excuse caused some harm to plaintiff. To constitute a tort, there must be:

- i) **Wrongful act:** The act complained of, should under the circumstances, be legally wrongful as regards the party complaining. In other words, it should prejudicially affect any of the above-mentioned interests, and protected by law. Thus, every person whose legal rights, e.g., right of reputation, right of bodily safety and freedom, and right to property are violated without legal excuse, has a right of action against the person who violated them, whether loss results from such violation or not.
- ii) **Legal damages:** It is not every damage that is a damage in the eye of law. It must be a damage which the law recognizes as such. In other words, there should be legal injury or invasion of the legal right. In the absence of an infringement of a legal right, an action does not lie. Also, where there is infringement of a legal right, an action lies even though no damage may have been



caused. As was stated in *Ashby v. White*, (1703) 2 Ld. Raym. 938 legal damage is neither identical with actual damage nor is it necessarily pecuniary. Two maxims, namely:

- (a) *Damnum sine injuria*, and
- (b) *injuria sine damnum*, explain this proposition.

### ***Damnum Sine Injuria***

*Damnum* means harm, loss or damage in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on the plaintiff. The maxim means that in a given case, a man may have suffered damage and yet have no action in tort, because the damage is not to an interest protected by the law of torts. Therefore, causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Common examples are, where the damage results from an act done in the exercise of legal rights. Thus, if I own a shop and you open a shop in the neighbourhood, as a result of which I lose some customers and my profits fall off, I cannot sue you for the loss in profits, because you are exercising your legal right. [Gloucester Grammar School case]

### ***Injuria Sine Damnum***

It means injury without damage, i.e., where there is no damage resulted yet it is an injury or wrong in tort, i.e. where there is infringement of a legal right not resulting in harm but plaintiff can still sue in tort.

Some rights or interests are so important that their violation is an actionable tort without proof of damage. Thus when there is an invasion of an “absolute” private right of an individual, there is an *injuria* and the plaintiff’s action will succeed even if there is no *Damnum* or damages. An absolute right is one, the violation of which is actionable *per se*, i.e., without the proof of any damage. *Injuria sine damno* covers such cases and action lies when the right is violated even though no damage has occurred. Thus, the act of trespassing upon another’s land is actionable even though it has not caused the plaintiff even the slightest harm.

- (iii) **Legal remedy:** The third condition of liability for a tort is legal remedy. This means that to constitute a tort, the wrongful act must come under the law. The main remedy for a tort is an action for unliquidated damages, although some other remedies, e.g., injunction, may be obtained



in addition to damages or specific restitution may be claimed in an action for the detention of a chattel. Self help is a remedy of which the injured party can avail himself without going to a law court. It does not apply to all torts and perhaps the best example of these to which it does apply is trespass to land. For example, if “A” finds a drunken stranger in his room who has no business to be there, and is thus a trespass, he (A) is entitled to get rid of him, if possible without force but if that be not possible with such force as the circumstances of the case may warrant.

### **Mens Rea**

How far a guilty mind of persons is required for liability for tort?

The General principle lies in the maxim “actus non facit reum nisi mens sit rea” i.e. the act itself creates no guilt in the absence of a guilty mind. It does not mean that for the law or Torts, the act must be done with an evil motive, but simply means that mind must concur in the Act, the act must be done either with wrongful intention or negligence. However, the cases of absolute or strict liability are exceptions to this principle.

### **Kinds of Tortious Liability**

Strict or Absolute Liability	Vicarious Liability	Vicarious Liability of the State
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### **Strict or Absolute Liability**

In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or, negligence on the part of defendant. In other words, the defendant is held liable without fault. These cases fall under the following categories:

- (i) **Liability for Inevitable Accident:** Such liability arises in cases where damage is done by the escape of dangerous substances brought or kept by anyone upon his land. Such cases are where a man is made by law an insurer of other against the result of his activities.
- (ii) **Liability for Inevitable Mistake:** Such cases are where a person interferes with the property or reputation of another.
- (iii) **Vicarious Liability for Wrongs committed by others:** Responsibility in such cases is imputed by law on the grounds of social policy or expediency.
- (iv) **These case involve liability of master for the acts of his servant.**



The rule in *Rylands v. Fletcher* (1868) is that a man acts at his peril and is the insurer of the safety of his neighbour against accidental harm. Such duty is absolute because it is independent of negligence on the part of the defendant or his servants. It was held in that case that: "If a person brings or accumulates on his land anything which, if it should escape may cause damage to his neighbours, he does so at his own peril. If it does not escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage."

### Facts

- i. B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill.
- ii. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursts through the shafts and flooded the plaintiff's coal mines on the adjoining land.
- iii. It was found as a fact that B did not know of the shafts and had not been negligent, though the independent contractors, had been, B was held liable. Blackburn, J., observed; "We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if, he does not do so is, prima facie answerable for all the damage which is the natural consequence of its escape."

Later in the case of *Read v. Lyons*, it has been explained that two conditions are necessary in order to apply the rule in *Ryland v. Fletcher*, these are:

- a. Escape from a place of which the defendant has occupation or over which he has a control to a place which is outside his occupation or control or something likely to do mischief if it escapes; and
- b. Non-natural use of Land : The defendant is liable if he makes a non-natural use of land. If either of these conditions is absent, the rule of strict liability will not apply.



### **Exceptions to the Rule of Strict Liability**

The following exceptions to the rule of strict liability have been introduced in course of time, some of them being inherent in the judgment itself in *Ryland v. Fletcher*:

#### **(i) Damage due to Natural Use of the Land**

In *Ryland v. Fletcher* water collected in the reservoir in such large quantity, was held to be nonnatural use of land. Keeping water for ordinary domestic purpose is 'natural use'. Things not essentially dangerous which is not unusual for a person to have on his own land, such as water pipe installations in buildings, the working of mines and minerals on land, the lighting of fire in a fire-place of a house, and necessary wiring for supplying electric light, fall under the category of "natural use" of land.

#### **(ii) Consent of the plaintiff**

Where the plaintiff has consented to the accumulation of dangerous thing on the defendant's land, the liability under the rule in *Ryland v. Fletcher* does not arise. Such a consent is implied where the source of danger is for the 'common benefit' of both the plaintiff and the defendant.

#### **(iii) Act of Third Party**

If the harm has been caused due to the act of a stranger, who is neither defendant's servant nor agent nor the defendant has any control over him, the defendant will not be liable. Thus, in *Box v. Jubh* (1879) 4 Ex. D. 76, the overflow from the defendant's reservoir was caused by blocking of a drain by stranger, the defendant was held not liable. But if the act of the stranger, is or can be foreseen by the defendant and the damage can be prevented, the defendant must, by due care prevent the damage. Failure on his part to avoid such damage will make him liable.

#### **(iv) Statutory Authority**

Sometimes, public bodies storing water, gas, electricity and the like are by statute, exempted from liability so long as they have taken reasonable care.

Thus, in *Green v. Chelsea Water Works Co.* (1894) 70 L.T. 547 the defendant company had a statutory duty to maintain continuous supply of water. A main belonging to the company burst without any fault on its part as a consequence of which plaintiff's premises were flooded with





water. It was held that the company was not liable as the company was engaged in performing a statutory duty.

#### (v) Act of God

If an escape is caused, through natural causes and without human intervention circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility, there is then said to exist the defence of Act of God.

#### (vi) Escape due to plaintiff's own Default

Damage by escape due to the plaintiff's own default was considered to be good defence in *Rylands v. Fletcher* itself. Also, if the plaintiff suffers damage by his own intrusion into the defendant's property, he cannot complain for the damage so caused.

#### **Applicability of the Rule in *Rylands v. Fletcher* in Cases of Enterprises Engaged in a Hazardous or Inherently Dangerous Industry.**

The Supreme Court has discussed the applicability of the rule of *Rylands v. Fletcher* in the case of *M.C. Mehta v. Union of India* and while determining the principles on which the liability of an enterprise engaged in a hazardous or inherently dangerous industry depended if an accident occurred in such industry.

"We have to evolve new principle and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that, in any other foreign country".

On the question of the nature of liability for a hazardous enterprise the court while noting that the above rule as developed in England recognizes certain limitations and responsibilities, recorded its final view as follows:

"We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently





dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged, must be conducted with the highest standards of safety; and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm; and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without negligence on its part.”

Thus, while imposing absolute liability for manufacture of hazardous substances, the Supreme Court intended that the requirement of non-natural use or the aspect of escape of a dangerous substance, commonly regarded as essential for liability under *Rylands v. Fletcher*, need not be proved in India.

### **Vicarious Liability**

Normally, the tortfeasor is liable for his tort. But in some cases a person may be held liable for the tort committed by another. A master is vicariously liable for the tort of his servant, principal for the tort of his agent and partners for the tort of a partner. This is known as vicarious liability in tort. The common examples of such a liability are:

#### **(a) Principal and Agent [Specific authority]**

*Qui facit per alium facit per se* – he who acts through another is acting himself, so that the act of the agent is the act of the principal. When an agent commits a tort in the ordinary course of his duties as an agent, the principal is liable for the same. In *Lloyd v. Grace, Smith & Co.* (1912) A.C. 716, the managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud, against a lady client by fraudulently inducing her to sign documents transferring her property to him. He had done so without the knowledge of his principal who was liable because the fraud was committed in the course of employment.

### **Partners**

For the tort committed by a partner in the ordinary course of the business of firm, all the other partners are liable to the same extent as the guilty partner. The liability of the partners is joint and several. In *Hamlyn v. Houston & Co.* (1903) 1 K.B. 81, one of the two partners bribed the



plaintiff's clerk and induced him to divulge secrets relating to his employer's business. It was held that both the partners were liable for the tort committed by only one of them.

### **(b) Master and Servant [Authority by relation]**

A master is liable for the tort committed by his servant while acting in the course of his employment. The servant, of course, is also liable; their liability is joint and several.

#### **In such cases**

- a. liability of a person is independent of his own wrongful intention or negligence
- b. liability is joint as well several
- c. In case of vicarious liability the liability arises because of the relationship between the principal and the wrongdoer but in case of absolute or strict liability the liability arises out of the wrong itself.

A master is liable not only for the acts which have been committed by the servant, but also for acts done by him which are not specifically authorized, in the course of his employment. The basis of the rule has been variously stated: on the maxim *Respondeat Superior* (Let the principal be liable) or on the maxim *Qui facit per alium facit per se* (he who does an act through another is deemed to do it himself).

The master is liable even though the servant acted against the express instructions, for the benefit of his master, so long as the servant acted in the course of employment.

### **(c) Employer and Independent Contractor**

It is to be remembered that an employer is vicariously liable for the torts of his servants committed in the course of their employment, but he is not liable for the torts of those who are his independent contractors.

A servant is a person who is employed by another (the employer) to perform services in connection with the affairs of the employer, and over whom the employer has control in the performance of these services. An independent contractor is one who works for another but who is not controlled by that other in his conduct in the performance of that work. These definitions show that a person is a servant where the employer "retains the control of the actual performance" of the work.



**(d) Where Employer is Liable for the acts of Independent Contractor**

The employer is not liable merely because an independent contractor commits a tort in the course of his employment; the employer is liable only if he himself is deemed to have committed a tort. This may happen in one of the following three ways:

When employer authorizes him to commit a tort.

1. In torts of strict liability.
2. Negligence of independent contractor.

**(e) Where Employer is not Liable for the acts of an Independent Contractor**

An employer is not liable for the tort of an independent contractor if he has taken care in the appointment of the contractor. In *Philips v. Britannia Hygienic Laundry Co. (1923)*, the owner of lorry was held not liable when a third-party's vehicle was damaged, in consequence of the negligent repair of his lorry by a garage proprietor. Employers of independent contractors are liable for the "collateral negligence" of their contractors in the course of his employment. Where A employed B to fit casement windows into certain premises. B's servant negligently put a tool on the sill of the window on which he was working at the time. The wind blew the casement open and the tool was knocked off the sill on to a passer-by. The employer was held to be liable, because the harm was caused by the work on a highway and duty lies upon the employer to avoid harm.

**(f) Liability for the acts of Servants**

An employer is liable whenever his servant commits a tort in the course of his employment. An act is deemed to be done in the course of employment if it is either:

1. a wrongful act authorized by the employer, or
2. a wrongful and unauthorized mode of doing some act authorized by the employer.

So far as the first alternative is concerned there is no difficulty in holding the master liable for the tort of his servant. A few examples, however, are necessary to explain the working of the rule in the second. These are as follows:



In *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board* (1942) A.C. 509, the director of a petrol lorry, while transferring petrol from the lorry to an underground tank at a garage, struck a match in order to light a cigarette and then threw it, still alight on the floor. An explosion and a fire ensued. The House of Lords held his employers liable for the damage caused, for he did the act in the course of carrying out his task of delivering petrol; it was an unauthorized way of doing what he was employed to do.

Similarly, in *Bayley v. Manchester, Sheffield and Lincolnshire Rly. Co.* (1873) L.R. 7 C.P. 415, erroneously thinking that the plaintiff was in the wrong train, a porter of the defendants forcibly removed him. The defendants were held liable.

### **Vicarious Liability of the State**

#### **a. The Position in England**

At Common Law the Crown could not be sued in tort, either for wrongs actually authorized by it or committed by its servants, in the course of their employment. With the passing of the Crown Proceeding Act, 1947, the Crown is liable for the torts committed by its servants just like a private individual. Thus, in England, the Crown is now vicariously liable for the torts of its servants.

#### **b. The Position in India**

Unlike the Crown Proceeding Act, 1947 of England, we have no statutory provision with respect to the liability of the State in India.

When a case of Government liability in tort comes before the courts, the question is whether the particular Government activity, which gave rise to the tort, was the sovereign function or nonsovereign function. If it is a sovereign function it could claim immunity from the tortious liability, otherwise not. Generally, the activities of commercial nature or those which can be carried out by the private individual are termed as non-sovereign functions.

The whole idea of Vicariously Liability of the State for the torts committed by its servants is based on three principles:

- *Respondeat superior* (let the principal be liable).
- *Qui facit per alium facit per se* (he who acts through another does it himself).



- Socialisation of Compensation.

### **Torts or Wrongs to Personal Safety and Freedom**

An action for damages lies in the following kinds of wrongs which are styled as injuries to the person of an individual:

#### **(a) Battery**

Any direct application of force to the person of another individual without his consent or lawful justification is a wrong of battery. To constitute a tort of battery, therefore, two things are necessary:

1. use of force, however, trivial it may be without the plaintiff's consent, and
2. without any lawful justification.

Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch a person in anger or without any lawful justification is battery.

#### **(b) Assault**

Assault is any act of the defendant which directly causes the plaintiff immediately to apprehend a contact with his person. Thus, when the defendant by his act creates an apprehension in the mind of the plaintiff that he is going to commit battery against him, the tort of assault is committed. The law of assault is substantially the same as that of battery except that apprehension of contact, not the contact itself has to be established. Usually when there is a battery, there will also be assault, but not for instance, when a person is hit from behind. To point a loaded gun at the plaintiff, or to shake fist under his nose, or to curse him in a threatening manner, or to aim a blow at him which is intercepted, or to surround him with a display of force is to assault him clearly if the defendant by his act intends to commit a battery and the plaintiff apprehends it, is an assault.

#### **(c) Bodily Harm**

A wilful act (or statement) of defendant, calculated to cause physical harm to the plaintiff and in fact causing physical harm to him, is a tort.



**(d) False Imprisonment**

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient lawful justification. It means unauthorized restraint on a person's body. What happens in false imprisonment is that a person is confined within certain limits so that he cannot move about and so his personal liberty is infringed. It is a serious violation of a person's right and liberty whether being confined within the four walls or by being prevented from leaving place where he is. If a man is restrained, by a threat of force from leaving his own house or an open field there is false imprisonment.

**(e) Malicious Prosecution**

Malicious prosecution consists in instigating judicial proceedings (usually criminal) against another, maliciously and without reasonable and probable cause, which terminate in favour of that other and which results in damage to his reputation, personal freedom or property.

The following are the essential elements of this tort:

1. There must have been a prosecution of the plaintiff by the defendant.
2. There must have been want of reasonable and probable cause for that prosecution.
3. The defendant must have acted maliciously (i.e. with an improper motive and not to further the end of justice).
4. The plaintiff must have suffered damages as a result of the prosecution.
5. The prosecution must have terminated in favour of the plaintiff.

To be actionable, the proceedings must have been instigated actually by the defendant. If he merely states the fact as he believes them to a policeman or a magistrate, he is not responsible for any proceedings which might ensue as a result of action by such policeman or magistrate on his own initiative.

**(f) Nervous Shock**

This branch of law is comparatively of recent origin. It provides relief when a person may get physical injury not by an impact, e.g., by stick, bullet or sword but merely by the nervous shock through what he has seen or heard. Causing of nervous shock itself is not enough to make it an





actionable tort, some injury or illness must take place as a result of the emotional disturbance, fear or sorrow.

### (g) Defamation

Defamation is an attack on the reputation of a person. It means that something is said or done by a person which affects the reputation of another. It is defined as follows:

“Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person.”

Defamation may be classified into two heads: Libel and Slander. Libel is a representation made in some permanent form, e.g., written words, pictures, caricatures, cinema films, effigy, statue and recorded words. In a cinema film both the photographic part of it and the speech which is synchronized with it amount to tort.

Slander is the publication of a defamatory statement in a transient form; statement of temporary nature such as spoken words, or gestures.

Generally, the punishment for libel is more severe than for slander. Defamation is tort as well as a crime in India.

In India both libel and slander are treated as a crime. Section 499 of the Indian Penal Code recognizes both libel and slander as an offence. However, torts in criminal law are stricter than in law of tort.

### Remedies in Torts

#### Judicial Remedies

Three types of judicial remedies are available to the plaintiff in an action for tort namely:

#### (a) Damages

The courts may award damages against the wrong caused to any person.

#### (b) Injunction





A person may be prohibited to act in a particular way or compelled to do a certain act under the remedy of Injunction.

**(c) Specific Restitution of Property**

A person may be asked to restore a property under the Specific Restitution of Property.

**Extra Judicial Remedies**

In certain cases, it is lawful to redress one's injuries by means of self-help without recourse to the court. These remedies are:

**(a) Self Defence**

It is lawful for any person to use reasonable forces to protect himself, or any other person against any unlawful use of force.

**(b) Prevention of Trespass**

An occupier of land or any person with his authority may use reasonable force to prevent trespassers entering or to eject them but the force should be reasonable for the purpose.

**(c) Re-entry on Land**

A person wrongfully disposed of land may retake possession of land if he can do so in a peaceful and reasonable manner.

**(d) Re-capture of Goods**

It is neither a crime nor a tort for a person entitled to possession of a chattel to take it either peacefully or by the use of a reasonable force from one who has wrongly taken it or wrongfully detained it.

**(e) Abatement of Nuisance**

The occupier of land may lawfully abate (i.e. terminate by his own act), any nuisance injuriously affecting it. Thus, he may cut overhanging branches as spreading roots from his neighbour's trees, but

1. upon giving notice;
2. by choosing the least mischievous method;



3. *avoiding unnecessary damage.*

**(f) Distress Damage Feasant**

*An occupier may lawfully seize any cattle or any chattel which are unlawfully on his land doing damage there and detain them until compensation is paid for the damage. The right is known as that of distress damage feasant-to distrain things which are doing damage.*



## CHAPTER 3 – ELEMENTS OF COMPANY SECRETARIES LEGISLATION

### THE INSTITUTE OF COMPANY SECRETARIES OF INDIA

The Institute of Company Secretaries of India (ICSI) is the only recognized professional body in India to develop and regulate the profession of Company Secretaries in India. It is a premier national professional body set up under an act of Parliament, the Company Secretaries Act, 1980. ICSI functions under the jurisdiction of the Ministry of Corporate Affairs, Government of India. The Institute provides top-quality education to the students of Company Secretaries (CS) Course and best quality set standards to CS Members.

ICSI has been contributing to the initiatives of Government of India that have potential to excel the social economic growth of India.

### THE VISION, MOTTO, MISSION AND CORE VALUE OF THE INSTITUTE

#### VISION

To be a global leader in promoting Good Corporate Governance

#### MISSION

To develop high calibre professionals facilitating good Corporate Governance

#### MOTTO

Speak the Truth, Abide by the Law

### CORE VALUES

Core values are the expression of beliefs, followed by an individual, group or community in their personal or professional behavior, individually or collectively. The ICSI identifies for itself and its members the following core values:

- Integrity
- Ethics
- Reliability
- Ownership
- Being 'stakeholder-centric'



### **Integrity**

The ICSI's vision to be a global leader in promoting Good Corporate Governance is a promise to the nation. It casts upon the ICSI and the profession of Company Secretaries a huge responsibility to deliver upon this promise, with objectivity and integrity as core values. There is no middle path to integrity.

The word 'integrity' derives from the Latin word 'integer' which means whole or complete. In this context, integrity may comprise the personal inner sense of wholeness deriving from character, courage and consistency. As integrity conveys a sense of wholeness and strength, members shall be guided by a set of core principles that will empower them to remain consistent with high standards, viz compassion, dependability, generosity, honesty, openness, transparency, loyalty, maturity, objectivity, trust, and wisdom.

### **Ethics**

The term 'ethics' has its origin from a Greek word "ethos", which means character or custom – the distinguishing character, moral nature or guiding beliefs of a person, institution or a group.

'Ethics' in its simplest form means possessing a sense of right and wrong. Whatever is conscientiously right is ethical; whatever is not, is unethical. In other words, ethics is the sense of right and wrong, coupled with a desire to do good in some measure for someone.

ICSI endeavors to make all its members:

- a. **Being 'stakeholder-centric'**
- b. **Reliability**
- c. **Ownership**

Ownership is synonymous with responsibility, accountability and empowerment. The idea of ownership is much more than simply a willingness to accept own criticism, deficiency or oversight. It is more about setting one's priorities, placing rightful obligations on others as high as obligations to self. To be responsible is to always do the right things in the eyes of valued stakeholders and the public at large. It is to value the trust and confidence stakeholders put in



them. It is about commitment to keep a promise or make right some unintentional wrong, even when it is inconvenient to do so. "Ownership being one of our core values, we believe that it will reduce risk, increase efficiency and contribute to goodwill, reputation and brand image of the Institute and the profession. We shall uphold this at all times."

### COMPANY SECRETARY

According to Section 2(1)(c) of the Company Secretaries Act, 1980 "Company Secretary" means a person who is a member of the Institute of Company Secretaries of India. The role of the Company secretary is defined in various other legal enactments.

Under the Companies Act, 2013 Company Secretary has been defined under section 2(24) as: 'Company Secretary' or 'Secretary' means a Company Secretary as defined in Section 2(1)(c) of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of the Company Secretary under the Companies Act, 2013.

Company Secretary is recognized as one of the **Key Managerial Personnel (KMP)** of a company under the Companies Act, 2013. Section 203 of Companies Act, 2013 read with Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that every listed company and every other public company having a paid-up share capital of ten crore rupees or more shall have the following whole-time key managerial personnel:

- (i) Managing Director, or Chief Executive Officer or Manager and in their absence, a Whole-Time Director;
- (ii) Company Secretary; and
- (iii) Chief Financial Officer

According to Rule 8A of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

Every Private company which has a paid-up share capital of 10 crore rupees or more shall have a whole-time company secretary.



### **Functions of a Company Secretary**

The functions of the company secretary shall include:

- (a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
- (b) to ensure that the company complies with the applicable secretarial standards;
- (c) to discharge such other prescribed duties.

### **Duties of Company Secretary**

The duties of Company Secretary shall also discharge, the following duties, namely:

- (1) to report to the Board about compliance with the provisions of the Companies Act, 2013 and the rules made thereunder and other laws applicable to the company;
- (2) to ensure that the company complies with the applicable secretarial standards;
- (3) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;
- (4) to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;
- (5) to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;
- (6) to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;
- (7) to assist the Board in the conduct of the affairs of the company; (8) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and
- (8) to discharge such other duties as have been specified under the Act or rules; and
- (9) such other duties as may be assigned by the Board from time to time.

### **Company Secretary in Practice**

As per Section 2(25) the Companies Act, 2013 "Company Secretary in Practice" means a company secretary who is deemed to be in practice under section 2(2) of the Company Secretaries Act, 1980.



A member of the Institute shall be deemed “to be in practice” when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions as may be prescribed, he, in consideration of remuneration received or to be received,—

- (a) Engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company; or
- (b) offers to perform or performs services in relation to the promotion, forming, incorporation, amalgamation, reconstruction, reorganisation or winding up of companies; or
- (c) offers to perform or performs such services as may be performed by—
  - (i) an authorised representative of a company with respect to filing, registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company
  - (ii) a share transfer agent,
  - (iii) an issue house,
  - (iv) a share and stock broker,
  - (v) a secretarial auditor or consultant,
  - (vi) an adviser to a company on management, including any legal or procedural matters
  - (vii) issuing certificates on behalf of, or for the purposes of, a company; or
- (d) holds himself out to the public as a Company Secretary in practice; or
- (e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or
- (f) renders such other services as, in the opinion of the Council, are or may be rendered by a Company.

Company Secretary in Practice have been authorised by Government as well as Regulatory Bodies including Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), NCLT & NCLAT, Insurance Regulatory Authority of India ((IRDA), Competition Commission of India (CCI), Real Estate Regulatory Authority of India (RERA) and Stock Exchanges (SE) to act as authorised representative and issue various certifications and undertake Secretarial Audit of Bigger Companies.





## CORPORATE GOVERNANCE AND SECRETARIAL SERVICES

### Corporate Governance Services

Advising on good governance practices and compliance of Corporate Governance norms as prescribed under various Corporate, Securities and Other Business Laws and regulations and guidelines made thereunder.

### Corporate Secretarial Services

1. Promotion, formation and incorporation of companies and matters related therewith
2. Filing, registering any document including forms, returns and applications by and on behalf of the company as an authorized representative
3. Maintenance of secretarial records, statutory books and registers
4. Arranging board/general meetings and preparing minutes thereof
5. All work relating to shares and their transfer and transmission

## SECRETARIAL AUDIT

According to Section 204 of the Companies Act, 2013 every listed company and every public company having a paid-up share capital of fifty crore rupees or more or every public company having a turnover of two hundred fifty crore rupees or more or every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more shall annex with its Board's report made in terms of section 134(3), a secretarial audit report, given by a company secretary in practice, in prescribed form. The format of the Secretarial Audit Report Prescribed in Form No. MR.3.

It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company.

The Board of Directors, in their report made in terms of section 134(3) of the Companies Act, 2013, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report.

If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, the company, every officer of the company or the company



secretary in practice, who is in default, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees

#### SERVICES WHICH A CS OFFERS:

- A. CORPORATE LAWS ADVISORY AND REPRESENTATION
- B. ARBITRATION AND CONCILIATION SERVICES
- C. FINANCIAL MARKETS SERVICES
- D. PUBLIC ISSUE, LISTING AND SECURITIES MANAGEMENT
- E. TAKEOVER CODE AND INSIDER TRADING REGULATION
- F. SECURITIES COMPLIANCE AND CERTIFICATION SERVICES
- G. FINANCE AND ACCOUNTING SERVICES
- H. TAXATION SERVICES
- I. INTERNATIONAL TRADE AND WTO SERVICES
- J. MANAGEMENT SERVICES
- K. GENERAL/STRATEGIC MANAGEMENT

## CHAPTER 4 – ELEMENTS OF COMPANY LAW

### MEANING OF 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 the leisurely past, merchants took advantage of festive gatherings, to discuss business matters.

Now a days, the business matters have

become more complicated and cannot be discussed at length at festive gatherings. Therefore, the word company has assumed greater importance. It denotes a joint stock enterprise in which the capital is contributed by a large number of people. Thus, in popular parlance, a company denotes an association of like-minded 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 that of the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The word 'corporation' is derived from the Latin term 'corpus' which means 'body'. Accordingly, 'corporation' is a legal person created by the process other than natural birth. It is, for this reason, sometimes called artificial legal person. As a legal person, a corporate is capable of enjoying many of the rights and incurring many of the liabilities of a natural person.

In the legal sense, a company is an association of both natural and artificial persons incorporated under the existing law of a country. In terms of the Section 2(20) of the Companies Act, 2013, Company means a company incorporated under this Act or under any previous company law. In common law, a company

is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of its members.

However, an association formed not for profit acquires a corporate life and falls within the meaning of a company by reason of a **licence under Section 8** of the Act.

From the foregoing discussion it is clear that a company has its own corporate and legal personality distinct and separate from that of its members.

## NATURE & CHARACTERISTICS OF A COMPANY

Since a corporate body (i.e. a company) is the creation of law, it is not a human being, it is an artificial person (i.e. created by law); it is clothed with many rights, obligations, powers and duties prescribed by law; it is called a 'person'. Being the creation of law, it possesses only the properties conferred upon it by its

Memorandum of Association. Within the limits of powers conferred by the charter, it can do all acts as a natural person may do.

The most striking characteristics of a company are:

### (i) Corporate Personality

By incorporation under the Act, the company is vested with a corporate personality quite distinct from individuals who are its members. Being a separate legal entity it bears its own name and acts under a corporate name. It has a seal of its own. Its assets are separate and distinct from those of its members. It is also a different 'person' from the members who compose it. As such it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. Its members are its owners but they can be its creditors simultaneously as it has a separate legal entity. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the agents of the company and so they cannot bind it by their acts. Thus, 'incorporation' is the act of forming a legal corporation as a juristic person. A juristic person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law [Shiromani Gurdwara Prabandhak Committee v. Shri Sam Nath Dass]

The case of *Salomon v. Salomon and Co. Ltd.* has clearly established the principle that once a company has been validly constituted under Companies Act, it becomes a legal person distinct from its members and for this purpose it is immaterial whether any member has a large or small proportion of the shares, and whether he holds those shares beneficially or as a mere trustee.



### Facts

- a. Salomon had, for some years, carried on a prosperous business as a leather merchant and boot manufacturer. He formed a limited company consisting of himself, his wife, his daughter and his four sons as the shareholders, all of whom subscribed for 1 share each so that the actual cash paid as capital was £ 7.
- b. Salomon sold his business to the Company for the sum of £ 38,782. The company's nominal capital was £ 40,000 in £ 1 shares. In part payment of the purchase money for the business sold to the company, debentures of the amount of £10,000 secured by a floating charge on the company's assets were issued to Salomon, who also applied for and received an allotment of 20,000 £ 1 fully paid shares. The remaining amount of £8,782 was paid to Salomon in cash.
- c. Salomon was the managing director and two of his sons were other directors.
- d. The company soon ran into difficulties and the debenture holders appointed a receiver and the company went into liquidation. The total assets of the company amounted to £6050, its liabilities were £10,000 secured by debentures, £8,000 owing to unsecured trade creditors, who claimed the whole of the company's assets, viz., £6,050, on the ground that, as the company was a mere 'alias' or agent for Salomon, they were entitled to payment of their debts in priority to debentures.
- e. They further pleaded that Salomon, as principal beneficiary, was ultimately responsible for the debts incurred by his agent or trustee on his behalf.

### Judgement

The company is at law a different person altogether from the subscribers of the memorandum; and though it may be that after incorporation the business is precisely the same as before, the same persons are managers, and the same hands receive the profits, the company is not in law their agent or trustee. There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertakings, or that they should have a mind or will of their own, or that there should be anything like a balance of power in the constitution of company."



### **Lee v. Lee's Air Farming Ltd.**

*Illustrates the application of the principles established in Salomon's case.*

#### **Facts**

- a. *In this case, a company was formed for the purpose of aerial top-dressing. Lee, a qualified pilot, held all but one of the shares in the company.*
- b. *He voted himself the managing director and got himself appointed by the articles as chief pilot at a salary.*
- c. *He was killed in an air crash while working for the company. His widow claimed compensation for the death of her husband in the course of his employment. The company opposed the claim on the ground that Lee was not a worker as the same person could not be the employer and the employee.*

#### **Judgement**

*The Privy Council held that Lee and his company were distinct legal persons which had entered into contractual relationships under which he became, the chief pilot, a servant of the company. In his capacity of managing director, he could, on behalf of the company, give himself orders in his other capacity of pilot, and the relationship between himself, as pilot and the company, was that of servant and master.*

*Lee was a separate person from the company he formed and his widow was held entitled to get the compensation. In effect the magic of corporate personality enabled him (Lee) to be the master and servant at the same time and enjoy the advantages of both.*

### **Re. Kondoli Tea Co. Ltd.**

*It recognized the principle of separate legal entity even much earlier than the decision in Salomon v. Salomon & Co. Ltd. case. Certain persons transferred a Tea Estate to a company and claimed exemptions from taxes on the ground that since they themselves were also the shareholders in the company and, therefore, it was nothing but a transfer from them in one name to themselves under another name. While rejecting this Calcutta High Court observed: "The company was a separate person, a separate body altogether from the shareholders and*





the transfer was as much a transfer of the property, as if the shareholders had been totally different persons.

## (ii) Limited Liability

The company, being a separate person, is the owner of its assets and bound by its liabilities. The liability of a member as shareholder, extends to contribution to the assets of the company up to the nominal value of the shares held and not paid by him. In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets. This means that the liability of a member is limited.

For example, if A holds shares of the total nominal value of Rs. 1,000 and has already paid Rs. 500/- (or 50% of the value) as part payment at the time of allotment, he cannot be called upon to pay more than Rs. 500/-, the amount remaining unpaid on his shares. If he holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent. In the case of a company limited by guarantee, the liability of members is limited to a specified amount mentioned in the memorandum.

There are, however, some statutory exceptions to the principle of limited liability. As the Companies Act, 2013 the members become personally liable if the membership falls below prescribed minimum and the business is carried on for more than six months thereafter.

## (iii) Perpetual Succession

An incorporated company never dies except when it is wound up as per law. A company, being a separate legal person is unaffected by death or departure of any member and remains the same entity, despite total change in the membership.

Perpetual succession denotes the ability of a company to maintain its existence by the constant succession of new individuals who step into the shoes of those who cease to be members of the company. Professor L.C.B. Gower rightly mentions, "Members may come and go, but the company can go on forever. During a war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived — not even a hydrogen bomb could have destroyed it".





**(iv) Separate Property**

A company being a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed off.

**(v) Transferability of Shares**

The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. When the joint stock companies were established, the object was that their shares should be capable of being easily transferred.

A member may sell his shares in the open market and realise the money invested by him. This provides liquidity to a member (as he can freely sell his shares) and ensures stability to the company (as the member is not withdrawing his money from the company). The Stock Exchanges provide adequate facilities for the sale and purchase of shares.

**(vi) Capacity to Sue and Be Sued**

A company being a body corporate, can sue and be sued in its own name. To sue, means to institute legal proceedings against (a person) or to bring a suit in a court of law.

All legal proceedings against the company are to be instituted in its own name. Similarly, the company may bring an action against anyone in its own name.

A company, as a person separate from its members, may even sue one of its own members for libel.

A company has a right to seek damages where a defamatory material published about it, affects its business. Where video cassettes were prepared by the workmen of a company showing, their struggle against the company's management, it was held to be not actionable unless shown that the cassette would be defamatory. The court did not restrain the exhibition of the cassette. [TVS Employees Federation v. TVS and Sons Ltd.]



### **(vii) Contractual Rights**

A company, being a separate legal entity different from its members, can enter into contracts for the conduct of the business in its own name. A shareholder cannot enforce a contract made by his company; he is neither a party to the contract nor entitled to the benefit of it, as a company is not a trustee for its shareholders. Likewise, a shareholder cannot be sued on contracts made by his company.

Similarly, a member of a company cannot sue in respect of torts committed against the company, nor can he be sued for torts committed by the company. Therefore, the company as a legal person can take action to enforce its legal rights or be sued for breach of its legal duties. Its rights and duties are distinct from those of its constituent members.

### **(viii) Limitation of Action**

A company cannot go beyond the power stated in the Memorandum of Association. The Memorandum of Association of the company regulates the powers and fixes the objects of the company and provides the base upon which the entire structure of the company rests. The actions and objects of the company are limited within the scope of its Memorandum of Association.

### **(ix) Separate Management**

While members are its owners, the company is administered and managed by its managerial personnel.

### **(x) Termination of Existence**

A company, being an abstract and artificial person, does not die a natural death. It is created by law, carries on its affairs according to law throughout its life and ultimately is effaced by law. Generally, the existence of a company is terminated by means of winding up. However, to avoid winding up sometimes companies change their form by means of reorganisation, reconstruction and amalgamation.

## NATIONALITY & RESIDENCE OF A COMPANY

- a. A company cannot be a citizen (only natural person can have citizenship)
- b. It still has nationality, domicile and residence. (Gasque v. Inland Revenue Commissioners, (1940) 2 K.B. 88, Macnaghten. J.)

The company, though a legal person, is not a citizen under the Citizenship Act, 1955 or the Constitution of India. In *State Trading Corporation of India Ltd. v. C.T.O.*, the Supreme Court held that the State Trading Corporation though a legal person, was not a citizen and can act only through natural persons.

Nevertheless, it is to be noted that certain fundamental rights enshrined in the Constitution for protection of "person", e.g., right to equality (Article 14) etc. are available to company.

### Lifting of or piercing through the corporate veil

It means the company has a separate legal entity from the persons constituting its members. Indeed, the theory of corporate entity is still the basic principle on which the whole law of corporations is based. But as the separate personality of the company is a statutory privilege, it must be used for legitimate business purposes only. Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. The Court will break through the corporate shell and apply the principle of what is known as "lifting of or piercing through the corporate veil". The Court will look behind the corporate entity and take action as though no entity separates from the members existed and make the members or the controlling persons liable for debts and obligations of the company.

However, the shareholders cannot ask for lifting veil for their purposes.

The Courts have found it necessary to disregard the separate personality of a company in the following situations:

- (a) Where the corporate veil has been used for commission of fraud or improper conduct. In such a situation, Courts have lifted the veil and looked at the realities of the situation.
- (b) Where a corporate facade is really only an agency instrumentality.
- (c) Where the doctrine conflicts with public policy, courts lifted the corporate veil for protecting the public policy.



- (d) Further, In *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.*, it was held that a company will be regarded as **having enemy character**, if the persons having de facto control of its affairs are resident in an enemy country or, wherever they may be, are acting under instructions from or on behalf of the enemy.
- (e) Where it was found that the sole purpose for which **the company was formed was to evade taxes** the Court will ignore the concept of separate entity, and make the individuals liable to pay the taxes which they would have paid but for the formation of the company.
- (f) **Avoidance of welfare legislation**, where it was found that the sole purpose for the formation of the new company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the Supreme Court upheld the piercing of the veil to look at the real transaction.
- (g) Where it is found that a **company has abused its corporate personality for an unjust and inequitable purpose**.

### COMPANY AS DISTINGUISHED FROM OTHER BUSINESS ENTERPRISES

#### **Distinction between Company and Partnership**

The principal points of distinction between a company and a partnership firm, are as follows:

- (1) A company is a distinct legal person. A partnership firm is not distinct from the several persons who compose it.
- (2) In a partnership, the property of the firm is the property of the individuals comprising it. In a company, it belongs to the company and not to the individuals comprising it.
- (3) Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. The creditors of a company can proceed only against the company and not against its members.
- (4) Partners are the agents of the firm, but members of a company are not its agents. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm's business. A member of a company has no such power.
- (5) A partner cannot contract with his firm, whereas a member of a company can.
- (6) A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners, whereas a company's share can ordinarily be transferred.



- (7) Restrictions on a partner's authority contained in the partnership contract do not bind outsiders; whereas such restrictions incorporated in the Articles are effective, because the public are bound to acquaint themselves with them.
- (8) A partner's liability is always unlimited whereas that of shareholder may be limited either by shares or a guarantee.
- (9) A company has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the company, whereas the death or insolvency of a partner dissolves the firm, unless otherwise provided.
- (10) A company is legally required to have its accounts audited annually by a chartered accountant, whereas the accounts of a firm are audited at the discretion of the partners.
- (11) A company, being a creation of law, can only be dissolved as laid down by law. A partnership firm, on the other hand, is the result of an agreement and can be dissolved at any time by agreement.

### **Distinction between Company and Hindu Joint Family Business**

1. A company consists of heterogeneous (varied or diverse) members, whereas a Hindu Undivided Family Business consists of homogenous (unvarying) members since it consists of members of the joint family itself.
2. In a Hindu Joint Family business the Karta (manager) has the sole authority to contract debts for the purpose of the business, other coparceners cannot do so. There is no such system in a company.
3. A person becomes a member of Joint Hindu Family business by virtue of birth. There is no provision to that effect in the company.
4. No registration is compulsory for carrying on business for gain by a Hindu Joint Family even if the number of members exceeds 50. Registration of a company is compulsory.

### **Distinction between company and Limited Liability Partnership (LLP)**

- a. LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own



name. LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.

- b. Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct.
- c. Mutual rights and duties of the partners within an LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be. The LLP, however, is not relieved of the liability for its other obligations as a separate entity. Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.
- d. The management-ownership divide inherent in a company is not there in a limited liability partnership. LLP have more flexibility as compared to a company. LLP have lesser compliance requirements as compared to a company.

### DISADVANTAGES OF CORPORATE FORM OF ENTERPRISE

There are, however, certain disadvantages and inconveniences in Incorporation. Some of these disadvantages are:

1. Expenses of Incorporation and Flotation
2. Corporate disclosures
3. Separation of control from ownership
4. Greater social responsibility
5. Greater tax burden in certain cases
6. Detailed winding-up procedure

### Applicability of Companies Act, 2013

According to section 1 of the Companies Act, 2013, the Act extends to whole of India and the provisions of the Act shall apply to the following:

- (a) Companies incorporated under this Act or under any previous company law;
- (b) Insurance companies,
- (c) Banking companies,
- (d) companies engaged in the generation or supply of electricity,





- (e) any other company governed by any special Act for the time being in force,
- (f) such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf,

Companies Act, 2013 is not applicable to unincorporated companies. An unincorporated company, association or partnership consisting of large number of persons has been declared illegal.

By virtue of section 464 of the Companies Act, 2013, no association or partnership consisting of more than such number of persons as may be prescribed 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. Rule 10 of Companies (Miscellaneous) Rules, 2014 prescribes 50 persons in this regard. The maximum number of persons which may be prescribed under this section shall not exceed 100.

Section 464 of the Act does not apply to the case of a Hindu undivided family carrying on any business whatever may be the number of its members. However, this section is also not applicable to an association or partnership, if it is formed by professionals who are governed by special Acts.

### TYPES OF COMPANIES

The Companies Act, 2013 provides for the kinds of companies that can be promoted and registered under the Act. The three basic types of companies which may be registered under the Act are:

- Private Companies;
- Public Companies;
- One Person Company

#### Private Company

Private company means a company having a minimum paid-up share capital as may be prescribed, and which by its articles:

- (i) restricts the right to transfer its shares;





- (ii) except in case of One Person Company, limits the number of its members to two hundred; Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

**Provided further that—**

- (A) persons who are in the employment of the company; and  
 (B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members.

- (iii) prohibits any invitation to the public to subscribe for any securities of the company.

### **Public Company**

Public company means a company which—

- (a) is not a private company and;  
 (b) has a minimum paid-up share capital as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

### **One Person Company**

One Person Company means a company which has only one person as a member.

### **Companies with Charitable Objects**

A person or an association of persons registered and licensed under Section 8 of the Companies Act, 2013 as a limited company—

- (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;  
 (b) intends to apply its profits, if any, or other income in promoting its objects; and  
 (c) intends to prohibit the payment of any dividend to its members.



### **Government Company**

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.

### **Foreign Company**

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.

### **Associate Company**

Associate Company in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

### **Explanation:**

- (a) the expression "significant influence" means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;
- (b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

### **Holding Company**

Holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies. It may be noted that here "company" includes anybody corporate.



### **Subsidiary Company or Subsidiary**

Subsidiary company or "subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company—

- (i) Controls the composition of the Board of Directors; or
- (ii) Exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies;
- (iii) By forming Layers

Explanation: For the purposes of this clause:

"Layer" in relation to a holding company means its subsidiary or subsidiaries;

### **Small Company**

Small company means a company, other than a public company,—

- (i) 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 ten crore rupees; and
- (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees;

Provided that nothing in this 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;

### **Dormant Company**

- a) Where a company is formed and registered 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 for obtaining the status of a dormant company.
- b) "inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;



- c) In case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.
- d) A dormant company shall have a minimum number of three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company.
- e) The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements.

### **Nidhi Company**

Nidhi means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

### **Producer Companies**

In terms of Section 378B (1) of the Companies Act, 2013, the objects of the Producer Company shall relate to all or any of the following matters, namely:

- a) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit: Provided that the Producer Company may carry on any of the activities specified in this clause either by itself or through other institution;
- b) processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members;
- c) manufacture, sale or supply of machinery, equipment or consumables mainly to its Members;
- d) providing education on the mutual assistance principles to its Members and others;
- e) rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members;
- f) generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce;
- g) insurance of producers or their primary produce;



- h) promoting techniques of mutuality and mutual assistance;
- i) welfare measures or facilities for the benefit of Members as may be decided by the Board;
- j) any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) or other activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner;
- k) financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) which include extending of credit facilities or any other financial services to its Members.

### **Non-Banking Financial Company (NBFC)**

A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, engaged in the business of loans and advances, acquisition of shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property. A non-banking institution which is a company and has principal business of receiving deposits under any scheme or arrangement in one lump sum or in installments by way of contributions or in any other manner, is also a non-banking financial company (Residuary non-banking company).

### **FORMATION OF COMPANY**

According to Companies Act 2013, a company may be formed for any lawful purpose by—

- (a) Seven or more persons, where the company to be formed is a public company;
- (b) Two or more persons, where the company to be formed is a private company; or
- (c) one person, where the company to be formed is a One Person Company

A company formed above may be either—

- (a) a company limited by shares; or
- (b) a company limited by guarantee; or
- (c) an unlimited company.

## INCORPORATION OF COMPANY

The Application for incorporation of a company shall be in **SPICe+** (Simplified Proforma for Incorporating company Electronically Plus: INC-32) along with e-Memorandum of Association (e-MOA) in Form No. INC-33 and e-Articles of association (e-AOA) in Form no. INC-34.

In case of incorporation of a company falling under section 8 of the Companies Act, 2013 Form shall be filed with Form No. INC-13 (Memorandum of Association) and Form No. INC-31 (Articles of Association) as attachments.

### Salient Features:

- a. The application for allotment of Director Identification Number(DIN) up to three Directors, reservation of a name, incorporation of company and appointment of Directors of the proposed company shall be filed in **SPICe+** with the Registrar having jurisdiction of proposed office along with the additional fee of rupees five hundred.
- b. The promoter or applicant of the proposed company shall propose only one name in form **SPICe+**. The subscribers and witness or witnesses shall affix their digital signatures to the e-MoA and e- AoA.
- c. A company using the above form and provisions may furnish verification of its registered office by filing **SPICe+** alongwith the documents specified.
- d. The **Certificate of Incorporation** of company shall be issued by the Registrar of Companies in **Form No. INC-11."**
- e. **Declaration** in the prescribed form by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of the Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with;
- f. **Directors, if any, in the articles that he is not convicted of any offence** in connection with the promotion, formation or management of any company, or that 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 preceding five years 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.





The application for incorporation of a company shall be accompanied by e-form AGILE-PRO-S (INC-35) containing an application for registration of the following matters, namely:-

- (a) GSTIN
- (b) EPFO
- (c) ESIC
- (d) Profession Tax Registration
- (e) Opening of Bank Account
- (f) Shops and Establishment Registration.

### SHARE CAPITAL

Share is a share in the share capital of the company, and includes stock except where a distinction between stock and shares is expressed or implied. Share capital refers to the funds that a company raises in exchange for issuing an ownership interest in the company in the form of shares. Share capital may also describe the number and types of shares that compose a company's share structure.

**In Company Law, Capital is the share capital of a company, which is classified as:**

**Nominal, Authorized or Registered Capital:** Such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.

**Issued Capital:** Such capital as the company issues from time to time for subscription. It is that part of the authorised or nominal capital which the company issues for the time being for public subscription and allotment. This is computed at the face or nominal value.

**Subscribed Capital:** Such part of the capital which is for the time being subscribed by the members of a company. It is that portion of the issued capital at face value which has been subscribed for or taken up by the subscribers of shares in the company. It is clear that the entire issued capital may or may not be subscribed.



**Called-up Capital:** Such part of the capital, which has been called for payment. It is that portion of the subscribed capital which has been called up or demanded on the shares by the company.

**Paid-up Share Capital:** Such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called.

**Equity Share Capital:** equity share capital with reference to any company limited by shares, means all share capital which is not preference share capital.

**Preference Share Capital:** preference share capital with reference to any company limited by shares, means that part of the issued share capital of the company which carries or would carry a preferential right with respect to—

- (a) payment of dividend,
- (b) repayment, in the case of a winding up

## BOARD OF DIRECTORS

The company is an artificial person and is managed by the human beings. The people who run it are known as Board of Directors. Directors acting collectively are known as Board. The directors play a very important role in the day-to-day functioning of the company. It is the board, who is responsible for the company's overall performance.

As per Section 149 of the Companies Act, 2013, the Board of Directors of every company shall consist of individual only. Thus, no body corporate, association or firm shall be appointed as director.

Section 149(1) of the Companies Act, 2013 requires that every company shall have a minimum number of 3 directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company. A company can appoint maximum 15 fifteen directors. However, a company may appoint more than fifteen directors



after passing a special resolution in general meeting. The restriction of maximum number of directors shall not apply to section 8 companies.

Section 149(3) provides that every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

The proviso to Section 149(1) requires that a certain class of prescribed companies shall have at least one-woman director.

### **Appointment of Directors**

Section 152 of the Companies Act, 2013 provides that where there is no provision made in Articles of Association of the company for appointment of first directors then the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed by the member. Every director shall be appointed by the company in general meeting.

A person shall not be appointed as a director of a company unless he has been allotted the Director Identification Number or any other number. Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number or such other number as may be prescribed and a declaration that he is not disqualified to become a director under the Act.

A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within thirty days of his appointment.

### **Retirement by Rotation**

- (a) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall—
1. be persons whose period of office is liable to determination by retirement of directors by rotation; and



- II. one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.
- III. The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.
- IV. At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.
- V. The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

#### **Note:**

Companies Act empowers the Board, if so authorized by its articles or by a resolution passed by the company in general meeting, to appoint a director (termed as 'alternate director') to act in the absence of a original director during his absence for a period of not less than three months from India.

#### **Removal of Directors**

- (i) A company may, by ordinary resolution, remove a director, not being a director appointed by the National Company Law Tribunal, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.
- (ii) An independent director re-appointed for second term shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.
- (iii) A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.



- (iv) A vacancy created by the removal of a director may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed.
- (v) A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.

### MEETINGS OF THE BOARD

Companies Act, 2013, mandates a company to hold minimal number of meetings of the Board for its proper functioning. Board meetings are crucial for a company's development as the because of the reason that in these formal meetings are held to devise policies, drive the management, strategize and evaluate the expectations of the stakeholders.

Companies Act provides that the first Board meeting should be held within thirty days of the date of incorporation. Thereafter there shall be minimum of four Board meetings every year and not more one hundred and twenty days shall intervene between two consecutive Board meetings.

In case of One Person Company (OPC), small company, dormant company at least one Board meeting should be conducted in each half of the calendar year and the gap between two meetings should not be less than Ninety days. However, this provision would not apply to a one person company in which there is only one director on its Board. Board of Directors of Section 8 Company shall hold at least one meeting within every six calendar months.

Directors may participate in the meeting either in person or through video conferencing or other audio-visual means. One third of total strength or two directors, whichever is higher, shall be the quorum for a meeting.

### SHAREHOLDERS MEETINGS

A meeting may be generally defined as a gathering or assembly or getting together of a number of persons for transacting any lawful business. There must be at least two persons to constitute a meeting. Therefore, one shareholder usually cannot constitute a company meeting even if he



holds proxies for other shareholders. However, in certain exceptional circumstances, even one person may constitute a meeting.

It is to be noted that every gathering or assembly does not constitute a meeting. Company meetings must be convened and held in perfect compliance with the various provisions of the Companies Act, 2013 and the rules framed thereunder. A general meeting is a meeting of the members of the company. The decision making powers of a company are vested in the members and the directors. They exercise their respective powers through Resolutions passed by them. General meetings of the members provide a platform to express their will in regard to the management of the affairs of the company.

Annual general meeting (AGM) is an important annual event where members get an opportunity to discuss the activities of the company. Convening of one such meeting every year is compulsory. Annual general meeting should be held once in each calendar year. Subsequent annual general meeting of the company should be held within 6 months from the date of closing of the relevant financial year. The gap between two annual general meetings shall not exceed 15 months.

An annual general meeting can be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday. It should be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated. However, annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by all the members in advance. The Central Government is empowered to exempt any company from these provisions, subject to such conditions as it may impose.

According to Section 102(2)(a) in the case of an annual general meeting, all business to be transacted thereat shall be deemed special, other than—

- (i) The consideration of financial statements and the reports of the Board of Directors and auditors;
- (ii) The declaration of any dividend;





- (iii) The appointment of directors in place of those retiring;
- (iv) The appointment of, and the fixing of the remuneration of, the auditors; and

Further, Section 102(2) (b) provides that in the case of any other meeting, all business shall be deemed to be special.

Section 99 of the Companies Act provides that if any default is made in complying or holding a meeting of the company, the company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in case of continuing default, with a further fine which may extend to five thousand rupees for each day during which such default continues.

### CORPORATE SOCIAL RESPONSIBILITY

Section 135(1) of the Companies Act, 2013, every company:

- a. having net worth of rupees five hundred crore or more, or
- b. turnover of rupees one thousand crore or more or
- c. net profit of rupees five crore or more during the immediately preceding 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

- (a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company in areas or subject, specified in Schedule VII;
- (b) recommend the amount of expenditure to be incurred on the activities; and
- (c) monitor the Corporate Social Responsibility Policy of the company from time to time.

The Board of every company referred to in section 135(1) of the Companies Act, 2013 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 or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

In case the unspent amount does not relate to any ongoing project, unspent amounts to be transferred to a Fund specified under Schedule VII within a period of six months of the expiry of the financial year.

In case the unspent amount relates to any ongoing project subject to fulfilling of prescribed conditions, unspent amounts to be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account.

Such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

#### **Penal provisions for non-compliances are as under:**

The company – liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less.

Every officer of such company who is in default – liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.

**Activities which may be included by companies in their Corporate Social Responsibility Policies Activities relating to:**



- i. Eradicating hunger, poverty and malnutrition, “promoting health care including preventive health care” and sanitation including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation and making available safe drinking water;
- ii. promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and the differently abled and livelihood enhancement projects;
- iii. promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
- iv. ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga;
- v. protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts;
- vi. measures for the benefit of armed forces veterans, war widows and their dependents, Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows;
- vii. training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;
- viii. contribution to the prime minister’s national relief fund or Prime Minister’s Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) or any other fund set up by the central govt. for socio economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women;
- ix.
- (a) Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and



- (b) Contributions to public funded Universities; Indian Institute of Technology (IITs); National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs).]
- (xi) rural development projects;
- (xii) slum area development;
- (xiii) disaster management, including relief, rehabilitation and reconstruction activities.

### BUSINESS ETHICS

Business ethics is nothing but the application of ethics in business. Business ethics is the application of general ethical ideas to business behaviour. Ethical business behavior facilitates and promotes good to society, improves profitability, fosters business relations and employee productivity. The concept of business ethics has come to mean various things to various people, but generally it's coming to know what is right or wrong in the workplace and doing what's right - this is in regard to effects of products/ services and in relationships with stakeholders. Business ethics is concerned with the behaviour of a businessman in doing a business. Unethical practices are creating problems to businessman and business units. The life and growth of a business unit depends upon the ethics practiced by a businessman. Business ethics are developed over the passage of time and custom. A custom differs from one business to another. If a custom is adopted and accepted by businessman and public, that custom will become an ethic. Business ethics is applicable to every type of business. The social responsibility of a business requires the observing of business ethics. A business man should not ignore the business ethics while assuming social responsibility.



Business ethics means the behaviour of a businessman while conducting a business, by observing morality in his business activities. According to Wheeler, Business Ethics is an art and science for maintaining harmonious relationship with society, its various groups and institutions as well as reorganizing the moral responsibility for the rightness and wrongness of business conduct.

The principles of business ethics developed by well-known authorities are as follows:

1. **Sacredness of means and ends:** The first and most important principle of business ethics emphasizes that the means and techniques adopted to serve the business ends must be sacred and pure. It means that a good end cannot be attained with wrong means, even if it is beneficial to the society.
2. **Not to do any evil:** It is unethical to do a major evil to another or to oneself, whether this evil is a means or an end.
3. **Principle of proportionality:** This principle suggests that one should make proper judgment before doing anything so that there is a fair view taken & others do not suffer from any loss or risk of evils by the conduct of business.
4. **non-co-operation in evils:** It clearly pints out that a business should not co-operate with any one for doing any evil acts.
5. **Co-operation with others:** This principles state that business should help others only in that condition when others deserve help.
6. **Publicity:** According to W. Wilson, anything that is being done or to be done, should be brought to the knowledge of everyone. If everyone knows, none gets opportunity to do an unethical act.
7. **Equivalent price:** According to W. Wilson, the people are entitled to get goods equivalent to the value of money that they will pay.



8. Universal value: According to this principle the conduct of business should be done on the basis of universal values.
9. Human dignity: As per this principle, man should not be treated as a factor of production and human dignity should be maintained.
10. Non-violence: If businessman hurts the interests and rights of the society and exploits the consumer by overlooking their interests this is equivalent to violence and unethical act.

### ETHICAL DILEMMA

Dilemma is a situation that requires a choice between options that are or seem equally unfavorable or mutually exclusive. By definition, an ethical dilemma involves the need to choose from among two or more morally acceptable courses of action, when one choice prevents selecting the other; or, the need to choose between equally unacceptable alternatives

A dilemma could be a right vs. wrong situation in which the right would be more difficult to pursue and wrong would be more convenient. A right versus wrong dilemma is not so easy to resolve. It often involves an apparent conflict between moral imperatives, in which to obey one would result in transgressing the other. This is also called an ethical paradox.

An ethical dilemma involves a situation that makes a person question what is the 'right' or 'wrong' thing to do. They make individuals think about their obligations, duties or responsibilities. These dilemmas can be highly complex and difficult to resolve. Easier dilemmas involve a 'right' versus 'wrong' answer; whereas, complex ethical dilemmas involve a decision between a right and another right choice. However, any dilemma needs to be resolved.



## Lesson 5 LEGAL REASONING

### LEGAL TERMINOLOGY AND MAXIMS

Sr.No.	Maxim	Meaning
1.	<i>A priori</i>	<i>From the antecedent to the consequent.</i>
2.	<i>Ab initio</i>	<i>From the beginning</i>
3.	<i>Absolute sentential expositore non-indigent</i>	<i>Plain words require no explanation</i>
4.	<i>Actio mixta</i>	<i>Mixed action.</i>
5.	<i>Actio personalis moritur cum persona</i>	<i>A personal right of action dies with the person</i>
6.	<i>Actionable per se</i>	<i>The very act is punishable and no proof of damage is required</i>
7.	<i>Curiae Neminem Gravabit</i>	<i>Act of the Court shall prejudice no one</i>
8.	<i>Actus non facit reumnisi mens sit rea</i>	<i>An act does not make a man guilty unless there be guilty intention.</i>
9.	<i>Actus reus</i>	<i>Wrongful act</i>
10.	<i>Ad hoc</i>	<i>For the particular end or case at hand</i>
11.	<i>Ad idem</i>	<i>At the same point</i>
12.	<i>Ad valorem</i>	<i>According to value</i>
13.	<i>Aliunde</i>	<i>From another source</i>
14.	<i>Amicus Curiae</i>	<i>A friend of court member of the bar who is appointed to assist the Court</i>
15.	<i>Animus possidendi</i>	<i>Intention to possess</i>
16.	<i>Audi alteram partem</i>	<i>Hear the other side</i>
17.	<i>Benami</i>	<i>Nameless.</i>
18.	<i>Bona fide</i>	<i>Good faith; genuine</i>
19.	<i>Caveat</i>	<i>A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator</i>
20.	<i>Caveat emptor</i>	<i>Let the buyer beware</i>



21.	<i>Caveat actor</i>	<i>Let the doer beware</i>
22.	<i>Caveat venditor</i>	<i>Let the seller beware</i>
23.	<i>Certiorari</i>	<i>A writ by which records of proceeding are removed from inferior courts to High Court and to quash decision that goes beyond its jurisdiction</i>
24.	<i>Cestui que trust</i>	<i>The person who has the equitable right to property in India he is known as beneficiaries</i>
25.	<i>Consensus ad idem</i>	<i>Common consent necessary for a binding contract</i>
26.	<i>Contemporanea exposition est optima et fortissima lege</i>	<i>A contemporaneous exposition or language is the best and strongest in Law</i>
27.	<i>Corpus delicti</i>	<i>Body/gist of the offence</i>
28.	<i>Cy pres</i>	<i>As nearly as may be practicable</i>
29.	<i>Damnum sine injuria</i>	<i>Damage without injury</i>
30.	<i>De facto</i>	<i>In fact</i>
31.	<i>De jure</i>	<i>By right (opposed to de facto) in Law</i>
32.	<i>Dehors</i>	<i>Outside; foreign to (French term)</i>
33.	<i>De novo</i>	<i>To make something new; To alter</i>
34.	<i>Dies non</i>	<i>Day on which work is not performed</i>
35.	<i>Deceit</i>	<i>Anything intended to mislead another</i>
36.	<i>Del credere agent</i>	<i>is a mercantile agent who in consideration of extra remuneration called a del credere commission undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts.</i>
37.	<i>Delegate potestas non potest delegari</i>	<i>A delegated power cannot be delegated further</i>
38.	<i>Delegatus non potest delegare</i>	<i>A delegate cannot delegate</i>
39.	<i>Dictum</i>	<i>Statement of law made by judge in the course of the decision but not necessary to the decision itself.</i>

40.	Dispono	Convey legally
41.	Ejusdem generis	Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.
42.	Estoppel	Stopped from denying
43.	Ex parte	Proceedings in the absence of the other party
44.	Expressio unius est exclusio alterius	Express mention of one thing implies the exclusion of another or which is shortly put
45.	Ex turpi causa non oritur actio	No action arises from an illegal or immoral cause
46.	Fatum	Beyond human foresight
47.	Fait accompli	Things done and no longer worth arguing against; an accomplished act
48.	Factum probandum	Fact in issue which is to be proved
49.	Factum probans	Relevant fact
50.	Ferae naturae	Dangerous by nature
51.	Force majeure	Circumstance beyond one's control, irresistible force or compulsion
52.	Generalia specialibus non derogant	General things do not derogate from special
53.	Habeas corpus	A writ to have the body to be brought up before the judge
54.	Ignorantia legis neminem excusat	Ignorance of law excuses no one
55.	Injuria sine damno	Injury without damage.
56.	Interest reipublicae ut sit finis litium	State or public interest requires that there should be a limit to litigation.
57.	Ipso facto	By the very nature of the case
58.	In prompt	In readiness

59.	<i>In posse</i>	<i>In a state of possibility</i>
60.	<i>In limine</i>	<i>Initial stage; at the outset</i>
61.	<i>In lieu of</i>	<i>Instead of</i>
62.	<i>Inter alia</i>	<i>Among other things</i>
63.	<i>Inter se</i>	<i>Among themselves</i>
64.	<i>In specie</i>	<i>In kind</i>
65.	<i>Inter vivos</i>	<i>Between living persons</i>
66.	<i>Intra vires</i>	<i>Within the powers</i>
67.	<i>In personam</i>	<i>A proceeding in which relief is sought against a specific person</i>
68.	<i>Indicia</i>	<i>A symbol; token; mark</i>
69.	<i>Innuendo</i>	<i>Allusive remark</i>
70.	<i>Jus in personam</i>	<i>Right against a person</i>
71.	<i>Jus in rem</i>	<i>Right against the world at large</i>
72.	<i>Jus non scriptum</i>	<i>Unwritten law; Customary Law</i>
73.	<i>Jus scriptum</i>	<i>Written Law</i>
74.	<i>Lex Mercatoria</i>	<i>The law merchant, is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the common law, afterwards became incorporated into it</i>
75.	<i>Lex fori</i>	<i>The law of the forum of court</i>
76.	<i>Lis</i>	<i>A suit cause of action</i>
77.	<i>Lis pendens</i>	<i>A pending suit</i>
78.	<i>Locus standi</i>	<i>Right of a party to an action to appear and be heard on the question before any tribunal</i>
79.	<i>Mala fide</i>	<i>In bad faith</i>
80.	<i>Mandamus</i>	<i>A writ of command issued by a Higher Court to a Lower Court/Government/Public Authority</i>
81.	<i>Mens rea</i>	<i>Guilty mind</i>
82.	<i>Manesuetae natureae</i>	<i>Harmless by nature</i>

83.	Mesne profits	The rents and profits which a trespasser has received/made during his occupation of premises.
84.	Misnomer	A wrong name
85.	Mutatis-mutandis	With necessary changes in points of detail
86.	Noscitur a sociis	A word is known by its associated, one is known by his companions
87.	Obiter dictum	An incidental opinion by a judge which is not binding
88.	Onus Probandi	Burden of proof.
89.	Pari passu	On equal footing or proportionately
90.	Per se	By itself taken alone
91.	Persona non-grata	Person not wanted
92.	Per incuriam	Through want of care; through inadvertence
93.	Prima facie	At first sight; on the face of it
94.	Profit a prendre	A right for a man in respect of his tenement
95.	Pro bono publico	For the public good.
96.	Pro forma	As a matter of form
97.	Pro rata	In proportion
98.	Posteriori	From the consequences to the antecedent
99.	Puisne mortgage	Second mortgage
100.	Pari causa	Similar circumstances, with equal right
101.	Pari materia	Relating to same person or thing
102.	Qui facit per alium facit per se	He who acts through another is acting by himself
103.	Quo warranto	A writ calling upon one to show under what authority he holds or claims an office
104.	Quia timet	Protective justice for fear. It is an action brought to prevent a wrong that is apprehended
105.	Quid pro quo	Something for something
106.	Ratio decidendi	Principle or reason underlying a decision

107.	<i>Res judicata</i>	A decision once rendered by a competent court on a matter in issue between the parties after a full enquiry should not be permitted to be agitated again
108.	<i>Res ipsa loquitur</i>	The things speak for itself
109.	<i>Respondent superior</i>	Let the principal be liable
110.	<i>Res sub judice</i>	Matter under consideration
111.	<i>Res gestae</i>	Facts relevant to a case and admissible in evidence
112.	<i>Rule nisi</i>	A rule which will become imperative and final unless cause to be shown against it
113.	<i>Scire facias</i>	Your cause to know.
114.	<i>Status quo</i>	The existing state of things at any given date
115.	<i>Scientiet volenti non fit injuria</i>	Injury is not done to one who knows and wills it
116.	<i>Spes successionis</i>	Chance of a person to succeed as heir on the death of another.
117.	<i>Supra</i>	Above; this word occurring by itself in a book refers the reader to a previous part of the book.
118.	<i>Suppressio veri</i>	Suppression of previous knowledge
119.	<i>Sui juris</i>	Of his own right
120.	<i>Simpliciter</i>	Simply; without any addition
121.	<i>Scienter</i>	Being aware of circumstances, the knowledge of which is necessary to make one liable, as applied to the keeper of a vicious dog, means no more than reasonable cause to apprehend that he might commit the injury complained of
122.	<i>Sine qua non</i>	An indispensable condition
123.	<i>Situs</i>	Position; situation; location
124.	<i>Suo motu</i>	On its own motion
125.	<i>Stare decisis</i>	Precedent. Literally let the decision stand
126.	<i>Sine die</i>	Without a day being appointed
127.	<i>Travaux preparatoires</i>	Preparatory records
128.	<i>Tortum</i>	Civil wrong actionable without contract
129.	<i>Uberrimae fide</i>	Of utmost good faith.



130.	Ubi jus ibi remedium	Where there is a right there is remedy
131.	Ultra vires	Beyond the scope, power or authority
132.	Ut lite pendent nihil innovertur	Nothing new to be introduced during litigation
133.	Usufructuary	One who has the use and reaps the profits of property, but not ownership.
134.	Ut res magis valeat quam pereat	The words of a statute must be construed so as to give a sensible or reasonable meaning to them
135.	Vis major	Act of God
136.	Vigilantibus, non dormientibus, iura subveniunt	The laws help those who are vigilant and not those who are slumber or lazy
137.	Vice versa	The order being reversed; other way round
138.	Volenti non fit injuria	Damage suffered by consent gives no cause of action.

### LEGAL REASONING

- Legal reasoning is the method that a person uses to apply laws to facts in order to answer legal questions.
- Good legal reasoning requires logical argument. In legal reasoning, legal principles have to be applied to the given factual situations to arrive at the most reasonable conclusion.
- The meaning of a legal rule and how it should be applied are often subject to multiple interpretations.
- When the meaning of a legal rule is ambiguous, a person uses legal reasoning to argue for the interpretation that they find most convincing or that is most favorable to him.

Derive a conclusion from given statements provided in question, and no deviation from it is allowed.

Questions in the Legal Reasoning may be asked mainly from the following areas:—

- (A) Indian Constitution
- (B) Indian Contract Act



(C) Law of Torts

(D) Element of Company Law

1. **Legal Principle:** All citizens shall have the right to freedom of speech and expression under Article 19 of the Constitution of India and it is a Fundamental Right.

**Factual Situation:** Mr. Sinha a famous English writer and orator criticized another novelist, Mr. Rahul stating that: "The novel of Mr. Rahul is irrational and indecent, his mind is impure, he is a loose character, he should write decent and good novel."

**Decide**

Can Mr. Rahul be sued for defamation?

(a) He is not liable because he has just expressed his personal views

(b) He is liable to be sued for defamation if his statement, was not true or said in mala fide intention

(c) He cannot be liable because he has fundamental right to freedom of speech and expression

(d) He cannot be sued, because both are writer and novelists and both can criticize each other.

2. **Legal Principle:** Every citizen of India has a fundamental right to carry on any trade or business or profession of his choice subject to the imposition of reasonable restrictions by the State.

**Factual Situation:** In pursuance of an order passed by the Institute of Company Secretary of India (ICSI), prohibit a person from Practice the profession of Company Secretary unless such person passed the Company Secretary ship Course and hold a certificate of practice from the ICSI. Mr. Manoj, a Executive Programme passed student of Company Secretary ship Course challenges the ban as it violates his right to carry his profession.

**Decide**

(a) Institute of Company Secretary of India (ICSI) has a superior right to ban.

(b) The ban is justified, as the right of Mr. Manoj to carry his profession is not absolute

(c) The ban is not justified, as the Institute of Company Secretary of India (ICSI) cannot



deprive any person of his right to carry on his profession

(d) None of the above.

3. **Legal Principle:** A contract is an agreement which the law will enforce. all agreements are contracts if they are made with free consent by parties competent to contract for a lawful consideration and with a lawful object.

**Factual Situation:** Mr. Raja offered to buy Mr. Ram's Car for Rs. 5 lakhs but Mr. Ram refused. Subsequently, Mr. Raja threatened to kill Mr. Ram and Mr. Ram agreed to the sale. Mr. Ram subsequently rescinded from the contract.

Mr. Raja suit to enforce the contract—

**Decide**

- (a) Will succeed because Mr. Raja was offering lawful consideration for the car
- (b) Will succeed because buying and selling of car is lawful
- (c) Will succeed because both parties have capacity to contract
- (d) Will fail because Mr. Ram was forced to agree to the contract.

4. **Legal Principle:** A contract is an agreement which the law will enforce. All agreements are contracts if they are made with free consent by parties competent to contract for a lawful consideration and with a lawful object.

**Factual Situation :** Mr. Joy a young boy of 27 years without any consideration agrees to give Ms. Jooly Rs. 10, 000/-. Mr. Joy fails to fulfil his promise. Ms. Jooly sues Mr. Joy for the amount.

**Decide**

- (a) Ms. Jooly will succeed as Mr. Joy made the promise of his own free will
- (b) Ms. Jooly will fail as the agreement is without consideration
- (c) Ms. Jooly will succeed as Mr. Joy has the capacity to make the contract
- (d) Ms. Jooly will succeed as the money is not being paid for any illegal object.



5. **Legal Principle:** Constitution of India empowers the President of India to appoint the Judge of the High Courts and Supreme Court.

**Factual Situation:** There is a deadlock between the Council of Minister including Prime Minister of India and the President of India. President of India appointed Mr. Adarsh as the Justice of Supreme Court of India and Mr. Garg appointed as Judge of Delhi High Court by the Prime Minister of India.

**Decide**

- (a) Appointment of Mr. Garg is valid in the eyes of law
- (b) Appointment of Mr. Adarsh is valid as per the Constitution of India
- (c) Appointment of Mr. Adarsh and Mr. Garg void abinitio
- (d) None of the above.

6. **Legal Principle:** A violation of a legal Right, with or without damage, gives rise to a tort.

**Factual Situation:** Mr. Ketan establishes a coaching class for Company Secretary Students of Executive Programme and charges Rs.10, 000/- per year as tuition fees. Mr. Ketan's neighbour Mr. Kalia establishes another coaching class for Company Secretary Students of Executive Programme thereby creating a competition between them. This forces Mr. Ketan to reduce his tuition fees to Rs. 7000/- per year.

**Decide**

Can Mr. Ketan claim damages from Mr. Kalia for the loss caused to him?

- (a) Yes, he can as Mr. Kalia has violated his Legal Right
- (b) No, Mr. Ketan has reduced the fees on his own
- (c) No, because though, there was damage there was no legal injury
- (d) None of the above.



7. **Legal Principle:** Company means a company incorporated under the Companies Act, 2013, or under any previous company law.

**Factual Situation:**

- (i) ABC Limited is incorporated under the Companies Act, 1956;
- (ii) ABC LLP incorporated under Limited Liability Partnership Act, 2008;
- (iii) ABC & Co registered under Partnership Act, 1832 and
- (iv) ABC Charitable Trust established under Trust Act, 1882.

**Decide**

Which of the above entity as mentioned in factual situation is a company?

- a) ABC Limited
- b) ABC LLP
- c) ABC & Co
- d) ABC Charitable Trust

8. **Legal Principle:** A master shall be responsible for the wrongful acts of his servants in the course of his employment.

**Factual Situation:** ABC Limited is a Non-Banking Financial Company (NBFC) is registered with Reserve Bank of India to accept deposit from public. Mr. Shyam appointed as authorised agent by ABC Limited to collect deposit money from several people on daily basis. Mr. Shyam, collecting deposits from people on daily basis. One day he disappeared. One Ms. Shyamlee, who had been handing over her deposit money to Mr. Shyam found that nearly for a month before his disappearance, he was not depositing her money at all. Ms. Shyamlee when approached the ABC Limited, the NBFC took the stand that Mr. Shyam was not its employee, he is his agent and therefore, ABC Limited is not responsible for his misconduct. Ms. Shyamlee files a suit against the ABC Limited.

**Decide**

Who is liable?



- (a) ABC Limited
- (b) Mr. Shyam
- (c) Ms. Shyamlee
- (d) None of the above.

9. **Legal Principle:** The members of both Lok Sabha and Rajya Sabha are eligible to be Ministers of the Union Government.

**Factual Situation:** Mr. Ram Singh is sitting member of Upper House of Parliament and as Recommendations of Prime Minister of India, President of India appointed Mr. Ram Singh as Minister for the Ministry of Education.

**Decide**

Appointment of Mr. Ram Singh as Minister for the Ministry of Education is valid?

- (a) Yes
- (b) No
- (c) President of India cannot be appointed
- (d) Prime Minister of India cannot be recommended

10. **Legal Principle:** Tort is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.

**Factual Situation:** Mr. Sunil has six pet dogs which are very ferocious and bark a lot. Mr. Surendra is his next door neighbor and feels that he is not able to enjoy his property due to the presence of a large number of dogs in the adjacent house. He is contemplating initiating a legal action against Mr. Sunil. Mr. Surendra can:

**Decide**

- (a) Initiate action for breach of contract against Mr. Sunil as there is an implied contract between the neighbours.





- (b) Initiate action for unliquidated damages under torts because there is no contract between the neighbours.
- (c) Initiate criminal action against Mr. Sunil because having a large number of ferocious dogs is a criminal act.
- (d) Not be successful as Mr. Sunil has an unrestricted right to enjoy his personal property and has no duty towards Mr. Surendra.

11. **Legal Principle:** Causing damage, however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff.

**Factual Situation:** Mr. Nandan opened a petrol pump next to earlier existing petrol pump of Mr. Chandan as a result of which Mr. Chandan suffered huge losses. Mr. Chandan wants to initiate action against Mr. Nandan for the losses suffered. He will

**Decide**

- (a) Succeed because he has suffered losses because of Mr. Nandan.
- (b) Fail because no legal right of Mr. Chandan was infringed.
- (c) Succeed because Mr. Nandan was wrong in opening a petrol pump next to already existing one.
- (d) Succeed because Mr. Chandan is entitled to earn reasonable profit on his investments.

12. **Legal Principle:** Even where there is infringement of a legal right which does not result in harm, plaintiff can still sue in tort.

**Factual Situation:** Cattle owned by Mr. Vinay entered the fields of Mr. Vipin and roamed about freely for considerable time without causing any kind of loss to Mr. Vinay. Mr. Vinay did not like Mr. Vipin and thought of imitating legal action against him using this opportunity. Mr. Vinay will:

**Decide**

- (a) Fail because he did not suffer any monetary loss.
- (b) Fail because he did not suffer any infringement of his legal right.



- (c) Succeed because his legal right was infringed.
- (d) Fail because he initiated the legal action because of his dislike for the defendant.

13. **Legal Principle:** Normally, the tort-feasor is liable for his tort but in some cases a person may be held liable for the tort committed by another.

**Factual situation:** Mr. Rahul's car was being driven by his driver when it hit a pedestrian as a result of which the pedestrian suffered heavy injuries. He brought a legal action against Mr. Rahul because the car belonged to him and the driver was employed by him. The legal action of the pedestrian against Mr. Rahul will:

**Decide**

- (a) Fail because Mr. Rahul had nothing to do with the accident.
- (b) Succeed because responsibility in such cases is imputed by law on grounds of social policy or expediency.
- (c) Succeed because a master is always liable for the acts of his or her servant.
- (d) Fail because it was the duty of the driver to be careful while driving.

14. **Legal Principle:** The defendant is liable if he makes a non-natural use of land.

**Factual Situation:** Mr. Kundan had stored chemicals on his land which escaped and caused damaged to the adjacent properties one of which belonged to Mr. Ankit. Mr. Ankit is

**Decide**

- (a) Fail because Mr. Kundan had stored chemicals on his own property.
- (b) Succeed because storing chemicals is a non-natural use of land.
- (c) Fail because storing chemicals is a natural use of land.
- (d) Fail because Mr. Ankit should have taken adequate precautions against the chemicals.



15. **Legal Principle:** Absolute or strict liability are exceptions to the requirement of mens rea.

**Factual Situation:** B, a mill owner employed independent contractors, who were apparently competent to construct a reservoir on his land to provide water for his mill. There were old disused mining shafts under the site of the reservoir which the contractors failed to observe because they were filled with earth. The contractors therefore, did not block them. When the water was filled in the reservoir, it bursts through the shafts and flooded the plaintiff's coal mines on the adjoining land. It was found as a fact that B did not know of the shafts and had not been negligent.

**Decide**

- (a) Even though the independent contractors had been negligible, B will be held liable for the losses suffered by the plaintiff.
- (b) B will be held liable for the losses suffered by the plaintiff only if B was negligent and not otherwise.
  - Independent contractors would be liable to the plaintiff as there is privity of contract between them.
- (c) Neither B nor the independent contractors would be held liable as there was no guilty mind at work.

16. **Legal Principle:** Consent of the Plaintiff is an exception to the rule of Strict liability.

**Factual Situation:** Mr. Jagdish was subjected to a risk owing to a defect in the machinery at the factory at which he was employed. He complained of this to the person who had the general management of the business, but was told nevertheless to go on with his work. He did so and sustained the injury for which he brought his action against the factory.

**Decide**

- (a) The suit will fail because it must be assumed Mr. Jagdish had assented to take upon himself the risk.
- (b) The suit will succeed because Mr. Jagdish had highlighted the risk to the Factory management and his refusal to work might have led to his termination.



- (c) The suit will fail because Mr. Jagdish should have stopped working at the factory if the management had refused to address his concerns regarding safety.
- (d) The suit will succeed because in a suit between an employer and an employee, the employee is favoured because he/ she is generally poor.

17. **Legal Principle:** For the tort committed by a partner in the ordinary course of the business of the firm, all the other partners are liable to the same extent as the guilty partner.

**Factual Situation:** A, B and C ran a Chartered Accountancy firm in partnership. In order to solicit work from a big bank, A, one of the three partners bribed the Bank's senior manager and induced him to hand over the audit work to their firm.

**Decide**

- (a) All the partners are liable for the tort committed by only one of them.
- (b) Only the partner who paid the bribe is liable.
- (c) Whether or not all partners are liable would depend on the fact whether B and C had knowledge of bribe or not.
- (d) The liability of B and C would be established only if they had given their written consent to A to bribe the bank official.

18. **Legal Principle:** The State can claim immunity from the tortious liability only in the cases of sovereign function, otherwise not.

**Factual Position:** Chandra and his father Gopal were lodged in a jail, wherein one day bombs were hurled at them by their rivals, causing the death of Gopal and injuries to Chandra. The victims were having previous knowledge of the impending attack, which they conveyed to the authorities, but no additional security was provided to them. On the contrary, there was gross negligence since there was a great relaxation in the number of police men who were to guard the jail on that fateful day. Thus, on the grounds of negligence a suit was filed by Chandra against the Government. The suit will

**Decide**

- (a) Succeed because there was gross negligence on part of the State.
- (b) Fail because maintain jail facilities is part of the sovereign function of the State.
- (c) Succeed because securing law and order is not a sovereign function of the State.
- (d) Fail because the State cannot be held responsible in any way if people lose life because of their personal rivalries even in facilities maintained and operated by the State.

19. **Legal Principle:** Under Article 12, unless the context otherwise requires, "the State" includes—

- a) the Government and Parliament of India;
- b) the Government and Legislature of each of the States; and
- c) all local or other authorities;
- d) within the territory of India; or
- e) under the control of the Government of India.

**Factual Situation:** Mr. Arvind is employed with Oil and Natural Gas Corporation (ONGC). He faces discrimination at work at the hands of the Management and thinks that his right to equality is violated. He contemplates moving a writ petition against ONGC but his colleague suggests that Mr. Arvind will not succeed because ONGC is not 'State'.

**Decide**

- (a) ONGC is 'State' as per Article 12 of the Constitution.
- (b) ONGC is not 'State' as per Article 12 of the Constitution.
- (c) Mr. Arvind will not succeed because a writ cannot be brought against a Company.
- (d) ONGC is not 'State' because its shares are listed in the stock market.

20. **Legal Principle:** No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence.

**Factual Situation:** Ms. Chandni had an altercation with her classmate in her college and in the heat of the moment she hurled a racist abuse at her classmate and her classmate was deeply offended by it. Ms. Chandni had later apologized for it. In the next few months, a law was passed



which made racist abuse punishable. Aware of the fact that the law of limitation does not apply to criminal acts, she moved an application to the court to initiate criminal action against Ms. Chandni for the racist abuse. The classmate's application will:

**Decide**

- (a) Fail because racist abuse was not punishable when it was hurled.
- (b) Succeed because the law made racist abuse punishable with imprisonment and it is undeniable that Ms. Chandni has hurled that abuse.
- (c) Succeed because law of limitation does not apply to criminal acts.
- (d) Fail because it was not a serious offence and Ms. Chandni had already apologized for it.

21. **Legal Principle:** No person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

**Factual Situation:** A person was accused of cheating and before he was arrested and committed to trial for it, the law relating to cheating was changed and the punishment for it was increased to life imprisonment. The person was found guilty and sentenced to life imprisonment. He decides to challenge his sentence of life imprisonment. He will

**Decide**

- (a) Fail because the punishment for cheating was increased to life imprisonment before his trial began.
- (b) Succeed because the punishment for cheating was not life imprisonment when he committed it.
- (c) Fail because the law does not provide for such leniency to guilty persons.
- (d) Succeed only if he is able to prove his innocence.

22. **Legal Principle:** Parliament can amend any part of the Constitution including the Fundamental Rights but the Parliament cannot alter the basic structure or framework of the Constitution.

**Factual Situation:** The Government of India passed a Constitutional amendment Act which has the effect of curbing the independence of the judiciary. The Act has been challenged in the Supreme Court of India by a group of NGOs and public spirited individuals as being violative



of the Constitution. The challenge will:

**Decide**

- (a) Succeed because any amendment that compromises the independence of the judiciary is unconstitutional.
- (b) Fail because the Parliament has unlimited power to amend the Constitution as per the Kesavananda Bharati judgment.
- (c) Succeed because the amendment was not brought to the Parliament with the consent of the Supreme Court of India.
- (d) Fail because the Supreme Court cannot sit in judgment over a matter that affects its own independence.

23. **Legal Principle:** Directive Principles of State Policy (DPSP) are non-justiciable in nature.

**Factual Situation:** Mr. Sumit works for the protection of cows. He has come to know that in some states slaughtering of cows is permissible under law. He also knows that one of the Directive Principles of State Policy calls upon the State to prohibit cow slaughter. Based on this, Mr. Sumit approaches the Supreme Court of India for getting direction to the states to enact anti-cow slaughtering law. His petition will:

**Decide**

- (a) Succeed because DPSP clearly says that states should take steps to prevent cow slaughter.
- (b) Fail because DPSP cannot be enforced by the Courts.
- (c) Succeed because laws in contravention of DPSP are unconstitutional.
- (d) Fail because only a section of Indian population holds cow as sacred and its views cannot be forced on others.

24. **Legal Principle:** The right of all citizens to practise any profession or to carry on any occupation, trade or business is a Fundamental Right.





**Factual Situation:** Due to a law passed by the Government, even a person with good knowledge of law cannot appear in the Court as lawyer unless he has a law degree from a recognized university and fulfils other mandatory conditions. Due to this Mr. Dinesh is not able to appear in courts and believes that government is denying him of his Fundamental Right to practice any profession or to carry on any occupation, trade or business. He decides to challenge this as a violation of his Fundamental Right. He will

**Decide**


- (a) Succeed because the requirements to be eligible to appear before the Court deny him the opportunity to earn his livelihood.
- (b) Succeed because government cannot abridge Fundamental Rights in any manner under any condition.
- (c) Fail because the Government is well within its rights to prescribe eligibility and other conditions for profession, trade or business.
- (d) Fail because Government has the power to abrogate the Fundamental Rights.

25. **Legal Principle:** Article 14 of the Constitution says that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

**Factual Situation:** Due to the growing menace of terrorism in the country, the Government of India decided to have a new substantive criminal laws for terrorists from other countries. A foreign terrorist captured by the police and subjected to the new law claimed that his rights under Article 14 of the Indian constitution were violated. His claim will:

**Decide**

- (a) Fail because the rights under Article 14 are available only to the citizens of India.
- (b) Fail because the rights under the Article cannot be made available to people who engage in terrorist activities in India.
- (c) Succeed because he is entitled to be subjected to the same laws as any other person charged with the same offence.
- (d) Succeed because once he is captured by the Indian authorities, he acquired all the

	
	<p>Fundamental Rights that are enjoyed by the citizens of India.</p>
<p>26.</p>	<p><b>Legal Principle:</b> The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament.</p>
	<p><b>Factual Situation:</b> During a time when the Lok Sabha was not in session the President of India promulgated an ordinance on a matter which was not very urgent. A non-governmental organization decided to challenge the ordinance as ultra vires the Constitution. His challenge will:</p>
	<p><b>Decide</b></p>
<p>(a)</p>	<p>Succeed because the ordinance is to be promulgated only in urgent matters.</p>
<p>(b)</p>	<p>Fail because the use of the power to promulgate ordinance is left to the discretion of the President.</p>
<p>(c)</p>	<p>Fail because the use of the power to promulgate ordinance is left to the discretion of the Government.</p>
<p>(d)</p>	<p>Succeed because an ordinance can be issued only when both the houses of the Parliament are not in session.</p>
<p>27.</p>	<p><b>Legal Principle:</b> The State shall not make any law which takes away or abridges the rights conferred by Part III and if such a law is made, it shall be void to the extent to which it curtails any such right.</p>
	<p><b>Factual Situation:</b> Right to Property was a Fundamental Right but was abolished as such by a Constitutional amendment. Mr. Gautam decides to challenge the constitutional validity of the amendment. He will</p>
	<p><b>Decide</b></p>
<p>(a)</p>	<p>Succeed because the State cannot make any law which takes away or abridges the rights conferred by Part III.</p>
<p>(b)</p>	<p>Fail because 'law' referred to in the above statement does not apply to Constitutional Amendment Acts.</p>



- (c) Succeed because even constitutional amendments cannot take away Part III rights.  
 (d) Fail because Right to Property was not conferred by Part III.

28. **Legal Principle:** There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

**Factual Situation:** The Lok Sabha general elections in 1996 did not give any party a clear majority and various political parties in their individual capacity and in association with other parties staked claim with the President to form government. The President had to invite one such party or a group to form the government. He was:

**Decide**

- (a) Bound to follow the advice of the outgoing Prime Minister on who should be first called to form the government.  
 (b) Free to exercise his discretion in such a situation.  
 (c) Bound to consult the Chief Justice of India in a situation of no clear majority in favour of a party or an alliance.  
 (d) Bound to invite the single largest party to form the government.

29. **Legal Principle:** An agreement enforceable by law is a contract.

**Factual Situation:** Mr. A and Mr. B, father of a minor boy P and minor girl Q respectively enter into an agreement that they would marry their children P and Q to each other. Mr. B, later refused to honour this agreement. Aggrieved by this, Mr. A decided to sue Mr. B and Ms. Q for breach. Mr. A will:

**Decide:**

- (a) Succeed because Mr. B has refused to fulfil his obligation under the agreement.  
 (b) Fail because the agreement between them is not a contract.  
 (c) Succeed because the agreement between them is a contract.



(d) Fail because Mr. A should have sued Mr. B and Ms. Q together with Mr. P and not alone as Mr. P has also suffered because of the breach.

30. **Legal Principle:** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object.

**Factual Situation:** A was planning to sell his property to B but B was not aware of it. Since B was interested in the property, he threatened to harm the only child of A if A did not enter into an agreement to sell the property to B. The price at which the agreement to sell was agreed upon was much more than the expectation of A or the prevailing market price of the property. Once the agreement was signed, B got to know that A was anyway interested in selling the property to B and at a lower price. A later refused to execute the sale deed and claimed that the contract between the parties was not valid. A will:

**Decide:**

- (a) Fail because there was a valid contract between him and B.
- (b) Succeed because the consent of A for the agreement to sell was not a free consent.
- (c) Fail because in the given facts and circumstances even with the free consent the same transaction would have taken place. A is even better placed because he is receiving a higher price.
- (d) Succeed because there is no lawful object in the contract.

31. **Legal Principle:** A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

**Factual Situation:** Mr. Jamal is a patient in a lunatic asylum who experiences intervals of sound mind. Jamal entered into a contract during such interval of sound mind. On having suffered losses, he challenged the validity of the contract on the ground that he not only was mentally unsound but also lived in lunatic asylum.

**Decide**

- (a) The contract is valid.



- (b) The contract is invalid.
- (c) The contract is voidable at the option of Mr. Jamal.
- (d) The contract is voidable at the option of the opposite party.

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

**Factual Situation:** One of the purposes of the business party was to strike business deals and Mr. Animesh was well aware of it. Still, Mr. Animesh drank so much at the party that he could not understand the terms of a contract, or form a rational judgment as to its effect on his interests. He still went ahead and entered into a few contracts at the party. One of such agreements had very oppressive terms and conditions for Mr. Animesh and therefore he challenges the validity of the contract. He will:

**Decide**

- (a) Fail because he knew the purpose of the business party and should have behaved more responsibly.
- (b) Succeed because he was temporarily of unsound mind because of his drunk state.
- (c) Fail because being drunk even to the extent of not being able to understand the terms of the contract cannot be considered as 'unsound mind'
- (d) Succeed because oppressive terms and conditions in the contract show that it could have been agreed to only by a person of unsound mind.

33. **Legal Principle:** 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.

**Factual Situation:** Mr. Ashwini having advanced money to his son, Bhuvan, during his minority, upon Bhuvan's coming of age obtains, by misuse of parental influence, a bond from Bhuvan for a greater amount than the sum due in respect of the advance.

**Decide**

- (a) Ashwini employed undue influence.
- (b) Ashwini did not employ undue influence.
- (c) Father and son cannot ever enter into a valid contract.
- (d) Ashwini employed coercion.

34. **Legal Principle:** 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.

**Factual Situation:** Mr. Arun, intending to deceive Mr. Prakash, falsely represented that five hundred tonnes of fertilizer are made annually at his factory, and thereby induced Mr. Prakash to buy the factory.

**Decide:**

- (a) The contract is voidable at the option of Mr. Prakash.
- (b) The contract is voidable at the option of Mr. Arun.
- (c) The contract is void.
- (d) The contract is valid.

35. **Legal Principle:** 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.

**Factual Situation:** Mr. Rupesh agrees to buy from Mr. Jalaj a certain car. It turns out that the car was scrapped at the time of bargain, though neither party was aware of the fact.

**Decide**

- (a) The agreement is valid.
- (b) The agreement is void.
- (c) The agreement is voidable at the instance of either parties.
- (d) The agreement is void because Mr. Jalaj played a fraud upon Mr. Rupesh.



36. **Legal Principle:** Every agreement of which the object or consideration is unlawful is void.

**Factual Situation:** Mr. Thomas promises Mr. Jhonson to drop a prosecution which he has instituted against Mr. Jhonson for robbery, and Mr. Jhonson promises to restore the value of the things taken.

**Decide:**

- (a) The agreement is void, as its object is unlawful.
- (b) The agreement is valid.
- (c) The agreement is voidable at the instance of Mr. Thomas.
- (d) The agreement is voidable at the instance of Mr. Jhonson.

37. **Legal Principle:** A stranger to a contract cannot sue for want of privity of contract.

**Factual situation:** A, who is indebted to B, sells his property to C, and C the purchaser of the property, promises to pay off the debt to B. C fails to pay B

**Decide**

- (a) B has no right to sue C for there is no privity of contract between B and C.
- (b) B has the right to sue C as there is privity of contract between B and C.
- (c) C has no legal obligation to A to pay B off.
- (d) Once the property is sold to C, B can only sue C and not A.

38. **Legal Principle:** All illegal agreements are void but all void agreements are not necessarily illegal.

**Factual Situation:** A had borrowed Rs. 1,000 from B to buy a pistol to shoot C which he did. He, however, failed to repay B and B decides to recover this money from A by filing a suit.

**Decide**

- (a) The contract between A and B is illegal.
- (b) The contract between A and B will be illegal only if it is established that B was aware of the





*purpose at the time of the borrowing.*

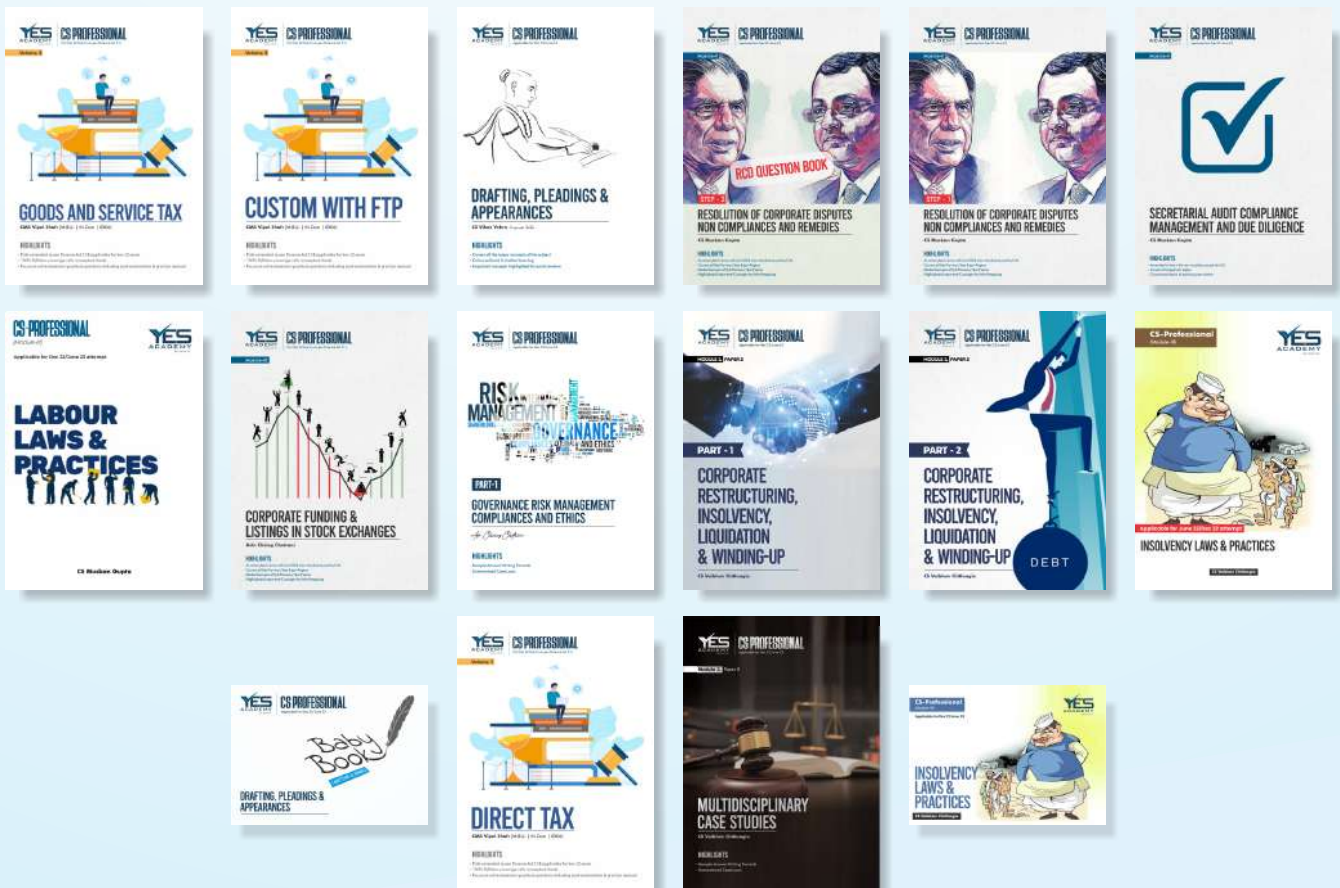
- (c) The contract between A and B is void but not illegal.*
- (d) The contract between A and B is valid even if B was aware of the purpose at the time of borrowing.*

# Our Publications

## CS Executive



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