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1. CONSTITUTIONAL LAW - II

The President of India is the head of state of the Republic of India. The President is the formal head of the legislature, executive and judiciary branches of Indian Democracy and is the commander-in-chief of the Indian Armed Forces. The powers to pardon and clemency vest with the President of India

The President is elected, from a group of nominees, by the elected members of the Parliament of India (Lok Sabha and Rajya Sabha) as well as of the state legislatures (Vidhan Sabhas), and serves for a term of five years . Historically, ruling party (majority in the Lok Sabha) nominees have been elected and run largely uncontested. Incumbent presidents are permitted to stand for re-election. A formula is used to allocate votes so there is a balance between the population of each state and the number of votes assembly members from a state can cast, and to give an equal balance between State Assembly members and National parliament members. If no candidate receives a majority of votes, then there is a system by which losing candidates are eliminated from the contest and their votes are transferred to other candidates, until one gains a majority. The Vice-President is elected by a direct vote of all members (elected and nominated) of the Lok Sabha and Rajya Sabha.

Although Article 53 of the Constitution of India states that the President can exercise his or her powers directly, with few exceptions, all of the authorities vested in the President are in practice exercised by the Council of Ministers, headed by the Prime Minister

POWERS AND DUTIES

Legislative

The President summons both the Houses (the Lok Sabha and the Rajya Sabha) of the Parliament and prorogues them. He or she can dissolve the Lok Sabha. These powers are formal, and by convention, the President uses these powers according to the advice of the Council of Ministers headed by the Prime Minister.

The President inaugurates the Parliament by addressing it after the general elections and also at the beginning of the first session each year. Presidential address on these occasions is generally meant to outline the new policies of the government.

All bills passed by the Parliament can become laws only after receiving the assent of the President. The President can return a bill to the Parliament, if it is not a money bill or a Constitutional amendment bill, for reconsideration. When after reconsideration, the bill is passed and presented to the President, with or without amendments, President is obliged to assent to it. The President can also withhold his assent to the bill thereby exercising pocket veto.

When both Houses of the Parliament are not in session and if government feels the need for immediate action, President can promulgate ordinances which have the same force and effect as laws passed by Parliament. These are in the nature of interim or temporary legislation and their continuance is subject to parliamentary approval. Ordinances remain valid for no more than six weeks from the date the Parliament is convened unless approved by it earlier.

Executive powers

The Indian Constitution, vests in the President of India, all the executive powers of the Central Government. The President appoints the Prime Minister, the person most likely to command the support of the majority in the Lok Sabha (usually the leader of the majority party or coalition). The President then appoints the other members of the Council of Ministers, distributing portfolios to them on the advice of the Prime Minister.

The Council of Ministers remains in power during the 'pleasure' of the President. In practice, however, the Council of Ministers must win the support of the Lok Sabha. If a President were to dismiss the Council of Ministers on his or her own initiative, it might trigger a Constitutional crisis. Thus, in practice, the Council of Ministers cannot be dismissed as long as it commands the support of a majority in the Lok Sabha.

The President is responsible for making a wide variety of appointments. These include

- Governors of States
- The Chief Justice, other judges of the Supreme Court and High Courts of India
- The Attorney General of India
- The Comptroller and Auditor General
- The Chief Election Commissioner and other Election Commissioners
- The Chairman and other Members of the Union Public Service Commission
- Ambassadors and High Commissioners to other countries

The President also receives the credentials of Ambassadors and High Commissioners from other countries.

The President is the Commander in Chief of the Indian Armed Forces.

The President of India can grant a pardon to or reduce the sentence of a convicted person for one time, particularly in cases involving punishment of death.

The decisions involving pardoning and other rights by the President are independent of the opinion of the Prime Minister or the Lok Sabha majority. In most other cases, however, the President exercises his or her executive powers on the advice of the Prime Minister and the cabinet.

Financial powers

All money bills originate in Parliament, but only if the President recommends it. He or she causes the Annual Budget and supplementary Budget before Parliament. No money bill can be introduced in Parliament without his or her assent. The President appoints a finance commission every five years. Withdrawal from the contingency fund of India is done after the permission of President.

Judicial powers

The President appoints the Chief Justice of the Union Judiciary and other judges on the advice of the Chief Justice. He/she dismisses the judges if and only if the two Houses of the Parliament pass resolutions to that effect by two-thirds majority of the members present.

If they consider a question of law or a matter of public importance has arisen they can ask for the advisory opinion of the Supreme Court. They mayor may not accept that opinion.

He/she has the right to grant pardon, to suspend, remit or commute the death sentence of any person.

He/she enjoys the judicial immunity:

- No criminal proceedings can be initiated against him/her during his term in office.
- He/She is not answerable for the exercise of his/her duties.

Basic terminologies used:

1. Pardon: Completely absolves the guilt of the offender
2. Reprieve: Temporary suspension of the sentence
3. Respite: Awarding a lesser sentence on special ground
4. Remission: Reducing the amount of sentence without changing its character
5. Commutation: Substitution of one form a punishment for another form which is of a lighter character

Diplomatic powers

All international treaties and agreements are negotiated and concluded on behalf of the President. However, in practice, such negotiations are usually carried out by the Prime Minister along with his Cabinet (especially the Foreign Minister). Also, such treaties are subject to the approval of the Parliament. The President represents India in international forums and affairs where such a function is chiefly ceremonial. The President may also send and receive diplomats, i.e. the officers from the Indian Foreign Service. The President is the first citizen of the country.

Military powers

The President is the supreme commander of the defence forces of India. The President can declare war or conclude peace subject to the approval of parliament only under the decision of the Council of the Armed Forces Chief staffs, Military Secretary and President's Officer (Deputy Military Secretary). All important treaties and contracts are made in president's name.

Pardoning Powers

As mentioned in Article 72 of Indian Constitution, the President is empowered with the powers to grant pardons in the following situations:

- Punishment is for offence against Union Law
- Punishment is by a Military Court
- Sentence is a death sentence

Emergency powers

The President can declare three types of emergencies: national, state and financial.

National emergency

National emergency is caused by war, external aggression or armed rebellion in the whole of India or a part of its territory. Such an emergency was declared in India in 1962 (Indo- China war), 1971 (Indo- Pakistan war), 1975 to 1977 (declared by Indira Gandhi on account of "internal disturbance").

Under Article 352 of the India Constitution, the President can declare such an emergency only on the basis of a written request by the Cabinet Ministers headed by the Prime Minister. Such a proclamation must be approved by the Parliament within one month. Such an emergency can be imposed for six months. It can be extended by six months by repeated parliamentary approval, up to a maximum of three years.

In such an emergency, Fundamental Rights of Indian citizens can be suspended. The six freedoms under Right to Freedom are automatically suspended. However, the Right to Life and Personal Liberty cannot be suspended (Article 21)

The Parliament can make laws on the 66 subjects of the State List (which contains subjects on which the state governments can make laws). Also, all money bills are referred to the Parliament for its approval. The term of the Lok Sabha can be extended by a period of up to one year, but not so as to extend the term of Parliament beyond six months after the end of the declared emergency.

State emergency

State emergency, also known as President's rule, is declared due to breakdown of Constitutional machinery in a state.

If the President is satisfied, on the basis of the report of the Governor of the concerned state or from other sources that the governance in a state cannot be carried out according to the provisions in the Constitution, he/she can declare a state of emergency in the state. Such an emergency must be approved by the Parliament within a period of two months.

Under Article 356 of the Indian Constitution, it can be imposed from six months to a maximum period of three years with repeated parliamentary approval every six months. If the emergency needs to be extended for more than three years, this can be achieved by a Constitutional amendment, as has happened in Punjab , Jammu and Kashmir.

During such an emergency, the President can take over the entire work of the executive, and the Governor administers the state in the name of the President. The Legislative Assembly can be dissolved or may remain in suspended animation. The Parliament makes laws on the 66 subjects of the state list (see National emergency for explanation). All money bills have to be referred to the Parliament for approval.

A State Emergency can be imposed via the following:

1. By Article 356 - If that state failed to run constitutionally i.e. constitutional machinery has failed
2. By Article 365 - If that state is not working according to the given direction of the Union Government.

This type of emergency needs the approval of the parliament within 2 months. This type of emergency can last up to a maximum of three years via extensions after each 6 month period. However, after one year it can be extended only if

1. A state of National Emergency has been declared in the country or in the particular state.
2. The Election Commission finds it difficult to organise an election in that state.

On 19 January 2009, President's rule was imposed on the Indian State of Jharkhand, making it the latest state where this kind of emergency has been imposed.

Financial emergency

If the President is satisfied that there is an economic situation in which the financial stability or credit of India is threatened, he/she can then proclaim a financial emergency, as per the Constitutional Article 360. Such an emergency must be approved by the Parliament within two months. It has never been declared. On a previous occasion, the financial stability or credit of India has indeed been threatened, but a financial emergency was avoided through the selling off of India's gold reserves.

A state of financial emergency remains in force indefinitely until revoked by the President.

The President can reduce the salaries of all government officials, including judges of the Supreme Court and High Courts, in case of a financial emergency. All money bills passed by the State legislatures are submitted to the President for approval. They can direct the state to observe certain principles (economy measures) relating to financial matters.

SELECTION PROCESS

Eligibility

Article 58 of the Constitution sets the principle qualifications one must meet to be eligible to the office of the President. A President must be:

- A citizen of India
- Of 35 years of age or above
- Qualified to become a member of the Lok Sabha

A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Certain office-holders, however, are permitted to stand as Presidential candidates. These are:

- The current Vice President.
- The Governor of any State.
- A Minister of the Union or of any State (Including Prime Minister and Chief Ministers).

In the event that the Vice President, a State Governor or a Minister is elected President, they are considered to have vacated their previous office on the date they begin serving as President.

Under the Presidential and Vice Presidential act 1952, a candidate, to be nominated for the office of president needs 50 electors as proposers and 50 electors as seconders for his\ her name to appear on ballot

Conditions for Presidency

Certain conditions, as per Article 59 of the Constitution, debar any eligible citizen from contesting the presidential elections. The conditions are:

- The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.

- The President shall not hold any other office of profit.
- The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.
- The emoluments and allowances of the President shall not be diminished during his term of office.

ELECTION PROCESS

Whenever the office becomes vacant, the new President is chosen by an electoral college consisting of the elected members of both houses of Parliament, the elected members of the State Legislative Assemblies (Vidhan Sabha) and the elected members of the legislative assemblies of the Union Territories of Delhi and Puducherry.

The nomination of a candidate for election to the office of the President must be subscribed by at least 50 electors as proposers and 50 electors as seconders. Each candidate has to make a security deposit of ~15,000 (US$299.25) in the Reserve Bank of India. The security deposit is liable to be forfeited in case the candidate fails to secure one-sixth of the votes polled.

The election is held in accordance to the system of Proportional representation by means of Single transferable vote method. The Voting takes place by secret ballot system. The manner of election of President is provided by Article 55 of the Constitution.

Each elector casts a different number of votes. The general principle is that the total number of votes cast by Members of Parliament equals the total number of votes cast by State Legislators. Also, legislators from larger states cast more votes than those from smaller states. Finally, the number of legislators in a state matters; if a state has few legislators, then each legislator has more votes; if a state has many legislators, then each legislator has fewer votes.

The actual calculation for votes cast by a particular state is calculated by dividing the state's population by 1000, which is divided again by the number of legislators from the State voting in the electoral college. This number is the number of votes per legislator in a given state. For votes cast by those in Parliament, the total number of votes cast by all state legislators is divided by the number of members of both Houses of Parliament. This is the number of votes per member of either house of Parliament.

Although Indian presidential elections involve actual voting by MPs and MLAs, they tend to vote for the candidate supported by their respective parties.

Applicability of Anti Defection Laws

Anti defection laws are not applicable for voting in Presidential Elections. Members of the electoral college are free to vote according to their conscience and and not bound to follow party whip. Since the election is by secret voting, political parties cannot identify the voting patterns easily.

CONSTITUTIONAL ROLE

Article 53(1) of the Constitution vests in the President "the executive power of the Union", to be "exercised by him [sic] either directly or through officers subordinate to him" in accordance

with the provisions of the Constitution. However, the Constitution also states that the Council of Ministers, headed by the Prime Minister, is "to "aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice".

However, the Article 74(2) bars all courts completely from assuming even an existence of such an advice. Therefore from the courts' point of view, the real executive power lies with the President. As far as President's decision and action are concerned no one can challenge such decision or action on the ground that it is not in accordance with the advice tendered by the Ministers or that it is based on no advice

GOVERNOR

Powers and Functions of Governor:

There shall be Governor for each State, Provided that nothing shall prevent the appointment of the same person as Governor for two or more States.

Executive power of State:

1. The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

Appointment of Governor.:

The Governor of a State shall be appointed by the President by warrant under his hand and seal. (Article 155)

Term of office of Governor:

(1) The Governor shall hold office during the pleasure of the President.
(2) The Governor may, by writing under his hand addressed to the President, resign his office.
(3) Subject to the foregoing provisions of this article, a Governor shall hold for a term of five years from the date on which he enters upon his office.
(4) Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office. (Article 156)

Qualifications for appointment as Governor:

No person shall be eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years. (Article 157)

Conditions of Governor' office:

(1) The Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor.
(2) The Governor shall not hold any other office of profit. (Article 158)

Discharge of the functions of the Governor in certain contingencies:

The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for (Article 160).

Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases:

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. (Article 161).

Extent of executive power of State:

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. (article 162)

CONCEPT OF FEDERALISM

The term 'Federalism' originate From the Latin word "Foedus" meaning 'treaty' or 'covenant'. Some free states bound together by agreement constitute a Federal-state.

Federalism is a system of government of a country under which there exist simultaneously a federal or central government (legislature & executive) & several state legislatures & government as contrasted with a unitary state both federal & state governments drive their powers from the federal-constitution both are supreme in particular sphere & both operate directly on the people.

Definition

Federation is a political-concept in which a group of members are bound together by 'covenant' with a governing representative head.

A system of National-government in which power is divided between a central authority & a number of regions which delimited self-governing authority.

A system of governance in which distribution of power of constituent-units is ensured by a written-Constitution, having independent judiciary to resolve, state of local-levels. Under the principal of government, power & authority is allocated between the national & local-government units, such that each unit is delegated a sphere of power & authority only it can exercise while other powers must be shared.

Constitutional-Intent

Being aware that notwithstanding a common cultural heritage, without political unity, the country would disintegrate under the pressure of Fissiparous forces, the constituent Assembly addressed itself to the immensely complex-task of devising a union with a strong centre. In devising the pattern of the central -state relations they were influenced by the Constitution of Canada & Australia which have a parliamentary-form of government. The Government of India act, 1935 was also relied upon significant changes. The Constitution cannot be called 'Federal' or 'Unitary' in the ideal-sense of the terms.

According to article 1 of the Constitution:

"India, i.e. Bharat will be the Union of States".

The Constitution, thus postulated India as a union of states & the consequently, the existence of Federal-structure of governance for this union of states becomes a basic structure of the union of India.

Necessity of Federalism:

(i) Emergence of different-set of states:

Before independence, the earliest from of political-organization was not federal but unitary. But after independence, the pressure of economic, political & social-circumstances which compelled unitary-states (generally Monarchical) to enter into alliance with other states for meeting common problems which initially related to 'defence'. Require a special-type of government which leads to federalism.

(ii) Scientific-development:

Scientific & technological-developments & increased economic interdependence have changed the scenario of the past, which brought the emerging-states (independent) on the same- platform. The exchange of Scientific-technologies between the development of these states. Scientific & technological-development brought a revolution during the era of federalism.

(iii) End of British-Colonies:

In India, the historical-process to create the federal-system was different. For long, before1935, British India has been administered on a unitary basis. There existed a unitary-system. But after the end of British-colonies, the unitary system was replaced by a federal-system. The present federal-system was built on the foundation of the 1935 system.

The past history of India establishes that in the absence of a strong Central-Government. the country soon disintegrates. This belief was strengthened by the recent-portion of the country. Therefore adequate precautions have to be taken against any such future contingency by making the centre strong in Indian-Federalism.

Components of a Federal-Constitution:

The legal-test of federalism, when analyzed, leads to the following broad features of a federal-Constitution.

(i) Distribution of powers (Dual-polity):-

An essential feature of every federal-Constitution is the distribution of powers between the central-government & the governments of the several-units forming the federations.

Federation means the distribution of the power of the state among a number of coordinate bodies, each originating in and controlled by the Constitution. (Dicey)

(ii) Written-Constitution:

A federal-state derives its existence from the Constitution, just as a corporation derives its existence from the grant or statute by which it is created. Every power (executive, legislature

or judicial) whether it belongs to the central, or to the component-states, is subordinated to & controlled by the Constitution. Therefore, a federal-state requires a written-Constitution for the obvious reason that in order to be workable & stable & the limitations, must be precisely defined by written-instrument.

(iii) Supremacy of the Constitution:

This means that the Constitution should be binding on the federal & state-government. Neither of the two governments should be in a position to override the provisions of the Constitution relating to the power and status which each is to enjoy.

(iv) Rigidity of the Constitution: - (Non unilateral change)

A natural corollary of a written-Constitution is its rigidity. A Constitution which is the supreme-law of the land must also be rigid. In a rigid Constitution, the procedure of amendment is very complicated & difficult. This does not mean that the Constitution should be legally unalterable. The Constitution provides a process for changing its provisions called "Amendment'. It simply means that the procedure of amending the Constitution should not remain exclusively with either the centre or state-Governments means "No Unilateral-change".

(v) Authority of the courts (Interpretation by Judiciary) :

The distribution of powers made by the Constitution must be guarded by the judiciary. Which is to interpret the Constitution as the 'Fundamental-law' of the lands to enforce its provisions against both the federal and Regional-governments and to invalidate any of their acts which transgresses the limitations imposed upon them by the Constitution.

Distinctive Federation

The federal polity, which our Constitution establishes, contains, as compared with other federal-constitutions, several distinctive features. These are:

(1) No Dual citizenship
(2) Single-Constitution
(3) In emergencies the Constitution can become Unitary
(4) Minimizes Rigidity & Legalism:

Legislative Relations

Article 245 {Extent of laws made by Parliament and by the Legislatures of States}

Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 {Subject-matter of laws made by Parliament and by the Legislatures of States} Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Article 247 {Power of Parliament to provide for the establishment of certain additional courts}

Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

Article 248 {Residuary powers of legislation}

Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Article 249 {Power of Parliament to legislate with respect to a matter in the State List in the National interest}

Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein: Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

Article 250 {Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation}

Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

Article 251 {Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the legislatures of States}

Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Article 252 {Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State}

If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which is applies, be amended or repealed by an Act of the Legislature of that State.

Article 253 {Legislation for giving effect to international agreements}

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 254 {Inconsistency between laws made by Parliament and laws made by the Legislatures of States}

If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Article 255 {Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only}

No Act of Parliament or of the Legislature of a State, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given -

- where the recommendation required was that of the Governor, either by the Governor or by the President;
- where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;
- where the recommendation or previous sanction required was that of the President, by the President.

Administrative Relations

Article 256 {Obligation of States and the Union}

The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may, appear to the Government of India to be necessary for that purpose.

Article 257 {Control of the Union over States in certain cases}

The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance: Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

Article 257 A {Assistance to States by deployment of armed forces or other forces of the Union}

Article 258 {Power of the Union to confer powers. etc .. on States in certain cases}

Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

Article 258A {Power of the States to entrust functions to the Union}

Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the exclusive power of the State extends.

Article 259 {Armed Forces in States in Part B of the First Schedule}

Article 260 {Jurisdiction of the Union in relation to territories outside India}

The Government of India may be agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

Article 261 {Public acts. records and judicial proceedings}

Administrative relations between Centre and State

Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

Article 262 {Adjudication of disputes relating to waters of inter-State rivers or river valleys} Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

Article 263 {Provisions with respect to an inter-State Council}

If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of -

- inquiring into and advising upon disputes which may have arisen between States;
- investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or
- making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organization and procedure.

PASSING OF BILLS

Provisions as to introduction and passing of Bills:

(1) Subject to the provisions of Articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

(2) Subject to the provisions of Article 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed by both Houses.

(3) A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.

(4) A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.

(5) A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the council of States, shall subject to the provisions of Article 108, lapse on a dissolution of the House of the People. (Article 107)

Joint sitting of both Houses in certain cases:

(1) If after a Bill has been passed by one House and transmitted to the other House

(a) the Bill is rejected by the other House; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it. the President may, unless the Bill has lapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that nothing in this clause shall apply to a Money Bill.

(2) In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause © of that clause is prorogued or adjourned for more than four consecutive days.

(3) Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.

(4) If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint siting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that a joint sitting -

(a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;

(b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed; and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

(5) A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein. (Article 108)

Special procedure in respect of Money Bills:

(1) A Money Bill shall not be introduced in the Council of States.

(2) After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the house of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.

(3) If the House of the People accepts any of the recommendations of the council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the council of States and accepted by the House of the People.

(4) If the House of the People does not accept any of the recommendations of the council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.

(5) If a Money Bill passed by the House of the People and transmitted to the council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People. (Article 109)

Definition of "Money Bill":

(1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely -

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;

(c) the custody of the consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

(d) the appropriation of moneys out of the consolidated Fund of India;

(e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or

(g) any matter incidental to any of the matters specified in sub-clause (a) to (f).

(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.

(4) There shall be endorsed on every Money Bill when it is transmitted to the Council of States under Article 109, and when it is presented to the President for assent under Article 111, the certificate of the Speaker of the House of the People signed by him that it is a Money Bill. (Article 110)

Assent to Bills:

When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom.

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

Procedures in Financial Matters (Article 111)

Annual financial statement.-

(1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately-

(a) the sums required to meet expenditure described by the Condition as expenditure charged upon the Consolidated Fund of India; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India, and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India-

(a) the emoluments and allowances of the President and other expenditure relating to his office;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People;

(c) debt charges for which the Government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court,

(ii) the pensions payable to or in respect of Judges of the Federal Court,

(iii) the pensions payable to or in respect of Judges of any High Court which exercises jurisdiction in relation to any area included in the territory of India or chat any time before the commencement of this Constitution exercises jurisdiction in relation to any area included in a Governor's Province of the Dominion of India;

(e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor- General of India;

(f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(g) any other expenditure declared by this Constitution or by Parliament by law to be so charged. (Article 112)

Procedure in Parliament with respect to estimates.-

(1) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates.

(2) So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and the House of the People shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the President. (Article 113)

Appropriation Bills:

(1) As soon as may be after the grants under article 113 have been made by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet-

(a) the grants so made by the House of the People; and

(b) the expenditure charged on the Consolidated fund of India but not exceeding in any case the amount shown in the statement previously laid before Parliament.

(2) No amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of India, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) Subject to the provisions of Articles 115 and 116, no money shall be withdrawn from the Consolidated Fund of India expect under appropriation made by law passed in accordance with the provisions of this article. (Article 114)

Supplementary, additional or excess grants:

(1) The President shall-

(a) If the amount authorised by any law made in accordance with the provisions of article 114 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year, cause to be laid before both the Houses of Parliament another statement showing the estimated amount of that expenditure or cause to be presented to the House of the People a demand for such excess, as the case may be.

(2) The provisions of Articles 112, 113 and 114 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure or grant. (Article 115)

Votes on account, votes of credit and exceptional grants:

(1) Notwithstanding anything in the foregoing provisions of this Chapter, the House of the People shall have power-

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 113 for the voting of such grant and the passing of the law in accordance with the provisions of article 114 in relation to that expenditure;

(b) to make a grant for meeting an unexpected demand upon there sources of India when on account of the magnitude or the indefinite character of the service the demand cannot be stand with the details ordinarily given in an annual financial statement;

(c) to make an exceptional grant which forms no part of the current service of any financial year; and Parliament shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of India for the purposes for which the said grants are made.

(2) The provisions of articles 113 and 114 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet such expenditure. (Article 116)

Special provisions as to financial Bills:

(1) A Bill or amendment making provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall not be introduced or moved except on the recommendation of the President and a Bill making such provision shall not be introduced in the Council of States:

Provided that no recommendation shall be required under this clause for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provision for any of the matters aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill. (Article 117)

JUDICIARY:

Establishment and Constitution of Supreme Court:

(1) There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed rom his office in the manner provided in clause (4).

(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and-

(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-third of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved mis- behaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the mis- behaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.

Salaries, etc., of Judges:

(1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule:

Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment. (Article 125)

Appointment of acting Chief Justice:

When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason or absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose. (Article 126)

Appointment of ad-hoc Judges:

(1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an ad hoc Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

(2) It shall be the duty of the Judge who has been so designated, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required, and while so attending he shall have all the jurisdiction, powers and privileges, and shall discharge the duties, of a Judge of the Supreme Court. (Article 127)

Original jurisdiction of the Supreme Court:

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute-

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagements, and or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute. (Article 131)

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as the interpretation of this Constitution.

(2) Omitted.

(3) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.

Explanation: For the purposes of this article, the expression "final order" includes an order declaring an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case. (Article 132)

Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under Article 134A-

(a) that the case involves a substantial question of law of general importance and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court. (Article 133)

Appellate jurisdiction of Supreme Court in regard to criminal matters:

(1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court-has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

Certifies under Article 134A that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law. (Article 134)

HIGH COURT

There shall be a High Court for each State.

High Courts to be courts of record:

Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. (Article 215)

Constitution of High Courts:

Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. (Article 216)

Appointment and conditions of the office of a Judge of a High Court:

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.

Provided that -

a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and -

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession; (Article 217)

EMERGENCY PROVISION

NATIONAL EMERGENCY

As it is very clear from the opening words of the above stated heading, national emergency deals with constitutional provisions to be applied, whenever there are imbalance in the society in the whole country and not in a particular or specific region or state.

Art. 352 reads that-

352. Proclamation of Emergency: (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether

by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.

Explanation: A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.

Provisions have been made in the Constitution for dealing with extraordinary situations that may threaten the peace, security, stability and governance of the country or a part thereof.

The Constitution of India has provided for imposition of emergency caused by war, external aggression or internal rebellion. This is described as the National Emergency. This type of emergency can be declared by the President of India if he is satisfied that the situation is very grave and the security of India or any part thereof is threatened or is likely to be threatened either, by war or external aggression by armed rebellion within the country. The President can issue such a proclamation even on the ground of threat of war or aggression. According to the 44th Amendment of the Constitution, the President can declare such an emergency only if the Cabinet recommends in writing to do so.

Title of the topic basically talks about two main and important factors of Indian Constitution of India i.e. “Emergency provision & fundamental rights”

When the Constitution of India was being drafted, India was passing through a period of Stress and strain. Partition of the country, communal riots and the problem concerning the Merger of princely states including Kashmir. Thus, the Constitution-makers thought to Equip the Central Government with the necessary authority, so that, in the hour of emergency, When the security and stability of the country is threatened by internal and external threats. Therefore, some emergency provisions were made in Constitution to safeguard and protect the security, integrity and stability of the country and effective functioning of State Governments.

Emergency provision falls in PART- XVIII of the Constitution of india from Art. 352 to Art. 360

1. National emergency (Article 352 of the Constitution of India)
2. State emergency (Article 356 of the Constitution of India)
3. Financial emergency (Article 360 of the Constitution of India)

COMPTROLLER AND AUDITOR GENERAL OF INDIA

In 1860, the first Auditor General of India was appointed and he looked after both audit and accounts functions. A statutory independent status was given to the Auditor General with the passing of the Government of India Act, 1919. Under the subsequent Government of India Act, 1935, the position of the Auditor General was further enhanced. He was appointed by the Governor General and could be removed from office in the same manner as a Judge of the Federal Court. The duties and powers of the Auditor General were regulated by the Government of India Audit and Accounts Order, 1936 which continued till 1971 when the Comptroller and Auditor

General's (Duties, Powers, Conditions of Service) Act, 1971 was passed by Parliament under the Constitution of India which came into effect from January 26, 1950. Under the Constitution, the former Auditor General of India was designated as Comptroller and Auditor General of India (CAG). The duties of the CAG related to audit and accounts of the Union Government and the State governments. In 1976, the CAG was relieved of the responsibility of compiling and keeping accounts of the Union Government but not of the State governments. The accounts of the States are still compiled and kept by the State Accountants General under the CAG and have not been taken over by the States.

Public audit of Central and State governments was restricted to regularity audit to see whether laws, rules and regulations were complied with in handling funds and to financial audit to see whether the financial statements of accounts presented a fair and correct state of affairs of the government with reference to vouchers and other initial records of accounts.

In the 1960s, the area of audit was extended from expenditure audit to revenue audit which was included in the CAG's (DPCS) Act, 1971 also later. From the 1970s the CAG undertook performance audit (value for money audit) of various development programmes/schemes/projects and of government organizations with due regard to economy, efficiency and effectiveness. The audit of the Public Sector Enterprises (PSEs) came under the purview of the CAG by a suitable provision in the Indian Companies Act or by a provision in the Act setting up a Corporation. A system of performance appraisals of the PSEs was introduced in 1970 through the Audit Board. Autonomous bodies substantially financed by the government are also within the ambit of audit by the CAG under the Act of 1971.

Under Articles 148 to 151 of the Constitution, the independence of the CAG is ensured, his salaries and allowance and the administrative expenses of his office, including salaries of officers and staff, are charged on the Consolidated Fund of India. He submits his reports as a result of audit to the President/Governor of the State who causes them to be laid before Parliament/the State Legislature as the case may be. These reports are remitted to the Central/State PACs which has to examine them. The members of the PAC, both at the Centre and States, have no time to examine all paras and reviews of the audit reports and therefore a selective approach is adopted to examine them.

The existing duties of the CAG enjoin on him to audit the Central/State expenditure and revenue and to submit audit reports. The tremendous work done by the CAG and his officers in auditing and producing audit reports is rendered infructuous as the PACs have no time to examine them. Even in respect of the few paras and reviews examined by the PAC, adequate action is not taken by the government. No adequate action is taken on paras not selected by the PAC.

The CAG of India is the CAG of the Union Government and also of the States. The State Accountant General (AG) under the CAG does not have any legal status. The book suggests that the State AG should be given the legal status equivalent to a Judge of the High Court, even though working within the general superintendence of the CAG of India as in other countries like the USA, Germany, Canada, Australia and the UK which have separate Auditor Generals in provinces. This suggestion is in line with the provision in the 1935 Act and in the original draft of Constitution and the recommendation of the National Commission to Review the Working of the Constitution (NCRWC).

The Constitution does not lay down any qualifications for the appointment of the CAG of India and also does not prescribe any procedure for making the appointment except that the CAG shall be appointed by the President of India by a warrant under his hand and seal. The book advocates the laying down of qualifications for such appointment and only persons with vast experience in audit and accounts and finance in government should be eligible to hold this high office as was intended in the debates in the Constituent Assembly in this matter in 1949. Further, the appointment should be made on the recommendation of an independent Committee which should include the Speaker of the Lok Sabha, the Chairman of the Central PAC and the Leader of the Opposition in the Lok Sabha as its members. In the UK the appointment of the CAG is ratified by the House of Commons on the recommendation of the PM made in agreement with the Chairman of the PAC and the CAG is made an officer of the House of Commons.

THE ELECTION COMMISSION OF INDIA

The Election Commission of India is an autonomous, constitutionally established federal authority responsible for administering all the electoral processes in the Republic of India. Under the supervision of the commission, free and fair elections have been held in India at regular intervals as per the principles enshrined in the Constitution. Election Commission of India is a permanent body governed by rules specified in the Constitution. The Election Commission was established on 25th January 1950. The Election Commission has the power of superintendence, direction and control of all elections to parliament and the state legislatures and of elections to the office of the President and Vice-President.

The commission consists of a Chief Election Commissioner (CEC) and two Election Commissioners, appointed by the president of India. Two additional Commissioners were appointed to the commission for the first time on 16th October 1989 but they had a very short tenure till 1 st January 1990. Later, on 1 st October 1993, two additional Election Commissioners were appointed. The concept of multi-member Commission has been in operation since then, with decision making power by majority vote. The current CEC is V Sundaram Sampath.

The Chief Election Commissioner can be removed from his office by Parliament with two- thirds majority in Lok Sabha and Rajya Sabha on the ground of proved mis- behaviour or incapacity. The Election Commission consists of a Chief Election Commissioner and such other Commissioners as the President may, from time to time, fix. Other Election Commissioners can be removed by the President on the recommendation of the Chief Election Commissioner. The Chief Election Commissioner and the two Election Commissioners draw salaries and allowances at par with those of the Judges of the Supreme Court of India as per the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Rules, 1992. [3] All three commissioner have equal rights of decision making.

Follow the Constitutional duties for conducting the free, fair and peaceful elections to the Parliament and the State Legislatures under Article 324 of the Constitution of India.

Chief Election Commissioner of India

The Chief Election Commissioner heads the Election Commission of India. The President of India appoints the Chief Election Commissioner and two Election Commissioners. They have tenure of six years, or up to the age of 65 years, whichever is earlier. The Chief Election Commissioner can be removed from office only through impeachment by Parliament.

The decisions of the Commission can be challenged in the High court of India and the Supreme Court of India by appropriate petitions. By long standing convention and several judicial pronouncements, once the actual process of elections has started, the judiciary does not intervene in the actual conduct of the polls. Once the polls are completed and result declared, the Commission cannot review any result on its own. This can only be reviewed through the process of an election petition, which can be filed before the High Court, in respect of elections to the Parliament and State Legislatures. In respect of elections for the offices of the President and Vice President, such petitions can only be filed before the Supreme Court.

PUBLIC SERVICE COMMISSION

Indianisation of the superior Civil Services became one of the major demands of the political movement compelling the British Indian Government to consider setting up of a Public Service Commission for recruitment to its services in the territory. The first Public Service Commission was set up on October 1 st, 1926. However, its limited advisory functions failed to satisfy the people's aspirations and the continued stress on this aspect by the leaders of our freedom movement resulted in the setting up of the Federal Public Service Commission under the Government of India Act 1935. Under this Act, for the first time, provision was also made for the formation of Public Service Commissions at the provincial level.

The Constituent Assembly, after independence, saw the need for giving a secure and autonomous status to Public Service Commissions both at Federal and Provincial levels for ensuring unbiased recruitment to Civil Services as also for protection of service interests. With the promulgation of the new Constitution for independent India on 26th January, 1950, the Federal Public Service Commission was accorded a constitutional status as an autonomous entity and given the title - Union Public Service Commission

Constitutional Provisions

The Union Public Service Commission has been established under Article 315 of the Constitution of India. The Commission consists of a Chairman and ten Members. The terms and conditions of service of Chairman and Members of the Commission are governed by the Union Public Service Commission (Members) Regulations, 1969.The Commission is serviced by a Secretariat headed by a Secretary with two Additional Secretaries, a number of Joint Secretaries, Deputy Secretaries and other supporting staff. The Union Public Service Commission have been entrusted with the following duties and role under the Constitution:

- Recruitment to services & posts under the Union through conduct of competitive examinations;
- Recruitment to services & posts under the Central Government by Selection through Interviews;
- Advising on the suitability of officers for appointment on promotion as well as transfer-on-deputation;
- Advising the Government on all matters relating to methods of Recruitment to various services and posts;
- Disciplinary cases relating to different civil services; and
- Miscellaneous matters relating to grant of extra ordinary pensions, reimbursement of legal expenses etc.

The major role played by the Commission is to select persons to man the various Central Civil Services and Posts and the Services common to the Union and States (viz. All-India Services).

EXPENSES OF PUBLIC SERVICE COMMISSIONS

The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

The Duties & Role of the Commission

Under Article 320 of the Constitution of India, the Commission are, inter-alia, required to be consulted on all matters relating to recruitment to civil services and posts.

RECRUITMENT is made by one of the following three methods:

Direct Recruitment, Promotion and Transfer

Under Article 320(3) of the Constitution the Commission are required to be consulted on the quantum of penalties in disciplinary cases affecting a person serving under the Government of India in a Civil Capacity. Article 321 also empowers the Parliament to extend the functions of the Public Service Commission to any local authority or other body corporate constituted by Law or by any public institutions.

The Commission have a duty, under Article 323 of the Constitution to present annually to the President a Report as to the work done by the Commission and on receipt of such report, the president shall cause a copy there of together with the Memorandum explaining, as respect the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of the Parliament.

The Constitution of India is not an end, but a means to an end, not mere democracy as a political-project but a socio - juristically process which opens up through a humanist, radical social-order, the opportunity to unfold the full personhood of every citizen.

Freedom of Trade, Commerce and Intercourse

The Constitution of India in Part XIII, wide Articles 301 to 305, deals with freedom of Trade, Commerce and Intercourse. Out of these articles, Article 301 creates an overall limitation on all legislative powers of the Union and the State legislature. The bar on state powers to interfere in the free trade, commerce and intercourse (Article 301) is loosened by Article 302,303 and 304. Article 305 provides for state monopoly.

Study of the Articles 302 to 305 will reveal when and how the Constitution of India permits the government to restrict freedom of trade, commerce and intercourse.

Article 301: The trade and commerce throughout the territory of India shall be free and without restriction. The restriction can generally may be way of taxes. The taxes may be compensatory where they are levied for any service provided it is not taken as restriction.

But if the tax is levied to regulate or to prevent certain people from carrying on business, it amounts to restriction.

Thus the object of Article 301 is to break down the barriers between the states and to make the country as one unit with a view to encourage trade and commerce.

Article 302: However, the Parliament can impose restrictions on freedom of trade commerce and intercourse in public interest.

Article 303: The Parliament while imposing restrictions under Article 302, cannot discriminate between different state. However, the parliament can discriminate in case of scarcity of goods.

Article 304: It enables state legislature to impose taxes on goods coming from other states, if goods produced within the state are subjected to such taxes.

Article 305: Any law passed by the Union thereby creating the state monopoly shall not be affected by the provision of Part XIII of the Constitution of India.

Amendment Procedure:

Amendment refers to the process of effecting desired change (s) in the Constitution. It may involve alteration, revision, addition, repeal, variation or deletion of any provision of the Constitution.

The framers of our Constitution did not want to make the Constitution a finite or infallible document. They favoured a flexible Constitution admitting of change and growth. If a Constitution is very rigid, it would not grow. And a Constitution which would not grow would be a bad Constitution.

A Constitution has to keep pace with the changing times. Our founding fathers, therefore, produced a Constitution which is partly rigid and partly flexible. Our Constitution combines rigidity as well as flexibility. This becomes clear as we analyse the procedures of amending the Constitution.

Article 368 of the Constitution of India provides for three procedures of amendments.

1. First Procedure:

Some provisions of the Constitution can be amended by simple majority in both Houses of the Parliament. The matters covered by such amendments are the followings:

(a) Articles 2,3 and 4 providing for admission or establishment of new states! Alteration of areas, names and boundaries of existing states;

(b) Articles 5, 6, 7, 9, 10 and II dealing with citizenship;

(c) Article 81 dealing with delimitation of constituencies;

(d) Article 100 dealing with quorum of Parliament;

(e) Article 106 relating to the privileges of MPs;

(f) Article 124 (1) relating to the appointment of the Judges of the Supreme Court;

(g) Art. 164 dealing with the abolition and creation of Legislative Council of a state;

(h) Art. 240 concerning the legislatures of union territories;

(i) Art. 312 relating to the creation of All India Services;

(j) Art. 327 dealing with the election system of the country;

(k) II, V and VI schedules of the Constitution.

2. Second Procedure:

The second category consists of constitutional amendments. The constitutional amendments require a special procedure and a special majority in each House of the Parliament. A bill

for constitutional amendment can be introduced in either House of the Parliament. It has to be passed by a majority of the total membership of the House in which it is introduced.

Further, it has to be passed by not less than the two-thirds majority of the members present and voting. After it is passed in the House in which it was introduced, it has to be passed in the similar manner in the other House.

After the bill is passed in both Houses in the special procedure and with special majority, it is sent to the President for his assent and according to the 24th Amendment, the President is bound to give his assent to all such bills.

With the assent of the President accorded, the bill becomes a part of the Constitution and the Constitution thus gets amended. Majority of the provisions of the Constitution can be amended in this way. This amending procedure achieves a balance between flexibility and rigidity.

3. Third Procedure:

The third category of amendment involves a rigid procedure. It has two stages. Firstly, the bill for amendment is to be passed in each House of Parliament in the special manner and with a special majority. It has to be passed B majority of the total membership of each House of the Parliament.

Further, it has to passed by a majority not less than two-thirds of all the members present and voting each House of the Parliament. Secondly, after the bill is passed by each House of the Parliament, it is to be ratified by the legislatures of at least one-half of the states. Thereafter it is sent to the President for his approval.

The matters which require this rigid procedure of amendment are election of President (Article 54 and Article 55), the extent of the executive power of the Union (Article 37), extent of executive power of the state (Article 162), High Courts for Union Territories (Ail 241), Union Judiciary (Chapter IV of Part V), High Courts in states (Chapter V of Part VI), Legislative Relations between state and centre (Chapter I of Part XI), three lists of subjects in VII Schedule, representation of states in the Parliament, and procedure of Constitutional Amendments (Article 368).

'Basic Structure' of Constitution, Not Amendable:

In the Golaknath Case of 1967, the Supreme Court observed that the parliament had no right to amend any of the provisions or parts of the Constitution relating to the fundamental rights. However, in the Kesavananda Bharati Case of 1972, the Supreme Court took a different view. The Court said that the parliament had power to amend any provision of the Constitution except the 'basic features' of the Constitution.

The 42nd Amendment Act, 1976 said that the parliament had power to amend any provision of the Constitution and that such amendments could not be questioned in any Court of Law. But in the Minerva Mill Case of 1980 the Supreme Court again asserted that the parliament could not amend the 'basic structure' of the Constitution.

Article 286 :

Restrictions as to imposition of tax on the sale or purchase of goods

1. No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

   a. outside the State; or

   b. in the course of the import of the goods into, or export of the goods out of, the territory of India

2. Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)

3. Any law of a State shall, in so far as it imposes, or authorizes the imposition of,

   a. a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter State trade or commerce; or

   b. a tax on the sale or purchase of goods, being a tax of the nature referred to in sub clause (b), sub clause (c) or sub clause (d) of clause 29 A of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

Article 286 , which imposes certain restrictions on the power of the State to impose sales tax, on goods was amended in 1956 by the Constitution (Sixth Amendment) Act, under which taxes on sale or purchase of goods in the course of inter-state trade or commerce were brought expressed within the purview of the legislative jurisdiction of parliament.

In Bengal Immunity Co. vs. State of Bihar, AIR 1955 SC661, the Supreme Court held that state is not competent to impose tax on inter-state trade. ln Tata Iron and steel Co. Vs. State of Bihar, AI R 1958 SC 452 it was held b the Supreme court that doctrine of nexus does not impose the tax and it only indicates the circumstances in which a tax is imposed b the legislature. It is important to note that sale or purchase must occasion the movement of goods from one state to another. Parliament is empowered in relation to the goods declared to be of special importance in inter - State trade or commerce to la down the restrictions and conditions subject to which an State law ma regulate the tax on sales or purchases of such goods in the state.

2. LAND LAWS

INCLUDING CEILING & ANY OTHER LOCAL LAWS

VILLAGE SYSTEM AND REVENUE ADMINISTRATION IN TAMILNADU

Melwaram:-

A share of produce from the cultivated lands received by the Sovereign. The other name is Rajabhogam.

Kudiwaram :-

The other share of produce retained by the cultivator is called Kudiwaram. Village Administration of each village was looked after by the two persons namely the Head man who was the representative of the King and Karnam who looked after the village accounts etc. The village in TamilNadu was divided into Warapet. Tiwarpet, tarisu a Poram boke.

Kinds of Revenue Administration:

1. Ryotwari or Kulwar System.
2. Zamindari System.
3. Inamdari System.

Ryotwari System: -

This system was introduced in the year 1792 by Col. Read. The main feature of this system is that there is direct contact between the state and the owners or cultivators of the land and the revenue is collected through the village servants without any intermediate agents.

Rights and Powers of Ryot:-

1. Transfer of interest.
2. Right to cultivation.
3. Right to minerals.
4. Right to trees.
5. Right to water.
6. Right to patta.

Obligations:-

1. Liablity to pay land tax.
2. Liability to pay water cess.

Zamindari system:-

This system became familiar during the Mohammedan regime. Since the Mohammedan Concentrated on the wars and expansion of their territories, they could not have sufficient man power to look after and scrutiny the collection of revenue and revenue administration. Therefore the Revenue administration particularly the collection of revenue i.e, land tax was handed over to the intermediate namely zamindars. Zamindar was an officer entrusted with certain portions of the country for the purpose of collecting the revenue payable to the Government by the cultivators of the land .There were two kinds of zamindars namely Hill Zamindars and Zamindars of the plain.

Rights and Obligation of the Zamindar:-

Rights:-

(1) Right of alienation

(2) Right to water

(3) Right to minerals

(4) Right to waste lands.

Obligations:-

(1) Duty to maintain tanks

(2) Liablity to pay water cess

(3) Liablity to pay Peishkush.

Abolition of Zamindari System

The Zamindari system was abolished by the introduction of Madras Estates Abolition and conversion into Ryotwari Act 1948. The object of this Act was to compensate only the right to collect rent. Further it suggested to vest in Government all there rights claimed by the Zamindar, lock, stock and barrel. In this Act, compensation was given to pre-settlement estate in the same basis as the Inams and to the post-settlement estates as if they are Zaminadars.

Inamwari System:

Inam means Manyam. Based on extent, the Inam is classified into major and Minor Inams. Likewise based on the benefits, it is categorized into personal grants and service grants. Depending on the remission the grants is classified into Sarva Manyam, Artha and Chaturbhagam.

Constitutional Provisions:-

The compulsory acquisition of property under Art.31 of the Constitution of India was repealed. The right hold the property is now vested in Art.300A reads as:-

“No person shall be deprived of his property save by authority of law.”

Therefore the right to hold property is not a fundamental right Art.31 A gives protection to those laws which provides for acquisition of estates. Likewise Art.31 B gives validity to certain Acts and regulations specified in the IX Schedule of the Constitution of India. Whereas Art.31 C saves the laws or Acts which promote or give effect to the directive principles of the state policy.

Keshwanand Bharathi -Vs- State of Kerala.

LAND ACQUISITION ACT, 1894

Preamble:

To amend law for acquisition of land needed for public purposes and for companies and for determining the amount of compensation to be made on account of such acquisition.

The basic principle guiding the law of land acquisition in India is "Salus populi east supreme lex" meaning public necessity is greater than that of private one. The Land Acquisition Act is applicable to whole of India except J & K in the definition section namely Section.3 of the Land Acquisition Act, many terms have been defined. Some of the terms are

(1) Land,

(2) Person Interested,

(3) Court,

(4) Company

(5) Public purpose.

The first step in the Land Acquisition proceedings is the preliminary investigations i.e. publication of notification under Section 4 (1) accordingly when any land in any locality is needed or likely to be needed for any public purpose or for a company, a notification shall be published in the gazette and in two daily newspapers. The substance of the notification was placed in the convenient places in the locality. The last date of publication is called as the date of publication of the notification. The notification under Section 4 (1) is a mandatory requirement.

TamilNadu Amendment Act, 1997 says the publication of such notification in two Daily newspapers and the giving of public notice should be completed within a period of sixty days.

With regard to the question who is to issue the publication of Notification, Tamil Nadu Act of 1997, says, it must be by:

(a) The collector in respect of land exceeding 10 acres in extent the value of which does not exceed Rs.5,00,000/- (Rupees five lakhs only);

(b) The Commissioner of Land Administration in respect of land not exceeding 20 acres in extent of the value of which exceeds Rs.5,00,000/- (Rupees five lakhs only) but does not exceed Rs.20,00,000/- (Rupees twenty lakhs only); and

(c) The Government in other cases.

Hearing of Objection:

The person interested as defined under Section 3(b) in respect of lands notified in the official gazette can file his objections to the acquisition of the land to the collector in writing within 30 days from the date of publication of the notification. The said objector shall be heard either personally or through an advocate. Thereafter the collector shall make reports as the case may be to the government along with his recommendations and the records for the final decision by the government. The hearing of objections contemplated under Section.5A shall not apply to any emergent or urgent acquisition under Section.17 or any temporary occupation of land under Sections 35 to 37. The enquiry conducted by the collector under Section.5A is an administrative enquiry.

Section 6 of the Act relates to the declaration of intended acquisition. This declaration under Section.6 is that the land is for public purpose. Prior to the publication of the declaration,

satisfaction of the appropriate government with respect to the public purpose is important. The declaration under Section 6 shall be made by the secretary to the government or by some authorized officer of the appropriate government. After the amendment in the year 1984, the declaration under section 6 shall not be made after the expiry of one year from the date of publication of notification under section 4(1). Like publication of notification, the section 6 declaration shall also be published in the official gazette, two daily newspapers and by public notice by the collector.

After the publication of the Section 6 declaration, notice to the person interested in the land has to be given. This is a mandatory requirement Under Section 9, the collector shall give public notice in the convenient places near the lands sought to be acquired by the government. Apart from the public notice, the collector has to serve individual notices to the occupier of the land. The notice under Section.9 shall state that the government intends to take possession of the lands, all the claims may be made to the collector, and require those persons interested to appear either personally or through an advocate before the collector in order to put forth the nature of their interest in the lands and their claims to compensation.

Enquiry and Award by the Collector:

After hearing and perusing the objections raised by the person interested pursuant to the notice under Section.9, the collector shall make an award with respect to the true extent of land, the compensation allowable for the land and the apportionment of the compensation amount among the persons interested. An award by the collector is an offer made to the person interested in the land notified for acquisition. The collector shall make an award within two years from the date of publication of the declaration under Section.8. The award shall become final as soon as it is filed in the office of the collector. After passing of award, the collector has power to take possession of the land which would vest absolutely with the government free from all encumbrances.

In case of emergency and in certain circumstances the Section.17 gives power to take possession of the land by the collector even prior to the passing of award. Before intimating action under Section.17, the Section.6 declaration and notice under Section.9 (1) should have been made.

Reference to Court:

After the making of award under Section.11, if any person interested is aggrieved by the award, the collector can make a reference to court on application by the person interested. The above said application to collector should be in writing. Reference to court can be made for any dispute in respect of -

(1) the measurement of land;
(2) the amount of compensation;
(3) persons to whom it is payable; and
(4) apportionment of compensation.

Determination of Compensation:

The section 23 and 24 deals with the procedure and matters that has to be taken into account while determining the compensation.

Matters to be considered

(1) Market value of the land on the date of 4(1) notification;
(2) Damages to the standing crops or trees at the time possession of the land;
(3) Damages due to severing of acquired land from other land at the time of possession of land;
(4) Damages caused to the other movable or immovable property or to the earnings of the person interested;
(5) Reasonable expenses due to the change of his residence or place of business pursuant to the acquisition of land; and
(6) Diminution of profits of the land during Section.6 declaration and possession of land by the collector.

Matters not to be considered

(1) Degree of urgency,
(2) Disinclination to part with the land,
(3) Damages without injury,
(4) Prospective Damage,
(5) Prospective increase in value of other land,
(6) Prospective increase in value due to acquisition,
(7) Costs of improvement after notification and
(8) Increased value for illegal or uses against public policy.

The amount of compensation awarded by court shall not be less than the award of the collector.

Appeal:

As per Section 54 an award by Land Acquisition Judge in reference is appealable before High Court. Limitation for an appeal to High Court is 90 days. Section 5 of the Limitation Act for condonation of delay is applicable to the appeal under Land Acquisition Act.

Acquisition of Land for Companies:

The provisions under Section.38 A to 44 B shall apply only to acquisition for companies.

For acquisition for company, Section. 39 lays down two conditions -

(1) There must be previous consent of the Appropriate Government,
(2) There must be an agreement executed between the company and the appropriate government.

The entire cost for acquisition must come from the fund of the company concerned. There must be a previous enquiry as contemplated under Section. 40 by an officer appointed by the appropriate government. Based on the inquiry or report, the government must be satisfied with the purpose of the acquisition. After the subjective satisfaction by the government, an agreement between the company and the government must be satisfied with the purpose of the acquisition. After the subjective satisfaction by the government, an agreement between the company and the government shall be entered into with respect to -

(1) payment to Appropriate Government of the cost of acquisition
(2) transfer on such payment of the land to the company
(3) terms on which the land shall be held by the company etc.

After the execution of the agreement under Section 41, the same shall be published in the official gazette. The company for which any land is acquired is restricted from transferring the said land or any part by sale, mortgage, gift, lease or otherwise except with the previous approval of the appropriate government.

TAMIL NADU LAND REFORMS (FIXATION OF CEILING ON LAND) ACT 1961

Preamble of the Act is that an Act to provide for the fixation of ceiling on agricultural land holdings and for certain other matters connected therewith in the State of Tamilnadu. The object is to acquire the excess holdings and distribute to landless and other persons.

According to Section. 3(1) of this Act. Agriculture includes horticulture, dairy farming, poultry farming, livestock breeding, growing of trees etc. The term cultivating tenant is defined in Section 3(10) which means a person who contributes his own physical labour in the cultivation of land under tenancy or lease. The ceiling limit has been prescribed in terms of standard acre which would constitute one stand acre depends on the nature of the land namely wet land or dry land and also upon the assessment of land revenue.

In this enactment different ceiling limits have been prescribed for various categories like educational institutions, individuals etc. In respect of a family consisting of not more than 5 members, the limit is 15 standard acres and for any college, the limit is 40 standard acres. Likewise in any event the total extent of land held or deemed to be held by a family shall not exceed 30 standard acres. Therefore from the date of commencement of the Act, no person shall be entitled to hold land in excess of the ceiling area prescribed by the Act.

Furnishing of Return & Collection of Information:

Each and every person who held land in excess of ceiling area ought to have furnished the return to the authorized officer within 30 days from the notified date in case of failure to furnish the return, the authorised officer has to collect the information regarding the extent held by each person and other particulars of the land. After giving reasonable opportunity to make representations and considering the same, the authorised officer shall prepare a draft statement in respect of each person.

In respect of any question relating to the title of the land, the authorised officer may decide the issue summarily. If it involves, any substantial question of law or tact, the question shall be referred to the Land Tribunal. Against the order of the authorized officer no appeal or revision lies. The authorised officer shall publish the final statement which reveals the extent of land of a person, the surplus of land etc. After the publication of the final statement, a notification to the effect that the surplus land is required for public purpose would be made. The authorised officer may take possession of the land after publication of notification and vests with the government. From the date of vesting of land with government to the date of possession of the land, the person in occupation of the said land is liable to pay amount or use and occupation and for enjoyment.

When any surplus land of a person is acquired by the government that person shall be paid compensation amount according to the Schedule III as on the date of acquisition of land. In case of any disputes, the aggrieved person can approach -

(1) Authorised officer

(2) Land Board

(3) Land Tribunal

(4) Land Commissioner and

(5) T.N. Land Reforms Special Appellate Tribunal.

This is the hierarchy of Tribunals. Against the orders of the authorised officer, appeal lies to the Land Tribunal which has to be filed within a period of 30 days from the date of decision. Similarly the revisional powers have been given to the Land Commissioner and also the Special Appellate Tribunal. The various sections 85 to 92 deals with various penalties that would be inflicted on the person who commits any breach of the provisions of the Act.

Act 41 of 1971 has made a number of amendments. Section 8(1) clause (x) and sub-section (2) of section 8 have been omitted as also section 9(4); section 10 (1) (xiii); section 13 (2); section 14 (3). Sections 38 to 49 dealing with Sugar Factory Board have been omitted. Section 73 (xiii), Sections 74, 75 have been omitted. In section 18(3) and section 91 the words "wells, filter points or power lines" have been added, after the words, "machinery, plant or apparatus". As per new section 94-A added, the Government shall make arrangements for the cultivation of surplus lands acquired by the Government from a sugar factory. Section 94-B added deals with corporation owned by the State Government through which the surplus lands referred to above will be cultivated. Section 94-C newly added deals with exemption in respect of land held by sugar factory for research purposes. Consequential amendments have also been made in Sections 98, 100, 101, 103, 105, 107.

Act 10 of 1972 has omitted section 59. Act 20 of 1972 added, section 3-A containing special definitions like "date of commencement of this Act", "notified date". Section 5 was amended to reduce the total ceiling for any family from 60 to 40 standard acres. The amending act also introduced new Chapter IV- dealing with permission by Government to hold excess land by industrial or commercial undertaking. New section 18-A empowers the Land Commissioner to direct that land not included in a person's holding to be included in such holding.

An amendment of 1974 empowers the Government to prescribe a time limit for preferring applications to the Land Commissioner for revision under Section 82. The Second Amendment Act of 1974 provides for the purpose of fixing the ceiling area of any person, any transfer, sale or sub-division of land effected on or after the notified date and before the publication of Government's notification that the surplus land is required for the public purpose will be deemed to have been void, this amendment became necessary as held by the Madras High Court in Naganatha Iyer Vs. Authorised Officer, (1971) 1 M.L.J.274

TAMIL NADU OCCUPANTS OF KUDIYIRUPPU (CONFERMENT OF OWNERSHIP) ACT, 1971.

The object of this Act is to provide for the conferment of ownership rights on occupant of kudiyiruppu in the State of TamilNadu. Further the Act is applicable to any agriculturist or agricultural labourer occupying any kudiyiruppu as tenant or licensee as on 01.04.1990.

Kudiyiruppu means any site of dwelling house or hut occupies as tenant or licensee by agriculturist or agricultural labourers and also the adjacent areas required for quiet enjoyment of the dwelling house or hut.

According to Section.3 of the Act, those agriculturist or agricultural labourer occupying any kudiyiruppu on 01-04-1990 shall be the owner of such kudiyiruppu and vest absolutely free from

encumbrances. If the Authorised officer is satisfied that the vesting of existing kudiyiruppu would cause inconvenience to the owner, the owner may be permitted to provide any alternate site with certain conditions.

The Authorised officer has power to decide the disputes regarding -

(1) whether the person is agriculturist 0 agricultural labourer;

(2) whether the land is an agricultural land;

(3) whether site is a kudiyiruppu; and

(4) whether any adjacent area is necessary for quiet enjoyment of dwelling house or hut.

Aggrieved by any decision or order by the authorised officer, appeal lies to the District Collector. The limitation period for preferring appeal is 90 days. On sufficient cause the Appellate Authority can condons the delay in filing the appeal.

After hearing the occupant and owner of the kudiyiruppu and all the persons interested, the authorised officer shall decide the compensation in accordance with the schedule and thereafter publish the order in the District Gazette. Aggrieved by the order of the authorised officer in respect of determination of compensation, appeal lies to the court namely Sub court. It has to be preferred within 90 days from the date of communication of the order. There lies a right of second appeal to the High Court from the order of that court that too when the compensation fixed exceeds Rs.10,000/- .

The compensation paid to the owner shall be recovered by the government from the occupant on whom the ownership is conferred in 15 equal monthly installments.

Prohibition of Alienation:

There is a restraint on the power of alienation of the occupant or legal representative of the occupant of the kudiyiruppu on whom the ownership is conferred for a period of 10 years particularly in respect of sale, mortgage, lease, etc. Any how with the sanction of the authorised officer, they have the power of alienation. If there is any contravention to these provisions, the alienation shall be made as null and void and the kudiyiruppu shall vest with the government free from encumbrances.

Bar of Civil Jurisdiction:

By virtue of Section 23, the jurisdiction of the civil court has been taken away. In matters over which the government or authorised officer has power to determine any issue, the civil courts cannot interfere. In case of any breach of the provisions of this enactment, there are penal provisions for fine and for prosecution of the offence committed.

Even in respect of any prosecution for any action contravening the provisions of the Act, there is a protection given by the enactment itself if the action is in good faith.

TAMILNADU CULTIVATING TENANTS PROTECTION ACT 1955

Object & Scope:

An act for the protection from eviction of cultivating tenants in certain areas in the State of Tamil Nadu.

The Tamilnadu Cultivating Tenants Protection Act was only a beneficial legislation for the security of tenure to the cultivating tenants of agricultural lands. The Original Parent Act enacted was in force only for a period of one year and it would be expired by 26th September 1956. By the amending Act XIV of 1956 the period of enforcement was extended. A series of amended Acts extended both the area of operation of the Act and also the continuance of the Act.

Cultivating Tenant:

Cultivating tenant means a person who contributes his own physical labour or that of any member of his family who contributes their own physical labour.

On the death of the cultivating tenant, his legal representatives would be entitled to claim the protection of the Act if anyone of them satisfied that he has personally contributed his labour in the cultivation of such land.

Landlord:

Landlord in relation to a holding or part thereof means the person entitled to evict the cultivating tenant from such holding or part.

Landlord as defined in Section 2(e) of the Tamil Nadu Cultivating Tenants Protection Act would clarify include any person who is entitled under the common law, to evict a cultivating tenant from a holding, exercising the same rights as his predecessor in-interest.

Disposal of Application under Section 3:

On receipt of an application for eviction, the Revenue Divisional Officer shall hear the landlord and the cultivating tenant and hold an enquiry into the matter and pass an order accordingly. It is therefore obvious that the officer acting under the Act has either to allow the application or to dismiss it after hearing the representations of the parties who have been served and in case he finds the tenant is in arrears, he may in his discretion grant some time for depositing such arrears and if the cultivating tenant does not comply with the order, he may pass an order of eviction. One of the grounds in which eviction can be sought is that set out in Section 3 (2) I i.e. use of the land for any purpose not being an agricultural or horticultural purpose.

Restoration of Possession:

In cases where the tenant surrenders possession voluntarily without being compelled to do so by any act or conduct on the part of the landlord there is no eviction.

In order to entitle, a person to apply for restoration to possession of land under the Cultivating Tenants' Protection Act 1956, he must be a cultivating tenant within the meaning of the Act. It means that there should be the relationship of landlord and tenant between the parties.

Privileges to Army Personnels:

Sub-section (3) of Section 4-AA gives special privilege to the landlord who got himself enrolled as a member of the Armed Forces to resume lands for personal cultivation after his discharge or retirement from service or he being sent to reserve from the Armed Force.

Bar of Civil Jurisdiction:

Under Section 6 the civil court has been barred from entertaining matters in which the Revenue Divisional Officer is empowered to decide and determine. The clear import 0 Section 6-A is that in any suit before any civil court for possession, if the defendant proves not only that he is a cultivating tenant but also he is entitled to the benefits of the Act, the civil court is bound to transfer it to the Revenue Divisional Officer and cannot proceed to try and dispose of it itself.

Revision:

The civil revision petition would lie before the High Court under Section 6-8 of the Act against any order passed by the Authorised Officer.

TAMILNADU CULTIVATING TENANTS' (PAYMENT OF FAIR RENT) ACT, 1956

Introduction:

Whereas it is expedient to provide for the payment of fair rent by cultivating tenant in certain areas in the State of Tamilnadu. The Tamilnadu Cultivating Tenants' (Payment of Fair Rent) Act 1956 is intended to regulate rents payable by a cultivating tenant to the landlord and its provisions will take effect irrespective of any contract or usage, decree or order of court or any provision of law to the contrary;

The fixation of fair rent by the Rent court would take effect from the date of application in which the order was passed.

Definitions:

Section 2 of this Act viz., Tamilnadu Cultivating Tenants (Payment of Fair Rent Act 1956, clearly explains the meaning of various terms and expressions to construe the provisions of the Act in a right manner. The term cultivating tenant explained in this Act is the same as explained in the Tamilnadu Cultivating Tenants Protection Act 1956.

Rights and Liabilities of Cultivating Tenant and Land Owners:

With effect from 15t day of October 1956, every cultivating tenant shall be bound to pay to the land owner and every land owner shall be entitled to collect from the cultivating tenant fair rent payable under this Act.

The Tamilnadu Cultivating Tenants (Payment of Fair Rent) Act 1956 whilst providing for the fixation of fair rent in the case of wet land where the normal produce is paddy, it avoids to advert itself to cases where the main crop is sugar cane, Plantain or betel vines, etc.

What is the procedure to the adopted to fix such rent which was not the subject matter of agreement or arrangement between the landlords and the Tenant? The normal basis is the market rent or fair rent that is being obtained for similar land in similar locality in the vicinity.

Fair Rent:

Where there was no concluded contract between the landlord and the tenant in regard to the rent relating to the year in question the rent payable would be in accordance with Section 4 of the Tamilnadu Cultivating Tenant (Payment of Fair Rent) Act 1956, i.e., in the case of wet land 40 per cent of the normal gross produce or its value in money.

Payment of Fair Rent:

The Fair Rent may be paid either in cash or in kind as embodied in Section 5 of the Act. Section 5 and 7 of the Act governs the parties only when there is no dispute s to the fair rent payable by the tenant to the landlord. Section which provides for payment in cash or in kind or partly in cash and partly in kind refers clearly to the fair rent and not the agreed rent.

Sharing of Produce:

It is clear that Section 7 of the Fair Rent Act can be transgressed in one of two ways, namely (1) when the tenant does not bring the crop to the threshing floor at all or (2) having brought it to the threshing floor, he removes any portion of it at such time or in such manner as to prevent the due division thereof at the proper time. The section forbids removal of any portion of the crop. There is no question therefore, of share of the tenant or the landlord's either the removal as a whole will transgress Section 7 or it will not; and that will depend upon the fact whether the removal was in order to prevent due division of the crops at the proper time.

Appeal and Revision:

The appeal remedy is contemplated under section 9 of the Act to Court from any orders passed by the Record Officer. Whereas Section 11 deals with the revisional power of the High Court. Against the order passed by the Rent Court appeal shall lie to the Rent Tribunal and his decision shall be final subject to the revision under Section 11. The orders of the Rent Tribunal shall be liable to revision by the High Court.

Surrender of Excess Land:

Section 14 applies only to the case of a tenant claiming relief under the Fair Rent Act. That section will have no application to the case of a landowner whose tenant owns or enjoys more than 6.2/3 acres of land.

Under the Acts tenant in order to get the benefit of fixation of fair rent should surrender the excess land before the ending of the agricultural year 1957. The intention of the Section 14(2) is that the tenants should exercise the option but relinquish at the end of the agricultural year ending in 1957, but not subsequent thereto.

TAMILNADU AGRICULTURAL LANDS RECORDS OF TENANCY RIGHTS ACT OF 1969

Object and Scope:

An act to provide for the preparation and maintenance of record of tenancy rights in respect of agricultural lands I the State of Tamilnadu.

The object of the Act is to provide for the preparation and maintenance of the record of tenancy rights in respect of agricultural lands in the State of Tamilnadu. The operation of the Act was extended by notification issued in the official Gazette every now and then.

To implement the provisions of the Act, under Section 2(7) of the Act, Government had appointed Special Tahsildars as Record Officers and Special Deputy Collectors or Revenue Divisional Officer as Appellate Authority. The Special Tahsildars who were working as records officer have completed enquiries and prepared Draft Records in respect of most of the villages and published them in the District Gazette.

The need for the Act arose out of the fact that the implementation of tenancy laws was very much retarded for want of an authentic record of tenancy rights. The condition stipulated in the Tenants Protection Act for the land owners to tender lease deeds to tenants annually was observed more in the breach than in its practical observance. The tenants were at the mercy of the land owner in acknowledging their tenancy right. Receipts were scarcely given for warrant delivered by the tenants. The land owners took action to forcibly evict tenants taking advantage of the absence of a record of tenancy. Protection was therefore needed to the tenants. Except in very few cases, the leases were mostly oral and as hitherto there was no record to prove the tenancy, the tenants found it difficult to establish their rights by recorded evidence and claim the protections given to them under the various tenancy laws. Now all such cases 0 tenancy will find place in the approved record and thereby the tenants concerned will be ensured of the benefits of tenancy legislation.

Preparation of record of Tenancy Rights:

Section 3 of the Act empowers the government to prepare the record of tenancy rights. The land owner, Tenant or any other intermediary must submit a written statement to the Record Officer (Special Tahsildars) containing the particulars required in Form- III provided under the rules. The officer will prepare a draft record and it will be published in the District Gazette. After hearing the parties, final draft will be prepared and published in the Fort St. George Gazette.

Inclusion of Lands in the Approval Records:

Section 4 of the Act provides procedure for inclusion of any land let in for cultivation after preparation of the record. It also includes provision to add any land left out at the time of preparation of the final record.

Modification:

At times modification in the record is necessary due to the following reasons:

(a) Death of the Owner or tenant or intermediary

(b) The land may be transferred or for any other reasons. In such cases the record is modified after hearing the interested person. This procedure is provided in Section 5 of the Act.

Appeal and Revision:

Any person aggrieved by the order passed by the Record Officer can prefer an appeal to the District Collector. Further the District Collector has the power to call for examine and pass orders in respect of any proceedings under this Act.

Bar of jurisdiction of civil courts. No civil court shall have jurisdiction in respect of any matter which the Record Officer, the District Collector has the power to call for examine and pass orders in respect of any proceedings under this Act. The record will be modified as per the order in Appeal for Revision and it will be given effect by the Record Officer.

Bar of jurisdiction of civil courts. No civil court shall have jurisdiction in respect of any matter which the Record Officer, the District Collector or other officer or authority empowered by or under this Act has to be determine and no injunction shall be granted by any court in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under the Act.

TAMILNADU BUILDING (LEASE AND RENT CONTROL) ACT, 1960

INTRODUCTION:

The Rent control legislation in this state is by now more than 52 years old. It deals mainly with landlord and tenant a very sensitive subject like the relationship of mother-in-law and daughter-in-law. Some landlords and tenants fight for prestige. Others fight for necessity and shelter. It has been extended to almost the entire state.

The Act is a self contained and complete code for regulation of rights of landlords and tenants as defined in the Act with respect of buildings. A short analysis of the act would show that the Act provides for every contingency that is likely to arise in the relationship between landlord and tenant.

OBJECT AND SCOPE:

Whereas it is expedient to amend and consolidate the law relating to the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants there from in the State of Tamilnadu.

DEFINITIONS:

Building:

Building means any building or hut or part of building or hut, let or to be let separately for residential or non-residential purposes includes -

(a) The garden, grounds and out houses, if any, appurtenant to such building, hut or part of such building or hut and let or to be let along with such building or hut.

(b) Any furniture supplied by the landlord for use in such building or hut or part of building or hut, but does not include a room in a hotel or boarding house.

Landlord:

"Landlord" includes the person who is receiving or is entitled to receive the rent of a building whether on his own account or on behalf of himself and others or as an agent trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent if the building were let to a tenant. A tenant who sub-lets shall be deemed to be a landlord within the meaning of this Act in relation to the sub-tenant.

Tenant:

The definition of the word tenant as given in the Rent Control Acts, is the indicative of the widest meaning assigned to it, but it is to be limited in accordance with the scope of the term of a particular Act. While some Acts define the term 'tenant' as a person by whom or on whose behalf the rent is payable, the other Acts include the sub-tenant also. Tenant includes any person by whom or on whose account rent is payable for a building and even includes the surviving spouse or any son or daughter and any person continuing in possession after the termination of tenancy in his favour.

Fixation of Fair Rent:

Under Section 4 Sub-section (2) either the tenant or the landlord can file application for fixation of fair rent and the Rent controller after making such enquiry according to the guidance and principles laid down in other sub sections of Section 4 shall fix the fair, rent. The fair rent

shall be nine per cent gross return per ‘annum in the case of residential building and twelve per cent gross return per annum in the case of non-residential building on the total cost of such building. This has been laid down in sub-section (2) and (3) and includes the market value of the site, cost of construction of the building and cost of provisions of the amenities specified in schedule I. While calculating the market value of the site, the area of the site on which the building is constructed and up to fifty percent of the portion of the site on which the building is constructed of the vacant land shall be taken into account and the remaining excess portion of the vacant land as amenity. In the cost of site in which the building is constructed and the cost of construction of the building, certain percentage will be the cost of provision of amenities. In the case of residential building, it shall not exceed fifteen per cent and in the case of non-residential building twenty five per cent. The cost of construction of the building is determined after deducting the depreciation calculated at the rate as specified in Schedule H by using the formula P = A [1000-r/100]n

Where -

A	=	total cost of construction of the building,
r	=	rate of depreciation per annum,
n	=	age of the building (i.e. number of years)
p	=	the final depreciated value of the building.

The amount of depreciation will be equal to (A-P) subject to a minimum of ten percent of “A”.

Deposit of Rent:

According to section 8(1) it is mandatory for the landlord to issue duly signed receipt for the actual amount of rent or advance which he has received. If the landlord refuses to accept or evades to receive any rent lawfully payable by the tenant in respect of the rented premises, then the tenant may issue notice directing the landlord to specify a bank to deposit the rent lawfully payable to him within ten days from the date of receipt of the notice. It is always open to the landlord to specify another bank instead of one which he has already specified. Where landlord specifies a bank then the tenant has to deposit the same in respect of the building. After issuing notice to the landlord to specify a bank, if the landlord does not specify a bank, it is mandatory for the tenant to remit the rent to the landlord by way of Money order after deducting the money order commission. Suppose the landlord refuses to receive the rent remitted by the tenant as per sub-section (4) of Section 8, the tenant may deposit and continue to deposit the rent before the controller.

Grounds for Eviction of Tenants:

A landlord can evict the tenants only in accordance with the provisions of the Act. The Act specifies certain grounds for eviction and they are as follows: -

(A)	Wilful Default	---	Section 10(2) (1)
(B)	Sub-letting	---	Section 10(2) (ii) (a)
(C)	Different User	---	Section 10(2) (ii) (b)
(D)	Act of Waste	---	Section 10(2) (iii)
(E)	Immoral or Illegal Purpose	---	Section 10(2) (iv)

(F)	Act of nuisance	---	Section 10(2) (v)
(G)	Non-occupation of the Building	---	Section 10(2) (vi)
(H)	Denial of Title	---	Section 10(2) (vii)
(I)	Personal Occupation	---	Section 10(3) (a)
(J)	Additional Accommodation	---	Section 10(3) (c)
(K)	Demolition and Reconstruction	---	Section 14

(a) Willful Default:

No tenant could be evicted from the premises in his occupation unless without default was established. To arrive at a finding that the tenant is in willful default, the mere fact that the tenant is in arrears is in arrears of rent would not be enough and the court has to consider whether there has been intentional violation of the clear obligation to pay rent.

(b) Sub-Letting:

In the lease deed there must be a specific clause authorizing the tenant to sub-let the premises and in the absence of such specific clause, it cannot be said that the right the tenant enjoys under the ordinary law with regard to subletting can be inferred. If the tenant sub-lets the premises without the consent of the landlord, then that is a ground for eviction.

(c) Different User:

Though the word 'purpose' occurring in this section has been defined in the Act, it is qualified by the other words occurring in the sub-clause viz., other than that for which it was leased. Once the purpose of lease is determined the evidence regarding different user of the premises by the tenant will afford material to the controller to decide whether the tenant has put the premises for different user or not.

(d) Act of Waste:

In short though changing the nature of the demised premises is technically waste yet this is not so if the change has been expressly sanctioned by the lessor, and the mere change is not waste unless it is in act injurious to the inheritance either by diminishing the value of the estate or by increasing the burden upon it or by impairing the evidence of title.

(e) Illegal or Immoral Purpose:

Using the building for the illegal or immoral purpose is a ground for eviction. Merely because a tenant played cards for stakes in the building in his occupation on a solitary occasion and was convicted under the city Police Act, it is not proper to say that the building has been converted into a gambling den.

(f) Acts of Nuisance:

What the Act requires under this section is either the tenant is guilty of such acts and conducts which are sources of nuisance to those who occupy other portions in the building, a portion of which he himself occupies as a tenant, or such acts and conduct amount to nuisance to the occupiers of the building in the neighbourhood.

(g) Non-Occupation of the Building:

Section 10(2) (vi) depicts that if a tenant fails to occupy the demised premises for more than four months without assigning any bonafide reason, he is liable to be evicted on that ground alone.

(h) Denial of Title

When a tenant denies the title of the landlord without any bonafide, then that itself is a ground for eviction. But any bonafide denial of title would not render a tenant liable for eviction.

(i) Personal Occupation:

Section 10 (3) (a) deals with the ground of personal occupation for eviction. This section consists of three clauses namely clause (i) which deals with the residential buildings, clause (ii) deals with buildings used for keeping vehicles and clause (iii) deals with the non residential buildings. Under this section a landlord can ask for his owner's occupation only if he has no other building of his own.

(j) Additional Accommodation:

The ground of additional accommodation for eviction is embodied under section 10 (3) (c). The purpose of this sub-section would be that if the landlord is in occupation of a portion 0 a residential or non-residential building he would be entitled to the other portion and there is no warrant in the section restricting his right to activities which are commercial in nature. The expression "as the case may be" occurring in the section has only one meaning that is the requirement of additional accommodation may be for residential or for non-residential purpose.

(k) Demolition and Reconstruction:

Section 14 deals with the demolition and reconstruction as aground for eviction. This section stipulates that the landlord can ask for eviction of the tenants on the ground of demolition and reconstruction. For this section the condition of the building, then the age of the building etc., are to be taken into consideration for passing a decree for eviction. It is not necessary that the building should be very old and descript to enable the landlord to claim that the immediate purpose was for demolition of the building. While the age and condition of the building are relevant factors to be taken that there is an imminent threat of the same crumbling down in the near future and only in such a contingency, the landlord could resort to the process under Section 14 (1) (b) of the Act.

Execution:

The decree of eviction passed by the rent controller can be executed as laid down in the Section 18 of the Act. Section 18 deals with the execution of the order of eviction. The executing court has no right to go into the question whether the finding reached by the Rent Controller on the question whether the need 0 the landlord was bonafide or not, its duty is to execute the order of eviction as it stands.

Appeal and Revision:

Any person aggrieved by the order of the Rent Controller can prefer an appeal under Section 23 and from any order of the Appellate Authority a revision under Section 25 can be preferred. The appeal has to be preferred within a period of 15 days from the date of order. The revision has to be preferred within a period of 30 days from the date of order.

THE TAMILNADU CULTIVATING TENANTS SPECIAL PROVISIONS ACT, 1968

As it was felt that it would be difficult for the cultivating tenants to pay in one lump sum the entire arrears of the rent outstanding on the 201h April 1968 due to the unprecedented drought in 1965, The Tamilnadu Cultivating Tenants (Special Provisions) Act, 1968 was enacted to provide for the payment of arrears of rent accrued and due to the landlord and outstanding on the 201h April 1968, in for equal annual installments on or before 151 April 1969, 151 April 1970, 151 April 1971 and 151 April 1972, along with current dues.

Section 3 of this Act protects the Cultivating Tenant from eviction on the ground of arrears of rent for the period prior to 201h April 1968. By the help of this Act, he can pay the arrears of rent in four equal installments. Failing which he will be evicted according to the procedure established by law under this Act.

THE TAMILNADU CULTIVATING TENANTS ARREARS OF RENT RELIEF ACT, 1972.

In 1972, this Act has been passed to provide relief to cultivating tenants in respect of certain arrears of rent.

This Act removed the cultivating tenant's fear of eviction for arrears of rent. So their occupancy right is secured. Sections 3 to 7 are to protect the interest of the poor peasants. This Act is a milestone in the achievement of protecting the cultivating tenants in Tamil nadu.

Section 4 of the Act further says if any Cultivating Tenant makes any payment by way of rent in the Court shall be deemed to have paid or deposited towards the current rent.

This Act specially lays emphasis that no suit for recovery of the debt shall be instituted and no application for the execution of a decree or payment of money passed in a suit for recovery of a debt.

CASE LAWS

LAND ACQUISITION ACT: -

1) Sunderial Vs. Paramasukhdas

   S.C. Held that the attaching Decree-holder is a person interested.

2) Himalayan Tiles Vs. F.V. Coutinho

   S.C. held that the body i.e., company for whose benefit property is acquired is also person interested for purpose the Act.

3) Seethalakshmi Ammal Vs. State of T.N.

   Madras H.C. Held Purchase of a property during the pendency of acquisition proceedings is a person interested.

4) Bai Malimabu Vs. State of Gujarat

   S.C. Held acquisition of land for university to construct buildings, staff quarters, hostel etc. is definitely a public purpose.

5) Kashi Vidyapith Vs. Motilal

   S.C. Held acquisition of land for university to construct buildings, staff quarters, hostel etc. is a public purpose.

6) Somawanti Vs. State of Punjab

   S.C. upheld the constitutional validity of Section 4 of the Act.

7) Madhya Pradesh Housing Board Vs. Mohd. Shafi.

S.C. upheld the mandatory requirement of issuance of notification under Section 4(1) and its strict compliance.

8) Farid Ahmed Abdul Samad Vs. Municipal Corporation,Ahmedabad

S.C. held Personal hearing of the person interested in the enquiry under Section 5A of the Act.

TAMILNADU LAND REFORMS (FIXATION OF CEILING ON LAND) ACT's :

1) Vavallevvai Maricar Dharamam Vs. State of Tamil Nadu

Held that trust created for running a madarasa i.e. place where religious instructions are imparted to Muslim boys and girls is a public trust of religious instructions and come under the exemption of Section 2.

2) Ramakrishnan Vs. State of Madras

Held, for the purpose of this Act Stridhana land refers only to the land held by a female on the date of commencement of the Act and nothing else.

3) State of Tamil Nadu Vs. Narendra Dairy Farms (P) Ltd.,

Held, though Section 7 of the Act prohibits a person from holding land in excess of ceiling area, the surplus land shall vest with the Govt. only on publication of notification under Section 18(1)

4) M.K. Harihara Iyer Vs. Authorised Officer, Land Reforms

S.C. Held that Under Section 10 for preparation of draft statement the Authorised Officer has to take into account only the members of the family as defined in Section 3 (14)

5) Syed Rabia Beevi Vs. Authorised Officer

Held that Section 15 applies to mistakes in the correctness not of the merits, but of the form of entry in the final statement.

6) Lakshmi Ammal Vs. Assistant Commissioner

Held that the Section 50 is not void for vagueness, merely because no specified period has been prescribed for fixation of final compensation.

T.N. OCCUPANTS OF KUDIYIRUPPU (CONFERMENT OF OWNERSHIP) ACT:-

1) T.K. Narayana Pillai Vs. Naganatha Iyer

Held that conferment of ownership under Section 3 will be applicable only if the person proves he is an occupant. And also held an agriculturist can claim his site in occupation as Kudiyiruppu only if he is a tenant or a licensee in respect of the site alone.

2) Kalyanasundaram Udayar Vs. Pazhaniayya Udayar.

Held that in respect of disputes referred under Section 4, the Authorised Officer alone is entitled to decide and civil court jurisdiction is ousted.

3) R. Veerappan Vs. Shanmugavelu

Held that the questions to be determined under Section 3-B are within the exclusive jurisdeiction of the Authorised Officer and not with the Civil Court.

T.N. CULTIVATING TENANTS PROTECTION ACT:-

1) Ramaswamy Gounder Vs. Kaliappa Gounder

   Held Lesse was not entitled to the protection of the Act in case where the lease of agricultural land was from a guardian under the directions of court.

2) Sudailaimuthu Vs. Palaniyandavan

   S.C. Held that the contribution of his own physical labour by one member of a joint family is sufficient for that joint family to the protection under the Act.

3) P. Somasundaram Vs. M. Govindasamy

   Held that the members of the Armed Forces are entitled to the special privilege under Section 4AA only, if they were landlords at the time of joining the Armed Forces.

4) Chinnamuthu Gounder Vs. Perumal Chettiar

   S.C. Held that the civil court has to transfer the pending suit for possession or for injunction to the Revenue Division Officer for disposal, if it is a satisfied before the civil court by the defendant that he is a Cultivating Tenant and entitled to the benefits of the Act.

5) Baluchamy Vs. Thayammal

   Held that the eviction order passed by the Revenue Court cannot be set aside on the ground that the arrears are paid on the direction by the High Court.

6) Rama Iyer Vs. Sundaresa Ponnapoondar

   S.C. Held that the decision of the Tribunal pursuant to the enquiry Summarily is also subject to revisional power of the High Court.

7) Ramaswamy Gounder Vs. Perianna Moopan

   Held that the Revenue Court has no power to remit the rent due on the ground of failure of crop.

T.N. CULTIVATING TENANTS (PAYMENT OF FAIR RENT) ACT:

1) N.S.S. Sivanu Mudaliar Vs. Sivapakaia Nadar

   Held that in what circumstances remission could be claimed under Section 5.

2) Govinda Gounder Vs. Oeenappa Gounder

   Held the pendency of proceedings for fixation of fair rent before Rent Tribunal is no bar to the Rent Court to decide application under Section 6(2) of the Act.

T.N. AGRICULTURAL LANDS RECORD OF TENANCY RIGHTS ACT:

1) Palanisami Gounder Vs. Bhattammal

   Held Authorities functioning under the Act cannot eschew from consideration the decisions of Civil Court in adjudicating the rights of parties under the provisions of the Act.

2) Muniyandi Vs. Rajanagan Iyer

   Held that jurisdiction of the civil court is expressly excluded in matters to be determined by Record Officer, Collector by the Act.

3) Govindarajan Vs. K.A.N. Srinivasa Chetty

   Held, Civil Court's Jurisdiction is not ousted in pending matters and Bar of Civil Court's jurisdiction is only prospective and not retrospective.

T.N. BUILDING (LEASE AND RENT CONTROL) ACT :-

1) Raval & Company Vs. Ramachandran

Held that the fixation of fair rent means fair rent for the building and not fair rent payable by the tenant to the landlord who applies to court for fixation.

2) S. Sundaram Pillai Vs. V.R. Pattabiraman

Held that Wilful default appears to indicate that default in order to be wilful must be intentional, deliberate, calculate and conscious, with full knowledge of legal consequences flowing therefrom.

3) V.K.C. Choultry Vs. Veeraswamy

Held that the tenant cannot without the written consent of the landlord transfer his right under the lease or sub-let the entire or any portion thereof and if he does so would be a ground for eviction.

4) T.M. Ramaswamy Gounder Vs. Ranganayaki

Held the tenant cannot without the written consent of the landlord transfer his right under the lease or sub-let the entire or any portion thereof and if he does so would be a ground for eviction.

5) Mohideen Sahib Vs. Mohammed Habibullah Sahab

Held that such acts which are prejudicial to the interest of the landlord in so far as the premises is concerned and would physically and demonstrably lessen the utilitarian value of the building would amounts to acts of waste.

6) Subramania Chettiar Vs. Manivannan

Nuisance alleged must be caused to the occupiers of other portions in the same building or of buildings in the neighbourhood.

7) Masilamani Vs. Balaiah

The plea of tenant if the landlord is occupying a building outside the city concerned and is therefore not entitled to maintain an eviction petition is rejected as the section requires only that the landlord should not be occupying a building of his own in the city, town or village concerned.

8) P.Orr and Sons Pvt. Ltd .. Vs. Associated Publishers

Held that the condition of the building is a basic and essential requirement for eviction of a tenant on the ground of demolition and reconstruction.

9) Shanmugham Vs. Sathyanarayana Prasad

Held the executing court has no right to go into the question whether the finding reached by the Rent Controller on the question whether the need of the Landlord was bonafide or not. Its duty is to execute the order of eviction as it stands.

10) Abdul Jameel Vs. Simson & Machonochy Ltd.,

Held that when the landlord has got a right to evict the lessee is tenant and recover possession of the premises, the sub-lease, will have no independent right or superior rights on the basis of the Sub-lease.

3. INTERPRETATION OF STATUTES

Meaning of Statute:

The meaning of a statute is the will of the legislature otherwise it is an authentic expression of the legislative will, which the court seeks to interpret the document.

The Statutes speak about the intention of the legislature. Its function shall always be "jusdicere" and not "jusdare" which means court can always reform the existing law and not to over rule the law.

Lord Green M.R. states that "there is one rule of construction for statutes and other documents, is that, you must not imply anything in them which is inconsistent with the words expressedly used".

Thus statute lays down main principles which judges apply in construing the statute.

CLASSIFICATION OF THE STATUTES

A statute is basically classified with reference to its object, reasoning, extent of application. The kinds of statutes are as follows:

1. Temporary Statutes.
2. Permanent Statutes.
   - (i) Mandatory Acts.
   - (ii) Directory Acts.
3. Declaratory Statutes.
4. Remedial Statutes.
5. Enabling Statutes.
6. Disabling Statutes.
7. Penal Statutes.
8. Taxing Statutes.
9. Explanatory Statutes.
10. Amending Statute.
11. Repealing Statute.
12. Curative Enactment
13. Consolidated act
14. Codifying Statute

Temporary Statute :

The statute remains to be operative only for a particular period of time, and the date to the extent of its validity is specified in the statute itself.

On the expiry of the said date the act becomes inoperative or the act could be declared as void ab initio. But the remedy accrued before the expiry of the act always remains in force.

Eg. Finance act is passed every year. Repealing an temporary statute However is impermissible by applying. Sec.6 of the General Clauses Act.

Permanent Statute or Perpetual Statute :

This type of statute remains in force unless and until it is repealed by the legislature.

Mandatory & Directory Acts

The use of words “shall” or “may” be taken into consideration to testify whether an act is mandatory or directory. When a contemplated action be taken without any option or discretion it will be called as pre- emptory or Mandatory.

The whole of the provisions or any part thereof is mandate then the noncompliance of the said provision would render an act penal consequences. If however the acting authority is vested with discretion, choice or judgement, the enactment will be taken as permissible or directory so the non-compliance of it does not render an act penal.

Remedial Statute:

The objective of the statute is to enforce ones right or for to redress the wrongs and to remove the existing defects or mistakes in the former law.

Enabling Statute:

An enabling statute is the one which enlarges the common law where it is narrow. It empowers necessary implications to do the indispensable things for carrying out the object of the legislature.

Disabling Statute:

A disabling statute is the one that narrows down or brings down the existing law.

Penal Statute :

A penal statute is one which punishes certain acts or wrongs. Such a statute may be in the form of a comprehensive criminal code or a large number of sections providing punishments for different wrongs.

Taxing Statute:

The statutory rules imposes strict construction of taxes or fee. (Refer Topic: Taxing Statute)

Explanatory Statute:

The acts remain to be explanatory with a view to supply an apparent omission or to clarify ambiguity as to the meaning of an expression used in a previous statute.

Amended Statute :

An amending statute is one which makes an addition to or operates to change the original law so as to effect an improvement therein or to more effectively carry out the purposes for which the original law was passed.

An amending statute cannot be called a repealing statute. It is a part of the law it amends.

Repealing Statute:

A repealing statute is one which repeals an earlier statute. This revocation or termination may be express or explicit language of the statute or it may be, by necessary implication also.

Curative or Validating Statute:

A curative or validating act is the one which intends to clear the existing defects in other statutes. By doing this, it validates the proceeding. If not done makes an act as void ab initio. It removes the cases of ineffectiveness or invalidity of actions or proceedings which are validated by a legislative measures. Eg. Expose Facto laws.

Consolidated Statute:

The consolidated acts could be distinguished as pure consolidation which means the re-enactment or consolidation with correction and minor improvement or consolidation with Law Commission amendments.

What is a consolidated act?

A consolidated statute is the one which intends to consolidate the similar existing statutes dealing with the same subject matter in to a single statute. But its intention is definitely not to alter the existing law. This act can also be a amended act. It is not a sound canon of construction to refer to the provisions in repealed statutes when the consolidating statute contains enactment dealing with the same subject in different terms. In fact, the section from an earlier act is repeated in a consolidated act in identical terms but the sketch of it may be different.

Lord Watson explains "The very objective of consolidation is to collect the statutory law bearing upon a particular object and to bring it down to date, in order that it may form a use full code applicable to the circumstances existing at the time when the consolidating act is passed".

The consolidated act has its origin in different statutory legislation in case of consistency between two such provisions it may be legitimate to refer to the date of commencement of acts the question of construction of a section in a consolidating act may for this reason be a question of construction of an earlier act in which that section first appeared and its necessary to refer to various acts in the series as also to the common law existing at the time when the earliest act was enacted. It is not permissible to construe a section in a consolidating act in such cases with reference to circumstances existing at the time when it was first enacted in a former act.

In Lowsley Vs. Forbes (1998) 3 ALL ER 897 P 899 (HL)

The distinction between the consolidated act and other statutes is obliterated. The consolidated act should be interpreted according to normal canons of construction and recourse to repealed enactment can be taken only to solve any ambiguity for the process of consolidation would lose much of its point if whenever a question as to construction of a consolidating act arise then reference had to be made to the similar existing statutes. So it is only when there is a real or substantial difficulty or ambiguity that the court is to attempt to resolve the difficulty or ambiguity by reference to the legislation which has been repealed and re-enacted in the consolidated act.

Codifying Statute:

A codifying statutes gives leading rules of law in an orderly and in an authoritative statement that can be either called as statute law or common law. This is done in an exhaustive manner. The purpose of this statute is that law should be ascertained by interpreting the language used in an codified law and not outside the purview of a particular code.

For e.g. A matter concerning the admission and disposal of criminal appeals has to be dealt with the provisions of Cr. P. C. and not outside those provisions in Commissioner of Wealth Tax Vs. Chander Sen AI R 1986 SC 1753

Under the Hindu Succession Act of 1956, Sec.8 wherein a law relating to intestate succession among Hindus, in case of son inheriting his father separate property becomes the exclusive property of the son and does not become his coparcenary property under Sec. 8. The basis of the act is to amend and codify the law relating to intestate succession among Hindus but it is not permissible to apply the principles of Hindu law on matters covered by the act.

BASIC PRINCIPLES OF INTERPRETATION

Interpretation:

Interpretation is the process whereby courts seeks to ascertain the will of the legislature through the various authoritative forms in which it is expressed.

Types of Interpretation

1. Legal interpretation
2. Doctrinal interpretation

Legal interpretation is the one that aids the provision of law and Doctrinal interpretation is the one that is recognized as the canons of Interpretation.

Purpose : Lawyers try to unfold the meaning of the ambiguous words and expressions resolving inconsistencies besides the age old process of application of the enacted law has led to the formation of certain rules of interpretation or construction.

Salmond comments "By interpretation or construction is meant - the process by which courts seeks to ascertain the meaning of the legislature Through the various authoritative forms in which it is expressed."

Cooley states "that he could differentiate the terms interpretation and construction."

According to him, Interpretation means it is an art of finding out the true sense of any form of words, that is the sense which their author intended to convey. Construction means drawing of conclusions, respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text conclusions which are in the spirit though not within the letter of law" Thus Statute lays down main principles which the judges apply in carrying out their task in construing a statute.

INTENTION OF THE LEGISLATURE

Mens or Sententia legis means the duty of the judicature is to act upon the true intention of the legislature. Statutes in general can be considered as the edict of the legislature. One way is that the Intention of the Legislature could be understood from the words or the language of the act that is used i.e., reading the statute as a whole one has to know the intention of the law maker.

Lord Denning states "We sit here to find out the intention of Parliament and that of ministers and carry it out and we do this better to filling in the gaps and making sense of the enactment than by opening it up to destructive analysis"

Francis Mc Caffrey states Intention of Legislature, first of all to be sought in the words of the statute, taking in them their natural and ordinary sense, and if, as thus read, they are free from ambiguity and doubt, and express a single definite and sensible meaning there is neither necessity nor justification for resorting to other means of interpretation.

In a case, Salmon Vs. Salmon states that intention of the legislature can be known by express means and also by implication.

Intention of the legislature can be understood by applying the express means, when any question arises as to the meaning of certain provision in a statute, its proper to read the provision in its context and this also enables statutes to be placed in its true relation with the other parts, and in order that its meaning shall be deduced from the words of the statute that gives plain, ordinary meaning unless the context requires some special or technical meaning to be attached to a word. Sometimes the intention of legislature can be understood by implication.

GENERAL PRINCIPLES OF INTERPRETATION

Interpretation is mainly of two kinds:

(1) Literal Interpretation.

(2) Liberal Interpretation.

(1) LITERAL INTERPRETATION:

This interpretation confines itself to the words of law and shall not go beyond the Letters of Law (Litera Legis). Whenever the words of the statute as clear. It must give effect to it. The judges do not go to determine the idea behind them with the help of Legislative debates or reports of commission etc.,

Defects in Literal Interpretation:

(i) Logical defects such as ambiguity, inconsistency & incompleteness.

Ambiguity occurs when statute has not one but various meanings and its not clear which one of the particular meaning it represents.

Inconsistency occurs when the different parts of the statute are repugnant to each other.

Incompleteness means when a statute has Lacunae or Omission or Its Logically incomplete.

(ii) Unreasonable or Absurdity :- When the statute has certain provisions that highly unreasonable or absurd then Legislature would not have meant so court try to ascertain the intention of Legislature by adopting certain rules namely,

(i) Golden Rule.

(ii) Mischief Rule.

When Literal Construction of Statute Observed:

To construe the plain meaning of a statute every word of a statute have to be understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning. This could be done unless the words lead to some absurdity or unless there is something in the context or in the object of the statute to comment to the contrary. Similarly wherever the technical meaning found it could be understood in technical sense.

The basis of this principle is that the object of all interpretations being to know what the legislature intended, what ever was the intention of the legislature has been expressed by its through words which are to be interpreted according to the rules of grammar.

For Eg., Will : It is a written document, its ordinary and grammatical meaning could be adhered to, unless it leads to any absurdity, or some repugnance or inconsistency with sense of the words then it can be modified, so as to avoid that absurdity, and inconsistency no further.

Viscount Simonds L.C. comments: “The golden rule is that the words of a statute must primo facie be given their ordinary meaning”. Natural and ordinary meaning of words should not be departed from “unless it can be shown that the legal context in ‘which the words are used requires a different meaning”.

The legislature intention can be deduced only from the language through which it has expressed itself. If the language of a statute is plain then court need not carry out interpretation. The duty of the court is to examine the law as it exists and leave rest of the way to the hands of the legislature.

In A. R. Antulay Vs. R.S.Nayak, AI R 1984 SC 1656 held that the provisions of the statute should be construed as it is and cannot alter the same according to the circumstances of a case. Sec 8(1) of the Criminal Law Amendment Act (46 of 1952) states a special judge shall take cognizance of an offence and shall not take it on commitment of the accused. Here, the legislature provided both power on special judge to take cognizance and in turn removed the concept of commitment. Hence may not say that Sec.8(1) as canvassed of behalf of the appellant, that cognizance can be taken upon a police report.

In Tej Kumar Balakrishna Ruia Vs. A.K.Menon AIR 1997 5.C.442

Held, that while interpreting Sec.3(3) of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, courts are empowered to interpret the law as it reads. Where two interpretations are possible, the purposive interpretation always preserves the constitutionality of the provision.

Mischief Rule or Purposive Construction

The words of the statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonies with the subject of the enactment and the object which the legislature has in view. The meaning of the statute in a strict grammatical or etymological sense in the subject shall attain the object.

Rule laid down in Heydon's Case: When the material words are capable of bearing two or more constructions, the most firmly established rule for construction of such words of all statutes in general (be they penal or beneficial, restrictive or enlarging of common law

Principles of the Case:

- What was the common law before the making of the Act?
- What was the mischief and defect for which the common law did not provide?
- What remedy the parliament hath resolved and appointed to cure the disease of the common Law, and
- The true reason of the remedy;

In Bengal Immunity Co. Vs. State of Bihar. The aforesaid principles laid down in Heydons case would be the true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) are to be always discerned and considered.

Golden Rule of Interpretation

It's a modification of the principle of grammatical interpretation. It's the day of the court to find out the intention of the legislature from the words found in the statute by giving them their natural meaning but if this leads to absurdity, repugnance, inconvenience, hardship, in justice or evasion, the court must modify the meaning-to such an extent that the provisions of statute is unambiguous, clear and explicit so as to make every provision render workable.

Directorate of Enforcement Vs. Deepak Mahajan AIR 1995 SC 1775.

Where a person was guilty of an offence under the provisions of the Foreign Exchange Regulation Act or the Customs Act and court has to construe the provisions of the act by reading the statute as a whole. Wherever results in ambiguity which means the legislative intent is not clear then it is permissible for the court to have functional approaches and look behind the words of the enactment and take other factors into consideration to give effect to the legislative intent and to the purpose and spirit of the enactment.

(2) LIBERAL INTERPRETATION:

The Judge should go beyond the Letter of the Statute in order to ascertain the true intention (of the statute) or the ratio Legis. Examples are historical & sociological Interpretation. This rule of applied whenever there are defects in Statutes.

According to this rule, the needs of the society are taken into consideration in Interpreting a Statute. Judges shall give full effect to the intent of Legislature and the intent should be ascertained in the context of social needs in which the Legislation takes place.

Construction of Statutes:

(1) Harmonious Construction.

(2) Alternative Construction.

(3) Beneficial Construction.

Harmonious Construction

When provisions of statute are repugnant to each other, the court duty is to construe the provisions in such a manner so as to give effect to all the provisions. The court may do so by regarding or by holding that one provision merely provides for an exception of the general rule contained in the other. The question as to whether separate provisions of the same statute are coinciding.

In Mis. Rahabhar Productions Private Ltd. Vs. Rajendra K.Tandon

The Delhi Control Act, 1958 provides for protection of tenancy rights subjected to the privilege of the land owner that a tenant can be evicted by the aforesaid act, inclusive of the Transfer of Property Act. The act is both beneficial and restrictive in nature in the sense for both the tenant and land lord and hence the court balances its right of the land lord and obligations of the tenant towards each other keeping-in mind that one of the objects of the legislature while enacting that Act was to curb the tenancy of and to harmoniously read the provisions of the act so as to balance the rights of the land lord as well.

Alternative Construction

When there are two constructions made to the provisions of a statute then that construction which acts best in conformity with the scheme of the act is always taken into consideration. So wherever alternative construction is possible for the smooth functioning of the system for which the statute, has been enacted rather than the one which would create inconvenience. The narrower of the two interpretations which would fail to achieve the objective of the law must give way to a good construction paving way for a good result. Thus interpreting any part of a provision without effect is not permissible.

Beneficial Construction

It is a method of interpretation whereby a liberal process is adopted so as to give effect to the declared intention of the legislature. This could be applied in the cases where the strict meaning of the words used in the statute, if given in the technical meaning, if given a technical interpretation, might defeat the object of the legislation. Words found in the provisions of a statute, their natural meaning shall not be strained so as

to achieve the object of the statute. If the legislation, the general object of which is to benefit a particular class of persons, any provision is ambiguous so that it is capable of two meanings, one of which would preserve the benefit and other which would take it away, the meaning which preserves it should be adopted. So, the court should always give due regard to the beneficial part of it. The omission made need not be supplied by the court in straining the construction made. Hence in case where, more description is given, that gives wider meaning can best be construed than the narrow meaning from the provision of a statute.

In Regional Executive Kerala Fishermens Welfare Board Vs. Mis. Fancy Food case, 1985 SC 1620 the Supreme Court held that the definition to the Welfare legislation, the Kerala Fishermen's Welfare Fund Act, 1985, direction towards promoting welfare of fishermen which is in consonance with the Article 39 of the Constitution and hence the provision of the constitution must be construed to achieve the objective of the act. When the word is not defined in the statute its meaning has to be gathered from the context.

INTERNAL AIDS TO INTERPRETATION OF STATUTE (OR) THE DIFFERENT PARTS OF THE STATUTE

Title

(i) Short Title

(ii) Long Title

- Preamble
- Marginal notes
- Provisos
- Heading
- Schedule
- Non Obstante Clause
- Punctuation Marks
- Gender
- Interpretation Clause
- Conjunctive & Disjunctive words

Short Title :

The short title of the act is used as ready reference. It doesn't play much role in interpretation of statutes. Short title neither explains the content of the act nor can it delimit the clear meaning of a particular provision.

Long Title:

A statute is headed by a long title whose purpose is to give a general description about the object of the Act. (Eg., Code of Criminal Procedure Code, 1973 states an act to consolidate and amend the law relating to criminal procedure.

Pollock states that “the term title aids the construction of an Act but agrees that its certainly not the part of law but its strictness need not be taken into consideration at ali”.

In the present context, it is now a settled law that the title of the statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction.

Aswini Kumar Vs. Arabindo Bose

In this case the Supreme Court looked at the long title of the Supreme Court Advocates (practise in High Court) Act, 1951 which said “An act to authorise Advocates of Supreme Court to practise as of right in any court “Hence the same was adopted by reading the long title of the act.

Preamble:

Preamble contains the general principles and also the main objects of the Act and is therefore a part of the statute. Court considers it as an internal aid to interpretation in case of ambiguity that exists and Court doesn’t apply preamble as an intrinsic aid if the language used in the provision of the statute is clear and explicit and unambiguous the preamble has no part to play. Modern Statutes avoid adding preamble as a part of a statute.

Eg. Inre Berubari Case

Kesavananda Bharathi’s Case

KedarNath Vs. State of West Bengal AI R SC 404.

Marginal Notes:

Marginal Note or Side Note are those notes that are inserted at the side of the sections. Jurists opine that use of Marginal Note leads only to confusion. Marginal notes doesn’t aid in construction of a statutes, because it cannot be said to have construed in the same sense as the long tit’: or any part of the body. Of the act sometimes a marginal note may be inaccurate on its own merits of no assistance what ever.

Lord McNaughten states: “It is a well settled that marginal notes to the sections of an Act of the Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and has been exploded long ago”:

Patanjali Shastri, J state: “Marginal Notes in a Indian statute, as in an act of Parliament cannot be referred to for the purpose of construing the statute.

Proviso:

A proviso is a conditional clause which acts as a subsidiary to the main section. The general rule is that it has to be construed in its strict legal sense in the light of the main section. Hence it carves something from the main section itself. Proviso never destroys the section as a whole for the reason even in case of an ambiguity with that proviso and main section, it is always the main section that would prevail against a proviso.

For Eg., The Main Section, Under Article 240(1) of the constitution power is conferred on the president “to make regulations for the peace progress and good government” of the union territories. The proviso appended to the Article 240(1) which directs that the President shall not make any regulations after the constitution of the legislature of Union Territory for that Union Territory.

It was contended that on the basis of the proviso that the power of the President is coextensive with the power of the legislature which may be constituted for a union territory and hence the President's power to make regulations is limited to subjects falling which the concurrent and state lists. This contention was not accepted by the court and the court stated President is conferred with plenary power of making regulations which are not curtailed by a proviso.

Heading:

A heading is always prefixed to a section or a group of sections. It explains ambiguous words.

In Frick India Ltd Vs. Union of India AIR 1990 SC 689, P.693

The Supreme Court of India expressed its view "Its well settled that the headings prefixed to sections or entries cannot control the plain words of the provision they cannot also be referred to for the purpose of construing the provisions when the word used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision".

Schedule:

It's a part of the act itself. This part deals with as to how claims or rights under the act are to be asserted or as to how powers conferred under the act are to be exercised.

Mis Apali Pharmaceuticals Limited Vs. State of Maharashtra AIR 1989 SC 2227

Held, whenever there is a conflict between the main proviso and that of the schedule, it is always the main section that would prevail and the schedule has to be rejected.

Non Obstante Clause:

A clause stating "Notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force". This word is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of Act mentioned in the main obstante clause. It is used as a legislative device to modify the ambit of the provision or law mentioned in the non obstante clause.

Punctuation Marks:

When a case is referred the court looks in to the provision as it is which means as they are punctuated and if they feel that there is no ambiguity while interpreting the punctuated provision they shall so interpret it. But while interpretation if there exists any ambiguity or repugnancy the court shall read the whole provision without any punctuations and if the meaning is clear will so interpret it.

In Aswini Kumar Bose Vs. Aurobindo Bose AIR 1952 SC 369

The Supreme Court held that the punctuation cannot be regarded as a controlling element and cannot be allowed to control the plain meaning of a text.

Interpretation Clause:

Every act contains an interpretation clause dealing with the definition of various expressions and explaining some terms. When a word or a phrase is defined as having a particular meaning in an enactment, it is that meaning which alone must be given to interpret a section of the act,

unless there by anything repugnant in the context. When the term is defined in the act it is not permissible to ignore the definition and to give another meaning when the expression occurs anywhere in the act. Sometimes an expression might have been defined in the interpretation clause in an altogether different way from its ordinary meaning and it is not permissible to depart from the meaning and assign the ordinary meaning to it unless there are strong circumstances to the effect.

Conjunction & Disjunctive Words:

The use of word 'or' is disjunctive and the use of the word 'and' is a conjunctive word but at times they can also be read vice-versa in order to give effect to the intention of the legislature.

EXTRINSIC AIDS OF INTERPRETATION OF STATUTES:

Dictionaries :

The words used in a statute shall be interpreted as it is in its ordinary sense. When a word is not defined in the Act itself it is permissible to refer to the dictionaries to find out the general sense in which the word is understood in common parlance. Dictionaries help to understand the real meaning of the word in its original sense.

In Ram Nair Vs. State of U. P. AI R 1957 SC. It is stated that "the meanings of words and expressions used in an Act must take their colour from the context in which they appear.

In State Bank of India Vs. N. Sundara Money, AIR 1976 SC

Krishna Iyer. J states "Dictionaries are not dictators of statutory construction where the benignant mood of law and more emphatically, the definition clause finish a different denotation".

Parliamentary History:

English Practise : The method of approach of using parliamentary history as an aid in construction was not much appreciated in the earlier stages of law. Where intention of the parliament which passed the act was not to be gathered from the parliamentary history of the statute. Gradually the opinion changed.

Lord Halsbury L. C. admitted the report of a commission that had been set to inquire into the working of an earlier act, which had been superseded by the act construed by him, and observed "No more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission".

In Pepper Vs. Hart (1993) 1 All ER 42 (HL) Lord Wilkinson laid down: "Reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to absurdity. Even in such cases reference in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in parliament, as at present advised, I cannot for see that any statement .other then the statement of the minister or other promoter of the Bill is likely to meet these criteria. Thus Wilkinson states if the words are capable of bearing more than one meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not parliament" true intention be enforced.

Indian Practice:

The initial period reveals that the parliamentary history of an enactment was not considered, later on felt that if the use of the parliamentary is within circumspect limits can be considered in resolving ambiguities.

Indira Sawhney Vs. Union of India AIR 1993 SG

The Supreme Court in interpreting Article 16(4) referred the speeches made by Dr.Ambedkar and stated that the debates in the Constituent assembly can be relied upon as an aid in interpretation, in particular where the court wants to ascertain at any rate the context background and the objective behind them.

In P.V.Narashima Rao Vs. State AIR 1998 SC 2120

The court observed that according to the earlier decisions of the court, the statement of a minister who had moved the Bill can be looked at to ascertain the mischief sought to be remedied and object and purpose for which the legislation was enacted, but it is not taken into account for interpreting the provisions of the enactment.

Reference to other Statues :

Statutes In Pari Materia:

Every statute should be read in its original context and sometimes inferences can also be obtained from other statutes. It means when there are similar statutes dealing with the same subject matter or forming a part of the same system is said to be statutes in pari materia.

Lord Mansfield states “where there are different statutes in pari materia though made at different times or even expired, and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other”

In Registered society Vs. Union of India AIR 1996 SC.

The representation of the Peoples Act, 1950 the explanation 1 of Sec. 77(1) states “Any expenditure incurred or authorised in connection with the election of a candidate by a political party shall not be deemed to be an expenditure in connection with the election incurred or authorised by the candidate.” Under the Income Tax Act of 1961 the Sec.13A and 319 (4B) demands to maintain audited accounts and to file income tax return for each assessment year irrespective of class of persons. The case concerned with political parties whether these parties shall be bounded to maintain audit accounts as per the provision of I.T. Act or would get exemption under the Explanation I of Section 77(1) of Representation of Peoples Act 1950 by showing a statute in pari materia that restrict their liabilities. Court held that if a political party is not maintaining audited and authentic accounts and is not filing return to income, it cannot justifiably plead that it has incurred authorised any expenditure in connection with the election of party candidate within the meaning of Representation of Peoples Act.

State of Madras Vs. A. Vaidyanath Iyer. AI R 1958 SC

The court constructed the provisions of Sec A Prevention of Corruption Act, 1947, the words used “It shall be presumed” and the word “Shall Presume” in the provisions of the Indian Evidence Act; 1872 were considered as Statutes in Pari Materia.

COMMENCEMENT, REPEAL AND REVIVAL OF STATUTES

Commencement

Commencement of an act means the period of time in which an act comes into operation. Generally act refers to "Short Title, and the extent of an act.

Modes of Communication:

- Act shall come into force at once.
- Act shall come into force, when it is published in the official gazette wherein the date of commencement of an act is specified.
- In case if the date of commencement of an act is not published in the official gazette then there are certain rules that are recognized by the courts so as to ascertain the dates on which a particular act comes into force.
- Sec.5 of the General Clauses Act states "When any central Act is not expressed to come into operation on a particular day then it shall come into operation on a day on which it receives it assent. (i) In the case of the Central Act made before the commencement of the constitution the Governor General. (ii) In the case of an Act of the parliament of the President.

This rule also governs the cases where the commencement of the Act is stated in the Act then the act shall come into force at once.

Eg. Indian Constitution. Date of Commencement of the constitution is November 26th 1949. On this day, certain provisions like Citizenship, Election, Provisions Parliament temporary and transitional provisions were given immediate relief. On 26th January 1950, the rest of the constitution came into force and this date is referred to in the constitution as the date of the commencement.

Time limit for an Act to come into existence:

Whether is there any exact time for which an act has to come into force! Sec.5(3) of General Clauses Act says that "An act could come into force on the midnight of the previous day. Duration can also be construed according to the nature of the Statute whether it is in the nature of Temporary statute where the term expire on the expiry date or Permanent Statute where the term would remain always until it is repealed by the legislature.

Extent of Applicability of an Act:

Extent means the territories to which the act applies. A Central Act would be applicable to whole of India and State Act would be applicable to whole of the State. The Act while referring to the date of commencement would also express as to the extent of applicability sometimes it may exempt any particular state (For Eg. Jammu & Kashmir).

As per the Interpretation of Statutes Act 1889, commencement means "Where an act is not to come into effect immediately after it is passed and it confers powers to make appointments, issue instruments, give notice, prescribes forms or do give notices prescribe forms or do any other thing for the purpose of the Act, that power may in the absence of the contrary intention, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of commencement thereof, subject to

this restriction, that any instrument made under the power shall not unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation came into operation until the Act comes into operation".

REPEAL

Repeal is a process by which legislature takes away certain provisions of an enactment expressly are by implication if found inconsistent with the other provisions of the statute. The object of an act is to excise dead matter prune off superfluities and reject the clearly inconsistent enactment and doesn't create any fresh liabilities. By this provision of the statute expressedly or by implication revokes another statute because, when an enactment is repealed by the legislature no fresh proceedings can be taken under it, but repeal would not affect the vested rights or would not affect matters already concluded before the repeal.

In Orissa Vs. M.A. Tullock (AIR 1964 SC 1284)

It has been long established that when an Act is repealed it must be considered except as to transaction past and closed as though it has never existed. The exception to :this rule is contained under Sec.6 of the General Clauses Act.

Sec. 6 of the act reads:

Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any central act or regulation was amended by the express omission, insertion or substitution of any matter, then unless a different intention appears the repeal shall not affect the continuance of any such amendment made by the enactment to repealed and in operation at the time of such an repeal"

Meaning:

The regulations made, repeals any enactment made or hereinafter to be made then unless a different intention appears the repeal shall not -

(i) revive anything not in force or existing at the time at which the repeal takes effect; or

(ii) affects the previous operation of any enactment so repealed or anything duty done or suffered there under or

(iii) affect any right, privilege, obligation or liability acquired occurred or incurred under any enactment so repealed or

(iv) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed.

(v) affect any investigation legal proceeding or remedy in respect of any such right privilege obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and such penalty, forfeiture or punishment may be imposed if the repealing Act or Regulation Act has not been passed.

Thus whenever repeal to be made then all the provisions of Sec.6 of the General Clauses Act would follow.

Under Sec.6(A) when provisions of an Act are incorporated in another Act, the repeal of the original Act does not affect its operation in the incorporated act unless a different intention appears in the repealing act.

REVIVAL

When the repealing provision in an act is repealed by another it does not revive the original enactment unless such revival is expressly stated in the new repealing act. Sec.? Of the General Clauses Act states "In any central Act or Regulation made after the commencement of this Act it shall be necessary for the purpose of reviving either wholly or partially, an enactment wholly or partially repealed expressly to state that purpose.

SUBSIDIARY RULES

Mandatory and Directory Enactments

The language of an Act alone is not taken into consideration and due regard should be given as to the context, subject matter and objects of statutory provision in question. In determining whether the act is of the nature Mandatory or Directory depends upon the intent of legislature and not upon the language in which the intent is clothed. In case of a Mandatory provision any act done in breach thereof will be invalidated and would be liable for penalty. Because it's a bounded duty to fulfill the conditions exactly and if it is directory a substantial compliance is enough which may give rise to some other penalty if provided by the statute. Under the directory provision two conditions must be imposed (1) The act to the extent of substantial compliance is valid. And secondly even if it is not complied it would not render the act invalid.

Banwarilal's Case:

The Issue in this case was whether Sec.59(3) of the Mines Act 1952, requiring the Central Government to consult every mining board before framing regulations was Mandatory; and it was held that having regard to the language, the object of providing for consultation, the constitution of the Mining Boards and the provision for making regulations in cases of emergency without such consultation, the provision for making regulations in cases of emergency without such consultation, the provision of section 59(3) was mandatory.

In N.Nagendra Rao and Company Vs. State of Andhra Pradesh

The goods seized by the collector if perishable in nature though Sec.6(a)(2) of the Essential Commodities Act, 1955 demands for custody of the said goods the collector may call for the disposal of the goods in order to prevent the deteriorated condition of the seized goods. Even though the section uses the word may but keeping in view the objective of the Act and the context in which it has been used it should be read as 'shall' otherwise it would frustrate the objective.

Of the sub-section. Therefore, the collector has to form an opinion if the goods seized are of the one of the other category mentioned in Section 6 (A) (2) and once he comes to the conclusion that they belong to one of the categories he has no option but to direct their disposal or selling of in the manner provided.

Strict Construction of Penal Statutes

In ancient days, breach of duty could be made liable for the offence of the contempt of the statute. Wherever, a statute enacting or imposing penalty shall be strictly construed. According to Maxwell the strict construction of penal statutes seems to operate if the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the compliance to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.

Polfock C B. comments. “Whether there be any difference left between a criminal statute and any other statute not creating offence, I should say that in a criminal statute you just be quite sure that the offence charged is within the letter of law of the law”

The court will inflict punishment on a person only when the circumstances of a case unambiguously fall under the letter of the law. If there are two reasonable constructions made to the penal provision, the more lenient should be given effect to. Punishment can be meted out to a person only if the plain words of penal provision are able to bring that person under its purview.

In Dyke Vs. Elliot (1872) LR 4 PC 184. P.191

Lord Justice James opined “No doubt all penal statutes are to be construed strictly that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip; that there has been a causa omissus, that the thing is so clearly within the mischief that it; must have been included if thought of. On the other hand the person charged has a right to say the thing charged although within the words is not within the spirit of the enactment. But where the thing is brought within the words and ,within the spirit, there a penal enactment is to be construed, like any other instrument, according to fair common sense meaning of the language used, and a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other enactment”.

According to him the plain words should be construed as it is and shall not be strained to derive at an ordinary meaning.

State of Punjab Vs. Ram Singh AIR 1992 SC 2188.

A constable on duty holding a gun was seen roaming in the market with service revolver. The constable misbehaved with a medical officer on duty due to his drinking habit. The SC held that his conduct would constitute gravest misconduct warranting dismissal from service. The authorities justified their act of imposing the penalty of dismissal.

The word misconduct though not capable of precise definition. Its reflection receive its connotation from the context the delinquency in its performance and its effect on the discipline and nature of the duty. It’s negligence or carelessness in performance of his duty.

Illustrative Cases:

State of Punjab Vs. Ram Sign AIR 1992 SC 2188.

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In Sanjay Dutt Vs. State Through CBI. Bombay. JT 1994 (5) SC 540. PP557. 560.561. Sec.5 of the Terrorist and Distributive Activities (Prevention) Act, 1987 provides, where a person

is in possession of any arms and ammunition specified in columns 2 & 3 of the category lor category III (a) of Schedule I to the Arms Rules, 1962 or bombs or dynamite or other explosives substances unauthorisedly in a notified area, he shall notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

Notified Area is defined in Sec.2(1) to mean such areas as the state government may, by notification in the official gazette specify, considering the Act, state government can on its subjective satisfaction notify only such area as notified area under the act which is prone terrorist and disruptive activities.

Sec.5 of the act requires possession of any of the specified arms and ammunitions, unauthorisedly, in a notified area. Here the section does not in terms provide that the accused can in any way Escape punishment if the aforesaid conditions are established. However, it was held that the possession of the unauthorised arms etc. In a notified area raised a presumption that the arms etc. Were meant to be used for a terrorist or disruptive act which was in effect of the conditions and therefore the accused was entitled to counter the statements and escaped punishment under Sec.5 Held, that his unauthorised possession of arms etc., was wholly unrelated to any terrorist or disruptive activity and the same was neither used nor available in the area for any such use and its availability in a notified area was innocuous.

STRICT CONSTRUCTION OF TAXING STATUTES

General Principles of Strict Construction

A taxing statute has to be strictly be construed. A person cannot be taxed unless the language of the statute unambiguously imposes the obligation without straining itself. Intention of the legislature to tax must be gathered from the natural meaning of the words by which it has expressed itself.

Rowlatt.J expressing the principle states “In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read. In nothing is to be implied. One can only look fairly at the language used.”

While construing a Taxing statute, if the language is clear, effect must be given to them irrespective of the consequences. Statutes imposing pecuniary burdens are interpreted strictly in favour of those on whom the burden is desired to be imposed. If the words of a taxing statute are clear effect must be given to them irrespective of the consequences. Statutes imposing pecuniary burdens are interpreted strictly in favour of those on whom the burden is desired to be imposed.

In Commissioner of Income Tax. Hyderabad Vs. Mis. P.J.Chemicals Limited.

It was held that the expression actual cost in sections 32 and 43(1) of the Income Tax Act, 1961 needs to be interpreted liberally. The subsidy of the nature granted by the government to industries does not partake of the incidents which attract the conditions for their deductibility from ‘actual cos!’. The government subsidy, it is not unreasonable to say, is an incentive not

for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the actual cost.

Interpretation of the Constitution

Constitutional interpretation could be distinguished as the rules relating to the interpretation of the constitution itself and the interpretation of other statutes with the aid of the constitution. The constitutional document is the most solemn document of the country. And all the authorities are subordinate thereto, the legislative, executive and judicial organs of the derive power from the constitution. In interpreting the constitution the court has to look at the functioning of the constitution as a whole. Certain general principles to be adopted that words used in the constitution should not be given a narrow and contracted meaning but should be construed in its original sense. That every words hall have its original meaning and no word shall be rejected as superfluous. If the language is plain, it should be applied irrespective of any inconvenience that might result but if two views are possible, the one which obviates the inconvenience should be always preferred and when there are two conflicting provisions every effort should be made to reconcile them by applying the rule of harmonious Construction and in case of any ambiguity in a provision, the General Clauses Act be applied.

In Madhava Rao Vs. Union of India, AIR 1971 SC 530

Held, the constitutional provision, words or expression used in the constitution often is coloured by the context in which it occurs; the simpler and more common the word or expression the more meanings and the shades of meanings it has. It is the duty of the court to determine in what particular meaning and particular shade of meaning the word or expression was used by the constitution makers and in discharging the duty the court will take into account the context in which it occurs, the object to serve which it was used its collocation, the general concept or object was intended to particular and host of other consideration, held, the expression Article 363 means provision having dominant and immediate connection with “It does not mean merely having a reference to a wide meaning of the expression may exclude disputes from the jurisdiction of the courts in respect of rights and obligations, however indirect or tenuous the connection between the constitutional provision and the covenant may be .. “

Kesavanandha Bharathi Vs. State of Kerala AIR 1973 SC

Stated that the preamble of the constitution like any other statutes furnishes the key to open the mind of the makers of the constitution more so because the constituent assembly took great pains in formulating it so that it may reflect the essential features and basic objectives of the constitution. The preamble is a part of the constitution. The constitution including the preamble, must be read as a whole and in case of doubt interpreted consistent with its basic structure to promote the great objectives stated in the Preamble. The judges further conferred that Preamble cannot be amended of alter the basic structure of the constitution.

Maxims that are used in Interpretation:

Utiloguitur Vulgus:

This refers to interpretation made in popular sense or according to the common understanding and acceptance of the terms 'that are employed in such sense and if anyone asserts that they are employed in such technical sense the burden is upon them to establish it. When words are used in a statute which have gained a technical meaning in legal parlance, those words must be taken to mean: in such technical sense. When expressions which cannot technical sense in English law are important those expressions must be given their meaning under the English Law.

Argumentum in Convenience :

The expression means an argument cannot be ignored or not implemented on the ground that it will create inconvenience.

Which means a provision of an act cannot be ignored or not implemented on the ground that it will create inconvenience.

In Mysore State Electricity Board Vs. Bangalore Woolen Mills Ltd. and others,

The supreme court of India held that the inconvenience is not a factor in interpreting a Statute. The courts have to interpret the provision of an Act so as not cause inconvenience but if such an interpretation becomes impossible an inconvenience should not stand in the way of giving effect.

Utres magis valeat quam pereat :

This maxim means that "the thing may prevail rather than being destroyed". This principle is evolved from Murray Vs. Inland Rev. Commissioner were Lord Dunedin states: "Its our duty to make what we can of statutes, knowing that they are meant to be operative, and not redundant and nothing short of impossibility should allow a judge to declare a statute unworkable"

In Tinsukia Electric Supply Company Limited Vs. State of Assam, the supreme court observed the Tinsukia and Dibrugarh Electric Supply undertakings Acquisition 1 Act 1973 shall not be made applicable. The provision of a statute must be so construed as to make it effective and operative on the principle of Ut res magis valeat quam pereat. It is no doubt true that if a statute is absolutely vague them it could be declared as void for vagueness. This could be done by checking the arbitrariness and reasonableness part of the statute in order to ascertain from and accord to the statute the meaning and purpose which the legislature intended for it. It is the court duty to make what it can understand from the statute knowing that the statutes are meant to be operative and not incept and that nothing short of impossibility should allow a court to declare a statute unworkable.

Construction Noscitur a Sociis

The meaning of a doubtful word may be ascertained from the words that are associated with it. This rule would apply where the word isolated from the context yields so sensible meanings, but when associated with other expressions, gives a sensible meaning. The term Noscere means to

know and sociis means to from its association. So when two or more words which are susceptile of analogous meaning and are put together, they are to be understood in its cognate sense.

In Alamgir Vs. State of Bihar. AIR 1959 SC 436

The Supreme court referred to Sec.498 of the IPC wherein the word detention means detaining a person against a will and the meaning cannot be attributed to word here in the case because the expression should be construed in the light of other words used. This clarifies that the word detains should be interpreted with reference to the expression takes entices, and conceals used in the Sec.498. The word detains therefore, should mean detention without the consent of the person involved.

In K.Janardhan Pillai Vs. Union of India, AIR 1981 SC 1485

The issue of this case is the commodity raw Cashew nut is a food stuff falling under Sec.2(A) Essential Commodities Act, 1955 and hence it cannot be declared to be as an essential article under Sec.2(A) of the Kerala Essential Articles control Act 1962. The Supreme Court stated that associated words take their meaning from one another and that is the meaning of the rule of noscitur a sociis. When foodstuffs are associated with edible oil seeds which have to be processed before the oil in them can be consumed. It is appropriate to interpret foodstuffs in the wider sense as including all articles of food which may be consumed by human beings after processing.

Construction Ejusdem Generis :

Construction of General Words:

The general words of the enactment shall have general construction unless and until it is specified that the legislative intent is to restrict their meaning. So the scope of the general word cannot be restricted. Generally the meaning as it is to a word has to be construed, otherwise sometimes a qualified meaning be given to it.

It is a well established rule in construction of statutes that general terms following particular ones apply only to such persons or things as are ejusdem generis with those comprehend in the language of the legislature.

Rule of ejusdem Generis :

This rule is otherwise known as Tenderden's rule which provides that where words of specific meaning are followed by general words, the general words will be construed as being limited to persons or things of the same general kind or class as those enumerated by the specific words.

When the legislature uses a words of a general nature following specific and particular words, they are meant and intended to be limited to things as those specified by the particular words. So the legislature uses the general words in a restricted sense. The effect is the same as if the specific or particular words were actually enacted by the legislature itself. Hence, whenever any words of limitation or restriction are read in a statute they should be treated as having been enacted.

It's a rule of construction which lays down that when particular words are followed by general words, the meaning of the general words is to be understood with reference to the particular words, the general words are limited to the same kind as the particular words. The rule of ejusdem generis is certainly not the rule of law, but only a permissible inference where in view of the context and the purpose of the enactment it is necessary to assign to the words their plain and simple meaning.

It always attempts to reconcile the incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous.

Lord Evershed, M.R. points out "in all times of public, processions, rejoicings or illuminations, and in any case etc., were intended to be confined to cases within the genus or category of which public processions, rejoicings and illuminations were specific instances and they are limited to particular extraordinary occasion".

In Assistant Collector of Central Excise Vs. Ramdev Tabocco Company AIR 1991. SC pg. 506

The Central Excise and Salt Act, 1994 SecAO(2) before any amendment could be made states that no suit, prosecution or other legal proceeding could be initiated for anything done or ordered to be done under the law after expiration of six months form the accrual of the case of the action. Here, the expression other legal proceedings must be read ejusdem generis with preceding words 'suit' and 'prosecution' as they constitute a distinct genus. Therefore, the penalty and adjudication proceedings do not fall within the expression 'other legal proceedings in Sec 40(2) as it stood prior to its amendment on 1973 and consequently, the said proceedings were not subject to the limitation prescribed; by the said sub-sec. Suit or Prosecution are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one.

In Bihar State Electricity Board Vs. Parmeshwar Kumar Agarwala, AIR 1996 SC 2214

Held, the SecA9(3) of the Electricity Supply Act, 1948 empower.

The electricity board to fix different tariffs for the supply of electricity to any person having regard to the geographical position of any area, the nature of the supply arid purpose for which the supply is required and any other relevant factors. In construing the section the supreme court declined to apply the rule of ejusdem generis for limiting the ambit of 'other relevant factors' on the ground that there was no genus of the relevant factors.

Reddendo Singular Singulis :

Where there are general words of description, following an enumeration of particular things such general words are to be construed distributively. In simple way we may say it as "Giving each to each".

When there are provisions that gives different meaning to different objects it has to be understood respectively.

For e.g .. , I devise and bequeath all my real and personal property to "A" will be construed reddendo singula singulis by applying "device" to "real property" and bequeath to "Personal property".

Where there are general words of description, following an enumeration of particular thing such general words are to be construed detractively reddendo singular singulis; and if the general words will apply to some things and not to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply, that rule is beyond all controversy.

In Koteswar Vittal Kamath Vs. K. Rangappa Baliga & Co., AIR 1969 SC 504

Under Article 304 of the Constitution, when we look into the construction made to the proviso "Provided that no Bill or amendment for the purpose of clause (B) shall be introduced or moved in the legislature of a State without the previous sanction of the President. It was held by the supreme court that the word "introduced" referred to "Bill" and the word "moved" to amendment.

Contemporanea Exposito:

This means expositions made by the contemporary authorities it is always the clear meaning of a statute must be given effect to but in case of an ambiguity of a word used reference could be made to the contemporanea exposito. This usually applies in case of old statutes. Where an act has come into existence and soon after the commencement of the act the judges associated themselves with the act prevailing and were in an advantageous position of gathering the intention of the legislature. Its difficult for the court to gather the intention of the legislature prevalent at that time now in the present context and therefore it is most expedient to rely upon the construction given by the judges who had occasion to interpret the law soon after the legislation.

Lord Upjohn states "For my part, am quite unable to apply the principle to a statute although it was passed a hundred years ago, whose language is plain and unambiguous a "The view of the jurists are no doubt of greater value. This principle finds no application in latest enactments.

In state of Tamilnadu Vs. Mahi Traders, AIR 1989, SC 1167

The Ministry of Commerce sought clarification in construing the meaning of the expression 'hides and skins in dressed state' as used in Sec.14 of the Central Sales Tax Act, 1956. The act was used as contemporanea exposito to construe the meaning of the hides and skins.

Causa Omissus:

Means the case is omitted. Legislature ought to have made provision, to meet every contingency but due to in advertency or otherwise the case do not fit in all the cases. Generally, the legislature contemplates all cases coming under the provision and it will be so worded so as to be applicable to all varieties of cases that might come up. But there may be instances where a provision enacted may not fit into the facts of a particular case. Here, the court is not empowered to supply the omission there by filling the gaps, it is only empowered to point out causa omissus. Some times if it is in the general scheme of the act then the legislature intended

to include the particular case also within the provision the court can give effect to it by supplying the omission.

Lord Denning states “when a defect appears a judge cannot simply fold his hands and blame the draftsman rather know the intention of the legislature in order to give” force & life to the intention of the legislature.

In Seaford court Estates Ltd. Vs. Asher (1994) 1 All ER 155, P. 164 (CA) stated that ‘A judge must not alter the material of which the Act is woven, but he can and should iron out the creases”.

Exvesceribus actus:

Meaning a statute cannot be interpreted in isolation. The meaning of the word may be understood by the other words used in the same section, while in some cases, a section may be interpreted in the light of some other sections of the same statute. Its always the scheme of the act should be taken into consideration.

In Aswin Kumar Bose Vs. Aurobindo Bose

Held, to find out the true intention of the legislature it is necessary to take all the parts of the statute together for interpreting any provision in it.

INTERPRETATION OF THE CONSTITUTION

A constitution is an organic instrument. It is a fundamental law. The General Rules adopted for construing a written constitution embodied in a statute are the same as far construing any alter statue. When more than one reasonable interpretation of a constitutional provision are possible, that which would ensure a smooth and harmonious working of the constitution shall be accepted rather than the one that would lead to absurdity or give rise to practical inconvenience or make well-existing provisions of existing law nugatory. The constitution must be interpreted in a broad and liberal manner giving effect to all its parts and the presumptions should be that no conflict or repugnancy was intended by its frames. While interpreting the constitution a construction most beneficial to the widest possible amplitude must be adopted.

Preamble and Interpretation of Constitution:

The preamble of the constitution like the preamble of any statute furnishes the key to open the mind of the makers of the constitution more so because the constituent assembly took great pains in formulating it so that it may reflect the essential features and basic objectives of the Constitution. The preamble is part of the Constitution. The Constitution, including the preamble, must be read as a whole and in case of doubt interpreted consistent with its basic structure to promote the great objectives in the preamble. The value of the preamble in respect of the interpretation of the constitution is same as that of a preamble to any other Act. The modern view is that where the enacting part is explicit and unambiguous, the preamble cannot be restored to, to control quality or restrict it. It is a well established rule of interpretation that it is only when an Act is ambiguous (i.e., not clear) that a preamble can be made use of to throw further light on the express provisions of the enactment.

In **D.S.Nakara vs Union of India (1983) SCC 304)** Supreme Court held that the preamble is the floodlight illuminating the path to be pursued by the state set up a Socialist, Secular, Democratic Republic.

In the **Berubari Union Case AIR 1960 SC** Supreme Court held that the preamble was not a part of constitution and could not be regarded as a source of any substantive powers. It was held that the preamble was a key to open the mind of makers.

In **Keshavananda Bharati vs State of Kerala AIR (1973) SC 1461)** a majority of the Full Bench of the Supreme Court held that the objectives stated in the Preamble reflect the basic structure of the Constitution which cannot be amended by exercising the power of amendment under Art.368 of the Constitution and further it was held that preamble is a part of our constitution.

In **K.K.Kochuni vs State of Madras and Kerala (AIR 1960 SC 1080)** the Supreme Court observed that in case of an apparent clash between an Article granting a fundamental right and any other Article every attempt should be made to harmonies them, and if that is impossible only then should one provision be allowed to yield to the other.

Following principles have frequently been discussed by the court while interpreting the constitution:

Principle of pith and Substance: The principle means that if an enactment substantially falls within the powers conferred by Constitution upon the Legislature by which it was enacted, it does not become invalid merely between it incidentally touches upon subjects within the domain of another legislature as designated by the Constitution. The court would go in depth of care and see the pith and substance from the facts.

Doctrine of Colourable Legislation: The doctrine of colorable legislation applies where the legislature in a particular case has transgressed the limits of its constitutional powers (Constitution distributes legislative powers by specific legislative entries in three legislative lists. There are certain constitutional limits on the legislative authority in the shape of fundamental rights etc.,) The legislature may have transgressed the limits in respect of the subject-matter of the statute or it may be disguised covert and indirect. The expression “colourable legislation” has been applied in certain judicial pronouncements to this latter class of cases.

The whole doctrine of colourable legislation is based on the maxim that you cannot do indirectly what you cannot do directly. But when a thing within competence of a legislature is attempted in an indirect or disguised manner it cannot make the Act invalid. The inquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not form alone that will determine as to whether or not in relates to a subject which is within the power of the legislative authority.

Doctrine of eclipse

The doctrine of eclipse applies only to valid pre-constitution laws which have become inoperative and void by reason of some supervening circumstance which case a shadow on it or eclipse it for the time being. The impugned (valid) law does not become dead but remains dormant to the extent it is inconsistent. It revives and becomes effective again when the shadow is removed. By virtue of the doctrine of eclipse such law does not need to be re-enacted in order to be enforced, if the cause of its unconstitutionality is removed the impugned law revives and becomes effective again. For instance, a pre-constitution law may remain dormant to the extent it is inconsistent or in conflict with the fundamental rights enshrined in the Constitution, it may again revive and become effective by virtue of the doctrine or eclipse if an amendment of the constitution removes the inconsistency.

Principle of Severability: When the part of any enactment is found to be unconstitutional, it can be severed from the rest of the enactment; it is called the principle of severability. Only the severed part of the enactment shall be declared unconstitutional while the rest of the part of the enactment shall remain constitutional and remain in force.

However, it is to be rated that where such severance is not possible the whole enactment shall be declared unconstitutional.

THE GENERAL CLAUSES ACT, 1897

Scope and applicability

The General Clauses Act, 1897 makes provisions as to construction of general Acts and laws. It is an important component for interpretation of statutes.

The Act is not restrictive in its application. It applies to all branches of law.

The General Clauses Act, 1897, is applicable only to Central Acts, rules and regulations. Most of the States have their own versions of state General Clauses Act which are modelled on the Central Act. Such State General Clauses Acts are used for interpretation of statutes enacted by the legislatures governing those States.

Objectives achieved by the General Clauses Act, 1897

1. It provides for uniformity in application/expression by defining terms of common use.

2. It expressly states rules for the construction and interpretation of Acts

3. It defines common clauses that would otherwise have to be inserted expressly into every Central Act

4. It codifies the law relating to statutory interpretation (guidelines for interpretation)

5. The General Clauses Act 1897 serves as the template for all State General Clauses Act.

6. The Act is expressly applied for interpretation of the Constitution by virtue of Article 367 of the Constitution.

Structure of the Act

Sections 5 to 13 contain general rules of construction of statutes, other than definitions. This can be considered in two aspects -

- Sections dealing with commencement and repeal of enactments. In other words, these sections concern issues during the time when the law is in force (sections 5 to 8)

- Sections dealing with general rules of construction. These sections deal with matters of detail, such as time, distance, gender, rate of duty, number, etc. (sections 9 to 13).

Sections 14 to 19 of the Act deal with bodies of persons, i.e., power and functionaries. It also concerns itself with notifications issued under enactments. It states the provisions applicable to the making of rules and bylaws after previous publications, and issue of orders between passing and commencement of enactment. It also deals with the power to issue, providing that the power to issue includes the power to add to, amend, vary or rescind notifications, orders, rules and bylaws.

The important aspects of the General Clauses Act, 1897 deal with continuation of orders etc. issued under enactments repealed and re-enacted, recovery of files, provisions as to offences punishable under two or more enactments, meaning of the term “service by post” and citation of enactments. It also deals with saving for previous enactments, rules, and bylaws, application of Act to Ordinances, Application of the Act to laws made by the governor-general.

Important provisions of the General Clauses Act

The important sections of the Act are as follows: -

Section 3 : Among other things, the Act defines common but legally significant expressions like “Central Government” which is used in many Acts passed by Parliament, District Judge, Document, Enactment, Financial Year, High Court, immovable property, imprisonment, month, movable property, offence, Gazette, Presidency Town, registered, schedule, and section. Further, the opening sentence of this section makes it clear that the definitions are applicable “in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context.”

Section 5 : Coming into operation of enactments.

This Section provides that where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent ... in the case of an Act of Parliament, of the President [Relevant Section: Section 5(1)(b)].

In terms of sub-section (3), a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement, unless the contrary is expressed. In other words, if an enactment were to come into force with effect from 12.09.2012, then it shall be deemed to have come into force at midnight of 11th -12th September 2012.

Section 6 : Effect of Repeal - repeal of an Act or Regulation shall not -

- Revive anything not in force or existing at the time the repeal takes effect,
- affect any right or liability under any enactment so repealed
- Affect any penalty, forfeiture or punishment incurred in respect of any offence
- any investigation, legal proceeding or remedy in respect of any such right or obligation, meaning thereby that such investigation, legal proceeding or remedy can continue as if the repealing Act or regulation had not been passed.

The general rule of construction is that when any Central Act is not expressed to come into operation on a particular day, it shall come into force on the day it receives Presidential assent.

Section 9 : Commencement and termination of time.

Section 15: The power to appoint includes the power to appoint ex officio. Section 16: The power to appoint includes the power to suspend or dismiss.

Section 24: Continuation of orders etc. issued under enactments repealed and re-enacted.

This section provides that once an order etc. is issued under an enactment which is subsequently repealed, any action in pursuance of that order shall continue to be valid until it is expressly superseded by another order or notification, etc.

For example, Sanjay Dutt's prosecution under TADA continued in spite of the fact that TADA was repealed during the pendency of the trial itself.

Section 27: This section defines the meaning of "service by post."

It states that where any Central Act or regulation authorises or requires any document to be served by post, where the expression "serve" or "give" or "send" is used, then the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Advocates and law students should realise that this is the reason why we address legal notices by registered post, so that the benefit of section 27 may be obtained when the postal record is submitted before court.

Section 28: This section provides that any Central Act or Regulation, any enactment may be cited by reference to the title or short title (if any) conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

For example, the Companies Act, 1956, may be referred to either as Companies Act, 1956, or as Act 1 of 1956. We also refer to specific provisions of the law by reference to section number or sub-section number.

4. COMPANY LAW

Definition and Meaning of a Company

A Company is one of the forms of business organization. It is a voluntary association of persons and is formed for certain common purposes. Its capital is raised by selling shares and the persons holding such shares are known as shareholders. Liability of shareholders is limited to the extent of the shares they hold. A Company is an artificial person with a perpetual succession and a common seal.

Main Features or Characteristic of a Company

Following are the main features or characteristics of a company:

(a) An Incorporate Association.

(b) Separate Legal Entity.

(c) An Artificial Person but not a Citizen.

(d) Perpetual Succession.

(e) Common Seal.

(f) Separate Name.

(g) Limited Liability.

(h) Separation of Ownership and Management.

(i) Transferability of Shares.

(j) Separate Property.

(k) Number of Members.

(l) Shareholders are actual owners.

(m) Raising of Capital on the large scale.

(n) Capacity to Sue.

(o) Rigidity of Objects.

(p) Statutory Requirements.

(q) Company is Body Corporate.

Important Types of Companies

Companies can be classified into various types on different basis.

(1) Classification of Companies on the basis of Liability.

- (a) Companies Limited by Shares.
- (b) Companies Limited by Guarantee.
- (c) Unlimited Companies:

Classification of companies on the basis of Mode of Incorporation:

(a) Chartered Companies: Chartered Companies are also known as Royal Charter.

Such Companies are incorporated under the Royal (special) Charter granted by the King or the Queen. Such companies are given exclusive pokers, rights and privileges under the royal charter and therefore, they have to function in accordance with the terms and conditions of the royal charter. The East India Company, Bank of England, the Chartered Bank of Australia are some of the examples of chartered or Royal companies. However, such Companies find no place in India after her independence, since there is no monarchy in India.

(b) Statutory Companies.

(c) Registered Companies under the Act.

Classification of Companies based on the Basis of Ownership:

(a) Private Company:

Section 3 (1) (iii) defines a private company as follows - "Private company" means a company which has a minimum paid up capital of Rupees one lacs or such higher paid up capital as may be prescribed, and be its Articles -

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

(b) limits the number of its members to fifty not including

(i) persons who are in employment of the company', and

(ii) 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; and prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(c) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives. This sub-clause has been inserted by the Companies (Amendment) Act of 2000 with effect from 13.12.2000.

(b) Public Company:

By amending the Companies Act in 2000, by making certain additions in Section 3 (1) (iv), the definition of "Public Company" is given in the said section as follows: "Public Company" means a company which -

(a) is not a private company',

(b) has a minimum paid-up capital of Five lakh rupees or such higher paid-up capital as may be prescribed',

(c) is a private company which is a subsidiary of a company which is not a private company. Thus, Section 3 (1) (iv) (c) implies that any private company which is a subsidiary of a public company is also treated as a public company as a result of amendments in the Companies Act in 2000.

It is also made clear in Section 3 (6) that a company registered under Section 25, before or after the commencement of the Companies (Amendment) Act, 2000, shall not be required to have the minimum paid-up capital as specified (i.e. Rs. five lakh) in this section.

(c) Government Company:

Section 617 of the Companies Act of 1956.

Classification of Companies on the basis of Control and or share holding:

Companies can be classified on the basis of control as (a) Holding Companies and (b) Subsidiary companies.

(a) Holding Company:

Section 4 (4) of the Companies Act of 1956 implies that a company is deemed to be holding company of another if that other is its subsidiary. Thus, a holding company can be defined as a company which has a control over a subsidiary company through anyone of the several methods as explained in Section 4 (1).

(b) Subsidiary Company:

A company is a subsidiary of a holding company if a holding company controls the majority composition of its board of directors, having an object to control the management of the subsidiary or that other company

FORMATION OR INCORPORATION OF A COMPANY

(a) Formation

A private company can commence its business immediately after obtaining the certificate of incorporation. But a public company has to obtain a certificate to commence business from the Registrar of Companies before it can commence business and the Registar grants such certificate on fulfilling the following conditions.

1. The minimum subscription has been allotted;
2. The directors have taken up and used for their qualification shares, and
3. The statutory declaration and the prospectus or statement in lieu of prospectus have been filed.

Provisions of the Companies Act are given in Part II of the Companies Act in Sections from 11 to 25 under the heading " Incorporation of Company and matters incidental thereto. But, before consisting these provisions, let us know the important stages involved in the process of formation of a company.

(b) Registration:

For the purpose of the registration of a company, an application is required to be done to the Registrar of the companies as per the provisions of Section 12 .

(c) Floatation and raising of Capital:

After completing the legal formalities required for registration, a company goes in the third stage for raising the sufficient capital to commence and carryon its business.

(d) Commencement of Business:

In respect of private or companies having no share capital can start their business immediately after they are incorporated. But public companies have their share capital required to obtain necessary certificate from the Registrar of companies to commence the business (Section 149).

Procedure of a Registration of a Company:

(i) Mode of forming Incorporated Company:

Any seven or more persons, or where the company to be formed will be a private company, any two or more persons associated for any lawful purpose may by subscribing their names to a memorandum of Association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

(ii) Certificate of incorporation:

When the documents required for registration are filed with the Registrar of Companies and if the Registrar is satisfied and convinced that all the statutory requirements regarding the registration have been duly complied with., he registers all necessary documents i.e. memorandum, articles etc. and issues a certificate of incorporation under his hand.

Certificate of incorporation is very important document which certifies that the company has been registered with the Registrar of Companies under the Companies Act of 1956 on a particular date. as and from that date of the issue of the certificate of incorporation, the company obtains a legal status and an distinct corporate personality.

A certificate of incorporation is a conclusive evidence that all requirements of the Companies Act of 1956 in respect of registration of the company have been Though the certificate of incorporation is conclusive for the purpose of incorporation, it does not make an illegal object of a company legal one.

Conclusiveness of certificate of incorporation:

Section 35: A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorized to be registered and duly registered under this Act.

CORPORATE PERSONALITY AND LIFTING OR PIERCING THE CORPORATE VEIL:

The advantage of incorporation, particularly of separate artificial and distinct entity, is allowed to be enjoyed only by those who do not make dishonest and fraudulent use of their company. It has been noted that the company is a separate legal entity different from its members. It has independent legal existence. Its assets are not the assets of its members, nor is its liability or the debts to be discharged by the members.

In Salomon vs. Salomon and Company Ltd. Case (1897 A.C. 22), t the Court held that Salomon as an individual was distinct from Salomon and Company and therefore, he could be a secured creditor of the company even though he held the majority of shares.

In Lee vs. Lee Air Farming Ltd., (1961) AC 12 it was held that 'L' was a separate person distinct from the company hence compensation was due to the widow

The Character of a body corporate was explained by the Supreme Court in Tata Engineering And Locomotive vs State Of Bihar And Other 1965 AIR 40, 1964 SCR (6) 885

In Naga Brahma Trust vs. Translanka Air Travels P. Ltd. It has been held that shareholders and the company are entirely different persons

The corporate veil may be lifted in the following instances.

The Corporate veil may be lifted under two circumstances. They are:

1) Under Statutory Interpretation
2) Under Judicial Interpretation

Under Statutory Interpretation the corporate veil may be Lifted in the following cases:

UNDER THE COMPANIES ACT, 1956

1. Reduction in membership below the statutory minimum (Sec 45)
2. Civil Liability in case of any mis-statement in Prospectus (Sec 62)
3. Failure to refund application money (Sec 69)
4. Fraudulent conduct of business (Sec 542)
5. Contracts made in personal names of directors etc (Sec 147)
6. Subsidiary Company (Sec 212)
7. Ultra Vires.

Corporate Veil may be lifted under Judicial Interpretation under the following circumstances:

1. To prevent fraud or improper conduct.
2. When the company is a mere cloak or sham (Unlawful act)
3. Evasion of Tax or avoiding welfare legislation
4. Under the authority of statute.
5. To Study the Legal character of the company

    1. Fraud or Improper conduct: When the corporate personality is used as an instrument of fraud, the doctrine of piercing the corporate veil may be applied in the interest of justice.

       P.N.B. Finance Ltd. V. Shital Prasad Jain (1983) 54 corp, cas.66 In Jones Vs. Lipman case (1962, All ER. 342),
    2. When the company is a mere cloak or sham (Unlawful act)
    3. Evasion of Tax or avoiding welfare legislation

       In Sir Dinshaw Manekaji Petit case (Re. AIR 1927 - Bombay - 371).
    4. Under the authority of statute.

       In LIC of India vs. Escorts Ltd. (AIR 1986 SC 1370)
    5. To Study the Legal character of the company:

       In times of war the court may ignore the place of registration of the company and lift the corporate veil to see whether the company is being controlled by enemy aliens or not and determine the enemy character of the company by that.

       In Daimler Company Vs, Continental Tyre and Rubber Company Ltd. Case (1916 - 2 A. C. 307J,

PROMOTER

Refers to the entire process by which a company is brought into existence. It starts with the conceptualization of the birth a a company and determination of the purpose for which it is to be formed. The persons who conceive the company and invest the initial funds are known as the promoters of the company ..

The promoters have certain basic duties towards the company formed :-

1. He must not make any secret profit out of the promotion of the company. Secret profit is made by entering into a transaction on his own behalf. Gluckstein vs. Barnes (1900) AC240
2. He cannot sell concerned property to the company at a profit without making disclosure of the profit to the company or its members. Erlanger v. N. S. Phosphate Company- The promoter can make profits in his dealings with the company provided he discloses these profits to the company and its members. What is not permitted is making secret profits i.e. making profits without disclosing them to the company and its members.
3. He must make full disclosure to the company of all relevant facts including to any profit made by him in transaction with the company.

In case of default on the part of the promoter in fulfilling the above duties, the company may:-

1. Rescind or cancel the contract made and if he has made profit on any related transaction, that profit also may be recovered
2. Retain the property paying no more for it then what the promoter has paid for it depriving him of the secret profit.
3. If these are not appropriate (eg cases where the property has altered in such a manner that it is not possible to cancel the contract or where the promoter has already received his secret profit), the company can sue him to for breach of trust. Damages upto the difference between the market value of the property and the contract price can be recovered from him.

A promoter may be rewarded by the company for efforts undertaken by him in forming the company in several ways. The more common ones are :-

1. The company may to pay some remuneration for the services rendered.
2. The promoter may make profits on transactions entered by him with the company after making full disclosure to the company and its members.
3. The promoter may sell his property for fully paid shares in the company after making full disclosures.
4. The promoter may be given an option to buy further shares in the company.
5. The promoter may be given commission on shares sold.
6. The articles of the Company may provide for fixed sum to be paid by the company to him. However, such provision has no legal effect and the promoter cannot sue to enforce it but if the company makes such payment, it cannot recover it back.

MEMORANDUM OF ASSOCIATION

Definition of 'Memorandum of Association': In Section 2 (28) of the Companies Act, 1956, the definition of memorandum is given which is as follows:

" Memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies laws or this Act."

Form of Memorandum

Section 14 - The memorandum of association of a company shall be in such one of the forms in tables B, C, C and E in Schedule I as may be applicable to the case of the company or in a form as near thereto as circumstances admit.

Printing and signature of memorandum:

Section 15 - The memorandum shall -

a) be printed

b) be divide into paragraphs numbered consecutively and

c) be signed by such subscriber (who shall add his address, description and occupation, if any), in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

Memorandum contains the following clauses.

1. The name clause.
2. The registered office clause.
3. The objects clause.
4. The capital clause.
5. The liability clause
6. The association clause.

No company can be registered unless the Memorandum of Association is submitted to the Registrar. It is required to be prepared according to the provisions of the Companies Act. In the case of a public company, Memorandum must be signed by at least seven persons and if it is a private company, by two persons duly witnessed.

Alteration and Amendment of Memorandum:

Section 16 :1) A company shall not alter the conditions in its memorandum except in the cases, in the mode, and to the extent for which express provision is made in this Act.

Change of Object Clause:

Section 17 :

(1) A company may by special resolution alter the provisions of its memorandum so as to change the place of its registered office from one state to another or with respect to the objects of the company so far as may be required to enable it -

a) to carryon its business more economically or more efficiently.

b) to attain its main purpose by new or improved means.

c) to enlarge or change the local area of its operations.

d) To carryon some business which under existing circumstances may conveniently or advantageously be combined with the business of the company.

e) To restrict or abandon any of the objects specified in the memorandum.

f) To sell or dispose of the whole or any part of the undertaking or of any of the undertakings of the company or

g) To amalgamate with any other company or body of persons.

(2) The alteration of the provisions of memorandum relating to the relating to the change of the place of its registered office from on State to another shall not take effect unless it is confirmed by the Company Law Board on petition.

Change of Registered office:

Section 17A :

(1) No company shall change the place of its registered office from one place to another within a State unless such change is confirmed by the Regional Director.

(2) The company shall make an application in the prescribed form to the Regional Director for confirmation under sub-section (1)

(3) The confirmation referred to in sub-section (1) shall be communicated to the company within four weeks from the date of receipt of application for such change.

Explanation: For the purpose of this section, it is hereby declared that the provisions of this section shall apply only to the companies which change the registered office from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies within the same state

(4) The company shall file, with the Registrar a certified copy of the confirmation by the Regional Director for change of its registered office under this section ,within two months from the date of confirmation, together with a printed copy of the memorandum as altered and the Registrar shall register the same and certify the registration under his hand within one month from the date of filing of such document.

(5) The certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and Confirmation have been complied with and henceforth the memorandum as altered shall be memorandum of the company.

Alteration to be registered within three months:

Section 18 :

(1) A company shall file with the Registrar-

(a) a special resolution passed by a company in relation to clauses (a) to (g) of sub-section (1) of section 17, within one month from the date of such resolution, or

(b) a certified copy of the order of the Company Law Board made under sub-section (5) of that section confirming the alteration, within three months from the date of order, as the case may be, together with a period copy of the memorandum as altered and the Registrar shall register the same and certify the registration under this hand within one month from the date of filling of such documents.

(2) The certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and henceforth the memorandum as so altered shall be the memorandum of the company.

(3) Where the alteration involves a transfer of the registered office from one State to another, a certified copy of the order confirming the alteration shall be held by the company with the register the same, and shall certify under his hand the registration thereof, and the Registrar of the state from which such office is transferred shall send to the Registrar of the other State all documents relating to the company registered, recorded or filed in his office.

Change of Name:

Section 21:

A company may, by special resolution and with the approval of the Central Government signified in writing, change its name. It is also provided that so such approval shall be required where the only change in the name of a company is the addition thereto or, as the case may be, the deletion there from, of the work “Private”, consequent on the conversion in accordance with the provisions of this Act of a public company into a private company or a private company into a public company.

Registration of Change of name and effect thereof:

Section 23:

Where a company changes its name in pursuance of section 21 or 22, the Registrar shall enter the new name on the register in the place of the former name, and shall issue a fresh certificate of incorporation with the necessary alterations embodied therein; and the change of name shall be complete and effective only on the issue of such a certificate.

DOCTRINE OF ULTRA VIRES

An action outside the memorandum is ultra vires the company.

The act of company is not ultra vires if it is found:

This doctrine prevents the wrongful application of the company’s assets likely to result in the insolvency of the company and thereby protects creditors. Besides the doctrine of ultra vires prevents directors from departing the object for which the company has been formed and, thus, puts a check over the activities of the directions. It enables the directors to know within what lines of business they are authorized to act.

(a) The Doctrine of “ ultra vires” has been well established in the case of Ashbury Railway carriage & Iron Co. Ltd V. Riche(1875)LR 7 HL 653

(b) By such representation the directors must have induced the third party to make a contract with the company in respect of a matter beyond the memorandum or powers of the company.

(c) The third party must have acted on such inducement and suffered some loss.

ARTICLES OF ASSOCIATION

'Articles of Association' is another very important document and if contains the internal regulations of the company relating to internal affairs and the conduct of its business. It regulates the internal management of the company. As a member of fact, the memorandum lays down the objects and purposes for which the company is formed while the articles are subordinate to the memorandum and prescribes regulations for the attainment of the objectives of the company. Form and signature of articles:

Section 30: Articles shall-

a. be printed;

b. be divided into paragraphs numbered consequently; and

c. be signed by each subscriber of the memorandum of association (who shall add his address, description and occupation, if any) in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

(a) Articles of Association contains the rules, regulations, bye-laws etc. for the internal management of the affairs of the company. Such rules, regulations are framed for carrying out the aims objects as set out in the Memorandum of Association. The following types of Companies are required to have their own articles.

1. Unlimited companies

2. Companies limited by guarantee

Private Companies limited by shares

The Articles of Association is required to be signed by the subscribers of the Memorandum of Association along with the memorandum. A public company may have its own articles of association. But, if in case, it does not have its own articles, I may adopt Table A as given in schedule-I to the Companies Act of 1956.

Alteration of articles by special resolution:

Section 32: (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may, but special resolution, alter its articles.

It is provided that no alteration made in the articles under this sub-section which has the effect of converting a public company into a private company, shall have effect ;unless such alteration has been approved by the Central Government.

The Doctrine of Constructive Notice:

Memorandum of Association and articles of association are two most important documents needed for the incorporation of a company. The memorandum of a company is the constitution of that company. It sets out the -

(a) object clause,

(b) name clause,

(c) registered office clause,

(d) liability clause and

(e) capital clause; whereas the articles of association enumerate the internal rules of the company under which it will be governed.

Constructive Notice:

Memorandum of association and the articles of association are public documents in the sense that any person under section 610 of Indian company act, 1956 may inspect any document which will include the memorandum and articles of the company kept by the registrar of companies in accordance with the rules made under the destruction of records act, 1917 being documents filed and registered in pursuance of the act.

Unreal Doctrine:

The doctrine of Indoor Management:

It imposes an important limitation on the doctrine of constructive notice. According to this doctrine "persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed". The doctrine of indoor management is also known as the TURQUAND rule after Royal British Bank v. Turquand

PROSPECTUS

When the certificate of incorporation is obtained, the promoters and directors of a public company, in order to raise the necessary capital, invite the public to subscribe to its shares or debentures. This done by issuing a document called "Prospectus". The definition of "Prospectus" is given in Section 2 (36) of the Companies Act, 1956 which is given on next page.

"Prospectus and includes any notice, circular, advertisement or other document inviting deposits form the public or inviting offers form the public for the subscription or purchase of any shares in, or debentures of a body corporate".

From this definition of a prospectus, we come to know that -

(1) A prospectus is a document and really the means of raising share capital and it plays the role of silent salesman.

(2) A prospectus can be any notice, circular, advertisement or even any other document.

(3) It is issued to invite the subscription to shares or debentures or to keep deposits with a company.

Civil Liability for Mis-statements in Prospectus and Compensation under Section 62:

(1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in debentures of a company, the allowing persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein, that is to say -

(a) every person who is a director of the company at the time of the issue of the prospectus;

(b) every person who has authorised himself to be named and is name as in the prospectus either as a director, or as having agreed to become director, either immediately or after an interval of time;

(c) every person who is a promoter of the company; and

(d) every person who has authorised the issue of the prospectus [Section 62 (1)].

It is provided that where, under section 58, the consent of a person is required to the issue of a prospectus and he has given that consent, or where, under sub-section (3) of Section 60, the consent of a person named in a prospectus is required and he has given that consent, he shall not, by reason of having given that consent, he shall not, by reason of having given such consent, be liable under this sub-section as a person who has authorised the issue of the prospectus except in respect of an untrue statement, if any, purporting to be made by him as an expert [Proviso to Section 62(1)].

(2) No person shall be liable under sub-section (1) if he proves -

(a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;

(b) that, in prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent;

(c) that, after the issue of the prospectus and before allotment there-under, he on becoming aware of any untrue statement therein, withdraw his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason therefore; or

(d) that-

(i) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement was true; and

(ii) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract form, the report or valuation, and he had reasonable ground to believe, and did upto the time of the issue of the prospectus, believe that the person making the statement was competent to make it and that person had given the consent required by Section 58 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the

prospectus for registration or, to the defendant's knowledge, before allotment thereunder, and

(iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official documents, it was a correct and fair representation of the statement, or a correct and fair extract from the document [Section 62 (2)].

(3) A person who, apart from this sub-section shall not apply in the case of a person liable, by reason of his having given a consent required of him by Section 58 as a person who has authorised the issue of a prospectus in respect of an untrue statement, purporting to be made by him as an expert shall not be so liable, if he proves-

(a) that, having given his consent under Section 58 to the issue of the prospectus, he withdrew it in writing before delivery of a copy of the prospectus for registration;

(b) that, after delivery of a copy of the prospectus for registration and before allotment thereunder, he on becoming aware of the untrue statements withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefore; or

(c) that, he was competent to make the statement anal that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, believe that the statement was true [Section 6 (3)].

(4) Where-

(a) the prospectus specifies the make of a person as a director of the company; or-as having agreed to become a director thereof and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof; or

(b) the consent of a person is required under Section 58 to the issue of the prospectus and the either has not given that consent or has withdrawn it before the issue of the prospectus;

Criminal Liability for Mis-statements in prospectus and Compensation under Section 63 :

1) Where a Prospectus issued after the commencement of this Act includes any untrue statement, every person who authorized the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees (Rs. 50,000) or with both, unless he proves whether that the statement was immaterial or that he had reasonable found to believe an did up to the time of the issue of the prospectus believe, that the statement was true (Section 63(1))

2) A person shall not be deemed for the purposes of this section to have authorized the issue of a prospectus by reason only of his having given:

a) the consent required by Section 58 to the inclusion therein of a statement purporting to be made by him as an expert or

b) the consent required by Sub section (3) of Section 60 (Section 63(2))

ALLOTMENT OF SHARES

Prohibition of allotment unless minimum subscription received (Section 69)

(1) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the amount stated in the prospectus as the minimum amount which, in the opinion of the Board of directors, has been subscribed.

(2) Application Money (Section 69(3) The amount payable on application on each share shall not be less than five per cent of the nominal amount of the share.

Application money to be kept in Bank:

Section 69(4) All moneys received from applicants for shares shall be deposited and kept deposited in a Scheduled Bank-

No opening of subscription list before 5th day after the issue of prospectus (Section 72)

No allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally, and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the fifth day after that on which the prospectus is first so issued or such later time, if any, as may be specified in the prospectus, Provided that where, after a prospectus is first issued generally, a public notice is given by some person responsible under section 62 for the prospectus which has the effect of excluding, limiting or diminishing his responsibility, no allotment shall be made until the beginning of the fifth day after that on which such public notice is first given.

Allotment of shares and debentures to be dealt in on stock exchange (Section 73)

Every company, intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

Return as to allotments (Section 75)

Whenever a company having a share capital makes any allotment of its shares, the company shall, within thirty days thereafter, file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and occupations of the allot tees, and the amount, if any, paid or due and payable on each share.

Commissions (Section 76) - Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.

SHARE CAPITAL

There are two basic types of kinds of capital of a company i.e., owned capital and borrowed capital. Share and stocks represent owned capital while debentures and bonds represent borrowed capital.

Classification of Share Capital

Share Capital refers to the capital raised by the company by issuing its shares to the people.

Authorised Capital:

It is also known as nominal or registered capital. Total amount of authorized capital is mentioned in the Memorandum of Association of a company with the division thereof into shares of different nominations. This is, in fact the maximum capital which the company can raise during its lifetime unless it is increased by following certain legal procedure suggested in the Act.

Issued Capital:

It is not necessary for any company that it must issue all the authorised capital. The Company may issue certain shares according to its requirement, Issued capital can be defined as the nominal value of shares which are offered to the public for subscription. Issued capital is always less than the authorised capital or it can be equal to it.

Subscribed Capital:

When shares are offered to the public for subscription, public may not take all such shares. In such, the part of the issued capital which is taken by the public is known as the subscribed capital.

Called-up and Paid-up Capital:

Called-up capital is that part of the issued capital which has been called up on the shares issued for subscription. While the amount which is actually paid by the subscribes towards the share capital accepted by them is called, paid up capital. The entire capital issued and subscribed need not be called up and paid up immediately.

Un-called Capital:

That part of the issued and subscribed capital which has not been called up is known as un-called capital. Subject to the terms of issue of shares and the provisions of the articles of association, the company can call the amount of un-called capital any time when required.

Reserved Capital :

A limited company may by special resolution/determine that any portion of its shares capital which has not been already called-up shall not be capable of being called up, except in the event and for the purposes of the company being wound up and thereupon that portion of its share capital shall not be capable of being called-up except in that event and for those purposes [Section 99]. Thus, reserve capital is that part of the uncalled capital which can only be called up at the time of and for the purposes of winding up for the company. This implies that reserve capital is available only for creditors on the winding up of the company.

Share and Types or Kinds of Share Capital

Kinds of Share Capital:

A company raises capital by issuing either preference shares or equity shares. When it raises capital by issuing shares, it is known as owned capital. But, besides by issuing shares, company issues debentures and bonds and raises the capital, that is known as borrowed capital. Provisions of Section 85 make clear two kinds or types of share capital i.e. Preference share capital and equity share capital.

(1) "Preference share capital" means, with the reference to any company limited by shares, whether formed before or after the commencement of this Act, the part of the share capital of the company which fulfils both the following requirements, namely:

(a) that as respects dividends, it carriers or will carry a 'preferential right to be paid a fixed amount or an amount calculated at a fixed rate, which may be either free of or subject to income-tax; and

(b) that as respect capital, it carries or will carry, on a winding up or repayment of capital, a preferential right to be repaid the amount of the capital paid-up or deemed to have been paid-up, whether or not there is a preferential right to the payment of either or both of the following amounts, namely:

(i) any money remaining unpaid, in respect of the amounts specified in clause (a) up to the date of the winding up or repayment of capital; and

(ii) any fixed premium or premium on any fixed scale, specified in the memorandum or articles of the company [Section 85 (1)]

Capital shall be deemed to be preference capital, notwithstanding that it is entitled to either both of the following rights, namely:

(i) that, as respects dividends, in addition to the preferential right to the amount specified in clause (a), it has a right to participate, whether fully or to a limited extend, with capital not entitled to the preferential right aforesaid;

(ii) that, as respects capital, in addition to the preferential right to the repayment, on a winding up, of the amounts specified clause (b) it has a right to participate, whether fully or to a limited extent, with capital not entitled to that preferential right in any surplus which may remain after the entire capital has been repaid [Explanation to Section 85 (1)].

Types of Preference Shares

1. Cumulative or Non-cumulative:

A non-cumulative or simple preference shares gives right to fixed percentage dividend of profit of each year. In case no dividend thereon is declared in any year because of absence of profit, the holders of preference shares get nothing nor can they claim unpaid dividend in the subsequent year or years in respect of that year. Cumulative preference shares

however give the right to the preference shareholders to demand the unpaid dividend in any year during the subsequent year or years when the profits are available for distribution. In this case dividends which are not paid in any year are accumulated and are paid out when the profits are available.

2. Redeemable and Non- Redeemable :

Redeemable Preference shares are preference shares which have to be repaid by the company after the term of which for which the preference shares have been issued. Irredeemable Preference shares means preference shares need not repaid by the company except on winding up of the company. However, under the Indian Companies Act, a company cannot issue irredeemable preference shares. "Equity share capital" means, with reference to any such company, all share capital which is not preference share capital [Section 85 (2)]

(1) The expressions "preference share" and "equity share" shall be constructed accordingly" [Section 85 (3)]

The Companies (Amendment) Act, 2000 has substituted Section 86 with new provisions which are as follows:

"The share capital of a company limited by shares shall lie of two kinds only, namely:

(a) Equity share capital -

(i) with voting rights; or

(ii) with differential] rights as to dividend, voting or otherwise in accordance with such rules and subject to such conditions as may be prescribed;

(b) Preference share capital".

Provisions Relating to "Certificate of Shares" [Section 84]

Alteration of Share Capital

A limited company having a share capital is empowered to alter its share capital subject to the provision of Section 94 of the Companies Act of 1956. But such company has to give the notice of alteration in share capital to the Registrar within thirty days of the alteration as per the provisions of sections 95 and 97.

According to Section 94 a limited company having a share capital may, if so authorized by its articles of association, alter the conditions of its Memorandum in the following manner and alter its share capital.

Such company may -

(1) increase its share capital by such amount as it thinks expedient by issuing news shares,

(2) consolidate or divide all of its share capital or any part of it into shares of larger amount than its existing shares,

(3) convert all or any of its fully paid-up shares into stock or reconvert that stock into fully paid up shares of any denomination,

(4) sub-divide all of its shares or any of them into shares of smaller amount than is fixed by its Memorandum of association.

Reduction of Share Capital

The Provisions relating to reduction of share capital have been made in Sections 100 to 105. Section 100 lays down that, "Subject to the confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital, may if so authorised by its articles, by special resolution, reduce its share capital in any way, and in particular and without prejudice to the generality of the foregoing power, may-

(i) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;

(ii) either with or without extinguish or reducing liability on any of its shares, cancel any paid-up share capital which is lost or is un-represented by available assets; or

(iii) either with or without extinguishing or reducing liability on any of its shares, pay of any paid-up share which is in excess of the wants of the company; and may, if and so far as is necessary, alter its Memorandum by reducing the amount of its share capital and of its share accordingly."

As a matter of fact, no action resulting in reduction of share capital of a company is allowed. But the reduction in the share capital can only be affected under statutory authority or by forfeiture and strictly according to the procedure, if any, laid down in the Articles of Association of the company. A reduction in the share capital contrary to the provisions is not legal. Section 100, which is reproduced above, implies that subject to confirmation by the Court, a company limited by shares of by guarantee and having a share capital may, if so authorised by its articles, by a special resolution, reduce its share capital

DEBENTURE AND CHARGES

A debenture is a document that either creates a debt or acknowledges it. Debentures are generally freely transferable by the debenture holder. Debenture holders have no voting rights and the interest paid to them is a charge against profit in the company's financial statements. As per Section 2(12) "debenture" includes debenture stock bonds and any other securities of a company, whether constituting a charge on the assets of the company or not;

Nature of shares or debentures

As per section 82 the shares or debentures or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company.

Kinds of Debentures:

There are various kinds of debentures. They are:

1. Registered Debenture:

When the name of the debenture-holder is mentioned on the debenture certificate and is recorded in the debenture holders register, he is registered debenture holder. He may transfer such debenture just like shares executing the instrument of transfer.

2. Bearer Debenture:

Sometimes the debentures may be payable to bearer. Such debentures could be transferred like bearer negotiable instrument, mere delivery.

3. Redeemable Debentures:

When a company issues debentures it specifies the period of the loan, or in other words, it mentions the terms on the expiry of which they are to be redeemed. The company redeeming the debentures can re-issue the same, when the same are re-issued and the person now entitled to debentures shall have the rights and priorities as if the debentures had never been redeemed.

4. Irredeemable :

A company can issue such debentures also which the company may not redeem or buy back. Such debentures are known as irredeemable or perpetual debentures.

5. Naked Debentures:

An unsecured debenture is called naked debenture. Such debentures do not carry any charge on the property of the company.

6. Mortgage Debentures:

Mortgage debentures are those which are secured by a charge on the whole or part of the property of the company.

7. Convertible debentures, which are convertible bonds or bonds that can be converted into equity shares of the issuing company after a predetermined period of time. "Convertibility" is a feature that corporations may add to the bonds they issue to make them more attractive to buyers. In other words, it is a special feature that a corporate bond may carry. As a result of the advantage a buyer gets from the ability to convert; convertible bonds typically have lower interest rates than non-convertible corporate bonds.

8. Non-convertible debentures, which are simply regular debentures, cannot be converted into equity shares of the liable company. They are debentures without the convertibility feature attached to them. As a result, they usually carry higher interest rates than their convertible counterparts

CREATION OF CHARGES OR CHARGES SECURING DEBENTURES OR FIXED CHARGES AND FLOATING CHARGES)

Debentures are loans that are usually secured and are said to have either fixed or floating charges with them. A secured debenture is one that is specifically tied to the financing of a particular asset such as a building or a machine.

A charge means an interest or right which a lender or creditor obtains in the property of the company by way of security that the company will pay back the debt. Charges are of 2 types :-

1. Fixed Charge :

Such a charge is against a specific clearly identifiable and defined property. The property under charge is identified at the time of creation of charge. The nature and identity of the property does not change during the existence of the charge. The company can transfer the property charged only subject to that charge so that the charge holder or mortgage must be paid first whatever is due to him before disposing off that property.

2. Floating Charge:

Such a charge is available only to companies as borrower. A Floating charge does attach to any definite property but covers the property of a circulating and fluctuating nature

such as stock-in-trade, debtors, etc. It attaches to the property charged in the varying conditions in which happens to be from time to time. Such a charge remains dormant until the undertaking charge ceases to be a going concern or until the person in whose favour charge created takes steps to crystallize the floating charge. A floating charge on crystallization becomes a fixed charge.

COMPANY MEETINGS

A meeting can be defined as a gathering or an assembly or getting together of a number of persons for transacting a lawful business having certain purpose. So far as company meeting are concerned, they must be convened and held in perfect compliance with the applicable provisions of the Company Act of 1956 and the rules made the hereunder. The meetings of a company are of different types or kinds which are mentioned below.

(a) Board meetings.

(b) Meetings of the Committees of the Board.

(c) Meetings of debenture holders.

(d) Meetings of creditors for the purposes other than winding up and for the purpose of winding up.

(e) Meetings of contributories in winding up.

(f) Shareholders meetings i.e.

  (i) Statutory Meeting,

  (ii) Annual General Meeting,

  (iii) Extra-Ordinary General Meeting, and

  (iv) Class Meetings

Requisites or Essentials of a Valid Meeting

A meeting, whether of directors, or of shareholders or any other meeting of a company must be duly convened, legally constituted and properly conducted without which the decisions taken in the meeting or business conducted in the meeting are not considered as valid. The important requisites of a valid meeting are as a follows:

(a) Proper authority to convene and hold a company meeting:

Every meeting of a company must be properly convened and duly constituted. The proper authority to convene the meeting is the Board of Directors, Shareholders or the Company Law Board.

(b) Notice:

Proper and adequate notice of a meeting is required to be given under the Companies Act of 1956 to all those who are entitled to attend the same as per the provisions. For example, for statutory, annual or extra-ordinary meeting, atleast twenty one day's notice is required to be given to all the concerned members. In the notice, place, day and date, time of holding the meeting are required to be mentioned.

(c) Agenda:

Agenda is a statement of items to be discussed at the meeting. The statement must include all materials facts concerning each item of business to be conducted. Necessary documents are required to be annexed to the notice of the meeting.

(d) Chairman:

There must be a proper person in the chair who may be designated or elected to preside over and conduct the proceedings of a meeting as per the rules. Every meeting must have a chairman.

(e) Quorum:

The term 'Quorum' denotes the minimum number of the members must be present at a meeting to imitate and conduct the business of the meeting as required by law or rules. Required reason to maintain the quorum is to avoid the decision being taken at a meeting by a small minority which may be unacceptable to the vast majority of members.

There must be atleast two persons to constitute a meeting. However, in the following circumstances, there can be "one man meeting" which forms the quorum.

Statutory Meeting [Section 165]

Statutory meeting is held only once during the lifetime of the company. Its main object of the statutory meeting is to enable the members to know the financial position and prospectus of their company at an early date. This meeting has to be called within six moths from the date on which the company becomes entitled to commence its business, but it cannot be held within one month from that date. The directors are required to prepare and send to every shareholder statutory report atleast twenty one days before the day on which the meetings is to be held. Important provisions relating to the statutory meeting and report of a company have been made in Section 165 of the Companies Act of 1956. These provision are given below.

Statutory Meeting and Statutory Report of a Company (Section 165) :

(1) Every company limited by shares, and every company limited by guarantee and having a share capital, shall, within a period of less than one month not more than Six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called "the statutory meeting" [Section 165 (1)].

(2) The Board of Directors shall, atleast twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as "the statutory report") to every member of the company [Section 165 (2)].

It is provided that if the statutory report is forwarded later than is required above, it shall, notwithstanding that fact, be deemed to have been duly forwarded if its is so agreed to by all the members entitled to attend and vote at the meeting [Proviso to Section 165 (2)].

(3) The statutory report shall set out -

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid-up otherwise than in cash, and starting in the case of shares partly paid-up, the extent to which they are so paid-up, and in either case, the consideration for which they have been allotted.

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;

(c) an abstract of the receipts of the company and of the payments made there out, upto a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made there out, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company, showing separately any commission or discount paid or to be paid on the issue or sale of shares or debentures;

(d) the names, addresses and occupations of the directors of the company and of its auditors and also, if there be any, of its manager and secretary; and the changes, if any, which have occurred in such names, addresses and occupations since the date of the incorporation of the company;

(e) the particulars of any contract which, or the modification or the proposed modification of which is to be submitted to the meeting for its approval, together in the latter case with the particulars of the modification or proposed modification;

(f) the extent, if any, to which each underwriting contract, if any, has not been carried out, and the reasons therefore;

(g) the arrears, if any, due on calls from every director and from the manager; and

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares or debentures to any director or to the manager [Section 165 (3)].

(4) The statutory report shall be certified as correct but not less than two directors of the company one of whom shall be managing director, where there is one. After the statutory report has been certified as aforesaid, the auditors of the company shall, in so far as the report relates to the shares allotted by the company, the cash received in respect of such shares and the receipts and payments of the company certify it as correct [Section 165 (4)].

(5) The Board shall cause a cope of the statutory report certified as is required by this section to be delivered to the Registrar for registration forthwith, after copies thereof have been sent to the members of the company [Section 165 (5)].

The Board shall cause a list showing the names, addresses and occupations of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the statutory meeting, and to remain open and accessible to any member of the company during the continuance of the meeting [Section 165 (6)].

(6) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not but no resolution may be passed of which notice has not been given in accordance with the provisions of this Act [Section 165 (7)].

(7) The meeting may adjourn from time to time, and at any adjourned meeting, any resolution of which notice has been given in accordance with the provisions of this Act, whether before or after the former meeting, may be passed; and the adjourned meeting shall have the same powers as an original meeting [Section 165 (8)].

This section shall not apply to a private company [Section 165 (10)].

Annual General Meeting [Section 166]

As its name suggests, it is an annual meeting of the body of members. Every company, may it be a public or a private company, having a share capital or not, limited or unlimited, is required to hold the Annual General Meeting. The first AGM must be held within eighteen months from the date of incorporation of a company. However, the gap between two AGMs should not be more than fifteen months. These provisions are found in Section 166 which is given below. Power of calling the annual general meeting is given to the Company Law Board under Section 167 while in Section 168, provisions have been made to impose penalty for default in complying with Section 166 or 167. These sections area also reproduced below

[I] Provisions of Section 166 relating to Annual General Meeting:

(1) Every company shall in each year hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next [Section166(1)].

It is provided that a company may hold its first annual general meeting within a period of not more than eighteen months from the date of its incorporation; and if such general meeting is held within that period, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year [Proviso 1 to Section 166 (1)].

It is provided further that the Registrar may, for any special reason, extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a period not exceeding three months [Proviso 2 to Section 166 (1)].

(2) Every annual general meeting shall be called for a time during business hours, on a day that is not a public holiday, and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate [Section 166 (2)].

It is provided that the Central Government may exempt any class of companies from the provisions of this sub-section to such conditions as it may impose [Proviso 1 to Section 166 (2)].

It is provided further that -

(a) a public company or a private company which is a subsidiary of a pubic company, may by its articles fix the time for its annual general meetings and may also by a resolution passed in one annual general meeting fix the time for its subsequent annual general meetings; and

(b) a private company which is not a subsidiary of a public company, may in like manner and also by a resolution agreed to by all the members thereof, fix the times as well as the place for its annual general meeting [Proviso 2 to Section 166 (2)].

[II] Provisions of Section 167 relating to the Power of Company Law Board to call Annual General Meeting:

(1) It default is made in holding an annual general meeting in accordance with section 166, the Company Law Board may, notwithstanding anything in this Act or in the articles of the company, on the application of any member of the company, call, or direct the calling of, a general meeting of the company and give such ancillary or consequential directions as the Company Law Board thinks expedient in relation to the calling, holding and conducting of the meeting [Section 167 (1)].

Explanation: The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting. (2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the Company Law Board be deemed to be an annual general meeting of the company [Section 167 (2)].

[III] Provisions of Section 168 relating to Penalty for Default in Complying with Section 166 or 167:

If default is made in holding a meeting of the company in accordance with section 166, or in complying with any directions of the Central Government under sub-section (1) of section 167, the company, and every officer of the company who is default, shall be punishable with fine which may extend to Fifty thousand rupees and in the case of a continuing default, with a further fine which may extend to two thousand five hundred rupees for every day after the first meeting during which such default continues.

Extra-Ordinary General Meeting [Section 169]

All general meetings other than the annual general meeting are called as extraordinary general meetings. All business transacted at extraordinary meetings is called special business and hence, every item on the agenda must be accompanied by an explanatory statement in terms of Section 173, An extraordinary general meeting can be called by the Board of Directors of its own accord, or by the Directors on requisition, by the shareholders, or by the requisitions themselves, or by the Company Law Board. The important provisions relating to calling of extraordinary general meeting have been made in Section 169 of the Companies Act of 1956 which is given below for your information.

(1) The Board of Directors of a company shall, on the requisition of such number of members of the company as is specified in sub-section (4), forthwith proceed duly to call an extraordinary general meeting of the company [Section 169 (1)].

(2) The requisition shall set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisition, and shall be deposited at the registered office of the company [Section 169 (2)].

(3) The requisition may consist of several documents in like form, each signed by one or more requisition [Section 169 (3)].

(4) The number of members entitled to requisition a meeting in regard to any matter shall be -

(a) in the case of a company having a share capital, such number of them as hold at the date of the deposit of the requisition, not less than one-tenth of such of the paid-up capital of the company as at that date carries the right of voting in regard to that matter;

(b) in the case of a company not having a share capital, such number of them as have at the date deposit of the requisition not less than one-tenth of the total voting power of all the members having at the said date a right to vote in regard to that matter [Section 169 (4)]

(5) Where two or more distinct matters are specified in the requisition, the provisions of sub-section (4) shall apply separately in regard to each matter; and the requisition shall accordingly be valid only in respect of those matters in regard to which the condition specified in that sub-section is fulfilled [Section 169 (50].

(6) It the Board does not, within twenty-one days from the date of the deposit of a valid requisition in regard to any matters, proceed duly to call a meeting for the consideration of those matter on a day not later than forty-five days from the date of the deposit of the requisition, the meeting may be called -

(a) by the requisitions themselves;

(b) in the case of a company having a share capital, by such of the requisition as represent either a majority in value of the paid-up share capital held by all of them or not less than one-tenth of such of the paid-up share capital of the company as is referred to in clause (a) of sub-section (4) whichever is less; or

(c) in the cases if a company not having a share capital, by such of the requisition as represent not less than one-tenth of the total voting power of all the members of the company referred to in clause (b) of sub-section (4) [Section 169 (6)].

Explanation: For the purposes of this sub-section, the Board shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by sub-section (2) of section 189 [Explanation to Section 169 (6)].

(7) A meeting called under sub-section (6) by the requisition or any of them -

(a) shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by the Board; but

(b) shall not be held after the expiration of three months from the date of the deposit of the requisition [Section 169 (7)].

Explanation: Nothing in clause (b) shall be deemed to prevent a meeting duly commenced before the expiry of the period of three months aforesaid, form adjourning to some day after the expiry of that period [Explanation to Section 169 (7)].

(8) Where two or more persons hold any shares or interest in a company jointly, a requisition, or a notice calling a meeting, signed by one or some only of them shall, for a the purposes of this section, have the same force and effects as if it had been signed by all of them [Section 169 (8)].

(9) Any reasonable expenses incurred by the requisition by reason of the failure of the Board duly to call a meeting shall be repaid to the requisition by the company; and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default [Section 169 (9)].

RESOLUTIONS

(Sections 189 and 190)

In the meetings, decisions taken are recorded by means of resolutions. Section 189 deals with the provisions relating 0 the resolutions. The resolutions are of three kinds:

1. Ordinary Resolution
2. Special Resolution
3. Resolution requiring special notice

1) Ordinary Resolution (Section 189 (1))

A resolution shall be an ordinary resolution when at a general meeting of which the notice required under this Act has been duly given, the votes cast (whether on a show of hands, or on a poll, as the case may be), in favour of the resolution (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the resolution by members so entitled and voting.

When is an ordinary resolution required?

Ordinary resolution is necessary for the following among other purposes:

a) Rectification of name or adoption of new name by a company where it resembles the name of an existing company with he previous approval of the Central Government (Section 22 (1) (a).

b) Issue of shares at a discount (Section 79 (2))

c) Alteration of share capital (Section 94 (2))

d) Re-issue of redeemed debentures (Section 121)

e) Adoption of Statutory reports (Section 165)

f) Passing of annual accounts and balance sheet, along with reports of Board of Directors and auditors (Section 165)

g) Appointment of auditors and fixation of their remuneration (section 224 (1))

h) Appointment of first directors who are liable to retire by rotation (Section255 (1))

i) Increase or reduction in number of directors within the limit fixed by the Articles (Section 258)

j) Appointment of managing/ whole-time director (section 269)

k) Removal of a director and appointment of a director in his place (Section284(1))

l) Approval of appointment of sole-selling agents (Section 294)

m) Winding up a company voluntarily in certain events (Section 484(1)(a))

n) Appointment and fixation of remuneration of liquidators in a member voluntary winding up (Section 490(1))

o) Nomination of a liquidator in a creditors voluntary winding up (Section 502(1))

2) Special Resolution : (Section 189 (2)

A resolution shall be a special resolution when -

(a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

(b) the notice required under this Act has been duly given of the general meeting; and

(c) the votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, are not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

Special Resolution is necessary in the following matters

a) Alteration of Memorandum (Section 17)

b) To change company's name (Section 21)

c) To include or delete the word (Pvt.)

d) Alteration of Articles (Section 31)

e) Commencement of a new business

f) Appointment of an Auditor

g) Further issue of capital

h) Director's Remuneration

i) Director's Liability and

j) Winding up of the Company

3) Resolutions requiring special notice (Section 190)

(1) Where, by any provision contained in this Act or in the articles, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not less then 1 [fourteen days] before the meeting at which it is to be moved, exclusive of the day on which the notice is served or deemed to be served and the day of meeting.

(2) The company shall, immediately after the notice of the intention to move any such resolution has been received by it, give its members notice of the resolution in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than seven days before the meeting.

RESOLUTIONS PASSED AT ADJOURNED MEETINGS.

Where a resolution is passed at an adjourned meeting of -

(a) a company;

(b) the holders of any class of shares in a company; or

(c) the Board of directors of a company;

the resolution shall, for all purposes, be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

Management and Administration:

Who can be appointed as a Director

Appointment of a Director is not only a crucial administrative requirement, but is also a procedural requirement that has to be fulfilled by every company. Under the Companies Act, only an individual can be appointed as a Director; a corporate, association, firm or other body with artificial legal personality cannot be appointed as a Director.

Appointment of Directors

Generally, in a public company or a private company subsidiary of a public company, two-thirds of the total numbers of Directors are appointed by the shareholders and the remaining one-third is appointed in accordance with the manner prescribed in Articles failing which, the remaining one-third of the Directors must be appointed by the shareholders. The Articles of a public company or a private company subsidiary of a public company may provide for the retirement of all the Directors at every AGM.

In a private company, which is not a subsidiary of a public company, the Articles can prescribe the manner of appointment of any or all the Directors. In case the Articles are silent, the Directors must be appointed by the shareholders.

The Companies Act also permits the Articles to provide for the appointment of two-thirds of the Directors according to the principle of proportional representation, if so adopted by the company in question.

Nominee Directors can be appointed by a third party or by the Central Government in case of oppression or mismanagement.

Appointment of Managing Directors

A Managing Director must be an individual and can be appointed for a maximum term of five (5) years at a time.

A person who is already a Managing Director / Manager of a public company or a private company subsidiary of a public company can become the Managing Director / Manager of only one other company (whether private or public) with the prior unanimous approval of the Board of such company. However, no such restrictions are applicable to a Manager or a Managing Director of "pure" private companies.

In case of a public company or a private company that is a subsidiary of a public company, if the appointment is not in accordance with Parts I and II of Schedule XIII of the Companies Act, such appointment must be approved by the Central Government.

Remuneration

In the case of a public company or a private company which is a subsidiary of a public company, the remuneration payable is subject to the provisions of the Companies Act, and may be determined either by the Articles or, if the Articles so provide, by a special resolution of the company in general meeting.

Qualifications for Directors

The Companies Act does not prescribe any qualifications for Directors of any company. An Indian company may, therefore, in its Articles, stipulate qualifications for Directors. The Companies Act does, however, limit the specified share qualification of Directors which can be prescribed by a public company or a private company that is a subsidiary of a public company, to be five thousand rupees (Rs. 5,000/-).

Restrictions on number of Directorships

The Companies Act prevents a Director from being a Director, at the same time, in more than fifteen (15) companies. For the purposes of establishing this maximum number of companies in which a person can be a Director, the following companies are excluded:

1. A "pure" private company;
2. An association not carrying on its business for profit, or one that prohibits the payment of any dividends; and
3. A company in which he or she is only appointed as an Alternate Director.

Failure of the Director to comply with these regulations will result in a fine of fifty thousand rupees (Rs. 50,000/-) for every company that he or she is a Director of, after the first fifteen (15) so determined.

Director Identification Numbers

All Directors of Indian companies are required to obtain Director Identification Numbers ("DINs"). Primarily, DINs are required to authenticate any electronic filings made by the company.

Additional disqualifications in case of a public company

In addition to the requirements mentioned above, the Companies Act further provides that a person shall not be eligible to be appointed as a Director of any other public company for a period of five (5) years from the date on which the public company, in which he or she is a Director, has failed to file annual accounts and annual returns or has failed to repay its deposits or interest thereon or redeem its debentures on the due date or pay dividends declared.

Additional disqualification in case of a "pure" private company

A private company that is not a subsidiary of a public company can, by its Articles, provides that a person shall be disqualified for appointment as a Director on any grounds in addition to those specified in the Companies Act.

Additional disqualifications for Managing and Whole-time Directors

An individual cannot be appointed as a Managing or a Whole-time Director of a company if he or she:

1. is an un discharged insolvent, or has at any time been adjudged an insolvent;
2. suspends, or has at any time suspended, payment to his or her creditors, or makes, or has at any time made, a composition with them; or
3. is, or has at any time been, convicted by a court of an offence involving moral turpitude.

These requirements are not only more stringent than the requirements for an ordinary Director, but are also of an absolute and mandatory nature.

Retirement of Directors

In any public company or a private company that is a subsidiary of a public company, one- third of the Directors must retire at every AGM. However, every retiring Director is eligible for re-appointment. If the vacancy is not filled and the meeting has not expressly resolved to fill such vacancy, he or she shall be deemed to have been re-appointed until the next election meeting, unless he or she is not otherwise disqualified or is unwilling to so act as a Director or no resolution for such appointment has been put to the meeting and lost.

Removal of Directors

A Director can be removed by an ordinary resolution of the general meeting after a special notice has been given, before the expiry of his term of office. However, this is not applicable to Directors appointed by proportional representation or the Directors appointed by the Central Government.

Vacation of Office

The office of a Director of a public company, or of a private company which is a subsidiary of a public company, becomes vacant if he or she:

1. Becomes subject to any of the three (3) disqualifications mentioned above (with regard to disqualifications for a Managing or a Whole-time Director) during his or her term of office;
2. Fails to obtain within any time period as may be specified in the Articles (two months in case of a public company), or at any time thereafter ceases to hold, the necessary share qualification if any as prescribed by the Articles;
3. Absents himself or herself from three (3) consecutive meetings of the Board, or from all meetings of the Board for a continuous period of three (3) months, whichever is longer, without obtaining leave of absence from the Board;
4. Whether by himself or herself, or by any person on his or her account or any firm in which he or she is a partner or company in which he or she is a Director, accepts a loan or guarantee or security for a loan from the company in contravention of the requirements governing loans etc to Directors;

5. Acts in contravention of the requirements regarding disclosure of interests;
6. Is removed from office under the Companies Act; or
7. Having been appointed as Director by virtue of his or her holding an office or other employment in the company (for instance, that of Managing Director), he or she fails to hold such office or other employment.

If a person continues to act as a Director, despite knowing that his or her office has become vacant, he shall be punishable with a fine up to five thousand rupees (Rs. 5,000/-) for every day that he or she continues to function and act as such.

Resignation

The Companies Act is silent with respect to resignation of Directors. However, in a majority of cases, the Articles provide for Directors to resign. Even in cases where the Articles are silent, there is no absolute bar on Director's resigning, which becomes effective upon submission of such resignation letter and the filing of the necessary form for such resignation with the Registrar of Companies (whether or not the Board formally accepts the same, unless the Articles provide otherwise). The filing of such resignation related form with Registrar of Companies is an obligation to be discharged by the company in question.

The only exception to the above rule is in the case of Managing, Whole-time and Executive Directors who are employees of the company, and where the terms of their respective service contracts will ordinarily refer to resignations, notice periods and / or compensation in lieu thereof.

PREVENTION OF OPPRESSION AND MISMANAGEMENT

A Company functions through its Board of Directors who is guided by the wishes of majority. Prima facia a majority of members of a company are entitle to exercise the powers of a company and generally to control its affairs. It has also been pointed out in earlier cases like in Foss Vs Harbottle it was held that every member holds equal rights and in case of differences issue is decided by majority and the court should not interfere with the internal management of the company.

Meaning of Oppression

Section 397 of the companies act, 1956 provides relief to the oppressed minority. Basically oppression means exercise of power in an unjust manner. The law has not defined oppression for purposes of this section, and it is left to Courts to decide on the facts of each case whether there "oppression" under section 397 has been committed or not. Although the word 'oppressive is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are' treating the company and its affairs as if they were their own property' to the prejudice of the minority share-holders. In Scottish Co-operative Whole Sale Society Ltd. v. Meyer(1958) 3 All ER 66 (HL)) it was held that oppression is the lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members or to public interest. In Elder v. Elder & Watson Ltd., oppression has been defined as "" ... the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely." The oppressed minority has to show the conduct which is unfair to him and causes prejudice to him in the exercise of his legal and proprietary rights as a shareholder.

Remedies under Section 397: -

Under section 397 the members of a company who comply with the conditions of Section 399 can make an application to the Court for relief under Section 402 of the Act if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The Court has power to make such orders under section 397 read with section 402 as it thinks fit, if it comes to the conclusion that -

- the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members; and
- the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, and
- That to wind up the company would unfairly prejudice the petitioners.

Relief under Section 397 not Available under the following situations:

Where there are minor acts of mismanagement e.g. where passengers traveling without tickets on a company's buses were not checked or where the petrol consumption by a transport company was excessive. Negligence & inefficiency, even assuming that these are proved, do not amount to oppression or mismanagement as contemplated by the act. [Mohta Bros. Vs Calcutta Landing & Shipping Limited}

Where a shareholder holding 30 of shares of a company is denied access to or inspection of books of accounts of the company. This is because this right is recognized by the Companies Act. [Lalita Rajya Laxmi Vs. India Motor Company}

Meaning of Mismanagement

Generally if the affairs of a company are being running by the Board in a manner which is prejudicial to the interest of the company or to the public it is said to be mismanaged. In Re, Albert David (1964) CWN 163, 172 it was held that if a company was being run by the Board in their own interest overriding the wishes and interest of the majority of shareholders is deemed to be mismanagement. Courts have also ruled that erosion of a company's substratum, abuse of fiduciary duties, and misuse of funds are all instances of mismanagement that come within the ambit of section 398.

Relief under Section 398

A requisite number of members (as laid down in sec. 399) may apply to the Company Law Board/Tribunal for an order under this section and the Company Law Board/ Tribunal may grant relief. This section states that:

Any members of a company who complain -

- that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or
- that a material change not being a change brought about by, or in the interests of, any creditors including debenture-holders, or any class of shareholders, of the company has taken place in the management or control of the company whether by an alteration in its Board of Directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, may apply to the Company

Law Board/ Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399. If, on any application under sub-section (1), the Company Law Board/ Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board/ Tribunal may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Persons Entitle to Apply: - [Section 399]

(1) The following members of a company shall have the right to apply under section 397 or 398:

(a) In the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less or any members or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

(b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(2) Where any members of a company are entitled to make an application in virtue of sub-section (1), anyone or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

(3) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorize any member or members of the company to apply to the Company Law Board/ Tribunal under section 397 or 398, notwithstanding that the requirements of clause (a) or clause (b), as the case may be, of sub-section (1) are not fulfilled.

Powers of Company Law Board/Tribunal [Section 420]

Under section 397 and 398 the CLB/Tribunal has all the necessary powers to end oppression as well as prevent management of the company. Section 402 further lay down that an order under section 397 or 398 may provide for:

The regulation of the conduct of the company's affairs in future. [Richardson & Cruddas Ltd. Vs Hardas Mundra]

The purchase of the shares of any member of the company by the company.

In the case of purchase of the shares by the company, consequent reduction of its share capital.

The termination, setting aside or modification of an agreement between the company and managing director, or any other director, and manager.

The termination, setting aside or modification of any agreement with any person, provided due notice has been given to him and his consent obtained

Any other matter for which, in the opinion of the CLBI NCLT, it is just and equitable that provision should be made.

Not to change in the Board of Directors. If a change in the Board of directors is likely to take place which (if allowed) would affect prejudicially the affairs of the company, the CLB/Tribunal may, if satisfied, after such inquiry as it thinks fit to make that it is just and proper so to do by order, direct that no resolution passed or that may be passed or no action taken or that may be taken to effect a change in the Board of directors after the date of the complaint shall have effect unless confirmed by the CLB/Tribunal. [Section 409]

If CLB/NCLT orders any alteration in memorandum or articles, company can not introduce any provision inconsistent to the order. [Section 404(i)]

If order set asides or modifies any agreement causing any loss then any claim for the loss can not be made. [Section 407(i)(a)]

The managerial personnel set aside shall not be eligible to serve company for 5 years. [Section 407(i)(b)]

Powers of Central Government [Section 408]

The requisite minimum number of members can apply to the central government for relief from oppression and mismanagement under Sec. 397 and 398. The minimum number shall be 100 or members not holding less than 1/1 O" of the total voting power. The following are the reliefs can be provided.

The central government may appoint such number of persons as the CLB/NCLT specifies as being necessary to safeguard the interest of the company, or its shareholders or the public interest to hold the office as directors of the company to prevent oppression and mismanagement. The directors so appointed shall not hold office more than three years from the date of appointment. Government may appoint additional directors also.

Any person can appointed by the central government to hold office as director or additional director and the government may issue such directions to the company as it may consider necessary to be appropriate in regard to its affairs.

The central government may require the persons appointed as directors to report to the government from time to time with regards to affairs of the company.

The government may issue directions that may include:

- To remove an auditor already appointed and appoint another auditor in his place.
- To alter the articles of the company.

Section 388-B and 388-E empowers the central government to remove managerial personnel from office on recommendation of CLB/NCLT

Power to compromise or make arrangements with creditors and members From section 391 to 395.

(1) Where a compromise or arrangement is proposed

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made under section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributors of the company.

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditors report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

(3) An order made by the Court under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for each copy in respect of which default is made.

(6) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(7) An appeal shall lie from any order made by a Court exercising original jurisdiction under this section to the Court empowered to hear appeals from the decisions of that Court, or if more than one Court is so empowered, to the Court of inferior jurisdiction.

The provisions of sub-sections (3) to (6) shall apply in relation to the appellate order and the appeal as they apply in relation to the original order and the application.

Winding up of a company is defined as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors. An administrator, called the liquidator, is appointed and he takes control of the company, collects its assets, pays debts and finally distributes any surplus among the members in accordance with their rights. At the end of winding up, the company will have no assets or liabilities. When the affairs of a company are completely wound up, the dissolution of the company takes place. On dissolution, the company's name is struck off the register of the companies and its legal personality as a corporation comes to an end.

The procedure for winding up differs depending upon whether the company is registered or unregistered. A company formed by registration under the Companies Act. 1956 is known as a registered company. It also includes an existing company, which had been formed and registered under any of the earlier Companies Acts.

Winding up a Registered Company

The Companies Act provides for two modes of winding up a registered company.

Grounds for Compulsory Winding Up or Winding up by the Tribunal

- If the company has, by a Special Resolution, resolved that the company be wound up by the Tribunal.
- If default is made in delivering the statutory report to the Registrar or in holding the statutory meeting. A petition on this ground may be filed by the Registrar or a contributory before the expiry of 14 days after the last day on which the meeting ought to have been held. The Tribunal may instead of winding up, order the holding of statutory meeting or the delivery of statutory report.
- If the company fails to commence its business within one year of its incorporation, or suspends its business for a whole year. The winding up on this ground is ordered only if there is no intention to carryon the business and the Tribunal's power in this situation is discretionary.
- If the number of members is reduced below the statutory minimum i.e. below seven in case of a public company and two in the case of a private company.
- If the tribunal is of the opinion that it is just and equitable that the company should be wound up.

Tribunal may inquire into the revival and rehabilitation of sick units. It its revival is unlikely, the tribunal can order its winding up.

If the company has made a default in filing with the Registrar its balance sheet, profit and loss account or annual return for any five consecutive financial years.

- If the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

The petition for winding up to the Tribunal may be made by :-

- The company, in case of passing a special resolution for winding up.
- A creditor, in case of a company's inability to pay debts.
- A contributory or contributors, in case of a failure to hold a statutory meeting or to file a statutory report or in case of reduction of members below the statutory minimum.

The Registrar, on any ground provided prior approval of the Central Government has been obtained.

A person authorised by the Central Government, in case of investigation into the business of the company where it appears from the report of the inspector that the affairs of the company have been conducted with intent to defraud its creditors, members or any other person.

The Central or State Government, if the company has acted against the sovereignty, integrity or security of India or against public order, decency, morality, etc.

Voluntary Winding Up of a Registered Company

When a company is wound up by the members or the creditors without the intervention of Tribunal, it is called as voluntary winding up. It may take place by:-

- By passing an ordinary resolution in the general meeting if :-
  - (i) the period fixed for the duration of the company by the articles has expired; or
  - (ii) some event on the happening of which company is to be dissolved, has happened.

- By passing a special resolution to wind up voluntarily for any reason whatsoever.

Within 14 days of passing the resolution, whether ordinary or special, it must be advertised in the Official Gazette and also in some important newspaper circulating in the district of the registered office of the company.

The Companies Act (Section 484) provides for two methods for voluntary winding up:

Member's voluntary winding up

It is possible in the case of solvent companies which are capable of paying their liabilities in full. There are two conditions for such winding up:-

A declaration of solvency must be made by a majority of directors, or all of them if they are two in number. It will state that the company will be able to pay its debts in full in a specified period not exceeding three years from commencement of winding up. It shall be made five weeks preceding the date of resolution for winding up and filed with the Registrar. It shall be accompanied by a copy of the report of auditors on Profit & Loss Account and Balance Sheet, and also a statement of assets and liabilities up to the latest practicable date; and

Shareholders must pass an ordinary or special resolution for winding up of the company.

The provisions applicable to member's voluntary winding up are as follows:-

- Appointment of liquidator and fixation of his remuneration by the General Meeting.
- Cessation of Board's power on appointment of liquidator except so far as may have been sanctioned by the General Meeting, or the liquidator.
- Filling up of vacancy caused by death, resignation or otherwise in the office of liquidator by the general meeting subject to an arrangement with the creditors.
- Sending the notice of appointment of liquidator to the Registrar.
- Power of liquidator to accept shares or like interest as a consideration for the sale of business of the company provided special resolution has been passed to this effect.
- Duty of liquidator to call creditors' meeting in case of insolvency of the company and place a statement of assets and liabilities before them.
- Liquidator's duty to convene a General Meeting at the end of each year.
- Liquidator's duty to make an account of winding up and lay the same before the final meeting.

Creditor's voluntary winding up

It is possible in the case of insolvent companies. It requires the holding of meetings of creditors besides those of the members right from the beginning of the process of voluntary winding up. It is the creditors who get the right to appoint liquidator and hence, the winding up proceedings are dominated by the creditors.

The provisions applicable to creditor's voluntary winding up are as follows:-

The Board of Directors shall convene a meeting of creditors on the same day or the next day after the meeting at which winding up resolution is to be proposed. Notice of meeting shall be sent by post to the creditors simultaneously while sending notice to members. It shall also be advertised in the Official Gazette and also in two newspapers circulating in the place of registered office.

A statement of position of the company and a list of creditors along with list of their claims shall be placed before the meeting of creditors.

A copy of resolution passed at creditors' meeting shall be filed with Registrar within 30 days of its passing.

It shall be done at respective meetings of members and creditors. In case of difference, the nominee of creditors shall be the liquidator.

A five-member Committee of Inspection is appointed by creditors to supervise the work of liquidator.

Fixation of remuneration of liquidator by creditors or committee of inspection.

Cessation of board's powers on appointment of liquidator.

As soon as the affairs of the company are wound up, the liquidator shall call a final meeting of the company as well as that of the creditors through an advertisement in local newspapers as well as in the Official Gazette at least one month before the meeting and place the accounts before it. Within one week of meeting, liquidator shall send to Registrar a copy of accounts and a return of resolutions.

Winding up an Unregistered Company

According to the Companies Act, an unregistered company includes any partnership, association, or company consisting of more than seven persons at the time when petition for winding up is presented. But it will not cover the following:-

A railway company incorporated by an Act of Parliament or other Indian law or any Act of the British Parliament;

A company registered under the Companies Act 1956;

A company registered under any previous company laws.

An illegal association formed against the provisions of the Act.

However, a foreign company carrying on business in India can be wound up as an unregistered company even if it has been dissolved or has ceased to exist under the laws of the country of its incorporation.

The provisions relating to winding up of a unregistered company:

Such a company can be wound up by the Tribunal but never voluntarily.

Circumstances in which unregistered company may be wound up are as follows:-

- If the company has been dissolved or has ceased to carryon business or is carrying on business only for the purpose of winding up its affairs.
- If the company is unable to pay its debts.
- If the Tribunal regards it as just and equitable to wind up the company.

Contributory means a person who is liable to contribute to the assets of a company in the event of its being wound up. Every person shall be considered a contributory if he is liable to pay any of the following amounts:-

- Any debt or liability of the company;
- Any sum for adjustment of rights of members among themselves;
- Any cost, charges and expenses of winding up;
- On the making of winding up order, any legal proceeding can be filed only with the leave of the Tribunal.

5. BANKING LAW INCLUDING NEGOTIABLE INSTRUMENTS ACT

BANKING LAW

HISTORY OF BANKING

Origin of the Word - Difference of Opinion:

The world 'Bank' is said to have derived from the French world 'Benco' or 'Bancus' or 'Banc' or 'Banque' which means a 'bench'. In fact the early Jews transacted their banking business by sitting on benches. When their business failed, the benches were broken and hence the word 'bankruptcy' came into vogue.

Another common-held view is that the word 'bank' might be originated from the German word 'Back' which means a joint stock fund. Of course a Bank essentially deals with funds. In due course it was Italicized into 'Banco', Frenchised into 'Bank' and finally anglicised into 'Bank'. This view is most prevalent even today.

Babylonians developed a banking system. The temples of Babylon were used as banks and such great temples as those of Ephesus and of Delphi were the most powerful of the Great Banking Institutions. The Romus did not organise State Bank as did the Greeks but their minutes regulations as to the conduct of private banking were calculated to create the utmost confidence in it.

In England we find during the region of Edward-III money changing in important functions of the Bankers of those days was taken up by a Royal Exchangers of the benefit of the crown. He exchanged the various foreign coins tendered to him by travellers and merchants entering the kingdom into British money and on the other land supplied persons giving out of the country with the foreign money they requested.

Merchants decided to keep their cash with gold smiths who in those days has strong rooms and employed watchman. Thus large sums of money were left with the goldsmiths for safe custody against their signed receipts known as "goldsmith's notes" embodying on undertaking to return the money to the depositor or to bearers on demand. Goldsmiths gradually discovered that large sums of money were left in their keeping for long periods and following the examples of Dutch Bankers, they thought it safe and profitable to lend out a part of their Customers money, provided such loans where repaid within a fixed time realising that the business of loaning other peoples money at interest was profitable and in order to attract larger amounts, the more enterprising of the goldsmiths began to offer interest on money deposited with them, instead of changing a fee for their services in guarding their clients gold. There was general belief among people that the goldsmiths were guilty of imprudence and exhibitant practices.

The Bank of England was started in 1694 largely as a result of the financial difficulties of William-III who was carrying on war with France. The public distrust of goldsmiths for the same was also responsible.

A Bank is usually thought of as a reliable agency with which money is deposited.

Functions of Commercial Banks

i) Receiving money on deposit.

ii) Issuing of notes.

iii) Lending of money.

iv) Transferring money from place to place.

The dependence of commerce upon baking has become so great that in a modern money economy the cessation, even for a day or two of the banker's activities would completely paralysed the economic life of a nation.

In India the transition from money lending to banking must have occurred before Manu, who has devoted a special section to the subject of deposits and pledges. Where he says "a sensible man should deposit his money with a person of good family of good conduct well acquainted with the law having many relatives, wealthy and honourable". Manu gave us rules which governed the policy of loans and rate of interest.

Bankers in India have always been regarded as very important members of the community in Government, as well as in social circles. It was only a reliable agency for the deposit of jewellery cash and hoarding in other forms as was the case with goldsmiths in England in the 17th century. The Indian Banker however has highly esteemed and regarded as worthy specimen of commercial morality.

Nationalization of Banks

After independence India adopted a socialistic pattern of society as its goal (i.e.) a society with wealth distributed as equal as possible. The goal is purported to be achieved through democratic process. The Private Sector is regulated through a system of regulations, licenses controls and legislature acts, the latest of which is the M. R. T. P. Act, 1969. The Public Sector is made to grow by nationalization of industries and institutions. The Public Sector is wholly owned and controlled by the Government. The banking institutions are the custodians of private savings and powerful instrument to provide credit. There were complaints that Indian commercial banks were directing their advances to the large and medium scale industries and big business houses and the sectors demanding priority such as agriculture, small-scale industries and exports were not receiving their due share. This was one of the chief reasons for the imposition of social control by amending the Banking Regulation Act with effect from 1.2.1969. The imposition of social control had not changed the position very much and there were complaints that the Indian Commercial Banks continued to direct their advances to large and medium scale industries and that sector demanding priority such is agriculture, small-scale industries and import were not receiving the attention due to them of the banks.

On 19th July, 1969 fourteen major banks, (1) Central Bank of India Ltd., (2) Bank of India Ltd., (3) The Punjab National Bank (4) The Bank of Baroda Ltd., (5) The United Commercial Bank Ltd., (6) The Canara Bank Ltd., (7) The United Bank of India (8) The Dena Bank Ltd., (9) The Syndicate Bank Ltd., (10) The Union Bank of India (11) The Allahabad Bank Ltd., (12) The Indian Bank Ltd., (13) The Bank of Maharashtra Ltd., and (14) The Indian Overseas Bank Ltd., each having deposits of more than 50 crore and having between themselves aggregate deposit of more than Rs. 2632 crore, with 4130 branches were nationalised and fallen over ordinances VIII of 1969 promulgated on 19.7.1969. Fourteen banks were taken by the Government in order

to serve better the need of development of the economy in conformity with the national policy and objectives. The object of the social control was also the same but the Government thought that it was not successful. Restrictions imposed by social control measures were capable of leaving floated in spirit although observed in form. It was stated that in nationalizing the 14 Bank's, the Government was merely putting into effect as on long decided programme for achieving the socialist pattern of society.

Legal mode adopted for nationalization of 14 major Banks

Ordinance VIII, 1969 -19.7.1969 president power under Act 123 (1) of the Indian Constitution. The banking companies (Acquisition and Transfer of Undertakings) ordinance 1969. The ordinance provided for machinery of management of the 14 new banks and payments of compensations to the shareholders of the corresponding companies which were taken over.

Petitions challenging the competence of the ordinance were filed in the Supreme Court of India on 21 st July 1969. But before they were heard the Parliament passed and enacted on 19th August 1969. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 (Act 22 of 1969) the ordinance VIII of 1969 were repealed by the Act.

This Act was also challenged in the Supreme Court in Cooper vs. Union of India (AI R 1970 SC) judges decided the petitions on 10th February 1970 holding by a majority of 10 to 1.

Although the Act 22 of 1969 was within the legislative competence of parliament it was void and limits entirely.

(1) The Act prohibited the 14 Banking companies from carrying on banking business, where as other banks in India and Foreign were permitted to carryon banking business this was hostile discrimination.

(2) Although the 14 Banking companies would carryon any other business. Since they were stripped of their assets, staff, premises and even names it was impossible for them to carryon any other business, this was an unreasonable restriction.

(3) The principle adopted for determining the compensation to the 14 Banking companies were illusory and irrelevant.

The President promulgated another ordinance (No.3 of 1970) on 14.12.1970 which was followed by another Act. The Banking companies (Acquisition and Transfer of Undertakings Act 1970 No.5 of 1970) the new Act attempted to plug the loop holes pointed out by the Supreme Court. The Act has come to stay.

The Act mainly deals with their topics.

(1) The mode and mechanics of transfer of the undertaking of the 14 existing banking companies.

(2) Payment of compensation to the 14 Banking companies/undertakings of which are taken over.

(3) Management of the 14 new Banks nationalized.

Miscellaneous Provisions:

The important of which relate to accounts and profits, status of the banks for income-tax purposes, rights of employees whose services are transferred to the new banks, fidelity and secrecy, dissolution, framing of regulations and the limited application of the Banking Regulation Act to the 14 new Banks.

The object of nationalization would effectively decentralise credits with the result that the priority sectors such as agriculture, small scale industries exports self employed etc. would be provided with liberal banking facilities and that banking units would be extended to rural areas.

Banker and Customer

A person who is doing the banking business is called a Banker. He deals with other's money but with his own mental faculties. Secondly a Banker is not only acting as a depository, agent but also as a repository of financial adviser.

Section 5(b) of the Banking Regulation Act, 1949 defines the term Banking - "Accepting for the purpose of lending and investment, of deposits of money from the public, repayable on demand, order or other wise and withdrawable by cheque, draft order or otherwise".

Essential functions of Banking:

(a) Accepting of deposits; and

(b) Lending or investing the same.

If the purpose of acceptance of deposit is not to lend or invest the business will not be called banking business.

Single Transaction : that the moment a Banker has agreed to collect a cheque from a person, the later becomes a Customer. The relation of Banker and Customer begins as soon as the first cheque is paid. Even a single transaction can constitutes a person a Customer:

(a) He must have some sort of an account.

(b) Even a single transaction may constitute him as a Customer.

(c) Frequency of transactions in anticipated but not insisted upon.

(d) The dealings must be of a banking nature.

The relationship between a Banker and a Customer: This relationship falls under two broad categories; namely (i) General relationship and (ii) Special relationship.

General Relationship

Is there a depository relationship? : A depository is one who receives some valuables and returns the same on demand. But at present, a Banker is not bound to return the same coins and currency notes deposited by a customer. So, he is not a depository. Lord Cotten ham rightly observed in Foley vs. Hill "the money paid into a Bank ceases altogether to be the money of the principal; it is then the money of the Banker. He is known to deal with it as his own. He is bound to return an equivalent by paying a similar sum, that deposited with him when he is asked for it".

A Banker as a Bailee: A Banker becomes a bailee when he receives gold ornaments and important documents for safe custody. If in that case he cannot make use of them to his best advantage because he is bound to return the identical articles on demands.

A Banker as a Trustee: A Banker becomes a trustee only under certain circumstances. For instance, when money is deposited for a specific purpose, till that purpose is fulfilled the Banker is regarded as a Trustee for that money, a certain sum of money was deposited with the Bank with the specific instruction to buy shares (Official Assignee vs. J. W. Irwin). When a cheque is given for collection, till the proceeds are collected, he holds the cheque as a trustee.

A Banker as an Agent: The agent-principal relationship is said to exist between a Banker and his Customer, when the Banker buys and sells shares, collects cheques, bills, dividends, warrants, coupons and pays insurance premium subscriptions etc., on behalf of his Customer. The Banker is acting as an agent of his Customer under such circumstances. So also when he executes the will of the Customer, he is acting as an executor; when he administers the estate of a Customer he is regarded as an administrator.

Debtor-Creditor relationship: According to Sir John Paget, the relation of a Banker and a Customer is primarily that of a debtor and a creditor, the respective position being determined by the existing state of the account. Instead of, the money being set apart in a safe room it is replaced by a debt, due from the Banker. The money deposited by a Customer with the Banker becomes the later's property and is absolutely at his disposal. So Banker act as a debtor and the Customer act as a creditor.

The Banker as a Privileged Debtor: The privileges enjoyed by a Banker have been listed below:

(1) The creditor, i.e., the Customer must come to the Banker and make an express demand in writing for repayment of the money.

(2) In cases of ordinary commercial debt the debtor can pay the money to the creditor at any place. But in the case of banking debt, the demand by the creditor must be made only at the particular branch where the account is kept.

(3) Time is not an essential element in the case of an ordinary commercial debt where as the demand for repayment of a banking debt should be made only during the specified banking hours of business which are statutorily laid down.

(4) The Banker is able to get the deposit money without giving any security to the Customer while it is not possible in the case of ordinary commercial debtor. Thus the Customer in acting only as an unsecured creditor.

(5) The law of limitation which is applicable to all debts lays down that a debt will become a bad one after the expiry of three years from the date of the loan. But the law is not applicable to a banking debt.

(6) A Banker as a debtor has the right to combine the accounts of a Customer provided he has two or more accounts in his name and in the same capacity (The right to set- off).

(7) An ordinary debtor can close the account of his creditor at any time. But a Banker cannot close the account of his creditor at any time without getting his prior approval.

A Banker as a Creditor: In case of loan, cash credit and overdraft, the Banker becomes a creditor and the Customer assumes the role of a debtor. Here again, the Banker is privileged person because he is acting as a secured creditor. He insists upon the submission of adequate securities by the Customer to avail of the loan or cash credit facilities. More over, the law of limitation will operate in such cases from the date of the loan unless it is renewed.

Special Relationship

Statutory Obligation to honour cheques: When a Customer opens an account there arises a contractual relationship between the Banker and the Customer by virtue of which the Banker undertakes an obligation to honour his Customer's cheque. This obligation is a statutory obligation, since Sec. 31 of The Negotiable Instrument Act compels a Banker to do so.

Special types of Bankers Customers - Minors, Lunatics, Illiterates, Executors, Hindu Joint Family Partnership Firm, Joint Stock Companies, Clubs, Societies, Charitable Associations, Trustees etc.

A Minor is under a legal incapacity to enter into a contract.

A deposit account of a minor can be opened by the Bank and operation can be allowed by his natural guardian. Sometimes the court appoint, as a guardian of a minor some person who is not a natural guardian.

The account is in the minor's own name: It is clear that no overdraft can be given to a minor. Minor can have only saving Bank account. Where however the account is to be kept in credit two questions arise (a) whether the minor can draw a valid cheque; and (b) whether he would on attaining majority be bound by the withdrawals made by him by cheques when he was a minor. As to Sec. 26(a) of The Negotiable Instruments Act provides that a minor may draw endorse, delivery and negotiable instruments and hence a minor can validity draw a cheque. As to (b) if he can validly draw a cheque, it follows that the Bank would be bound to pay the same and be discharged by making payment in due course. Relaying on this principle, many commercial banks not open deposit accounts in the name of minor operates upon by himself. Ordinarily the balance is confined to a particulars maximum and the age of the minor ordinarily 12 years or above.

When a minor attains majority the account can be continued. It is however, advisable to take a balance confirmation letters signed by him immediately on his attaining the majority.

In an account operated by the nature guardian on behalf of a minor the guardian becomes functus officio on the minor attaining majority who can then alone operate the account.

Lunatics : No Banker would knowing the open an account in the name of a person of unsound mind because that would easily involve him in the difficulty of choosing between the risk of unjustifiably dis-honouring the Customer cheques on the one hand and of being held to have debited his account without adequate authority on the other.

Joint Hindu Family: A Banker dealing with joint Hindu families will find to his cost, that certain laws and Customers relating to succession and transfer of rights among Hindus, put serious obstacles in the way of his providing financial accommodation on the security of what is ordinarily considered to be normal and reliable Bank securities.

(For eg.) In a joint Hindu family governed by Mitakshara Law, all the member acquire a right in the ancestral property by birth and the accrual of that right dates from conception, so that there is always the danger of having a transaction impugned by even a person who at the date of the transaction was not born.

In order to change a joint family estate, it is necessary that all the members of the family should join the execution of the deed or should give their consent or that the deed should be made by the head of the family in his capacity as Karta or Manager.

The powers of the Karta are however, limited and a change created by him is binding on the family property only if the loan for which the change is created, is taken for a purpose necessary or beneficial to the family or is in discharge of a lawful antecedent debt due from the family.

In the event of a suit being filed by a Banker, who has granted loan on the security of the joint family estate, the burden of the joint family estate, the burden of the proof that, before he granter the loan he had satisfied himself that the loan was taken for purposes beneficial to the family lies in the Banker.

Powers of Karta or Manager regarding joint family property

In Ram Dayal and others vs. Bhanwar Lal and other (AIR 1973 Rajasthan) held that regarding the transfer of joint family property by the manager the principles.

Karta or Manager can create a charge against the joint family property only if the loan for which the charge is created is taken for a purpose necessary or beneficial to the family. The burden of providing legal necessity lies on the Karta and has not only to prove the legal necessity but also to prove that Banker made reasonable inquiries and was satisfied as to existence of the legal necessity.

Illiterate persons

Banks are providing loans to the Illiterate persons. However the illiterate persons cannot even write their names, cannot fill in the paying in slip, cannot sign cheque, cannot verify the statement of account and thus the Banker are find themselves in trouble.

However the banks are now opening the accounts of illiterate person also with a view to mobilise savings and to give an insensitive to those illiterate persons to save money.

The Bank may open the account for illiterate person, but the following precautions must be observed.

1) The Bank must ask for an introduction from a responsible person so that fraud can be eliminated.

   Respectable Customer, Gazetted Officers, an M.L.A., Municipal Councillor, An Employee of the Bank.

   Mode of introduction: A passport size photograph of the illiterate person is identified before the Banker in presence of the account holder and the left hand thumb impression in case of a male and right hand thumb impression in case of a female is clearly attested by some responsible person on the account opening form.

2) All dealings and operations should be allowed on the account only by the illiterate person.

3) The illiterate person should be provided with a Pass Book, which should also contain his photograph and similar photograph should also be affixed in the account opening form so that there may be no problem in dealing with such persons.

4) Just like the specimen signature in the case of an illiterate person, his thumb impression on the cheque and on the back of the cheque or withdrawal form should be duly compared with the specimen impression as kept by the Bank.

Executors and Trustees

An Executor is a person to whom the execution of a will is entrusted by the Testator. A Trustee is a person in whose case the control of an estate generally by a deceased person under a will or trust deed is placed.

As a rule a Banker will avoid opening accounts of executors and trustees, but can have no objection to do so, if the accounts are to be in their personal capacities.

Otherwise, he should thoroughly acquaint himself with documents appointing the executors or trustees and should leave no dealing with the estate until the official probate or letters of administration has been inspected by him.

In practice however, a Banker sometimes grants banking facilities to person known to be representative of the deceased pending the issue of the official documents.

Opening of Partnership Accounts: Sec. 19

Implied authority of partner as agent of the firm subject to Sec. 22. The act of a partner which is done to carryon, in the usual way, business of the kind carried on by the firm binds the firm. Sec. 19(2)(b) makes it clear that one of the acts which do not fall within the implied authority of a partner is that he has no implied authority of opening a Bank account on behalf of the firm in his own name.

The Bank should not allow a partnership account to be opened without all the partners signing the account opening form.

So far as the operation of the account is concerned the partners may agree that the account is to be operated only by two partners and not by the others, but such instruction must be given to the Bank on a partnership letter or on a mandate letter by all the partners of the firm must submit their specimen signatures to the Bank at the time of opening the partnership account, so that there is no dispute in future.

Death Partner: Means dissolution of the firm and his heirs have no right to step into the shoes and they cannot take part in the management. If the firm has a debit balance the account should be stopped to fix the liability of the estate of the deceased partner.

Joint Stock Companies: A company is brought into existence by means of a statute and enjoy a good many of the attributes of a person. Its entity is separate from that of at shareholders. Current account may be opened in the name of corporations, whether trading or non-trading and apart from special authority to open accounts with banks, they have inherent powers to draw valid cheques.

Clubs: Accounts are often opened in the names non-trading institutions, such as Clubs, Schools, Committees, Funds, Associations at should be remembered that such body if not incorporated have no contracting powers as they have no legal entity.

The Banker having satisfied himself that the club, committee (etc.) wishing to open an account, is a properly incorporated body should ask for a duly authenticated copy of the resolution of the managing committee authorizing the opening of the account and giving the necessary powers to a certain person or persons to operate upon the same.

The Banker should acquaint himself with the Bye-Laws and rules of such bodies and do nothing which is contrary to the procedure laid down in this.

At the time of opening such an account the Banker should be supplied with a authenticated copy of resolution appointing the treasurer and the Bank as Banker of the club as well as with detailed instructions as to the operation of the account.

In case of the death or resignation of the treasurer or other person authorised to operate the account, the Banker should stop the operation of the account until such time as the receives an authenticated copy of the resolution of the controlling committee about the appointment of another person to place of the deceased or resigned treasurer.

Deposits: Before opening a deposit account the Banker should observe certain general precaution.

(1) Application Form: The prospective Customer is first all asked to sign an application form prescribed for that purpose after furnishing all particulars. Different Banker have different printed application forms. They also vary with classes of Customers and for kinds of deposits. These application form contain the rules and regulations of the Bank along with the terms and conditions of the deposits.

(2) Specimen Signature : Every new Customer is expected to give three or more specimen signature.

(3) Letter of Introduction : It is always available on the part of the Banker to allow the prospective Customer to open an account only with a proper introduction. The usual practice of the Banker is to demand a letter of introduction from a responsible person know to both the parties.

(4) Interview: At the time of opening a new account, it is always advisable to have an interview in variably with the prospective Customer so as to obviate the chances of perpetration of any fraud at a latter stage.

(5) Account cash: It is common practice many Bankers to allow a new party to open an account only in cash.

(6) Mandate in writing: If a new party wants its account to be operated by somebody else the Banker should demand a mandate from his Customer in writing. The mandate contains the agreement between the two regarding the operation of the account, the specimen signature of the authorised person and the powers delegated to the authorized person.

(7) Verification of documents: If the new party happens to be a corporate it is essential that the Banker should verify some of the important documents like Memorandum of the Association, Articles of Association, Bye-Laws copy etc. In other cases, the verification of certain other documents like Trust deed probate, Letter of Administration etc. may be necessary.

(8) Conversant with the provisions of special acts: Since a banker has to deal with different classes of Customers, he has to be thoroughly conversant with certain laws like Indian Companies Act, Indian Partnership Act, Insolvency Act, the various Trust Act, The Co-operative Societies Act, etc.

(9) Pay-in-Slip Book, Cheque Book and Pass Book: Then the Customer is supplied with a Pay-in-Slip Book. The Pay-in-Slip is a document which is used for depositing cash or cheque or bill into the account, It has a counter foil which in returned to the Customer for making necessary entries in his book. The Customer is also supplied with a cheque book which normally contains 10 to 20 blank form. It is used for the purpose of withdrawing money. The Customer can also make use of the withdrawal forms for withdrawing money.

In addition to the above, a Customer is also given a Pass Book which effects the Customer's account in the bankers edges. It usually contains the rules and regulations of the Bank and the terms and conditions of the deposit.

(10) Passport size Photograph: Nowadays banks insists upon the prospective Customers to affix their passport size photographs on the application forms at the time of opening accounts. And also the Customer to affix their passport size photograph on the books.

Current Deposit Account (Current or Running Account)

A current account is an account which is generally opened by business people for the convenience. Money can be deposited and withdrawn at anytime. Money can be withdrawn only by means of cheques. Usually a Banker does not allow any interest on this account. Two privileges on current account (1) Overdraft facility; (2) Collection of cheques, transfer of money and rendering agency and general utility services.

Saving Bank Account (SB Account)

This account can be opened with a minimum amount which differs from Bank to Bank. A minimum balance should be maintained and if cheque book facility is allowed, the minimum balance should be Rs.1000/-. If the minimum balance is not maintained incidental charges is levied by the Bank.

It carries an interest rate of 4 per annum. Generally overdraft facility is not available in the Saving Bank account. The depositor is supplied with a pass book. Generally no withdrawals are allowed without the presentation of the pass book along with the withdrawal slip.

Recurring Deposit Account

It is one form of savings deposit. Depositors save and deposit regularly every month a fixed installment, so that they are assured of the sizeable amount at a later period. Any person can open this deposit account. He can even have more than one account at a time. This account can be opened in joint names also. A recurring deposit holder can get a loan on the security of a recurring deposit.

Fixed Deposit Account

A Fixed Deposit is one which is repayable after the expiry of a predetermined period fixed by the Customer himself. The period varies from 15 days to any number of years. A deposit account can be opened for a period of more than 3 years and in that case thereto of interest remains the same level.

The interest rate offered on the fixed deposit is so attractive one. However in recent times RBI has deregulated the interest rates on fixed deposit. The Banker are given the freedom to fix their own rates for different periods. At the time of opening the deposit account, the Banker issues a receipt acknowledging the receipt of money on deposit account.

It is popularly known as Fixed Deposit Receipt (FOR). No lien is available on the fixed deposit account. The Banker has only a right of set off. However a Banker can exercise his lien on the fixed deposit receipt which can be offered as security provided, it is only stamped and signed by the Customer.

The nomination facility has been extended to deposits of all kinds. A fixed account may be opened in the name of two or more individuals. The law of limitation does not cover a fixed deposit.

Pass Book: A Pass book is nothing but a statement of account rendered by a Banker to his Customer. According to Sir John Paget, “the proper function of a pass book is to constitute a conclusive and unquestionable record of transaction between the Banker and the Customer and it should be recognized as such”. Thus, the entries in the pass book are prima facie evidence against the Banker and the Customer is bound by it.

The entries in a pass book may be of two kinds namely (i) current entry; and (2) a wrong entry.

Current Entry: A dispute does not arise in respect of a correct entry and therefore we can boldly say that a current entry constitutes a settlement of accounts as between a Banker and a Customer.

Wrong Entry: May be either (i) favorable to a Customer, (ii) favorable to a Banker.

Banker Lien: Other special feature of the relationship existing between a Banker and his Customer is that a Banker can exercise the right of Lien on all the goods and securities entrusted to him as a Banker.

A Lien is the right of a person to retain the goods in his possession until the debt due to

him has been settled. A Banker lien is always a general lien. A Banker has a right to exercise both kind of lien.

Lien cannot go beyond the agreement. A Banker's lien as an implied pledge. It means that a lien not only gives a right to retain the goods but also gives a right to sell the securities and goods of the customer after giving a reasonable notice to him, when the customer does not take any steps to clear his arrears.

No general lien on safe custody deposits, documents entrusted for specific purpose, articles left by mistake and no lien on deposits. A Banker lien is not barred by The Law of Limitation Act.

A Banker's duty to maintain secrecy of Customer's Account

A Banker is expected to maintain secrecy of his Customer's account. The Banker should not disclose his Customer financial position and the nature and the details of his account. Of course, the duty of secrecy is not statutory one. Only the nationalized Banks in India are compelled under Sec. 13 of The Banking Companies Act, 1970, to maintain secrecy of their Customer's Account. If a Customer suffers any loss on account of the unwanted disclosure of his account, the Banker will be compelled to compensate for the loss suffered by the Customer.

In the following circumstances the Banker has to disclose a Customer's Account

1) Disclosure under the compulsion of Law.
2) In the interest of the Public.
3) In the interest of the Bank.
4) Under the express or implied consent of Customer.

In disclosing the state of the account to a Customer, great care should be exercise of the Banker is careless, he is liable to pay damages.

Right to claim incidental charges

Another special feature of the relationship that exists between a Banker and a Customer is that the Banker may claim incidental charges on un remunerating accounts.

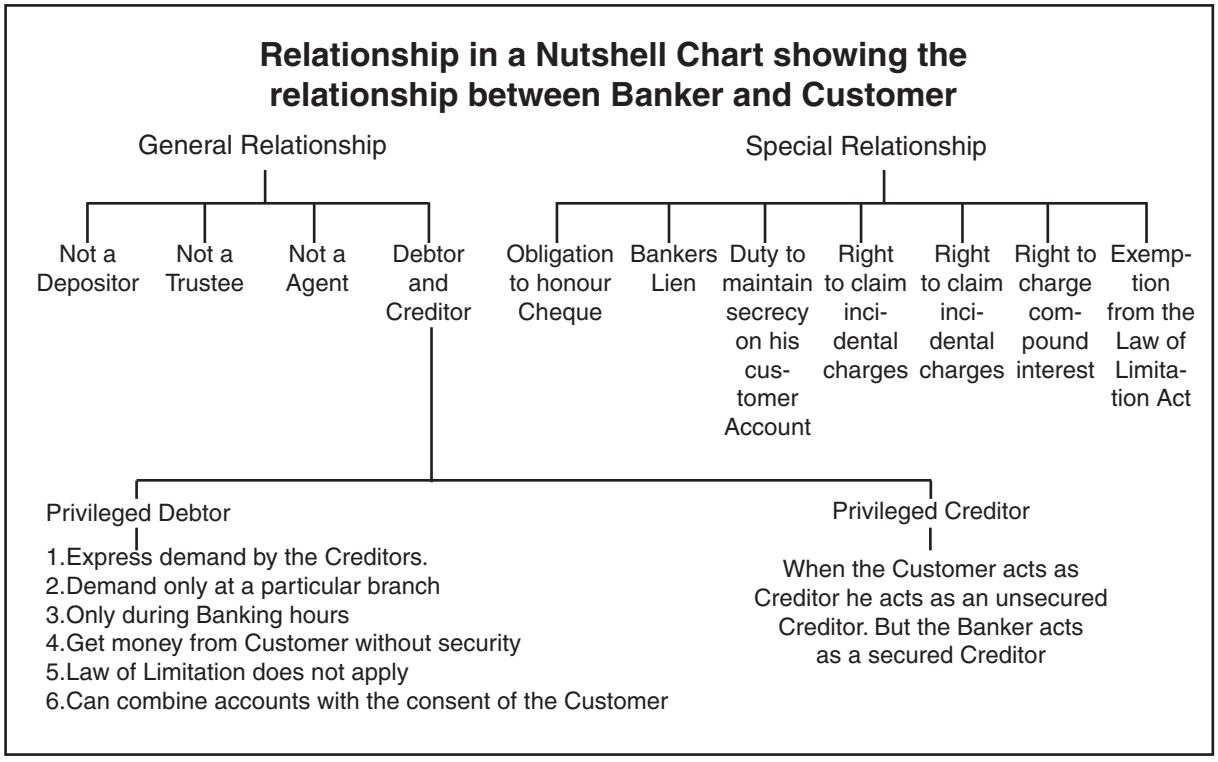
These incidental charges take the form of "Service Charges; Processing Charges; Ledger Folio Charges; Appraisal Charges; Penal Charges; Handling/Collection Charges and so on.

The Right to charge Compound Interest

As per general law/ levying of Compound Interest is strictly prohibited. But Banker is given a special privilege of charges of Compound Interest.

Exemption from the Law of Limitation Act

Another distinguishing feature is that the Banker is exempted from the Law of Limitation Act. As per the provision this law, a debt will become a bad one after the expiry of 3 years from the date of the debt. But according to Article 22 of Limitation Act, 1963 for a banking debt, the persist of 3 years will be calculated in made for the repayment of the debt. It follows that a Banker's debt cannot be made time barred.



Right of a Banker

(1) General Lien,

(2) Set off (to combine accounts),

(3) To charge interest and service charges,

(4) Appropriation (Rule in Clay tons case),

(5) Right to close an account,

(6) Charge Compounding Interest.

(1) Right to Set-Off: The Right to Set-off is nothing but a right to combine two or more accounts of a Customer. The Banker allow their Customers to open two or more accounts. In such a cases in the absence of any agreement to contrary, a Banker can exercise his right of Set -off; subject to fulfillment of the following conditions:

1) The two or more accounts must be in the name of the same Customer;

2) Must be in the same capacity;

3) In the same Bank, though at different branches.

Thus, set-off is the adjustment of a debt balance against a credit balance. It is in the form of cross claim. The mutual indebtedness between a Banker and a Customer is cleared by means of set-off, and thus the actual balance due to or by a customer is computed.

(2) Right to close an account : The contractual relationship between a Banker and Customer is terminated by closing an account. So it is permanent affair and once for all, the account will be closed. There is no opportunity for the Customer to operate the account once again. On the other hand, "stopping operation of an account" refers to the suspension of the operation of an account for time being at the advent of certain events. It is purely a temporary suspension of the relationship between a Banker and a Customer and the Customer can operate the account after such event come to close.

Circumstances for exercising either Right to close an account or stop operation of an account

1) Customers intention to close the account.

2) Banker's intention to close the account.

3) Customer's death.

4) Customer's insanity.

5) Customer's insolvency.

6) Upon the receipt of Garnishee orders.

7) Upon the receipt of notice of Assignment (Sec. 130)

(3) Right to appropriate payments (Rule in Clayton's case) : Yet another right of a Banker is to appropriate the money deposited by a customer to anyone of the loan accounts due by him. As a general rule, the Customer is given the first option to decide the account to which the amount should be credited. He should exercise his option at the time of depositing money and he can even ask his Banker to credit this amount to an account which is already showing a credit balance instead of an account which showing a debit balance.

If the Customer fails to indicate his choice, then the Banker has every legal right to credit the amount in anyone of the account of that Customer. He can even cancel a time barred debt or reduce an unsecured loan by exercising this right and inform the same to the Customer.

In case both of them do not exercise this option, then the rule given in the Clayton's case will apply for the appropriation of payment.

Rule in Clayton's case: This rule was laid down in the important case Devayanes vs. Noble. The principle laid down in Clayton's case is a great practical significance to Bankers particularly in case of running account like Current Account and Cash Credit Account.

General Rule is (i) Where the account goes into debt, the first item on the debt side is cancelled by the first item on the credit side (i. e) appropriation takes place in the order of time. (ii) Where the account goes into credit, the first item of the credit side is extinguished by the first item on the debt side and so on. In other words appropriation take place in a chronological order. The rule is applicable only to a running account and the existence of no legal bar to payment.

Further, the cheque must be in order and it must be duly presented for payment at the branch where the account is kept. The Paying Banker should use reasonable care and diligence in paying cheques. So as to abstain from any action likely to damage his Customer's credit. If the Paying Banker wrongfully dishonour a cheque/ he will be asked to pay heavy damages.

In order to safeguard his position. the Paying Banker has to observe the following precautions before honouring a cheque:

1) Presentation of cheque - cheque may -

   a) Generally be of two types - Open or Crossed. If it is an open one, the payment may be made at the counter. If it is crossed, the payment must be specifically made to that Banker, in whose favour it has been crossed.

   b) Branch: Then the Paying Banker should see whether the cheque is drawn on the branch where the account is kept.

   c) Account: Even in the same branch, a Customer might have opened two or more accounts. For each account, a separate cheque book would have been issued. Hence the Paying Banker should see that the cheque of one account is not used for withdrawing money from another account.

   d) Banking hours: The Paying Banker should also note whether the cheque is presented during the banking hours on a business day. Payment outside the banking hours does not amount to payment in due course.

   e) Mutilation: If the cheque is torn into pieces or cancelled or mutilated then, the Paying Banker should not honour it.

2) Form of the cheque: A Banker should see whether it is regular or not (a) Printed form; (b) Unconditional order; (c) Date; (d) Amount; (e) Material alteration. The cheque must be in the proper form. It must satisfy all the requirements of law.

3) Sufficient Balance: There must be sufficient balance to meet the cheque. If the funds available are not sufficient to honour, a cheque, the Paying Banker is justified in returning it.

4) Signature of the drawer: The next important duty of a Paying Banker is to compare the signature of his Customer found on the cheque with that of his specimen signature. If he fails to do so and if he pay a cheque, which contains a forged signature of the drawer the payment will not amount to payment is due course. Hence he cannot claim protection under Section 85 of the Negotiable Instrument Act.

5) Endorsement: Before honouring a cheque, the Banker must verify the regularity of endorsement, if any, that appears on the instrument.

6) Legal bar: The existence of legal bar like Garnishee order limits the duty of the Banker to pay a cheque.

7) Minor precautions: (a) He must see whether there is any order of the Customer not to pay a cheque; (b) Whether there is any evidence of misappropriation of money; (c) Whether he has got any information about the death or insolvency or insanity of his Customer.

Circumstance under which a cheque can be dishonour: (1) Where cheque post dated; (2) Where cheque outdated; (3) When funds insufficient; (4) When Customer countermands payment; (5) Where cheque mutilated; (6) Where cheque of doubtful validity; (7) Where Customer's signature does not agree; (8) Where Customer has died; (9) Where the Customer has become insolvent; (10) Where Customer has become a person of unsound mind; (11) Where the garnishee order has been issued.

Statutory Protection to a Paying Banker: Sec. 85 of Negotiable Instruments Act, 1881 offer protection to the Paying Banker in India. It read as follows, "where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course". To claim protection under Sec. 85, the Banker should have fulfilled the following conditions:

(i) He should have paid an order cheque.

(ii) Such a cheque should have been endorsed by the payee or his order.

(iii) It should have been paid in due course.

Payment in due course: Sec. 10 of the Negotiable Instruments Act defines payment in due course. It means payment is accordance with the apparent tenor of the instrument, in good faith and without negligence, to any person in possession there of under circumstances which do not afford a reasonable ground for believing that, he is not entitled to received payment of the amount therein mentioned.

This concept of payment in due course has three essential factor:

(i) Apparent tenor of the instrument: To avail of the statutory protection, the payment should have been made according to the apparent tenor of the instrument. It refers to the intention of the parties as in is evident from the face of the instrument.

(ii) Payment in good faith and without negligence: Good faith forms the basis for all banking transaction, and so it is taken for granted. As regards negligence the Banker may sometimes be careless in this duties which constitutes an act of negligence. If negligence is proved, the Banker will lose the statutory protection given under Sec. 85.

(iii) Payment to a person who is entitled to received payment: The Banker must see that the person, who presents the cheque, is possession of the instrument and he is entitled to receive the amount of cheque.

Recovery of Money paid by mistake

As a general rule a person who has committed a mistake, has every right to rectify the same. But in rectifying the mistake, he should not bring any disadvantage to a party. In this same way, a Banker can recover the money paid by mistake without adversely affecting the other party.

Money can be recovered, under the following circumstances:

(i) Money paid under a mistake of fact is recoverable.

(ii) Money received malafide is recoverable.

(iii) Mistake between the party paying and the party receiving.

Money cannot be recovered

(i) Money paid under a mistake of law is not recoverable.

(ii) Money paid on a negotiable instrument to an innocent holder is not recoverable.

(iii) When a person who receives money in good faith by mistake, alters his position relying upon it, need not return the same.

(iv) Money paid to an agent by mistake

Collecting Banker: A Collecting Banker is one who undertakes to collect the amount of a cheque for his Customer from the Paying Banker.

Banker as a Holder for value

In collecting a cheque, the Banker can act in to capacity, namely (i) as a holder for value; (2) an agent for collection.

The Banker would be regarded as a holder for value:

(1) If he allows his Customer to withdraw money before cheques paid in for collection are actually collection and credited. (Underwood Vs. Barclays Banks);

(2) If any open cheque is accepted and the value is paid before collection; and/or

(3) If there is a reduction in the overdraft account of the Customer before the cheque is collected and credited in the respective account.

In all these cases, the Banker acquires a personal interest.

A Banker as a Agent

In practice, no Banker credits a Customer's account even before a cheque is collected. He collects a cheque on behalf of a Customer. So he cannot require any of the rights of a holder for value. He has to act only as an agent of the Customer. This is so because, he cannot have a title better than that of the Customer himself. He will be regarded only as an agent so, during collection, if a bankers, in his capacity as an agent, collects a cheque which belongs to some other person, to the account of his Customer, he will be held liable for conversion.

Conversion: Conversion is a wrongful interference or meddling with the goods of another, (eg.) taking or using or destroying the goods or exercising some control over them in way that is inconsistent with the owner's bill of exchange, cheque or promissory note. Conversion may be committed innocently. Conversion is a wrong that renders the person committing it personally liable. This liability exists even when a person acts merely as an agent.

A Bankers' Liability

Hence, if a collecting banker, however innocent he may be has converted the goods of another, he will be held personally liable. This liability exists because the Banker is acting as an agent and not as a holder of value. If it is so, no Banker will be in a position to collect cheques for his Customer. Therefore, the statutory protection was granted by Sec. 131 of the Negotiable Instruments Act against conversion.

Duties of Collecting Banker

1) Exercise reasonable care and diligence in his collection work.

2) Present the cheque for collection without any delay.

3) Notice to Customer in the case of dishonour of a cheque.

4) Present the bill for acceptance at an early date.

5) Present the bill for payment.

6) Protest and note a foreign bill for non acceptance.

Statutory Protection to the Collection Bankers

According to Sec. 131 of the Negotiable Instruments Act, A Banker who has in good faith and without negligence, received payment for a Customer of a cheque, crossed generally or specifically to himself, shall not in case the title to the cheque proves defective, incur any liability to the true owner of the cheque, by reason only of having received such payment.

The Statutory Protection is available to the Collecting Banker only if he fulfills the following conditions:

(i) The cheque he collects must be a crossed cheque.

(ii) He must collect such crossed cheques only for his Customer as an agent and not as a holder for value.

(iii) He must collect such crossed cheque in good faith and without negligence.

Laws relating to Loans, Advances and Investments by Banks

Banks make loans and advances to traders, businessmen and industrialists against the security of some assets or on the basis of the personal security of the borrower.

Traditionally, Banks have been following three cardinal principles of lending, viz - Safety, Liquidity and Profitability. Banks in India have shouldered additional responsibility of fulfilling social obligations. Hence, the Banks observe both the traditional and certain other principles.

1) Safety: Safety depends upon (i) The Security offered by the borrower, and (ii) the repaying capacity and willingness of the debtor to repay the loan with interest.

2) Liquidity: refers to the ability of an asset to convert into cash without loss within short time

3) Profitability: Like all other commercial institution banks are run for profit. Banks earn profit to pay interest to depositors, declare dividend to shareholders, meet establishment charges and other expenses, provide for reserve and for bad and doubtful debts, depreciation, maintenance and improvements of property owned by the Bank and sufficient resources to meet contingent loss. So profit is an essential consideration. The main source of profit comes from the difference between the interest received on loans and those paid on deposit.

4) Security: Customers may offer difference kinds of securities, viz. Land, Building, Machinery, Goods and Raw Materials to get advances. For the sake of safety he should ensure that the securities are adequate, marketable and free from encumbrances.

5) Purpose of the Loan: Before sanctioning loans a Banker should enquire about the purpose for which it is needed.

6) Sources of Repayment: Before giving financial accommodation, a Banker should consider the source from which repayment is promised.

7) Diversification of Risks: The Banker must advance moderate sums to a large number of Customers spread over a wide area and belonging to different industries.

Recent concept of sound lending is productivity of loan:

Secured and unsecured advances:

Loans and advances may be made either on the personal security of the borrower or on the security of some tangible assets. The former is called unsecured or clean or personal advances and the latter is called secured advances.

Subsidiary Services:

The services and facilities provided by a Modern Banker may be classified into two as (i) Agency Services, (ii) Miscellaneous Services or General Utility Services.

Agency Services:

(i) Payment and collection of subscriptions, dividends, salaries, pension etc.

(ii) Purchase and sale of securities.

(iii) Acting as Executor, Administrator and Trustee.

(iv) Acting as Attorney.

Miscellaneous or General Utility Services:

(1) Safe custody of valuables;
(2) Letters of credit;
(3) Traveller's cheque;
(4) Remittance of funds;
(5) Merchant Banking;
(6) Dealing in foreign exchange business;
(7) Lease Financing;
(8) Factoring;
(9) Housing Finance;
(10) Underwriting of securities;
(11) Tax consultancy;
(12) Credit Cards;
(13) Gift Cheque;
(14) Consultancy Service.

Safe Custody of Valuables

Banks accept Shares, Debentures, Bonds, Fixed Deposit Receipts, Deeds of Property, Life Insurance Policies and Sealed Boxes and Packets containing will or valuables such as jewellery from their Customer for safe custody. Banks are equipped with strong, fire proof and theft proof rooms for safe maintenance of the articles. There are two ways through which a Banker ensures safety of its Customer's valuables.

i) By accepting valuable for safe custody;
ii) By hiring out safe deposit vaults or lockers to the Customers.

Safe Custody: The Bank issue a safe custody receipt which contains the name and address of the Customer and particulars about the articles lodged for safe custody. Safe custody accounts can be opened in single or joint names, partnership firm, companies, trust etc.

Liability of the Banker in respect of Safe Custody: The liability of the Banker in respect of safe custody is the same as that of a bailee under the contract of bailment.

The Customer may hold the Banker liable in the following cases:

(i) For negligence;
(ii) For conversion;
(iii) For fraud by his own employees.

Safe Deposit Valets: Banks provides safe deposit locker facility to its Customers in metropolitan cities and large towns to keep articles and valuables. Lockers which are convenient repositories for personal jewellary, official documents and securities are hired out to Customers.

As a general rule, the renter should be introduced. They are required to open a saving or current account and file an authority to the Bank to debit rental charge to the respected account. The hirer is required to execute a lease agreement which contains all the terms and conditions under which the locker is hired out. The rent for the lockers depends on its size and is collected in advance from the renters.

sNomination: The hirer of a locker is allowed to nominate a person to whom in case of death of hirer, the Bank may give access to the locker and liberty to remove, the contents of the lockers.

Joint Name: A locker may be hired in the joint names of two or more persons.

In case of death of a renter, the contents of the locker shall be delivered to the legal representative of the deceased only after getting a valid succession certificate from the court.

Prohibitory orders: A Banker may received a order from a court or a Government department asking him to seal a particular lockers and stop operations. The locker should be promptly sealed with the Bank's seal under intimation to the renter.

RBI control over Commercial Banks

Commercial Banks are the oldest Banking Institutions in the organised sector. They constitute the predominant segment of the banking system in India. They cater to need of trade, commerce industries, agriculture, small business, transport and other activities, with a wide network of branches through out the country. The Commercial Banking System consists of scheduled banks, and non-scheduled banks.

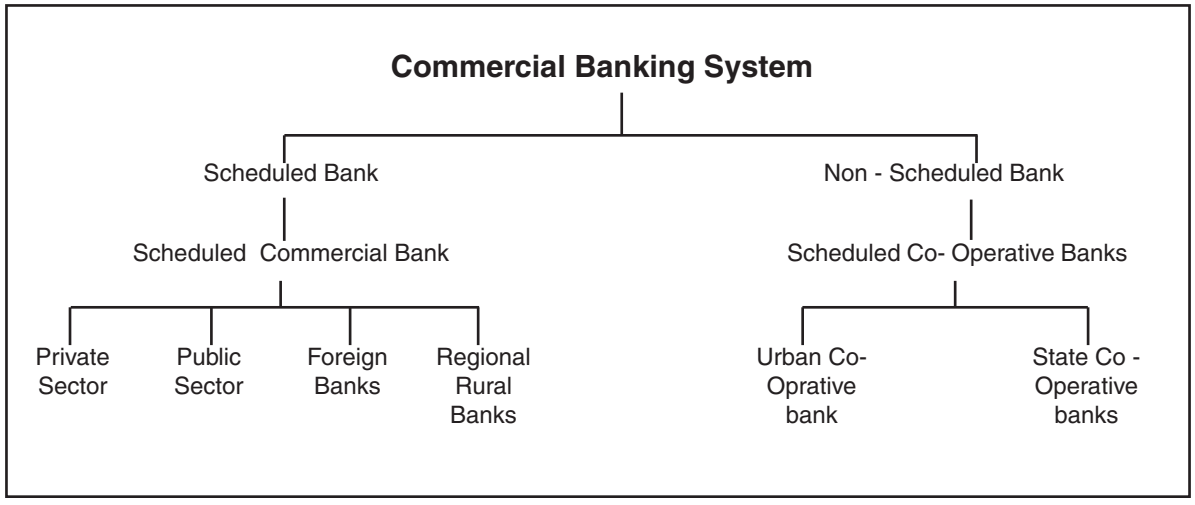
Scheduled Bank: Scheduled Bank is one which is registered in the second schedule of the Reserve Bank of India. The following conditions should be fulfilled by a Bank for inclusion in the schedule:

1) The Bank concerned must be carrying on a business of banking in India.
2) The Bank must have paid-up capital and reserve of an aggregate value of not less than RS.5lakhs.
3) It must satisfy R.B.I. that its affairs are not being conducted in a manner detriment to other interest of the Depositor.

Presently, the R.B.I. has prescribed minimum capital of RS.100 crore for starting a new Commercial Bank.

Non-Scheduled Bank: Bank which is not included in second schedule of the R.B.I. is known as Non-Scheduled Bank.

The Scheduled Bank come within the direct purview of the credit control measures of the R.B.I. They are entitled to borrowing and rediscounting facilities from R.B.I. Non-Scheduled Bank are not entitled to such facilities.



Recovery of Debts due to Banks and Financial Institutions Act, 1993

Statement of Objects and Reason: Banks and Financial Institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the Banks and Financial Institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial System headed by Shri M. Narashimhan has considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the Banks and Financial Institutions could be realized without delay. In 1981, a committee under the Chairmanship of Shri T.Tiwari had examined the legal and other difficulties faced by Banks and Financial Institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the Banks and Financial Institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfill a long-felt need, but also will be an important step in the implementation of the Report of Narasimhan Committee. Whereas on 30th September, 1990 more than fifteen lakh of cases filed by the Public Sector Banks and about 304 cases filed by the Financial Institutions were pending in various courts, recovery of debts involved more than Rs. 5622 crore in due of Public Sector Banks and about Rs. 391 crore of dues of the Financial Institutions. The locking up of such huge amount of public money in litigation prevents proper utilization and recycling of the funds for the development of the country. The Bill seeks to provide for the establishment of Tribunal and Appellate Tribunals for expeditious adjudication and recovery of debts due to Banks and Financial Institutions. Notes on clauses explain in detail the provisions of the Bill.

Act 51 of 1993: The recovery of debts due to Banks and Financial Institutions Bill having been passed by both the Houses of Parliament received the assent of the President on 27th August, 1993. It came on the statute book as "The Recovery of Debts due to Banks and Financial Institutions Act, 1993" (51 of 1993).

List of Amending Acts: (1) The Recovery of Debts due to Banks and Financial Institutions (Amendment) Act, 1995 (28 of 1995); (2) The Recovery of Debts due to Banks and Financial Institutions (Amendment) Act, 2000 (1 of 2000)

Powers of the Reserve Bank of India

1) Power to issue licence for new Banks and grant permission for starting new branches.

2) Power to determine the credit policy to be followed by Banks.

3) Power of inspection.

4) Power to issue directions. Sec. 35 of the Act (Banking Regulation Act, 1949).

5) Power to control management. Sec. 38AA of the Banking Regulation Act, 1949.

6) Power to advice Banks. Sec.36 of the Act. (Banking Regulation Act, 1949).

7) Power to assist in proposals for amalgamation.

8) Power to receive and scrutinize the returns.

9) To grant moratorium. Sec. 45, Banking Regulation Act, 1949.

10) To appoint liquidator.

11) To give advice to the Central Government.

12) The Reserve Bank of India may require any Banking Company to call a meeting of its directors to discuss any matters relating to the affairs of the company.

Winding up of Banking Companies

The Banking Company can be wound up like any other company (i.e.) compulsorily or voluntarily or subject to the supervision of the Court. The High Court shall be order the winding up of a Banking Company if the Banking Company is unable to pay its debts in the following circumstances.

(i) If it has refused to meet any lawful demands made at any of its offices within two working days, such a demand is made at a place where there is an office or in other cases within 5 days.

(ii) If the R.B.I. certifies in writing that the Banking Company is unable to pay its debts.

Amalgamation of Banking Company

In order to strengthen the Banking structure of the country, the R.B.I. has been encouraging amalgamation of small Banks with big one provided such a merger is in the trust of the Depositors. The procedure for amalgamation as given in Sec. 44(a) of The Banking Regulation Act, 1949.

(1) A draft scheme of amalgamation, containing all the terms of such amalgamation, must be placed before the share holders of each of the Banking Company concerned separately and approved by a resolution passed by two third majority of the share holders of each Bank.

(2) A notice of such meeting must be given to every share holder of the Bank concerned indicating the time, place and object of meeting. Such a notice must have been published in at least two newspapers for three consecutive weeks.

(3) The share holders who have objected to such a scheme of amalgamation are entitled to claim the value of the shares held by them.

(4) Such a scheme has to be sanctioned by the R.B.I.

(5) Once the scheme is sanctioned by the R.B.I. the assets and liabilities of the amalgamated Banks are transferred to the absorbing company.

(6) The amalgamated Banking will cease to function and shall stand dissolved by reason of such amalgamation on a specified date and notified by the R.B.I. A copy of this order must also be sent to the Registrar of Companies.

The State Bank of India was formed on July 1955 with the passing of the State Bank of India Act, 1955, by taking over the assets and liabilities of the Imperial Bank of India.

Functions of S.B.I.

1) Accepting deposits, giving loans, providing remittances, issuing letters of credit.

2) It acts as an agent of R.B.I. in place where there no branch of the R.B.I.

3) Agent of registered Co-operative Bank.

4) Authorised to purchase Gold and Silver.

5) Issue of Stocks, Shares and other Securities.

6) Acts as a Executor, Trustee for the administration of Estate on behalf of Customer.

7) As an agent to the Central Government, the State Government or to any Corporation for the purpose of Housing Schemes.

8) Authorised to grant financial assistance to Companies dealing in granting advances on hire purchase basis against the security of book debt.

9) It is allowed to subscribe to the share capital or to buy or sell shares of any Banking Companies in the capital market.

State Bank of India introduced an Agricultural Credit Card known as SBI Green Card.

NEGOTIABLE INSTRUMENTS

Definition of Negotiable Instrument

A Negotiable Instrument is a piece of paper which entitles a person to a sum of money and which is transferable from person to person by mere delivery or by endorsement and delivery.

The general principle relating to transfer of property is that no one can become the owner of any property unless he purchases it from the true owner or with his authority (nemodat quod non-habet). Negotiable Instrument however, constitute an exception to this principle. For a person who takes a negotiable instrument in good faith and for value becomes the true owner even if he take it from a thief or finder.

Sec. 13 of the Negotiable Instrument Act, 1881 provides that negotiable instruments include promissory note, bill or exchange and cheque whether payable to bearer or order. An order instrument can only be negotiated by endorsement and endorsement must be genuine.

Promissory Note (Sec. 4):

A Promissory Note is an instrument in writing containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only or to the order of a certain person or to the bearer of the instrument.

Characteristics of Promissory Note:

i) Must be in writing;

ii) It must contain a promise to pay;

iii) The promise to pay the money, should be unconditional.

iv) The instrument must be payable in money and money only.

v) The parties to the instrument must be designate with reasonable certainty.

vi) The Promissory Note must be signed by the maker.

Bill of Exchange (Sec.5):

A Bill of Exchange is an instrument in writing containing an unconditional order. Signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument.

Characteristics of Bill of Exchange

i) It must be in writing;

ii) It must contain and order to pay.

iii) The order to pay should be unconditional.

iv) The order must be to pay money and money only.

v) It requires three parties. First the person who makes the Bill of Exchange is called the Drawer, second the person to who it is addressed, called the Drawee and thirdly, the payee.

vi) Indication of drawee with reasonable certainty.

vii) The bill must be signed by the drawer.

Cheque - Sec.6: A cheque is a Bill of Exchange drawn on a specified Banker and not expressed to be payable otherwise than on demand. A cheque being a Bill of Exchange must possess all the essentials of a bill and should also meet the requirements of Sec. 6.

It was made payable to cash or order. The cheque must be drawn upon a Banker. It must be payable on demand.

Holder - Sec. 8: The holder of a Promissory Note, Bill of Exchange or Cheque means any person entitled in his own name to possession thereof and to receive or recover the amount due there on from the parties thereto.

Holder in due course - Sec. 9: Means any person who for consideration became the possessor of a Promissory Note, Bill of Exchange or Cheque if payable to bearer or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

Rights and Privileges of holder in due course

1) Presumptions. (Sec. 118)

2) Privilege against inchoate installment. (Sec. 20)

3) Fictitious drawer or payee. (Sec. 42)

4) Indorse from a holder in due course. (Sec. 53)

5) Prior defects. (Sec. 58)

Assignment and Negotiation

The transfer of an instrument by one party to another so as to constitute the transferee a holder is called "negotiation". A bearer instrument is transferable by simple delivery. An instrument payable to order can be transferred by endorsement and delivery.

Distinguished between Assignment and Negotiation

1) Subject to equity - Sec. 58: The assignee of a debt takes its subject to all the defects that may exist in the title of his assigner. But the holder in due course of a negotiable instrument takes it free from all defects in the title of the previous transferrers.

2) Notice of Assignment: An assignment does not bind the debtor unless a notice of assignment has been given to him and he has expressly or impliedly assented to it. But no information of the transfer of a negotiable instrument has to be given to the debtor.

3) Presumption: There are number of presumptions in favour of a holder in due course. But there are no presumptions in favour of an assignee.

Kinds of Indorsement

1) Indorsement in Bank. (Sec. 16 and 54)

2) Indorsement in full. (Sec. 16)

3) Restrictive Indorsement. (Sec. 50)

4) Indorsement sans recourse. (Sec. 52)

5) Conditional Indorsement. (Sec. 52)

6) Partial Indorsement. (Sec. 56)

Liability for unjustified dishonours of cheque (Sec. 31)

The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required to do, and in default of such payment must compensate the drawer for any loss or damage caused by such default.

In the following circumstances. however. the Banker is justified in refusing the payment of a cheque:

1) Where the cheque post dated.

2) Where the cheque out dated.

3) When funds insufficient.

4) When Customer countermands payment.

5) Where cheque mutilated.

6) Where cheque of doubtful validity.

7) Where Customer signature does not agree.

8) Where Customer has died.

9) Where Customer has become insolvent.

10) Where Customer has become a person of unsound mind.

11) Where garnishee order has been issued.

Criminal liability of drawer for issuing cheque without fund (Sec. 138-142) :

The liability arises when a cheque is not paid on account of insufficiency of funds standing to the credit of the drawer's account or the amount of cheque exceeds the amount of credit facility allowed to the Customer.

Sec. 138: The defender is punishable with imprisonment extending up to one year or with fine extending up to twice the amount of the cheque or with both. When the holder of the cheque receives information from the Bank that the cheque has been dishonoured he should within fifteen days make a demand to the drawer for payment. If the drawer does not make payment within the next 15 days after receiving such demand, the offence becomes completed and the course of action starts from the 16th day onwards.

Sec. 139: However, helps the holder by drawing a presumption that the cheque was issued to him in discharge of a debt or liability.

Sec. 140: Helps the holder further still by providing that the drawer will not be allowed this defence that he had no reason to believe when he issued the cheque that it would be dishonoured.

Sec. 141: When the drawer of a dishonoured cheque is a company, the company will of course be liable to be proceeded against, but liability will also be incurred by every person who at the time was in charge of and responsible to the company for the conduct of its business, though such a person can defined himself by showing that the offence was committed without his knowledge or that he had exercised due diligence to prevent the offence from being committed.

Sec. 142: A complaint can be made only by the holder of the cheque and only then cognizance will be taken of the offence. A complaint should be made within one month of the cause of action and before a Metropolitan Magistrate or Judicial Magistrate of the first class.

Liability under accommodation bills - (Sec. 43-45)

Instrument without consideration - Sec. 43:

An accommodation instrument means an instrument which has been accepted, made or indorsed without consideration and for the help of a party.

Sec. 43: Accordingly provides that if there was no consideration or the consideration has failed, as between the parties to the transaction, no obligation as to payment will arise. But if such instrument has been transferred by the holder to any person for consideration, he or any transferee from him can recover from all the prior parties.

Partial absence or failure of consideration - Sect. 44:

When a person has signed an instrument for a money consideration which was partly either originally absent or has subsequently failed his liability to the party immediate to him is proportionately reduced.

Sec.45: Extends the principle of Sec. 44 to cases in which the consideration which has failed consisted of something other than money.

Presentment for acceptance - Sec.61

A Bill of Exchange may have to be presented for acceptance before it is presented for payment. But it is not every bill which has to be presented for acceptance presentment for acceptance is necessary only where -

1) the bill is payable at a given time after acceptance or after sight;
2) the bill expressly stipulates that it shall be presented for acceptance before it is presented for payment;
3) the bill is made payable at a place other than the place of residence or business of the drawee.

Presentment for payment - Sec. 64

Casts upon the holder the duty to present the instrument for payment in accordance with the principles. The Section further provides that in default of such presentment, the other parties to the instrument are discharged from their liability to the holder.

Discharge from Liability

A party is said to be discharged from his liability when his liability on the instrument comes to an end.

1) By cancellation; (Sec. 82(a))
2) By release; (Sec. 82(b))
3) By payment; (Sec. 82(c))
4) By allowing more than 48 hours to accept; (Sec. 83)
5) By qualified acceptance; (Sec. 86)
6) By delay in presenting cheque; (Sec. 84)
7) By material alteration; (Sec. 87, 88, 89)
    a) Intentional alteration;
    b) Alteration should be in the material part of the instrument;
    c) Apparent alteration.
8) By Negotiation Bank.

Notice of Dishonours

A Bill of Exchange may be dishonoured either by non-acceptance or by non-payment. Dishonour by non-acceptance (Sec. 91)

Dishonour by non-payment (Sec. 92)

Noting Sec. 99: When a Promissory Note or Bill of Exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a Notary Public upon the instrument, or upon a paper attached to the instrument or partly upon each. Such note must be made within reasonable time after dishonour. The note should be specify the date of dishonour and the reason if any, assigned for such dishonour.

Protest Sec. 100: The holder of a dishonoured note or bill can also cause such dishonour to be noted and certified by a Notary Public. Such certificate called a Protest. It should also be done within reasonable time.

The advantage of Noting and Protesting is an evidence of dishonour.

Protest for better security (Sec. 100, para 2)

When before the maturity of a Bill, the acceptor has become insolvent, or his credit has been publicly impeached, the holder may through a Notary Public, demand better security from the acceptor. If the acceptor refused it, the fact may also be noted and certified by the Notary. Such a certificate is called a Protest for a better security. It should be done within a reasonable time.

Drawee in case of need (Sec. 115)

When a Drawee in case of need is named in the Bill itself or many indorsement on it, the Bill is not dishonour till it has been dishonoured by such Drawee. It follows that even when the

original Drawer has defaulted in acceptance, that is not a dishonour, because there is still a chance of its being accepted by the drawee in case of need. The Bill is dishonoured only when the latter also defaults.

Sec. 116: A Drawee in case of need can accept the Bill or pay it without any previous protest.

Presumptions in favour of negotiable instruments

Sec. 118: (1) As to consideration; (2) as to date; (3) time of acceptance; (4) time of transfer; (5) order of indorsement; (6) as to stamp; (7) holder in due course; (8) proof of protest.

Bills in sets (Sec. 132)

A Bill of Exchange may be drawn in parts. Each part should be numbered consecutively and should declare that it shall continue payable so along as the other remains unpaid. All the parts together make a set. But the whole set, constitutes. Only one Bill and would be extinguished when any part is paid.

International Law - Liability on Foreign Instrument (Sec. 134)

The liability of the maker or drawer of a foreign Bill, Note or Cheque is governed in all essential respects by the law of the place where he made the instrument. Sec. 11 says that an instrument drawn or made in India and made payable in India or drawn upon any person resident in India in an Inland Instrument. Sec.12 that any instrument does not carry these characteristics is foreign instrument.

Law in respect of dishonour (Sec. 135)

Foreign instruments made in accordance with India Law (Sec. 136)

Presumption as to foreign law (Sec. 137)

Crossed Cheque

When a cheque bears across its face two parallel lines, the cheque is said to be crossed. The lines are usually drawn on the left hand top corner of the cheque.

Crossing affects the mode of payment of the cheque. The cheque is not more payable to the Payee or Holder at the counter of the Bank. The payment of a crossed cheque can be obtained only through a Banker. Thus crossing is a mode of assuring that only the rightful holder gets payment.

Kinds of crossing: The kinds (1) General Crossing; (2) Special Crossing.

General Crossing - (Sec. 123): A cheque is said to be crossed generally when there are not words between the lines of crossing or when there are some words but not the name of a Bank.

Special Crossing - (Sec. 124): Where the lines of crossing bear the name of a Banker either with or without any additional words, the cheques said to be crossed specially and to be crossed to that Banker. The effect is that its payment can be obtained only through the particular banker whose name appears between the lines.

Account Payee only: Some times the lines of crossing contain the words "account payee only". This is also a version of General Crossing. The effect of such a crossing may be two fold. Firstly the negotiability of the cheque; and secondly the duty of the collecting Banker.

For the words "account payee only" is a direction to the Collecting Banker that the contents of the cheque shall be received only for the payee and credited to his account. If the Banker receives payment of such a cheque on behalf of any person other than payee, the Banker will be guilty of negligence and will not be entitled to the protection of Sec. 131.

Not Negotiable Crossing (Sec. 130): When the lines of crossing carry the words "not negotiable", the crossing is said to be "Not Negotiable Crossing". Such crossing materially diminishes the negotiable value of the cheque, in the sense that the person take it shall get only the rights of the transferor, but no better rights. He cannot become the holder in due course. If there is nothing wrong with the title of the prior parties, he may recover. But if something is wrong any where he will be effected by it. Thus the cheque remains transferable, but "everyone who takes cheque marked "not negotiable take it at his own risk". Thus where a blank cheque marked "not negotiable" was fraudulently completed by an agent and transferred to a person to whom the agent was indebted, it was held that the transferee was affected by the fraud.

Sec. 125 provides that the cheque may be crossed by the drawer, the Holder and Banker.

Bill of Exchange and Cheque compared

A cheque does not require acceptance, in the ordinary course it is never accepted; it is not intended for circulation; it is given for immediate payment; it is not entitled to days of grace.

A cheque is presented for payment, where as a Bill in the first instance is presented for acceptance, unless it is a Bill on Demand.

A bill is dishonoured by non-acceptance, this is not so in case of a Cheque.

A cheque has always to be made payable on demand, whereas an ordinary Bill of Exchange can be made payable after a fixed period.